Maryland Law Review

Volume 60 | Issue 2 Article 4

A Match Made in Maryland: Howard Chasanow and the Law of Evidence

Alan D. Hornstein

Nichole G. Mazade

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Biography Commons, and the Evidence Commons

Recommended Citation

Alan D. Hornstein, & Nichole G. Mazade, *A Match Made in Maryland: Howard Chasanow and the Law of Evidence*, 60 Md. L. Rev. 315 (2001)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol60/iss2/4

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

A MATCH MADE IN MARYLAND: HOWARD CHASANOW AND THE LAW OF EVIDENCE

ALAN D. HORNSTEIN* & NICHOLE G. MAZADE*

I. INTRODUCTION

From time to time, a particular judge will distinguish himself or herself in a specific area of law to the extent that he or she will become identified with that area and recognized for contributions to it.[1] So it is with Judge Howard Chasanow and the law of evidence.

Judge Chasanow's view of the impact that the Federal Rules of Evidence had and should have had on the development of Maryland evidence law was the subject of an earlier article in the *Maryland Law Review*.[2] Such an examination necessarily proceeds from a legislative perspective; that is, the concern is with the extent to which the new Maryland Rules of Evidence should mirror their federal counterparts. In this Article, we explore Judge Chasanow's contributions to Maryland evidence law from the more familiar common law perspective of a judge called upon to resolve specific problems by interpreting the new Rules or by resorting to preexisting evidentiary principles. Perhaps not surprisingly, the views of Judge Chasanow as "legislator" are not entirely harmonious with his views as judge.

First, we describe the two opposing theories on the extent to which formal rules of evidence constrain the further development of common law principles, and we note a distinct characteristic of the Maryland Rules that allows common law evidence principles to continue to take shape. We also discuss Chasanow's interpretive ap-

---

* Professor of Law, University of Maryland School of Law. B.A., M.A., Long Island University; J.D., Rutgers University; M.A., St. John's College.

** Miles & Stockbridge P.C., Baltimore, Maryland. B.A., Elon College; J.D., with honors, University of Maryland.

1. Examples include Robert Bork in antitrust law, *see, e.g.*, William E. Kovacic, The Antitrust Paradox *Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1416 (1990) (describing Bork as "the nation's leading conservative antitrust scholar"); Justices Black and Douglas in First Amendment law, *see, e.g.*, Daniel A. Farber, *Recent Books on the First Amendment*, 77 NW. U. L. REV. 729, 734 (1982) (book review) ("First amendment law has taken its shape from Justices like Holmes, Brandeis, Black, and Douglas."); and Judge Richard Posner in law and economics, *see, e.g.*, Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 373 (1995) (describing Judge Posner as "the founding father of the conservative legal movement known as the law and economics movement").

2. Alan D. Hornstein, in *Tribute to Judge Howard Chasanow*, 59 MD. L. REV. 711 (2000).

proach, which reflects a tendency to give deference to the codified Rules while at the same time continuing to develop common law doctrines not specifically addressed by those Rules. In addition, we review a selection of Chasanow's decisions in six areas of evidence law, and, in the process, highlight three traits that characterize Chasanow's rulings on the law of evidence in Maryland: his continued development of common law evidence principles both before and after the adoption of the Maryland Rules, his superior analytic precision, and his somewhat inconsistent view on the extent to which the Maryland Rules should mirror their federal counterparts.

II. THE MARYLAND RULES OF EVIDENCE AND THE COMMON LAW

The scholarly literature on the Federal Rules of Evidence is riven by a fundamental disagreement about the relationship between the Rules, the common law of evidence that preexisted them, and the extent of the constraint imposed by the Rules on the power of the courts to continue to develop the law of evidence.[3] On the one hand, there are those like Professor Imwinkelried, who hold that the Federal Rules of Evidence constitute a statute that should be treated like any other statute.[4] Courts have the power to construe, using the traditional tools and theories of statutory interpretation. The Supreme Court, according to Professor Imwinkelried, has employed a "moderate textualist approach" to construing the Federal Rules.[5]

In contrast, other scholars hold that the Federal Rules should be read to constrain courts to a far lesser degree.[6] According to Professor Weissenberger, for example, the Rules should be thought of less as

---

3. *Compare, e.g.*, Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539 (1999), *with* Edward J. Imwinkelried, *Whether the Federal Rules of Evidence Should Be Conceived as a Perpetual Index Code: Blindness Is Worse Than Myopia*, 40 WM. & MARY L. REV. 1595 (1999).

4. Professor Imwinkelried explains that "[t]he Federal Rules [of Evidence] sweep away many uncodified limitations on the introduction of logically relevant evidence and disable the appellate courts from enforcing categorical exclusionary rules that cannot be grounded in the statutory text of the Rules." Imwinkelried, *supra* note 3, at 1612.

5. *Id.* at 1596. For other views on the Court's approach to construing the Federal Rules, see Weissenberger, *supra* note 3, at 1541 n.7 (listing numerous law review articles that discuss the Court's interpretation of the Federal Rules of Evidence).

6. *See, e.g.*, Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393, 393 (1994) (describing the Federal Rules as a "skeletal structure of a richly complex evidentiary system"); *id.* at 402 (stating that the Federal Rules are not intended to discontinue the judiciary's "time-honored role in interpreting and expanding evidentiary doctrines"); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307 (1992) (attacking the Supreme Court's reliance on canons of statutory construction, such as the plain-meaning doctrine and the doctrine of legislative intent, in construing the judicially-created Federal Rules of Evidence).

a typical statute and more as an "index code" of the common law, preserving common law doctrines not included in the text of the Rules and permitting continuing common law development of the law of evidence.[7] Under this "perpetual index model,"[8] a code is a "'clarifying aid rather than a final statement'" and serves to facilitate the further growth of evidence law.[9] As Weissenberger explains:

> [T]he rules in the Federal Rules of Evidence should not be construed by attempting to discern their intended underlying meaning. Rather, they must be interpreted in the context of the fluid common-law doctrines that the Rules represent. . . .
>
> . . . .
>
> . . . [T]he law must be permitted to grow, and this growth inevitably occurs within the judicial branch on a case-by-case basis.
>
> The foregoing analysis should not be construed as an argument that federal courts have unbridled discretion to disregard the text of the Federal Rules of Evidence. Courts did not have limitless discretion to disregard the federal common law of evidence prior to the adoption of the Rules. On a case-specific basis, however, a court is justified in departing from the literal text of a rule of evidence when fairness, growth, and justifiable efficiency require it.[10]

Thus, Weissenberger concludes, the recent scholarly debate that focuses on the appropriate balance between text and extrinsic sources in interpreting the Federal Rules of Evidence[11] "faces a fate of unsat-

---

7. *See* Weissenberger, *supra* note 3, at 1556-67.

8. *Id.* at 1562. Weissenberger quotes Joseph Story's description of the perpetual index model: "a '*perpetual index* to the known law, gradually refining, enlarging and qualifying its doctrines, and, at the same time, bringing them together in a concise and positive form for public use.'" *Id.* at 1559 (quoting JOSEPH STORY ET AL., CODIFICATION OF THE COMMON LAW 46 (New York, John Polhemus 1882)).

9. *Id.* at 1559-60 (quoting Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1132).

10. *Id.* at 1580, 1582 (footnotes omitted).

11. *See, e.g.*, Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 412-25 (1996) (advocating the adoption of a "bottom up" theory of interpretation of the Federal Rules of Evidence that gives heightened emphasis to text); Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283 (1995) (advocating a partial reliance on the advisory committee's notes, stating that they are a unique and highly reliable type of legislative history to be referred to when analysis of the text of a Rule fails to solve an evidentiary problem); Andrew Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 353-99 (1995) (rejecting a textualist inter-

isfactory conclusions from the start because it proceeds from the wrong-minded premise that the Federal Rules of Evidence are a statute."[12]

The textual support for Professor Weissenberger's approach[13] is found in Federal Rule 102, which provides:

> These Rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[14]

On its face, Maryland Rule 5-102, providing guidance for the interpretation of the Rules of Evidence, substantively mirrors its federal counterpart. Rule 5-102 provides:

> The rules in this Title shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[15]

Yet there is an important difference between the Federal Rule and the Maryland Rule. It is a difference that went unremarked by Judge Chasanow's partial dissent to the order adopting the Maryland Rules of Evidence,[16] perhaps because it is at least partially "hidden" from one consulting Title 5. Following Rule 5-102, there is a cross-reference to Rule 1-201. The latter provides, in pertinent part: "Neither these rules nor omissions from these rules supersede common law or statute unless inconsistent with these rules."[17] Thus, the Maryland Rule differs from its federal analog by explicitly retaining those portions of the preexisting common law of Maryland that are not inconsistent with the new Rules.

On the question of the appropriate approach to the Rules, Judge Chasanow's explicit orientation would ally him more closely with the

---

pretation of the Federal Rules of Evidence and advocating a more flexible "politically realistic hermeneutics").

12. Weissenberger, *supra* note 3, at 1545.

13. In support of this approach, Professor Weissenberger offers historical and separation-of-powers arguments, as well as the textualist argument suggested above. *See id.* at 1546-55.

14. FED. R. EVID. 102.

15. MD. R. 5-102.

16. *See* Amendments to Maryland Rules of Procedure; Adoption of New Title 5, Rules of Evidence, 333 Md. XXXIX (1993) (Chasanow, J., partial dissent) [hereinafter Chasanow's Rules Dissent].

17. MD. R. 1-201(c).

Imwinkelreid camp than with Weissenberger. Yet he leaves some "wiggle room": "In construing a rule [of evidence], we apply principles of interpretation *similar to* those used to construe a statute."[18] In practice, however, Judge Chasanow looks to the language of the codified Rules and to the advisory committee's notes in interpreting the Rules,[19] but his decisions also indicate that he is willing to recognize the viability of common law doctrines not explicitly codified in the Maryland Rules of Evidence, and he has incorporated common law tests into several of the codified Rules.[20]

This difference in interpretive approach is not unimportant. For example, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[21] the Supreme Court determined that the adoption of Federal Rule of Evidence 702 superseded what had been the prevailing common law standard for the admissibility of scientific evidence, general acceptance in the relevant scientific community[22]—the so-called *Frye* test.[23] The *Frye* test had been adopted in Maryland in *Reed v. State*.[24] Although the advi-

---

18. State v. Harrell, 348 Md. 69, 79, 702 A.2d 723, 728 (1997) (emphasis added). Judge Chasanow applied a plain-meaning analysis to the language of Maryland Rule 803(b)(2)—the excited utterance exception to the hearsay rule—noting, however, that "[t]he ultimate goal of [the court] is 'to give the rule a reasonable interpretation in tune with logic and common sense.'" *Id.* at 80, 702 A.2d at 728 (quoting *In re* Victor B., 336 Md. 85, 94, 646 A.2d 1012, 1016 (1994)).

19. *See, e.g.*, *id.* at 80-81, 702 A.2d at 729 (consulting the advisory committee's notes to Federal Rule 803(2) for guidance in applying Maryland Rule 5-803(b)(2)).

20. *See, e.g.*, Conyers v. State, 345 Md. 525, 541-46, 693 A.2d 781, 788-91 (1997) (discussing the common law doctrines of "verbal completeness," "opening the door," and "curative admissibility"); *see also infra* notes 103-150 and accompanying text (discussing *Conyers* and Chasanow's analysis of these three doctrines).

21. 509 U.S. 579 (1993).

22. *Id.* at 589 & n.6.

23. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (finding that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs"). The general acceptance in the relevant scientific community requirement set forth in *Frye* was abandoned in *Daubert* in favor of a standard based on reliability and relevance. *See Daubert*, 509 U.S. at 589-92. In the absence of any mention of a general acceptance requirement in the text of Federal Rule of Evidence 702, the Court listed "general acceptance" as one factor of several to be considered in determining the admissibility of scientific evidence. *Id.* at 594. Other relevant considerations mentioned by the court included: testability of the theory or technique, whether the theory or technique has been subject to peer review, the error rate of the scientific technique, and whether that technique is governed by well maintained standards. *Id.* at 593-94.

24. 283 Md. 374, 391 A.2d 364 (1978). Faced with divided authority in the scientific community, the *Reed* court examined judicial opinions and legal and scientific commentaries on the subject of "voiceprint" analysis. *See id.* at 395-98, 391 A.2d at 375-76. The court concluded that voiceprint techniques were not yet generally accepted in the scientific community and therefore were inadmissible under *Frye*. *Id.* at 398-99, 391 A.2d at 377.

sory committee's note to Rule 5-702 suggests neither approval nor disapproval of *Frye-Reed*,[25] in the absence of Maryland Rule 1-201,[26] one might have expected the Court of Appeals to follow the Supreme Court's lead in *Daubert*, especially because *Daubert* preceded the adoption of Title 5.[27] Indications, however, are that *Frye-Reed* survives the adoption of the Maryland Rules of Evidence.[28]

III. CHASANOW'S DECISIONS IN THE LAW OF EVIDENCE

Chasanow's decisions in the law of evidence provide insight into three characteristics of the judge: his continued efforts to develop the common law of evidence after the adoption of the Maryland Rules, his analytic precision, and his occasional inconsistency concerning the extent to which the Maryland Rules should mirror the Federal Rules of Evidence. These characteristics are reflected in his analyses of the admissibility of rebuttal evidence, evidence of a defendant's prior criminal acts, character evidence, prior inconsistent statements, and hearsay evidence.

---

25. The committee's note states: "This Rule is not intended to overrule *Reed v. State*, and other cases adopting the principles enunciated in *Frye v. United States*. The required scientific foundation for the admission of novel scientific techniques or principles is left to development through case law." MD. R. 5-702 advisory committee's note (citations omitted).

26. *See supra* text accompanying note 17 (discussing the effect of Maryland Rule 1-201(c)).

27. The Maryland Rules of Evidence were adopted by the Court of Appeals of Maryland on December 15, 1993. Amendments to Maryland Rules of Procedure; Adoption of New Title 5, Rules of Evidence, 333 Md. XXXV (1993). The Rules became effective on July 1, 1994. *Id.*

28. *See* Burral v. State, 352 Md. 707, 737, 724 A.2d 65, 80 (1999) (finding that hypnosis is a scientific technique subject to the *Frye-Reed* standard); Williams v. State, 342 Md. 724, 752, 679 A.2d 1106, 1120-21 (1996) (discussing the *Frye-Reed* standard in relation to the admissibility of DNA evidence and recommending that, "should the State seek to admit the [DNA evidence collected by the] PCR [method of DNA testing] at [the defendant's] second trial, the trial court should consider conducting a new *Frye-Reed* hearing on the question of whether PCR testing results are admissible"); Armstead v. State, 342 Md. 38, 54, 673 A.2d 221, 228-29 (1996) (noting "general acceptance" in the scientific community as an avenue by which "novel scientific evidence" can become admissible); *see also* United States Gypsum Co. v. Baltimore, 336 Md. 145, 182, 647 A.2d 405, 423 (1994) (holding that for new scientific techniques to be admissible, the underlying technique must be "'generally accepted as reliable within the expert's particular scientific field'" (quoting *Reed*, 283 Md. at 381, 391 A.2d at 368)).

A. Rebuttal Evidence: The Doctrines of Verbal Completeness, Opening the Door, and Curative Admissibility

Judge Chasanow has recognized the continuing validity of Maryland's common law of evidence in a number of opinions.[29] The doctrines of "verbal completeness," "opening the door," and "curative admissibility" permit a party, under certain circumstances, to introduce otherwise inadmissible evidence in order to counter or rebut previously introduced evidence.[30] These doctrines, however, had often been confused,[31] and Judge Chasanow, with his characteristic analytic precision, helped clarify the circumstances under which each of the doctrines apply.[32] Important for our purposes, moreover, for Judge Chasanow these doctrines remain viable following the codification of the Maryland Rules of Evidence, although the only doctrine specifically addressed in the Rules is the doctrine of verbal completeness, and that only with respect to written or recorded statements.[33]

1. The Common Law Doctrines Before the Adoption of the Maryland Rules of Evidence.—As Judge Chasanow explained in *Richardson v. State*,[34] the doctrine of verbal completeness permits a party to introduce the remainder of a writing or conversation, part of which was introduced by an opponent, subject to the following limitations: (1) no irrelevant information may be admitted; (2) only that portion of the remainder that concerns the same subject and explains the first part is admissible; and (3) the remainder is not new substantive testimony, but merely aids in the construction of the conversation or statement as a whole.[35] Further, "'where the remainder is incompetent, not merely as to form as in the case of secondary evidence or hearsay,

29. *See, e.g.*, Conyers v. State, 345 Md. 525, 541-46, 693 A.2d 781, 788-91 (1997) (discussing the common law doctrines of "verbal completeness," "opening the door," and "curative admissibility"); Clark v. State, 332 Md. 77, 84-93, 629 A.2d 1239, 1242-47 (1993) (applying the common law doctrine of "curative admissibility" and discussing the doctrine of "opening the door"); Richardson v. State, 324 Md. 611, 622-23, 598 A.2d 180, 185-86 (1991) (applying the common law doctrine of "verbal completeness").

30. *See supra* note 29 (citing cases that discuss or apply these doctrines).

31. *See Clark*, 332 Md. at 84, 629 A.2d at 1242 (recognizing this problem and discussing the doctrines of opening the door and curative admissibility "[b]ecause of the confusion engendered by some cases and some commentators").

32. *See, e.g.*, *id.* at 84-93, 629 A.2d at 1242-47 (discussing the distinction between the doctrines of opening the door and curative admissibility).

33. *See* MD. R. 5-106; *infra* text accompanying note 38 (setting forth the relevant text of Rule 5-106).

34. 324 Md. 611, 598 A.2d 180 (1991).

35. *Id.* at 622, 598 A.2d at 185 (quoting Bowers v. State, 298 Md. 115, 134, 468 A.2d 101, 111 (1983), quoting in turn Feigley v. Balt. Transit Co., 211 Md. 1, 10, 124 A.2d 822, 827 (1956), quoting in turn 7 JOHN HENRY WIGMORE, EVIDENCE § 2113 (3d ed. 1940)).

but because of its prejudicial character then the trial judge should exclude if he finds that the danger of prejudice outweighs the explanatory value.' "[36]

The *Richardson* decision was rendered prior to the adoption of the Maryland Rules of Evidence, which partially codified the common law doctrine of verbal completeness.[37] Maryland Rule 5-106 provides that "[w]hen part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."[38] The Rule, however, addresses only the admissibility of writings or recorded statements,[39] while the common law doctrine applies to conversations as well as to writings and recordings.[40]

In *Richardson*, the defense elicited testimony from a police detective concerning several statements made to him by Michael McCoy, a friend of the defendant who did not testify.[41] The detective's testimony pertained to the timing of a telephone call and a meeting between the defendant and McCoy, and was admitted without objection from the State.[42] During the State's redirect examination of the detective, the trial judge permitted several additional portions of McCoy's statement to be read into evidence under the doctrine of verbal completeness.[43] This testimony included inculpatory statements allegedly made by the defendant both to McCoy and to another acquain-

---

36. *Id.* at 622-23, 598 A.2d at 185 (quoting CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 56, at 146 (Edward W. Cleary ed., 3d ed. 1984)). This is consistent with Maryland Rule 5-403, which states that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MD. R. 5-403. Though Judge Chasanow's formulation would exclude the evidence if the danger of prejudice outweighed its probative value rather than require prejudice to "substantially" outweigh probative value as required under Maryland Rule 5-403, the different formulations may be more semantic than effectual.

37. *See* Conyers v. State, 345 Md. 525, 540-41, 693 A.2d 781, 788 (1997). In *Conyers*, Judge Chasanow explained that Maryland Rule 5-106 partially codified the doctrine of verbal completeness with respect to timing. *Id.*

38. MD. R. 5-106.

39. *See id.* (permitting the use of the doctrine "[w]hen part or all of a writing or recorded statement is introduced by a party").

40. *See Conyers*, 345 Md. at 541, 693 A.2d at 788 (stating that under the common law doctrine of completeness, "[the] right of the opponent to put in [evidence] the remainder [of a writing or conversation was] universally conceded" (quoting *Feigly*, 211 Md. at 10, 124 A.2d at 827, quoting in turn WIGMORE, *supra* note 35, § 2113)).

41. *Richardson*, 324 Md. at 618-21, 598 A.2d at 183-85.

42. *Id.* at 618, 598 A.2d at 183.

43. *Id.* at 620, 598 A.2d at 184.

tance named Fletcher.[44] Fletcher had related his conversation with the defendant to McCoy, who in turn reported the defendant's statements to the detective.[45]

Judge Chasanow determined that the introduction of hearsay evidence of the "*time*" of McCoy's conversation with the defendant did not give the State the right to introduce hearsay evidence of the "*content*" of the conversation,[46] and concluded that the trial court had erred in allowing the detective to read the hearsay statements on redirect.[47] Chasanow explained that the issue raised by the defense was the timing of a telephone call and meeting between the defendant and McCoy, and the inculpatory statements allegedly made by the defendant to McCoy and Fletcher neither explained this issue nor helped to put it in perspective, as required for admissibility under the verbal completeness doctrine.[48]

In *Clark v. State*,[49] another opinion rendered before the Maryland Rules of Evidence went into effect, Judge Chasanow addressed two additional common law doctrines related to the admissibility of rebuttal evidence: the doctrine of "opening the door" and the doctrine of "curative admissibility."[50] As Chasanow explained, the doctrine of opening the door is a rule of "expanded relevancy" that permits the admission of otherwise irrelevant evidence to respond to either "(1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted . . . over objection."[51] Judge Chasanow noted that

---

44. *See id.* at 621, 598 A.2d at 184-85 (setting forth the relevant portion of the redirect examination).

45. *See id.* The detective testified that McCoy had stated that the defendant called and told him "'you don't know me and you never heard of me.'" *Id.*, 598 A.2d at 184 (emphasis omitted). When McCoy asked the defendant what he had done, the defendant replied, "I can't tell you. I'm on my way down." *Id.* The detective also testified that McCoy had related a conversation that occurred between the defendant and Fletcher, of which Fletcher had told McCoy. *Id.*, 598 A.2d at 185. According to McCoy, the defendant had asked Fletcher, "'What's the worst thing you can do?'" and when Fletcher answered, "'Kill somebody,'" the defendant responded, "'Yeah.'" *Id.* (emphasis omitted).

46. *Id.* at 623, 598 A.2d at 185.

47. *Id.* at 624, 598 A.2d at 186.

48. *Id.* at 623, 598 A.2d at 185-86. Judge Chasanow found that "the most damaging statements, *i.e.*, those allegedly made by [the defendant] to Fletcher and then related by Fletcher to McCoy, were clearly not 'opened' by the defense." *Id.*, 598 A.2d at 186.

49. 332 Md. 77, 629 A.2d 1239 (1993).

50. *See id.* at 84-93, 629 A.2d at 1242-47.

51. *Id.* at 84-85, 629 A.2d at 1242-43. The doctrine has limitations: Collateral issues may not be injected into the case, nor may extrinsic evidence on collateral issues be introduced. *See id.* at 87, 629 A.2d at 1244. Further, evidence admissible under this doctrine may be excluded by Maryland Rule 5-403 if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

when inadmissible evidence is admitted over objection, a party should not be prevented from introducing counter-evidence to explain or contradict the initial evidence on the ground that the counter-evidence is incompetent after the court has determined the initial inadmissible evidence to be competent.[52] Put another way, otherwise incompetent counter-evidence that explains or contradicts initial evidence admitted over objection is rendered competent through the court's declaration of the initial evidence as competent. This is critical to the admissibility of such evidence under the doctrine of opening the door, because the doctrine permits the introduction of evidence that otherwise would have been inadmissible due only to lack of relevance; if rebuttal evidence would be inadmissible regardless of its relevance—that is, incompetent—then it would not be admissible under the doctrine.[53] As Judge Chasanow summarized:

> Generally, "opening the door" is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue.
>
> . . . .
>
> In sum, "opening the door" is simply a way of saying: "My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue."[54]

In *Clark*, the defendant had been charged with first-degree rape.[55] The State introduced DNA evidence confirming that Clark had intercourse with the victim.[56] The defense challenged the chain of custody of clothing and blood specimens taken for DNA analysis, and in response, the State called a police officer who "had witnessed Clark's blood being drawn and who had submitted the extracted samples . . . for DNA profiling."[57] During the defense's cross-examination

---

cumulative evidence." MD. R. 5-403; *see also Clark*, 332 Md. at 87, 629 A.2d at 1244. In *Clark*, Judge Chasanow explained that evidence permitted by the doctrine of opening the door could be excluded if the court found that the evidence's probative value would be "substantially outweighed by the danger of unfair prejudice." *Clark*, 332 Md. at 87, 629 A.2d at 1244. Because the Maryland Rules of Evidence had not yet been enacted, Chasanow relied upon the Federal Rules of Evidence to articulate this general rule. *See id.* (quoting FED. R. EVID. 403).

52. *Clark*, 332 Md. at 85, 629 A.2d at 1243 (quoting *Lake Roland Elevated Railway v. Weir*, 86 Md. 273, 37 A. 714 (1897), for "the principles behind 'opening the door' to answer inadmissible evidence entered over objection").

53. *Id.* at 91-92, 629 A.2d at 1246.

54. *Id.* at 85, 629 A.2d at 1243.

55. *Id.* at 80, 629 A.2d at 1240.

56. *Id.* at 81, 629 A.2d at 1241.

57. *Id.*

of the officer, the defendant's attorney asked the officer what function he had served in being present while the defendant's blood was drawn.[58] The officer began to answer by referring to another report concerning a rape to which the officer had responded, but the State's attorney interrupted with a request to approach the bench before the question was answered.[59] The court refused the request and directed the officer to answer the question.[60] The officer then testified that he had answered a call for another rape in which Clark was implicated as the suspect.[61] When defense counsel immediately tried to elicit testimony from the officer that DNA testing had exonerated Clark in the other rape, the State objected and a bench conference ensued.[62] The defense proffered to the trial court that when he had asked the officer what his function was at the blood drawing, he believed the officer would respond that he was acting as a witness.[63] The defense argued that the officer's reference to Clark's involvement in the other rape case would be highly prejudicial if the defense was not permitted to ask the officer how that case had been resolved.[64] The court, however, ordered defense counsel to "stay away from that other case."[65]

On appeal, the defense argued that the trial court had erred in "denying the defense an opportunity to present curative evidence countering [the officer's] inadmissible and severely prejudicial testimony."[66] The State contended that although evidence of the defendant's prior arrest would generally be inadmissible, the defense had "opened the door" to the improper evidence and was thus precluded from complaining of error based on its impact.[67] The State argued that because the information had been elicited by the defense's own cross-examination, the defense had been properly precluded from correcting the testimony.[68]

---

58. *Id.*

59. *See id.*

60. *Id.*

61. *Id.* Clark had been arrested on two separate rape charges, and DNA profiling was conducted in both cases, but only one blood sample—the sample that had been drawn in the presence of the testifying officer—was used for DNA testing in both cases. *See id.* at 82, 629 A.2d at 1241.

62. *Id.* at 81-82, 629 A.2d at 1241.

63. *Id.* at 82, 629 A.2d at 1241.

64. *Id.* at 82-83, 629 A.2d at 1242.

65. *Id.* at 83, 629 A.2d at 1242.

66. *Id.* The Court of Appeals noted that, in Maryland, evidence of "'an accused's prior arrest, indictment or criminal activity, not resulting in conviction' is inadmissible." *Id.* (quoting Hall v. State, 32 Md. App. 49, 57, 358 A.2d 632, 636 (1976)).

67. *Id.*

68. *Id.*

Judge Chasanow first explained that the doctrine of opening the door did not apply to the facts in *Clark* because the rebuttal evidence that the defense sought to introduce was hearsay evidence of exculpatory DNA results.[69] Because the officer's testimony concerning the DNA results was hearsay and thus incompetent,[70] the doctrine of opening the door was not applicable.[71] This was so because the doctrine permits the introduction of rebuttal evidence that is inadmissible only for reasons of irrelevancy.[72] Judge Chasanow concluded that the testimony "should only have been admitted, if at all, under the 'curative admissibility' doctrine."[73]

Judge Chasanow's opinion in *Clark* was the first from the Court of Appeals to address the doctrine of curative admissibility,[74] which permits the admission of otherwise irrelevant and incompetent evidence, on rare occasions, to counter the prejudice caused by previously admitted incompetent evidence.[75] This is a narrowly applied doctrine, however, and as Judge Chasanow stated, "the rule of curative admissibility might better be called the 'rule against curative admissibility' since the rule is more of a general prohibition against admissibility than a general rule in its favor."[76] Curative admissibility is more limited than the doctrine of opening the door, and is implicated when a party seeks "to offer incompetent evidence in response to incompetent evidence . . . admitted *without objection.*"[77] Judge Chasanow explained that if a court overrules an objection and permits the introduction of otherwise incompetent evidence, the court has effec-

---

69. *See id.* at 87-88, 629 A.2d at 1244.

70. Judge Chasanow explained that the term "incompetent evidence," as used in this case, referred to "evidence that is inadmissible for reasons other than relevancy." *Id.* at 87 n.2, 629 A.2d at 1244 n.2. Such evidence would include, for example, evidence that is inadmissible hearsay, as well as evidence that is inadmissible "for lack of authentication, or because of the best evidence rule." *Id.*

71. *Id.* at 87-88, 629 A.2d at 1244.

72. *See id.* at 87, 629 A.2d at 1244. Presumably, Judge Chasanow did not consider the initial evidence to have been "inadmissible evidence admitted . . . over objection," since such circumstances would have rendered the defense's counter-evidence competent. *Id.* at 85, 629 A.2d at 1243.

73. *Id.* at 92, 629 A.2d at 1246.

74. *Id.* at 88, 629 A.2d at 1244. Judge Chasanow noted, however, that the Court of Special Appeals had considered several times what it had referred to as "curative admissibility." *Id.* (citing Savoy v. State, 64 Md. App. 241, 494 A.2d 957 (1985); Robinson v. State, 53 Md. App. 297, 452 A.2d 1291 (1982)).

75. *Id.*

76. *Id.*

77. *Id.*, 629 A.2d at 1244-45. Other courts take a contrary view, permitting application of the doctrine of curative admissibility even if an objection has been made. *See* 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 15, at 731 & n.2 (Tillers rev. ed. 1983) (citing cases from Iowa, Oregon, and Minnesota that follow this contrary view).

tively made counter-evidence admissible.[78] Under such circumstances, "the only issue is relevancy," and the doctrine of opening the door, rather than curative admissibility, would control.[79]

Judge Chasanow observed that the doctrine of curative admissibility is not often invoked to cure inadmissible evidence admitted without timely objection; rather, a party belatedly will move to strike and will request the judge to instruct the jury to disregard the evidence.[80] In some cases, however, the prejudice caused by inadmissible evidence cannot be eliminated by striking the evidence, and the damage inflicted by the prejudice is greater than the curative effect of a jury instruction.[81] In such cases, the doctrine of opening the door, with its notion of expanded relevancy, would not allow the damaged party to counter the prejudice with incompetent evidence because the doctrine does not permit rebuttal with otherwise irrelevant *and incompetent* evidence.[82] Under these limited circumstances, "when inadmissible and highly prejudicial evidence has been admitted without objection and the opposing party wishes to offer inadmissible evidence that would go no further than neutralize the previously introduced inadmissible evidence, the trial judge has discretion to permit 'curative admissibility.'"[83] If application of the doctrine is requested and the circumstances are appropriate, the doctrine may remedy the introduction of seriously prejudicial evidence without the need to declare a mistrial.[84]

Because the doctrine of curative admissibility permits a party to introduce incompetent evidence—that is, evidence that is inadmissible for reasons other than irrelevancy—in response to incompetent evidence introduced without objection, a party might be tempted to refrain from objecting to incompetent evidence in order to introduce incompetent rebuttal evidence under the doctrine. Judge Chasanow sought to prevent the use of such a strategy by requiring that a party's

---

78. *Clark*, 332 Md. at 88, 629 A.2d at 1245.

79. *Id.*; *see also supra* note 51 and accompanying text (explaining the doctrine of "opening the door").

80. *Clark*, 332 Md. at 88-89, 629 A.2d at 1245.

81. *Id.* at 89, 629 A.2d at 1245 (citing Kosmas v. State, 316 Md. 587, 594, 560 A.2d 1137, 1141 (1989)).

82. *Id.*

83. *Id.*

84. *See id.* at 92, 629 A.2d at 1246-47. In *Clark*, Chasanow determined that the police officer's testimony regarding the defendant's involvement in the prior rape case "may have been sufficiently prejudicial to justify a mistrial." *Id.*, 629 A.2d at 1246. He explained that instead of asking for a mistrial, the defense had sought to mitigate the prejudice by introducing neutralizing testimony from the officer; Chasanow concluded that the defense should have been afforded this opportunity. *Id.*, 629 A.2d at 1247.

failure to object to the admitted incompetent evidence not be "a tactical decision in order to admit its 'curative evidence.'"[85] Judge Chasanow also set forth the limited circumstances under which a trial judge has discretion to admit evidence under the theory of curative admissibility. A judge may admit such evidence when:

> (1) prejudicial inadmissible evidence was admitted without timely objection or timely motion to strike;[86]
> (2) the failure to object or move to strike was not shown to be an intentional or tactical decision [intended] to admit the "curative evidence";[87]
> (3) the inadmissible evidence is highly prejudicial and a motion to strike the previously admitted evidence and a cautionary instruction would not cure its prejudicial effect;[88]
> (4) the "curative" inadmissible evidence goes no further than neutralizing previously admitted inadmissible prejudicial evidence without injecting additional issues in the case and does not allow the curing party to gain a tactical advantage from the failure to object to inadmissible evidence;[89]
> (5) the curative inadmissible evidence is of the same character as the previously admitted inadmissible evidence;[90] and
> (6) the probative value of the otherwise inadmissible curative evidence outweighs the danger of "confusion of the issue or misleading the jury or by considerations of undue delay, waste of time, [etc.]."[91]

---

85. *See id.* at 90, 629 A.2d at 1246.

86. *Id.*

87. *Id.* Judge Chasanow did not explain which party has the burden of showing that the failure to object was not a conscious tactical decision. In *Clark*, Chasanow concluded that defense counsel did not intend to introduce evidence of the other rape in order to counter it with the DNA rebuttal evidence, because defense counsel was unaware of the officer's role in the other rape investigation. *Id.* at 92, 629 A.2d at 1246.

88. *Id.* at 91, 629 A.2d at 1246.

89. *Id.*

90. *Id.* Judge Chasanow did not elaborate on the meaning of "character" for this requirement. Presumably, inadmissible evidence that is of the same "character" as other inadmissible evidence could either (1) go to the same issue, or (2) be inadmissible for the same reason. In *Clark*, Chasanow concluded that the defense's rebuttal evidence of DNA results exonerating Clark in the other rape was "of the same character and scope as the original inadmissible evidence." *Id.* at 92, 629 A.2d at 1247. The original evidence and rebuttal evidence in this case were *not* inadmissible for the same reason (the original evidence that the defendant had been implicated in another rape was inadmissible because it was evidence of another arrest not resulting in conviction, and the rebuttal evidence was inadmissible because it constituted hearsay), but both did relate to Clark's involvement in the other rape. Thus, curative inadmissible evidence that is of the same "character" as previously admitted inadmissible evidence seems to mean evidence that goes to the same point as the previously admitted evidence.

91. *Id.* at 91, 629 A.2d at 1246 (citing FED. R. EVID. 403) (alteration in original).

Although determining that the application of the doctrine of curative admissibility is appropriate only on rare occasions, Judge Chasanow nonetheless concluded that the doctrine should have been applied in *Clark* to permit the defense to introduce testimony to mitigate the incriminating evidence that defense counsel inadvertently had elicited from the police witness.[92] He emphasized that the defendant's attorney had no prior knowledge of the witness's role in the other rape investigation and thus could not have strategically sought or anticipated the officer's "blurt" regarding the defendant's involvement.[93] In addition, the prejudice caused by the officer's unresponsive statement was substantial.[94] Judge Chasanow further explained that the defendant sought to introduce evidence of the same scope and character as the original inadmissible evidence from the same witness.[95] This neither helped the defendant's case nor hurt the State's case "beyond the neutralization."[96] While he noted that a trial judge will rarely be reversed for refusing to apply the doctrine of curative admissibility, the facts of *Clark* compelled its application.[97]

Judge Chasanow's analysis of the doctrines of opening the door and curative admissibility in *Clark* extended their applicability beyond situations in which one party introduces evidence that *another party* seeks to rebut, although Chasanow does not explicitly recognize this extension. In *Clark*, the defense elicited the testimony—albeit accidentally—that the defense then sought to rebut; the evidence and counter-evidence came in through *the same party*.[98] Although initially explaining that the doctrine of opening the door is generally used by a party when *his opponent* introduces evidence that the party wishes to rebut,[99] Judge Chasanow later stated that the doctrine could be applied to the facts of *Clark* if the defense's rebuttal evidence was "competent evidence that would otherwise be admissible if relevant."[100] In

92. *Id.* at 92, 629 A.2d at 1247.

93. *Id.*, 629 A.2d at 1246.

94. *Id.* As Judge Chasanow explained, "[o]nce elicited, . . . the damage to Clark's case cannot be overstated." *Id.*

95. *Id.*, 629 A.2d at 1247.

96. *Id.*

97. *Id.* at 93, 629 A.2d at 1247.

98. *See id.* at 81-83, 629 A.2d at 1241-42 (setting forth the exchange between the defense counsel and the police officer who offered the initial incompetent evidence and between the defense counsel and the trial court, which denied the defense the opportunity to present curative evidence).

99. *See id.* at 85, 629 A.2d at 1243 ("In sum, 'opening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'").

100. *Id.* at 91, 629 A.2d at 1246. In *Clark*, however, the rebuttal evidence was incompetent because it was inadmissible hearsay. *Id.* at 87, 629 A.2d at 1244.

addition, Chasanow explained that if the rebuttal evidence would be incompetent despite its irrelevance, the principles of curative admissibility could still be applied to determine whether the evidence was admissible.[101] *Clark* thus broadened the applicability of the doctrines of opening the door and curative admissibility to situations in which "an adverse witness gives an unresponsive, unanticipated prejudicial answer to a question," and the same party that asked the question seeks to introduce competent rebuttal evidence.[102]

2. *The Rebuttal Evidence Doctrines After the Adoption of the Rules.*—Judge Chasanow had yet another opportunity to consider and clarify the doctrines of verbal completeness, opening the door, and curative admissibility in *Conyers v. State*,[103] which was decided after the effective date of the Maryland Rules of Evidence.[104] Through his opinion in *Conyers*, Chasanow demonstrated that these three common law doctrines remain viable despite the adoption of the Maryland Rules.

At defendant Conyers's murder trial, his estranged girlfriend testified during the State's direct examination that the defendant had owned two guns—one that she had actually seen and one that she had learned about during a telephone conversation with the defendant shortly after he had been incarcerated.[105] On cross-examination, the defense attempted to elicit testimony regarding another conversation between the defendant and his girlfriend, in which the defendant had told her that he had given his guns to someone else shortly before the murders occurred.[106] The State objected on hearsay grounds.[107] The defense argued that the doctrine of verbal completeness required the court "to admit this exculpatory hearsay statement to balance the effect of the inculpatory hearsay statements elicited [by the State] during [the witness's] direct examination."[108]

Despite the new Rules, Judge Chasanow concluded that the common law doctrine of verbal completeness—rather than Maryland Rule 5-106—governed the admissibility of the contested evidence.[109] He explained that Rule 5-106 had partially codified the doctrine of verbal

101. *Id.* at 91-92, 629 A.2d at 1246.

102. *Id.* at 91, 629 A.2d at 1246.

103. 345 Md. 525, 693 A.2d 781 (1997).

104. *See supra* note 27.

105. *Conyers*, 345 Md. at 537, 693 A.2d at 786.

106. *Id.* at 540, 693 A.2d at 788.

107. *Id.*

108. *Id.*

109. *See id.* at 541, 693 A.2d at 788. For a discussion of the function and applicability of Rule 5-106, see *infra* note 111.

completeness with respect to timing,[110] allowing "certain writings or recorded statements to be admitted earlier in the proceedings than the common law doctrine" allows.[111] Rule 5-106 did not, however, change the requirements for admissibility under the common law doctrine, nor did it allow the admission of otherwise inadmissible evidence, "'except to the extent that it is necessary, in fairness, to explain what the opposing party has elicited.'"[112] Further, where otherwise inadmissible evidence is admitted under the doctrine, the evidence is admitted "merely as an explanation of previously-admitted evidence and not as substantive proof."[113] Chasanow concluded that because the defense had attempted to introduce evidence of the conversation between the defendant and his girlfriend concerning the location of the guns during its cross-examination of the girlfriend, rather than attempting to introduce the evidence *contemporaneously* with her testimony on direct that the defendant had owned two guns, the issue was not one of timing, and thus Rule 5-106 was not applicable.[114]

Judge Chasanow went on to analyze the admissibility of evidence of the conversation under the common law doctrine of verbal completeness,[115] and held that the trial judge did not abuse his discretion by refusing to admit the evidence.[116] Although no Maryland cases were found under the common law doctrine or Rule 5-106 that admitted a statement or writing that was not the remaining part of a single statement or writing, Judge Chasanow explained that under "appropriate circumstance[s]," the common law doctrine would permit the admission of a separate writing or conversation in order to place a

---

110. *Conyers*, 345 Md. at 540, 693 A.2d at 788.

111. *Id.* at 541, 693 A.2d at 788 (citing MD. R. 5-106 advisory committee's note). Under Rule 5-106, a party can introduce evidence of a writing or recorded statement during his opponent's direct examination of a witness to explain a writing or recorded statement introduced by his opponent, rather than having to wait until cross-examination, as contemplated by the common law doctrine of verbal completeness. MD. R. 5-106. The committee's note to Rule 5-106 states, however, that common law timing (that is, introduction of rebuttal evidence during cross-examination) remains as an alternative with regard to writings and recorded statements. MD. R. 5-106 advisory committee's note. The committee's note further states that "timing under the common law remains applicable to oral statements." *Id.*

112. *Conyers*, 345 Md. at 541, 693 A.2d at 788 (quoting MD. R. 5-106 advisory committee's note).

113. *Id.* (citing MD. R. 5-106 advisory committee's note).

114. *Id.* Although not discussed by Chasanow, Rule 5-106 would have been inapplicable because the disputed testimony involved an oral conversation; only written and recorded conversations are covered by the Rule. MD. R. 5-106; *see supra* note 38 and accompanying text.

115. *See Conyers*, 345 Md. at 541-44, 693 A.2d at 788-90.

116. *Id.* at 543, 693 A.2d at 789.

previously admitted writing or conversation in context.[117] Judge Chasanow cited the New Mexico Supreme Court's decision in *State v. Baca*[118] as an example of the "appropriate circumstance[s]" warranting introduction of a separate statement to place an initial statement in context.[119] Unlike *Baca*, however, where the jury "clearly could have been misled by the first statement if not also allowed to consider the second,"[120] in *Conyers*, the State had questioned the defendant's girlfriend about a conversation in which she and the defendant had discussed the fact *that he had* two guns, not where those guns were located.[121] Thus, according to Judge Chasanow, evidence of a second conversation between the defendant and his girlfriend concerning the location of the guns would not help to place the conversation regarding the defendant's ownership of the guns in context.[122]

Judge Chasanow also emphasized that even if the two statements at issue had been different parts of the same conversation, the defendant's statement regarding the location of the guns still may have not qualified for admission under the doctrine of verbal completeness.[123] Although the statement would have been an admission if offered by the State, it was inadmissible hearsay when offered by the defen-

117. *Id.* at 542, 693 A.2d at 789. The language of Rule 5-106 expressly permits the introduction of a separate writing or recorded statement. MD. R. 5-106; *see supra* note 38 and accompanying text.

118. 902 P.2d 65 (N.M. 1995).

119. *Conyers*, 345 Md. at 542, 693 A.2d at 789. In *Baca*, the defendant appealed his convictions for the murder of his wife and the attempted murder of his daughter. *Baca*, 902 P.2d at 67-68. At trial, the State had introduced a statement made by the daughter in a therapy session that she was afraid of dogs because she had been bitten by one at the house where "they killed me." *Id.* at 69. The State's theory was that the defendant and another family friend, Flores (whose nickname was "Huero"), had committed the crimes, and the daughter's use of the word "they" supported this theory. *Id.* at 68-69. The defendant argued that he should have been allowed to introduce another statement made by the daughter during another therapy session in which she had explained that the word "they" meant "Huero." *See id.* at 69. The Supreme Court of New Mexico held that the second statement should have been admitted under the "doctrine of completeness," as codified in New Mexico Rule of Evidence 11-106, *id.* at 72, which is New Mexico's equivalent of Maryland Rule 5-106. *See Conyers*, 345 Md. at 543, 693 A.2d at 789 (describing the similarity between the New Mexico and Maryland Rules). The court explained that the daughter's statement, "they killed me," was misleading when viewed alone because when she said "they," she meant "Huero." *Baca*, 902 P.2d at 72. The second statement was admissible to place in context the daughter's use of the word "they" in her first statement. *Id.*

120. *Conyers*, 345 Md. at 544, 693 A.2d at 790.

121. *Id.*, 693 A.2d at 789.

122. *See id.*, 693 A.2d at 790 (explaining that the trial judge acted within his discretion when he refused to admit evidence of the second conversation).

123. *Id.*

dant.[124] The defendant's statement that he owned two guns was offered by the State, thus qualifying the statement as an admission and an exception to the rule excluding hearsay.[125] In contrast, his statement regarding the location of the guns constituted inadmissible hearsay because it was the defense that sought to introduce the statement.[126]

As Judge Chasanow explained in *Richardson*, incompetent rebuttal evidence offered under the doctrine of verbal completeness should be excluded "'if the danger of prejudice outweighs the explanatory value'" of the evidence.[127] Chasanow iterated his concern with the competency of rebuttal evidence in *Conyers*, stating that "[t]he doctrine of verbal completeness does not allow evidence that is otherwise inadmissible as hearsay to become admissible solely because it is derived from a single writing or conversation."[128] When otherwise inadmissible hearsay evidence is admitted under the doctrine of verbal completeness, however, it is admitted for its explanatory value and not as substantive testimony,[129] and thus would not constitute hearsay.[130] Chasanow nonetheless appeared to consider the incompetency of rebuttal evidence as a factor weighing against its admission under the doctrine[131]—possibly because evidence that is incompetent on the merits may be misused by a jury when offered only for explanation.

124. *Id.* Maryland Rule 5-803(a)(1) creates a hearsay exception for statements made by a party and offered against that party at trial. MD. R. 5-803(a)(1). Thus, a statement made by a defendant may be admitted against the defendant by the State, but the same statement may not be admissible if offered by the defendant himself. *Conyers*, 345 Md. at 544-45, 693 A.2d at 790 (quoting Muir v. State, 64 Md. App. 648, 656, 498 A.2d 666, 670 (1985)).

125. *Conyers*, 345 Md. at 544, 693 A.2d at 790 (citing MD. R. 5-803(a)(1)).

126. *Id.*

127. Richardson v. State, 324 Md. 611, 622-23, 598 A.2d 180, 185 (1991) (quoting MCCORMICK, *supra* note 36, § 56, at 146). Note, however, that under Maryland Rule 5-403, a trial judge should exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, *regardless* of whether the evidence violates any other specific rule. *See* MD. R. 5-403.

128. *Conyers*, 345 Md. at 545, 693 A.2d at 790 (citing CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 56 (John W. Strong ed., 4th ed. 1992)).

129. *Id.* at 541, 693 A.2d at 788 (citing MD. R. 5-106 advisory committee's note); *Richardson*, 324 Md. at 622, 598 A.2d at 185 (quoting Bowers v. State, 298 Md. 115, 134, 468 A.2d 101, 111 (1983), quoting in turn Feigly v. Balt. Transit Co., 211 Md. 1, 10, 124 A.2d 822, 827 (1956), quoting in turn WIGMORE, *supra* note 35, § 2113).

130. *See* MD. R. 5-801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

131. *See Conyers*, 345 Md. at 544-45, 693 A.2d at 790 (explaining that hearsay statements offered by the declarant as evidence at trial are incompetent and therefore are less likely to be admitted under the doctrine of verbal completeness).

Richardson and *Conyers* suggest that Judge Chasanow's refusal to apply the doctrine of verbal completeness turns on whether the jury would be misled by the initial evidence without admission of the rebuttal evidence, rather than on whether the rebuttal evidence was incompetent. In *Richardson,* the issue raised by the defense was the timing of a telephone call, and the defendant's incriminating statements that the State sought to introduce did not explain this issue or help put it in perspective.[132] Similarly, in *Conyers,* the introduction of the statement regarding the defendant's disposition of his guns did not help to place in context the statement that the defendant owned two guns, and did not present a situation in which the jury clearly could have been misled if not permitted to consider the rebuttal evidence.[133]

If a jury *would* be misled by initial evidence if not also permitted to consider rebuttal evidence, however, the rebuttal evidence may be admissible under the doctrine of verbal completeness, even if the evidence would be incompetent and inadmissible on the merits.[134] In *Baca,* the Supreme Court of New Mexico admitted otherwise incompetent hearsay evidence under the doctrine.[135] Judge Chasanow's belief that *Baca* provided an example of appropriate circumstances warranting the application of the doctrine of verbal completeness[136] suggests his approval of the admission of such evidence under the doctrine in Maryland. Further, Judge Chasanow's statement in *Conyers* that evidence inadmissible as hearsay does not become admissible "*solely* be-

132. *Richardson,* 324 Md. at 623, 598 A.2d at 185-86.

133. *Conyers,* 345 Md. at 544, 693 A.2d at 790.

134. This view is consistent with that of many courts and commentators. *See, e.g.,* United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986) (explaining that otherwise inadmissible evidence may be admitted pursuant to Federal Rule 106 for the limited purpose of correcting a misleading impression created by previously admitted evidence); 2 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 11:39, at 369 (7th ed. 1994) ("Statements are sometimes made to the effect that the 'rule of completeness,' or [Federal Rule of Evidence] 106, only permits the acceleration of the introduction of evidence that was otherwise admissible, but does not permit introduction of evidence that was otherwise inadmissible."); *id.* at 370 ("The better view, however, is that the 'rule of completeness' permits introduction of otherwise inadmissible evidence for the limited purposes of explaining or putting other, already admitted evidence, into context, or avoiding misleading the jury.").

135. State v. Baca, 902 P.2d 65, 72 (N.M. 1995). In *Baca,* the Supreme Court of New Mexico admitted a videotaped conversation between the victim and her therapist in which the victim had made statements that tended to alter the meaning of other statements that she had made when identifying her assailant. *Id.* Ordinarily, the videotaped conversation would have been inadmissible hearsay. *See id.* at 70; N.M. R. ANN. 11-801(C) (2001) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

136. *See Conyers,* 345 Md. at 542-43, 693 A.2d at 789.

cause it is derived from a single writing or conversation"[137] suggests that if other criteria were met—for example, the jury would be misled without the clarifying statement—then the explanatory value of the rebuttal evidence might warrant admission.

Judge Chasanow also considered the applicability of the doctrines of opening the door and curative admissibility in *Conyers*.[138] He determined that the doctrine of opening the door did not apply since the rebuttal testimony proffered by the defense was inadmissible—not because it was irrelevant, but because it was incompetent hearsay.[139] Citing *Clark v. State*,[140] he iterated that the doctrine does not allow the admission of incompetent evidence.[141] Judge Chasanow also concluded that the curative admissibility doctrine did not apply because the initial evidence offered by the State, which the defense sought to counter with its incompetent inadmissible evidence, was competent and admissible.[142]

Judge Chasanow's analytic precision is evident in his identification and explanation of the subtle differences between the doctrines of verbal completeness, opening the door, and curative admissibility. His analyses of the doctrines provide guidance for a party seeking to introduce rebuttal evidence in order to explain or counter previously introduced evidence and indicate that in order to determine which doctrine controls the admission of such evidence, the nature of both the rebuttal evidence and the initial evidence must be examined.[143]

Judge Chasanow's opinions also indicate that these common law doctrines survive the codification of Maryland's evidence law, effectu-

---

137. *Id.* at 545, 693 A.2d at 790.

138. *Id.* at 545-46, 693 A.2d at 790-91.

139. *Id.* at 546, 693 A.2d at 790-91. Since the original evidence introduced by the State was an admission by the defendant (an exception to the hearsay rule), the original evidence was not "inadmissible evidence admitted over objection" and thus did not render the rebutting inadmissible evidence competent. *See supra* notes 51-52 and accompanying text.

140. 332 Md. 77, 85, 629 A.2d 1239, 1243 (1993).

141. *Conyers*, 345 Md. at 546, 693 A.2d at 790. Judge Chasanow relied on *Clark*, which explained that the doctrine of opening the door makes irrelevant but otherwise *competent* evidence relevant for the limited purpose of responding to evidence offered by the opposing party on the same side. *See Clark*, 332 Md. at 84-88, 629 A.2d at 1242-44 (explaining in detail the doctrine of opening the door and its application and limitations in Maryland).

142. *Conyers*, 345 Md. at 546, 693 A.2d at 791 (referring to testimony offered by the State that indicated that the defendant owned two .38-caliber handguns).

143. *See id.* at 541-45, 693 A.2d at 788-90 (discussing factors affecting the admissibility of evidence under the doctrine of verbal completeness); *id.* at 545-46, 693 A.2d at 790-91 (discussing factors affecting the admissibility of evidence under the doctrine of opening the door); *id.* at 546, 693 A.2d at 791 (discussing factors affecting the admissibility of evidence under the doctrine of curative admissibility).

ating the intent behind Maryland Rule 1-201 to maintain the common law where not inconsistent with the codified Rules.[144] Although he concluded that Maryland Rule 5-106 codified the doctrine of verbal completeness with respect to timing,[145] Judge Chasanow also asserted that the Rule did not "change the requirements for admissibility under the common law doctrine,"[146] and he applied the common law doctrine in *Conyers*, which was decided after the codified Rules became effective.[147] Judge Chasanow's departure from Professor Imwinkelried's view that codification of evidence rules eliminates common law doctrines not expressly provided for in those rules[148] becomes even more apparent in his discussion of the application of the doctrines of opening the door and curative admissibility in *Conyers.*[149] Although he ultimately concluded that the doctrines did not apply,[150] his consideration of them indicates that he still found them to be viable possibilities, though neither of the doctrines is explicitly mentioned in the Maryland Rules of Evidence.

B. *Evidence of Prior Criminal Acts of a Defendant*

Despite the enactment of Title 5, Maryland's common law of evidence also continues to play a role in determining the admissibility of a criminal defendant's prior acts when offered for purposes other than proving the defendant's poor character. In *Streater v. State*,[151] Judge Chasanow, examining the admissibility of "other crimes" evidence as substantive proof under Maryland Rule 5-404(b), explored

---

144. *See supra* text accompanying note 17 (quoting Maryland Rule 1-201(c), which explains the relationship between the codified Maryland Rules of Evidence and existing common law rules of evidence).

145. *Conyers*, 345 Md. at 540, 693 A.2d at 788.

146. *Id.* at 541, 693 A.2d at 788.

147. *Conyers* was decided in 1997; the newly codified Maryland Rules of Evidence became effective on July 1, 1994. *See supra* note 27.

148. *See* Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 881 (1988) ("In a series of articles, the Author has argued that the Federal Rules operate much like a self-contained, civil-law code, abolishing common-law rules that Congress failed to codify." (footnotes omitted) (citing Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129 (1987); Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577 (1984); Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465 (1985))).

149. *See Conyers*, 345 Md. at 545-46, 693 A.2d at 790-91. Chasanow considered these doctrines as possible methods for allowing the defendant to offer evidence rebutting the State's evidence that linked the defendant to the murder weapon. *See id.*

150. *Id.* at 546, 693 A.2d at 791.

151. 352 Md. 800, 724 A.2d 111 (1999).

the use of such evidence for purposes other than character.[152] Rule 5-404(b) provides that evidence of other crimes, while not admissible to prove character, may be admissible for other purposes.[153] These purposes include proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.[154]

The defendant in *Streater*, who had been convicted of harassment, stalking, and telephone misuse,[155] challenged the admissibility of factual findings contained within a protective order that was admitted as substantive evidence during the State's case-in-chief.[156] This protective order contained three factual determinations that constituted other-crimes evidence.[157] In his analysis, Judge Chasanow distinguished between the admissibility of the protective order itself and the admissibility of the factual findings contained within the protective order. Chasanow explained that "[a] fundamental principle of the law of evidence is that inadmissible evidence does not become admissible simply by being clothed within evidence that is admissible."[158] While acknowledging that the fact of the protective order had been properly placed in evidence,[159] Judge Chasanow questioned whether the written protective order should have been admitted—due to the other crimes evidence contained within it—because no threshold in-

152. *See id.* at 806-22, 724 A.2d at 114-22.

153. MD. R. 5-404(b).

154. *Id.*

155. *Streater*, 352 Md. at 803, 724 A.2d at 112.

156. *Id.* at 804, 812, 724 A.2d at 113, 117.

157. *Id.* at 815, 724 A.2d at 118. The findings within the protective order that constituted other crimes were as follows: (1) the defendant placed the victim "'in fear of imminent serious bodily harm'" and "'threaten[ed] to harm'" her; (2) the defendant "'broke into the house and took her money'"; and (3) the defendant committed a "'[b]attery or assault and battery.'" *Id.* (alterations in original) (quoting the protective order).

158. *Id.* at 813-14, 724 A.2d at 117.

159. Judge Chasanow explained that the protective order itself had special relevance, at least with respect to the harassment charge. *See id.* at 812-13, 724 A.2d at 117. Judge Chasanow explained: "Harassment prohibits a person from 'maliciously engag[ing] in a course of conduct that alarms or seriously annoys another person . . . [a]fter reasonable warning or request to desist by or on behalf of the other person . . . .'" *Id.* (alterations in original) (quoting MD. ANN. CODE art. 27, § 121A(c) (1996)). The protective order directed the defendant not to contact, attempt to contact, or harass the victim, and to vacate the home he had shared with the victim. *Id.* at 812-13, 724 A.2d at 117. The protective order was thus relevant to, and highly probative of, both the defendant's intent and the fact that he had notice not to contact the victim. *Id.* at 814 n.6, 724 A.2d at 117 n.6.

quiry was conducted by the trial judge regarding the admissibility of that evidence.[160]

Although *Streater* was decided under the codified Rules of Evidence, Judge Chasanow incorporated the three-pronged test for admissibility of other crimes evidence that had developed in Maryland under the common law.[161] Under the test, a trial judge must first determine whether the other crimes evidence fits within one or more special relevancy exceptions, such as those provided by Rule 5-404(b).[162] Next, the judge determines whether the defendant's involvement in such crimes has been established by clear and convincing evidence.[163] Finally, if these requirements have been met, the judge weighs the probative value of the other crimes evidence against the prejudice likely to result from its admission.[164] As Judge Chasanow explained, "[t]hese substantive and procedural protections are necessary to guard against the potential misuse of other crimes or bad acts evidence and avoid the risk that the evidence will be used improperly by the jury against a defendant."[165] Chasanow also emphasized that a trial court should state on the record its reasons for admitting other crimes evidence, thus enabling an appellate court to determine whether Rule 5-404(b) has been correctly applied as interpreted through the case law.[166]

Streater also provides an example of Chasanow's willingness to depart from his expressed desire to adopt the Federal Rules of Evidence, as written, in Maryland. Judge Chasanow approved of and incorporated the three-pronged common law test into Rule 5-404(b), even though the language of the Rule is silent as to the specific procedure to be utilized by a trial court in determining the admissibility of other crimes evidence under the Rule. Under Federal Rule of Evidence 404, evidence of prior acts will be admissible if a reasonable jury could find the acts to have been committed,[167] whereas under the rule

---

160. *See id.* at 813, 724 A.2d at 117 ("[T]he trial court in the instant case ruled the entire protective order form admissible without addressing in the record the admissibility of factual references to other crimes that the order contained.").

161. *See id.* at 807, 724 A.2d at 114 (quoting the three-pronged test stated in *State v. Faulkner*, 314 Md. 630, 634-35, 552 A.2d 896, 898 (1989), and citing *Ayers v. State*, 335 Md. 602, 632, 645 A.2d 22, 37 (1994), and *Terry v. State*, 332 Md. 329, 335, 631 A.2d 424, 427 (1993)).

162. *See id.* (quoting *Faulkner*, 314 Md. at 634, 552 A.2d at 898).

163. *Id.* (quoting *Faulkner*, 314 Md. at 634, 552 A.2d at 898).

164. *Id.* (quoting *Faulkner*, 314 Md. at 635, 552 A.2d at 898).

165. *Id.*

166. *Id.* at 810, 724 A.2d at 116.

167. In *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court held that evidence of prior acts need only meet the Rule 104(b) test for admissibility. *See id.* at 689-

adopted by Judge Chasanow in *Streater*, the defendant's involvement in the other crimes must have been established by clear and convincing evidence.[168] Applying these rules to the admissibility of the other crimes evidence in *Streater*, Judge Chasanow concluded that the trial judge had failed to apply Rule 5-404(b) correctly with respect to the findings.[169] Chasanow explained that there was no indication that the trial court had considered or assessed the admissibility of the other crimes,[170] and he ultimately held that "reversible error occurs where significant evidence of other crimes was admitted without any apparent on-the-record consideration by the trial court."[171]

Since the adoption of Title 5, Judge Chasanow has written a number of opinions on matters of evidence law. Given his expressed view on the importance of uniformity,[172] one might have expected that these opinions would have hewn closely to lines established by the Federal Rules and the opinions construing them, at least where the preexisting common law is not inconsistent with the applicable Rule. As we shall see, however, that has not always been the case.

C. *Character, Impeachment, and Rehabilitation*

Despite his commitment to the Federal Rules, once cases started arriving at the Court of Appeals, Judge Chasanow seemed a bit less faithful to federal evidence law. Perhaps the most well-known example of this is his decision in *Sahin v. State*.[173] The defendant, Isa Sahin, had been convicted of cocaine distribution.[174] At trial, he testified on his own behalf.[175] He then sought to introduce evidence of character through witnesses who would testify as to his reputation for truthfulness.[176] The trial court excluded the reputation evidence, reasoning that truthfulness was not a character trait relevant to whether the defendant had sold narcotics.[177] Further, because the defendant's char-

---

91. Thus, such evidence is admissible if a reasonable jury could find by a preponderance of the evidence that the prior acts were committed. *See id.* at 690.

168. *Streater*, 352 Md. at 807, 724 A.2d at 114.

169. *Id.* at 811, 724 A.2d at 116.

170. *Id.*

171. *Id.* at 821, 724 A.2d at 121.

172. *See* Chasanow's Rules Dissent, *supra* note 16, at XXXIX.

173. 337 Md. 304, 653 A.2d 452 (1995).

174. *Id.* at 307, 653 A.2d at 454.

175. *Id.* at 308, 653 A.2d at 454.

176. *Id.* at 309, 653 A.2d at 454.

177. *Id.* Under both Federal Rule of Evidence 401 and its Maryland counterpart, Maryland Rule 5-401, evidence is relevant only if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401; MD. R. 5-401. Under

acter for truthfulness had not been attacked on cross-examination, the trial court found that the introduction of evidence of good character for truthfulness was an impermissible attempt to bolster the defendant's credibility.[178] The charge of narcotics distribution, according to the trial court, was not in itself an attack on the defendant's veracity.[179]

On appeal, Sahin argued that truthfulness was a character trait relevant to the charge of cocaine distribution and that he should have been permitted to introduce evidence of his good character for truthfulness.[180] Indeed, the Court of Appeals had recently determined that distribution of narcotics was relevant to credibility, thus allowing a defendant's testimony to be impeached by evidence of his prior conviction for narcotics distribution.[181] Nevertheless, Judge Chasanow, writing for the court, declined to hold that evidence of good character for truthfulness is relevant evidence in determining whether the defendant is unlikely to have distributed drugs.[182] So, according to Judge Chasanow, drug-dealing is relevant to veracity, but veracity is *not* relevant to whether one has dealt drugs. Now, while this may be analytically sound, it calls to mind the ancient theological inquiry about angels and the heads of pins.

But Judge Chasanow was not yet finished. He went on to consider whether evidence that the defendant had committed the acts charged—that is, evidence on the merits of the case—itself constituted an attack on the defendant's credibility.[183] He concluded that if the crime for which the defendant was being tried was relevant to veracity—as the court had held drug dealing was[184]—evidence that the defendant had committed the offense necessarily entailed an attack on the defendant's character for truthfulness.[185] Thus, if the defendant were to testify, he would be entitled to offer evidence of good character for veracity by way of rehabilitation.[186]

---

both the Federal and Maryland Rules, "[e]vidence [that] is not relevant is not admissible." FED. R. EVID. 402; MD. R. 5-402.

178. *See Sahin*, 337 Md. at 309, 653 A.2d at 454-55.

179. *Id.*

180. *Id.* at 310, 653 A.2d at 455.

181. State v. Giddens, 335 Md. 205, 217, 642 A.2d 870, 876 (1994). Interestingly, the court also noted that *possession* of narcotics is *not* probative of credibility. *Id.* at 216, 642 A.2d at 875 (citing Morales v. State, 325 Md. 330, 339, 600 A.2d 851, 855 (1992); Lowery v. State, 292 Md. 2, 2, 437 A.2d 193, 193 (1981)).

182. *Sahin*, 337 Md. at 311-12, 653 A.2d at 456.

183. *See id.* at 313-14, 653 A.2d at 456-57.

184. *See Giddens*, 335 Md. at 217, 642 A.2d at 876.

185. *Sahin*, 337 Md. at 314, 653 A.2d at 457.

186. *Id.*

To sum up, a defendant charged with an offense that "counts" as relevant to veracity[187] may not introduce evidence of good character for truthfulness on the merits of whether he committed the offense, but may, if he testifies, offer such evidence to bolster his credibility, regardless of whether that credibility has been directly attacked by the prosecution. In short, there is a one way inference from conduct to character for truthfulness, but character for truthfulness will not support an inference that the defendant did not commit the charged conduct (unless, presumably, the charged conduct is directly related to veracity—perjury, for example).

Judge Chasanow clarified the meaning of *Sahin* three years later in *Sippio v. State.*[188] In *Sippio*, the defendant, who was charged with murder (a veracity-related offense under the standards of Maryland Rule 5-609[189]), attempted to introduce evidence of his good character for truthfulness *before* testifying.[190] The court, per Judge Chasanow, held that, to take advantage of *Sahin*, the defendant must testify or at least formally proffer that he or she will testify.[191]

Sahin's trial was not governed by the then-new Maryland Rules of Evidence, but Judge Chasanow made it clear that the result would be the same under the Rules.[192] Sippio's trial, of course, was controlled by the Rules. Given Judge Chasanow's insistence on uniformity between the Federal and Maryland Rules of Evidence when the Maryland Rules were under consideration for adoption by the Court of Appeals,[193] it is noteworthy that his analysis in *Sahin* is not consistent with federal cases interpreting the applicable Federal Rule.[194] Most

---

187. Maryland Rule 5-609(a) defines veracity-related offenses as "infamous crime[s] or other crime[s] relevant to the witness's credibility." MD. R. 609(a).

188. 350 Md. 633, 714 A.2d 864 (1998).

189. *See supra* note 187.

190. *Sippio*, 350 Md. at 640, 714 A.2d at 868.

191. *Id.* at 664-66, 714 A.2d at 880.

192. *See Sahin*, 337 Md. at 315 n.3, 653 A.2d at 457 n.3 (explaining that Maryland Rule 5-608(a)(2), "Rehabilitation by a Character Witness," was not in effect during Sahin's trial, but that "[t]he newly adopted Maryland Rules of Evidence are consistent with our holding in the instant case"); *see also Sippio*, 350 Md. at 663 n.10, 714 A.2d at 879 n.10 ("Although [Maryland Rule 5-608] was not in effect at the time of the trial court's decision in *Sahin*, it remains consistent with this Court's ruling in *Sahin.*").

193. *See supra* note 172 and accompanying text.

194. Federal Rule 608(a) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

FED. R. EVID. 608(a).

federal courts hold that neither a criminal charge nor the contradiction of a defendant's testimony by State's witnesses "constitutes an attack on a defendant's character for truthfulness sufficient to permit the defendant to introduce evidence of good character for truthfulness."[195] The cognate Maryland Rule is not identical to Federal Rule 608(a),[196] but despite his earlier expressed concern about such differences, Judge Chasanow recognized that the differences were not material.[197]

Nor is this the only instance in which Judge Chasanow has reached results not necessarily consistent with federal precedent construing Federal Rules of Evidence that are essentially the same as the corresponding Maryland Rules.[198] It is in the best tradition of common law judging to allow one's theoretical position, even when based on what appears to be sound policy (here, uniformity between state and federal practice), to be informed by the facts of the particular case to be decided. If the method of the common law has taught us anything, it is that the soundness of a theoretical position can best be tested through the adjudication of particular cases. It is a lesson that Judge Chasanow has learned well.

Sahin and *Sippio* demonstrate another characteristic of Judge Chasanow's approach to judging: he combines analytic precision with an appreciation of the way in which legal doctrine operates in the real

---

195. *Sahin*, 337 Md. at 316, 653 A.2d at 458 (citing United States v. Dring, 930 F.2d 687, 690-92 (9th Cir. 1991) (distinguishing between those attacks on credibility that give defendants the right to rehabilitate and those that do not, and explaining that rehabilitation is not triggered by the introduction of evidence that contradicts the defendant's testimony); United States v. Danehy, 680 F.2d 1311, 1314 (11th Cir. 1982) (discussing Rule 608 and finding that "[g]overnment counsel pointing out inconsistencies in testimony and arguing that the accused's testimony is not credible does not constitute an attack on the accused's reputation for truthfulness"); United States v. Angelini, 678 F.2d 380, 382 n.1 (1st Cir. 1982) (applying Federal Rule of Evidence 608 and explaining that a defendant may not offer character evidence on his or her own behalf merely because he or she takes the stand or because other witnesses contradict the defendant's testimony); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE ¶ 608[08] (1988), at 608-64-65).

196. Rule 5-608(a)(2) states that "[a]fter the character for truthfulness of a witness has been attacked, a character witness may testify (A) that the witness has a good reputation for truthfulness or (B) that, in the character witness's opinion, the witness is a truthful person." MD. R. 5-608(a)(2); *see also supra* note 194 (providing the text of Federal Rule 608(a)).

197. *See Sippio*, 350 Md. at 663 n.10, 714 A.2d at 879 n.10 (noting that "Maryland Rule 5-608 . . . differs slightly from its federal counterpart mainly in style and organization, but not in substance"); *Sahin*, 337 Md. at 315 n.3, 653 A.2d at 457 n.3 (explaining that the Maryland Rule "differs slightly in form from its federal counterpart").

198. *See supra* notes 151-172 and accompanying text (discussing Judge Chasanow's adoption of a standard for the admissibility of other-crimes evidence under Maryland Rule 5-404(b) that was different from the standard used under the corresponding Federal Rule).

world. The recognition that the inference from behavior to character for trustworthiness is not the same as the inference from character for trustworthiness to behavior is a rigorous analytic distinction. And the recognition that a jury is likely to draw an adverse inference about a criminal defendant's credibility from the mere bringing of the prosecution displays an awareness of the world of the criminal courtroom not always reflected in the sterility of legislated rules.[199] The *Sahin* solution is a nice balance between theory and reality, despite its lack of supporting precedent.

D. Prior Inconsistent Statements

Sahin and *Sippio* are not the only examples of Judge Chasanow's ability to temper sophisticated legal analysis with recognition of real world contexts. His opinions regarding the use of prior inconsistent statements provide another demonstration of his superior analytic precision. These opinions also illustrate Chasanow's tendency to defer to the plain language of codified rules of evidence when those rules are inconsistent with established common law principles.

A witness's prior inconsistent statement may be admissible to impeach the witness's testimony,[200] and under some circumstances, as substantive evidence.[201] When such statements are technically limited to impeachment, however, a jury may nonetheless ignore such niceties and use the prior statement for its substantive truth.[202] Thus, an adverse party is typically eager to "impeach" a witness through the use

---

199. The jury may draw this inference, however, regardless of whether the nature of the charged offense implicates questions of the defendant's veracity. Given the defendant's obvious interest in the outcome, the jury is likely to question the defendant's veracity without regard to the nature of the offense. *See* Alan D. Hornstein, ***Between*** Rock ***and a Hard Place: The Right to Testify and Impeachment by Prior Conviction***, 42 VILL. L. REV. 1, 17-18 & 17 n.77 (1997) (explaining that the credibility of a criminal defendant's testimony will be "substantially diminished" because of his or her interest in the outcome of the proceeding, and that, for this reason, under the common law, criminal defendants had historically been barred from testifying on their own behalf).

200. *See* MD. R. 5-616(a) ("The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at: (1) Proving under Rule 5-613 ['Prior Statements of Witnesses'] that the witness has made statements that are inconsistent with the witness's present testimony . . . .").

201. *See* MD. R. 5-802.1(a) (declaring that prior inconsistent statements made by a testifying witness that were "(1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement" are not excluded by the hearsay rule).

202. *See* Nance v. State, 331 Md. 549, 566, 629 A.2d 633, 642 (1993) (characterizing "separating substantive proof from impeachment evidence" as a "difficult task" for jurors to accomplish).

of that witness's prior inconsistent statement in order to get that statement before the jury.

In *Bradley v. State*,[203] Judge Chasanow propounded the rule that in a criminal case, the prosecution is not permitted, over objection, to inquire into an area independent of the witness's substantive testimony for the sole purpose of impeaching the witness by using a prior inconsistent statement that would otherwise be inadmissible.[204] In *Bradley*, the defendant was charged with kidnapping, armed robbery, and other related offenses.[205] At trial, the victim of the robbery testified that, as she left her car, a man approached her with a gun and ordered her back into the car.[206] After driving several blocks, the victim was ordered out of the car by the assailant, who drove off in the car.[207] To place the defendant in the victim's car close to the time of the robbery, the State proffered the victim's car phone bill, "which indicated that calls were placed from her car phone to a particular phone number within one-half hour of the theft."[208] The State called as a witness the defendant's cousin, who testified that his home phone number matched the number on the victim's car phone bill and that he had received phone calls from the defendant after the car had been stolen.[209]

The prosecution next elicited, over objection, a denial from the defendant's cousin that he told a police detective that the defendant, during these phone calls, said that he had stolen a car.[210] The prosecution then called the police detective who had interviewed the defendant's cousin.[211] The detective testified, over objection, that the cousin had said that the defendant had bragged to him about stealing a car.[212] The trial court instructed the jury to consider the portion of the testimony about the phone calls only to assess the credibility of the defendant's cousin.[213] On appeal, the defendant argued that the State had improperly used his cousin's prior inconsistent statement.[214]

---

203. 333 Md. 593, 636 A.2d 999 (1994).
204. *Id.* at 604, 636 A.2d at 1005.
205. *Id.* at 596, 636 A.2d at 1001.
206. *Id.*
207. *Id.*
208. *Id.* at 597, 636 A.2d at 1001.
209. *Id.* (quoting the unreported opinion of the Court of Special Appeals).
210. *Id.* (quoting the unreported opinion of the Court of Special Appeals).
211. *Id.* (quoting the unreported opinion of the Court of Special Appeals).
212. *Id.* (quoting the unreported opinion of the Court of Special Appeals).
213. *Id.* (quoting the unreported opinion of the Court of Special Appeals).
214. *See id.* at 598-99, 636 A.2d at 1002. The State had called the defendant's cousin to the witness stand merely to establish that he was, in fact, the defendant's cousin, that his phone number matched the number on the victim's car phone bill, and that the defen-

Judge Chasanow began his analysis by examining the Court of Appeals's opinion in *Spence v. State*.[215] In *Spence*, the State had asked the trial judge to call a witness whom the prosecution knew would exculpate the defendant on the stand.[216] The prosecution admitted that its reason for calling the witness was to introduce the witness's prior out-of-court statements to police officers, in which the witness had implicated the defendant in a burglary and robbery.[217] On the stand, the witness denied telling police that the defendant was one of the men involved in the incident.[218] The prosecution then called a police detective who testified, over objection, that the witness had told him that the defendant had participated in the crimes.[219]

The Court of Appeals rejected the prosecution's argument that the witness's out-of-court statement to police was admissible for impeachment of the witness's in-court testimony.[220] The court explained:

> It is obvious that the prosecutor's sole reason for prevailing on the court to call [the] court's witness was to get before the jury [the witness's] extrajudicial hearsay statement implicating [the defendant]. The prosecutor knew that [the witness's] testimony would be exculpatory as to [the defendant]. The inescapable conclusion is that the State, over objection, prevailed on the court to call a witness who would contribute nothing to the State's case, for the sole purpose of "impeaching" the witness with otherwise inadmissible hearsay.

---

dant had spoken with him from the car phone. *Id.* at 601, 636 A.2d at 1003. The defendant argued, and the court ultimately agreed, that after the State had the defendant's cousin verify all of the above information on the witness stand, "it was improper for the State to inquire about the contents of the telephone conversation for the sole purpose of impeaching [the cousin] regarding the entirely separate matter of whether or not the defendant bragged about the crime in the telephone call." *Id.* According to the court, the State undoubtedly knew that the defendant's cousin would deny hearing the confession over the phone, but still proceeded to question him regarding the alleged confession. *Id.*

215. 321 Md. 526, 583 A.2d 715 (1991); *see Bradley*, 333 Md. at 599-600, 636 A.2d at 1002.

216. *See Spence*, 321 Md. at 528-29, 583 A.2d at 716.

217. *Id.* at 528, 583 A.2d at 716.

218. *Id.* at 529, 583 A.2d at 717.

219. *Id.* at 529-30, 583 A.2d at 717.

220. *See id.* at 531-32, 583 A.2d at 717-18 (recognizing that "impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible" (internal quotation marks omitted) (quoting United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984), quoting in turn United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975))).

> . . . This blatant attempt to circumvent the hearsay rule and parade inadmissible evidence before the jury is not permissible.[221]

In *Bradley*, Judge Chasanow expanded on the *Spence* decision by recognizing that a defendant in a criminal case "is denied a fair trial if the State, with full knowledge that its questions will contribute nothing to its case, questions a witness concerning an independent area of inquiry in order to open the door for impeachment and introduce a prior inconsistent statement."[222] The State had attempted to distinguish the circumstances in *Bradley* from those in *Spence*, arguing that because its witness's testimony contributed to its case—that is, the witness was not called for the *sole* reason of introducing the witness's prior inconsistent statements—the witness was called for a proper purpose, and *Spence* was not violated.[223] Judge Chasanow disagreed, reasoning that the *Spence* rationale also applied to the circumstances in *Bradley*, which Chasanow referred to as an "'independent area of inquiry'" case.[224] As he explained, the prosecution called the defendant's cousin to testify (1) that his phone number matched the number found on the victim's car phone bill, and (2) that the defendant had called his cousin shortly after the robbery took place.[225] The State should not have been permitted to then question the cousin about the *contents* of the conversation between him and the defendant in order to impeach the cousin with the "entirely separate matter of whether or not the defendant [had] bragged about the crime in the telephone call."[226] Judge Chasanow determined that "we are led to the 'inescapable conclusion . . . that the State, over objection, [questioned a witness concerning an independent area of inquiry, knowing it] would contribute nothing to the State's case, for the sole purpose of "impeaching" the witness with otherwise inadmissible hearsay.'"[227]

Judge Chasanow acknowledged that other courts had not drawn the "independent area of inquiry" distinction, and instead focused on whether the primary purpose in calling the witness was "to elicit sub-

---

221. *Id.* at 530, 583 A.2d at 717.

222. Bradley v. State, 333 Md. 593, 604, 636 A.2d 999, 1005 (1994).

223. *Id.* at 601, 636 A.2d at 1003. The State argued that the cousin's value as a witness had not been as a method by which to introduce his prior statement; rather, the cousin's testimony had provided valuable evidence that demonstrated that the defendant was in the car after it was stolen and that the defendant had called his cousin from the stolen car. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 601-02, 636 A.2d at 1003 (alteration in *Bradley*) (quoting Spence v. State, 321 Md. 526, 530, 583 A.2d 715, 717 (1991)).

stantive testimony" or to introduce otherwise inadmissible hearsay under the guise of impeachment.[228] Nonetheless, he pointed out that the rationale behind these "primary purpose" cases was the same as that behind the *Bradley* "independent area of inquiry" rationale—that is, that the prosecution should not be permitted to engage in a subterfuge to circumvent the hearsay rule by presenting testimony in the name of impeachment.[229] As Judge Chasanow poetically put it:

> Impeachment may be thought of as a shield; it protects a party from unfavorable testimony by neutralizing that testimony. Impeachment should not be used as a sword to place otherwise inadmissible evidence before the jury when there is no reason whatsoever for eliciting the unfavorable testimony upon which the need for impeachment is predicated.[230]

Judge Chasanow also acknowledged, however, that the *Bradley* holding—"that it is impermissible for a party in a criminal case over objection, to venture into an independent area of inquiry" solely to impeach a witness with otherwise inadmissible evidence[231]—was limited.[232] The *Bradley* holding does not apply, Judge Chasanow explained, where there is no clearly independent area of inquiry, and in such a case, the State may impeach any portion of the witness's testimony that disfavors its case.[233] In addition, the State is not precluded from inquiring into a possibly independent area of inquiry where a failure to do so "could create a gap in the witness's testimony such

---

228. *Id.* at 602, 636 A.2d at 1004. The *Bradley* court identified numerous cases that have evaluated the State's "primary purpose" in calling a witness. *See id.* at 602-03, 636 A.2d at 1004 (citing United States v. Gomez-Gallardo, 915 F.2d 553, 556 (9th Cir. 1990) ("[W]e are compelled to conclude that the government called Gutierrez for the primary purpose of impeaching Gutierrez's credibility to prove the substance of the charges against Gallardo."); United States v. Hogan, 763 F.2d 697, 702 (5th Cir. 1985) ("The prosecution . . . may not call a witness it knows to be hostile for the *primary* purpose of eliciting otherwise inadmissible impeachment testimony, for such a scheme merely serves as a subterfuge to avoid the hearsay rule."), *corrected in part*, 771 F.2d 82 (5th Cir. 1985); United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975) ("The overwhelming weight of authority is . . . that impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible.")).

229. *See id.* at 603-04, 636 A.2d at 1004-05 (explaining why the rationale behind the "primary purpose" cases should apply to *Bradley*); *see also id.* at 603, 636 A.2d at 1004 (recognizing that "the polic[y] underlying the 'primary purpose' and 'mere subterfuge' cases is the concern that the government should not be permitted, 'in the name of impeachment, to present testimony to the jury by indirection which would not otherwise be admissible'" (quoting *Morlang*, 531 F.2d at 189)).

230. *Id.* at 605-06, 636 A.2d at 1005 (citations omitted).

231. *Id.* at 602, 636 A.2d at 1003.

232. *Id.* at 604, 636 A.2d at 1005.

233. *Id.*

that a negative inference may arise against the prosecution."[234] The State may also continue to impeach a witness with a prior inconsistent statement "if the witness's testimony comes as a surprise" to the State[235] and "where the State is not responsible for a witness's 'blurt' that harms its case."[236]

In *Bradley*, Judge Chasanow extended the applicability of the original "anti-subterfuge" rule that had been applied by the federal courts[237] and by the Court of Appeals in *Spence*.[238] The rule applies to situations in which the prosecution, knowing a witness will repudiate a prior statement on the stand, calls that witness for the primary purpose of introducing the prior inconsistent statement ostensibly to impeach the witness.[239] Judge Chasanow expanded the rule to apply to situations in which the prosecution questions a witness concerning an independent area of inquiry for the purpose of introducing a prior inconsistent statement for impeachment, even though no other court had recognized such a distinction.[240] Judge Chasanow's analysis is not inconsistent with these other courts, however, because his recognition of the additional circumstances under which the rule applies maintains the protection against the prosecution's misuse of evidence with which the original rule was concerned.[241] By preventing the State

---

234. *Id.* at 606, 636 A.2d at 1006.

235. *See id.* (noting that if the State called a witness expecting him to give favorable testimony, but instead, the witness gave unfavorable testimony, then the State would be entitled to impeach that witness).

236. *Id.* at 607, 636 A.2d at 1006; *see id.* (noting that prior inconsistent statements are permissible impeachment evidence so long as the State did not "create the need to impeach").

237. *See supra* note 228 (noting three anti-subterfuge cases cited by Judge Chasanow in *Bradley*).

238. Spence v. State, 321 Md. 526, 530, 583 A.2d 715, 717 (1991) (finding that "[t]he State cannot, over objection, have a witness called who it knows will contribute nothing to its case, as a subterfuge to admit, as impeaching evidence, otherwise inadmissible hearsay evidence").

239. *See id.*

240. *See Bradley*, 333 Md. at 602, 636 A.2d at 1004. Emphasizing that there is no case law recognizing the "independent-area-of-inquiry distinction," the State argued that the *Bradley* court should not adopt such a standard. *See id.* at 601-02, 636 A.2d at 1003-04. Judge Chasanow rejected the State's argument, noting that although other courts have not formally recognized the "independent-area-of-inquiry distinction," other courts do "look to whether the witness was called to elicit substantive evidence or whether the 'primary purpose' in calling the witness was to place otherwise inadmissible hearsay before the jury through impeachment." *Id.* at 602, 636 A.2d at 1004 (citing United States v. Gomez-Gallardo, 915 F.2d 553 (9th Cir. 1990); United States v. Hogan, 763 F.2d 697 (5th Cir. 1985); United States v. Morlang, 531 F.2d 183 (4th Cir. 1975)); *see supra* note 228 (noting the language of these cases relied upon by Judge Chasanow).

241. Judge Chasanow stated that "[i]n *Spence*, we made clear that 'blatant attempt[s] to circumvent the hearsay rule and parade inadmissible hearsay before the jury' should not

from questioning a witness concerning an independent area of inquiry in order to introduce an otherwise inadmissible prior inconsistent statement through impeachment, Judge Chasanow also protected against the possibility that a jury could misuse such a statement as substantive evidence.

Different considerations are involved, however, where a witness's prior inconsistent statement is introduced as substantive evidence. As a result, a prior inconsistent statement admissible for its truth will be admissible regardless of whether the party calling the witness is aware beforehand that the witness will repudiate the prior statement, provided that the statement meets certain requirements.

In *Stewart v. State*,[242] Judge Chasanow differentiated between the use of a prior inconsistent statement for impeachment and the introduction of such a statement as substantive evidence.[243] The question in *Stewart* was whether a witness's prior inconsistent statement could be admitted as substantive evidence in a criminal trial, even though the party calling the witness knew beforehand that the witness intended to recant his prior statement on the stand.[244] Michael Stewart had been convicted of murder and use of a handgun in the commission of a crime of violence.[245] George Booth had been present at the scene of the crime immediately before the shooting and subsequently identified Stewart from an array of photographs, presented to him by police, as the person who shot the victim.[246] About three-and-a-half months after the shooting, Booth identified the defendant from a photo array, writing on the back of the defendant's photograph: "I'm positive that he was the one that shot [the victim]."[247] Booth also ap-

---

be sanctioned." *Bradley*, 333 Md. at 603, 636 A.2d at 1004 (second alteration in original) (citing *Spence*, 321 Md. at 530, 583 A.2d at 717). He then concluded that there is

> no reason to distinguish between the State requesting that a court's witness be called as a way to get inadmissible hearsay before the trier of fact (*i.e.*, *Spence*), and the State questioning its own witness, in an independent area of inquiry, in order to get inadmissible hearsay before the trier of fact (*i.e.*, the instant case).

Id. at 604, 636 A.2d at 1004-05.

242. 342 Md. 230, 674 A.2d 944 (1996).

243. *See id.* at 236, 674 A.2d at 947.

244. *Id.* at 233, 674 A.2d at 946.

245. *Id.*

246. *Id.* at 233-34, 674 A.2d at 946. Booth was a key witness for the State. *See id.* at 234, 674 A.2d at 946. On the day of the shooting, Booth gave two statements to the police. *Id.* Booth first told police that he had seen neither the shooting nor the person who had murdered the victim. *Id.* In a second statement given later that same day, however, Booth said he had seen "a man wearing blue shorts and a sweat jacket" running from the murder scene just after the shooting. *Id.*

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

peared that same day before a grand jury, where he testified that Stewart had shot the victim.[248]

At a later pre-trial motions hearing, however, Booth gave testimony that was inconsistent with his grand jury testimony, stating that he had initially selected another person's photograph from the photo array but was pressured by the police into identifying Stewart as the shooter.[249] Similarly, when he was called as the State's witness at Stewart's trial, Booth testified that he did not know the person who had shot the victim and that he had never seen the killer before.[250] He also denied identifying the defendant as the killer from the police photo array and stated that he had initially selected someone else's photograph, but had signed his name and had written on the back of the defendant's photograph because the police had "hounded" him into doing so.[251] The trial court then admitted in evidence the photograph of the defendant containing Booth's statement that the defendant was the shooter.[252]

Still under direct examination, however, Booth acknowledged testifying before the grand jury that the defendant was the person who had shot the victim, and he also stated that his testimony before the grand jury had been truthful.[253] On cross-examination by the defense, he "recanted again and testified that [the defendant] was not the shooter."[254] The court then admitted Booth's grand jury testimony in evidence.[255]

On appeal, Stewart argued that neither the witness's out-of-court statements identifying the defendant as the shooter nor the witness's grand jury testimony should have been admitted because the prosecution's only purpose in calling Booth was to have the inculpatory out-of-court statements admitted in evidence.[256] Judge Chasanow began

---

248. *Id.* Booth later told prosecutors that he had "no intention" of testifying at Stewart's trial. *Id.* at 234-35, 674 A.2d at 946. After failing to appear at the initial trial date, a bench warrant was issued and Booth was forced to appear. *Id.* at 235, 674 A.2d at 946.

249. *Id.* at 235, 674 A.2d at 946-47.

250. *Id.*, 674 A.2d at 947.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* Both of Booth's statements to police on July 9, 1993, the day of the shooting, were also admitted in evidence without objection. *Id.*

256. *Id.* at 236, 674 A.2d at 947. Appealing his conviction to the Court of Special Appeals, the defendant argued that the admission of Booth's grand jury testimony and out-of-court statements was improper because the "State's only purpose in calling Booth as a witness was to have his previous out-of-court statements implicating [the defendant] in the shooting admitted into evidence." *Id.* The Court of Special Appeals rejected the defendant's argument and affirmed his conviction. *Id.*

his analysis by stating the traditional evidence rule that a witness's prior statements, when inconsistent with his in-court testimony, are admissible to impeach the witness's credibility, but when they are offered "to prove the truth of the matter asserted in the statements," the statements are hearsay and thus inadmissible as substantive evidence.[257] He explained, however, that the Court of Appeals had outlined an exception to this general rule in *Nance v. State*,[258] which permitted the admission of a witness's prior statement as substantive evidence at trial if:

> (1) the out-of-court statement is inconsistent with the witness's in-court testimony; (2) the prior statement is based on the declarant's own knowledge; (3) the prior statement is reduced to writing and signed or otherwise adopted by the witness; and (4) the witness is subject to cross-examination at the trial where the out-of-court statement is introduced.[259]

The *Stewart* court also noted that inconsistent grand jury testimony is admissible at a later trial if the witness is available for cross-examination.[260] Judge Chasanow explained that these common law principles had been codified in the Maryland Rules of Evidence by Maryland Rule 5-802.1,[261] but he observed that the use of prior writ-

---

257. *Id.* The Maryland Rules define "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MD. R. 5-801(c).

258. 331 Md. 549, 629 A.2d 633 (1993).

259. *Stewart*, 342 Md. at 237, 674 A.2d at 947-48 (footnote omitted) (citing *Nance*, 331 Md. at 569, 629 A.2d at 643). Prior to the *Stewart* decision, the court had discussed the validity of *Nance* in light of *Bradley v. State*, 333 Md. 593, 636 A.2d 99 (1994). *See Stewart*, 342 Md. at 241-44, 674 A.2d at 950-51. The *Bradley* court thought it important to make clear that its holding was not inconsistent with *Nance*. *See Bradley*, 333 Md. at 607, 636 A.2d at 1006. Judge Chasanow emphasized that the holding in *Bradley* did not affect *Nance* because *Bradley* addressed solely impeachment evidence and not evidence admissible substantively. *See id.* The evidence in *Bradley* was admissible only for impeachment because the witness's prior statement had not been reduced to writing and signed; therefore, it did not comply with the requirements for admissibility as substantive evidence as set forth in *Nance*. *See id.*

260. *Stewart*, 342 Md. at 237-38, 674 A.2d at 948 (citing *Nance*, 331 Md. at 571, 629 A.2d at 644).

261. *Id.* at 238, 674 A.2d at 948. Rule 5-802.1 provides in relevant part:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was
>
> (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement . . . .

MD. R. 5-802.1(a).

ten statements had been somewhat restricted by requiring such a statement to be *signed* by the witness, eliminating the ability of a party to introduce a prior written statement "otherwise adopted" by the witness.[262] Chasanow noted that although Rule 5-802.1 was not in effect at the time of Stewart's trial, the court's holding would be the same under that Rule.[263]

Although Booth's prior inconsistent statements met the requirements of *Nance* (and Rule 5-802.1) and were therefore admissible as substantive evidence,[264] the defense argued that the prosecution was required to have a purpose for calling Booth other than merely to introduce his prior statements in evidence.[265] The defense also argued that because the prosecution had known before it had called Booth that he would repudiate his out-of-court statements on the stand, the prosecution should not have been allowed to call the witness solely for the purpose of introducing his prior statements.[266] The defense relied on the *Spence/Bradley* rationale, but Judge Chasanow pointed out that those rules apply "when a witness's prior inconsistent statements are admitted only for purposes of *impeachment*, not as substantive evidence."[267] Judge Chasanow analyzed the reasons why prior inconsistent statements offered as substantive evidence are treated differently from prior inconsistent statements offered solely for impeachment.[268] As he explained, the purpose of evidence admitted only for impeachment is to attack the credibility of a witness in an attempt to neutralize the witness's testimony;[269] in other words, its only purpose is to negate previous testimony. Thus, if the prosecution learns in advance that a witness intends to repudiate a prior statement at trial, it should merely refrain from calling the witness to the stand and "avoid the need to neutralize the witness's testimony."[270] Judge Chasanow reasoned that the "evil" implicated in *Spence* and *Bradley* was the jury's

262. *Stewart*, 342 Md. at 237 n.2, 674 A.2d at 948 n.2.

263. *Id.*

264. *Id.* at 239-40, 674 A.2d at 949. Booth's grand jury testimony was given under oath and "transcribed verbatim," and he was available to be cross-examined at trial. *Id.* at 239, 674 A.2d at 949.

265. *Id.* at 240, 674 A.2d at 949.

266. *Id.*

267. *Id.* at 242, 674 A.2d at 950; *see also supra* notes 200-227 and accompanying text (discussing this distinction).

268. *See Stewart*, 342 Md. at 242-43, 674 A.2d at 950 ("The admission of prior inconsistent statements for impeachment creates the danger that the jury will misuse the statements as substantive evidence, despite instructions to the contrary. This danger does not exist where, as here, the prior statements are admitted as substantive evidence of guilt.").

269. *See id.* at 242, 674 A.2d at 950.

270. *Id.*

misuse of impeachment testimony as substantive evidence because, no matter how incriminating, evidence admitted only for impeachment is not substantive evidence of guilt and will not support a conviction.[271] Such a danger does not exist, however, when a prior inconsistent statement is initially offered as substantive evidence, because in such circumstances, the jury is permitted to consider the statement as evidence of guilt.[272] As a result, Judge Chasanow concluded that the prerequisite that "the State be surprised by a recanting witness's testimony before inconsistent out-of-court statements can be admitted to impeach the witness"[273] had no applicability where a prior inconsistent statement is "'openly offered and received as flat-out substantive evidence of guilt.'"[274]

Judge Chasanow's thoughtful analysis in *Stewart* is consistent with the underlying policies of the *Spence/Bradley* restriction on the use of prior inconsistent statements for impeachment. The major concern underlying the restriction is that the jury may misuse impeachment evidence as substantive evidence, for which the evidence would be inadmissible.[275] When evidence is substantively admissible in the first instance, however, there is no potential for misuse from which to "protect" the jury. In addition, the State need not engage in the type of "subterfuge" utilized in *Spence* and *Bradley* in order to admit the statement. The issue of concern regarding the admission of a prior inconsistent statement as substantive evidence is, thus, not the jury's misuse of such evidence or the possibility of State subterfuge, but is instead the right of the defendant to cross-examine the witness concerning the statement. This concern is satisfied, however, under the requirements of *Nance* and Maryland Rule 5-802.1, which hold that the witness must be available for cross-examination before a prior inconsistent statement will be admissible as substantive evidence.[276]

The *Stewart* opinion also revealed Judge Chasanow's deference to the plain language of the codified evidence Rules when the Rules are inconsistent with prior common law. As he indicated, Rule 5-802.1 modified and restricted the common law *Nance* rule by denying the admission of a witness's prior inconsistent written statement that was

---

271. *Id.*

272. *Id.* at 242-43, 674 A.2d at 950.

273. *Id.* at 243, 674 A.2d at 951.

274. *Id.* (quoting Stewart v. State, 104 Md. App. 273, 279, 655 A.2d 1345, 1350 (1995)).

275. *See supra* notes 268-274 (explaining the dangers that can arise when the prior inconsistent statement exception to the hearsay rule is used to elicit otherwise inadmissible evidence).

276. *See supra* notes 260-263 and accompanying text.

unsigned but "otherwise adopted" by the witness.[277] This approach is nonetheless consistent with Maryland Rule 1-201, which provides that the Maryland Rules do not supercede prior common law *unless inconsistent with* the Rules.[278]

E. Impeachment of Character Witnesses with Evidence of the Defendant's Criminal History

At the heart of Judge Chasanow's *Stewart* opinion is his recognition of the importance of the purpose for which evidence is introduced. In *Stewart*, the question concerned the admissibility of prior inconsistent statements for impeachment or substantive purposes.[279] An analytically similar problem was presented in *State v. Watson*,[280] in which Judge Chasanow addressed the propriety of cross-examining a defendant's character witness with questions concerning the defendant's prior crimes. "It is a basic principle of our legal system, requiring no citation of authority, that the State may not offer, as proof of guilt, evidence that the defendant is a person of bad character and, therefore, likely to commit the offense charged."[281] A defendant, on the other hand, is permitted to introduce evidence of his or her good character to suggest that it is unlikely that someone of such good character would commit a crime.[282] Should a defendant exercise this option, however, the prosecution may then introduce rebuttal evidence "to establish the defendant's bad character for the same trait."[283] In addition, the State is also permitted to question a defendant's character witness about the witness's knowledge of other crimes or offenses committed by the defendant and relevant to the character trait to

---

277. *See supra* note 262 and accompanying text.

278. MD. R. 5-102; *see also supra* text accompanying note 17 (setting forth the relevant language of the Rule).

279. *Stewart*, 342 Md. at 233, 674 A.2d at 946.

280. 321 Md. 47, 580 A.2d 1067 (1990).

281. *Id.* at 52, 580 A.2d at 1069; *see also* MD. R. 5-404(a)(1) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .").

282. *Watson*, 321 Md. at 52, 580 A.2d at 1069; *see also* MD. R. 5-404(a)(1)(A) (providing an exception to the general rule that character may not be used to prove conduct and stating that evidence of a pertinent character trait of an accused is admissible if offered by the accused).

283. *Watson*, 321 Md. at 52, 580 A.2d at 1069; *see also* MD. R. 5-404(a)(1)(A) (providing that if an accused introduces evidence that he possesses a pertinent character trait, the prosecution may introduce rebuttal evidence). This Rule may be viewed as a specific application of the doctrine of opening the door, since by introducing evidence of his good character, the defendant "opens the door" to that character, which then permits the State to provide rebuttal evidence of the defendant's character that would otherwise be inadmissible.

which the witness testified in order to test the witness's knowledge or the validity of the witness's opinion.[284] Using other-crimes evidence still creates the potential for substantial prejudice.[285] Quoting the Supreme Court in *Michelson v. United States*,[286] Judge Chasanow explained that "merely asking questions suggesting past criminal acts committed by an accused may 'waft an unwarranted innuendo into the jury box.'"[287]

In *Watson*, the defendant, who had been charged with first-degree murder, called character witnesses who testified about their opinions regarding his peaceful and nonviolent character.[288] Although the court prohibited the State from cross-examining *the defendant* about his prior conviction for second-degree rape,[289] the State was permitted to ask the character witnesses whether they were aware of the defendant's prior conviction to test the basis for the witnesses' opinions that the defendant had a peaceful and nonviolent character.[290] The defense objected to the use of the rape conviction because the conviction was for the statutory rape of a consenting thirteen-year-old girl and did not involve force.[291]

---

284. *Watson*, 321 Md. at 52-53, 580 A.2d at 1069-70. Judge Chasanow explained that a character witness's testimony as to a defendant's good character is weakened if the witness was not aware of relevant criminal acts of the defendant. *Id.* at 53, 580 A.2d at 1069. In addition, if the witness was aware of the prior crimes and adheres to an opinion that the defendant is of good character, the soundness of his or her opinion may be undermined. *Id.*, 580 A.2d at 1069-70. This use of evidence of a defendant's other crimes is consistent with the rule that such evidence may not be introduced to prove the defendant's guilt because the evidence is being used to impeach the character witness rather than as substantive evidence against the accused.

285. *Id.* at 53, 580 A.2d at 1070.

286. 335 U.S. 469 (1948).

287. *Watson*, 321 Md. at 53, 580 A.2d at 1070 (quoting *Michelson*, 335 U.S. at 481). In *Michelson*, the Supreme Court explained that an inquiry into a defendant's past crimes "is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson*, 335 U.S. at 475-76 (footnote omitted).

288. *Watson*, 321 Md. at 50, 580 A.2d at 1068.

289. *Id.* Chasanow explained that the trial court had properly prohibited cross-examination of the defendant regarding this conviction because the offense "was not a common law felony, *crimen falsi*, or lesser crime bearing on credibility and, therefore, could not be used to impeach [the defendant's] credibility." *Id.* The requirements for using prior crimes to impeach credibility have since been codified in Maryland Rule 5-609.

290. *Id.* In response to the State's question, most of the witnesses testified that they were aware of the defendant's conviction but that it had no effect on their opinions. *Id.* at 50-51, 580 A.2d at 1068.

291. *Id.* at 51, 580 A.2d at 1068-69. The court acknowledged, by citing the record of the second-degree rape conviction proffered by the State, that

Judge Chasanow emphasized that inappropriate cross-examination of a character witness may be highly prejudicial, and trial judges should be careful to allow cross-examination only about criminal acts clearly relevant to the character traits testified to on direct examination.[292] Chasanow also noted that while a cross-examiner is generally limited to the name of the crime, the time and place of conviction, and the punishment when inquiring about prior convictions,[293] "[t]here may, however, be instances where the name of the crime does not indicate its nature or where, as in the instant case, the name of the crime may even be misleading."[294]

Judge Chasanow explained that in order to admit evidence of a defendant's prior crime to impeach character testimony, the evidence must impugn the good character trait testified to by the character witness.[295] Although most acts of second-degree rape would be relevant to rebut the assertion that the defendant is a peaceful and nonviolent man,[296] Chasanow concluded that the crime of second-degree rape, based on the defendant's unforced sexual intercourse with a consenting thirteen-year-old girl, had little relationship to the defendant's peacefulness and nonviolence, and was thus irrelevant for purposes of impeachment.[297] In addition, any minimal probative value of the conviction was substantially outweighed by the probability that the jury would "misunderstand the nature of the conviction and misuse the evidence."[298] As Chasanow explained:

> [t]his [argument] was supported by the record of the second-degree rape conviction proffered by the State which included a pre-sentence investigation containing the following "Description of Present Offense":
>
> > "The victim who is thirteen years old states that she and the defendant engaged in vaginal intercourse on more than one occasion, but was never forced to do so. Further the victim stated that she was in love with the accused."

Id., 580 A.2d at 1069.

292. *Id.* at 53, 580 A.2d at 1070.

293. *Id.* at 54, 580 A.2d at 1070 (citing McCORMICK, *supra* note 36, at 127); Foster v. State, 304 Md. 439, 469-70, 499 A.2d 1236, 1251-52 (1985)).

294. *Id.* at 55, 580 A.2d at 1070. Chasanow explained, by example, that the crime of "second-degree rape" *can* include sexual intercourse by force and without the consent of the victim. *Id.*, 580 A.2d at 1070-71. However, the second-degree rape of which the defendant had previously been convicted *did not* require that sexual intercourse be accomplished by force or without the victim's consent. *Id.*, 580 A.2d at 1071. In fact, the victim herself testified that she was never forced to engage in sexual intercourse but did so willingly because she was in love with the defendant. *Id.* at 51, 580 A.2d at 1069.

295. *Id.* at 55, 580 A.2d at 1071.

296. *Id.*

297. *Id.* at 56, 580 A.2d at 1071.

298. *Id.*

> Rape in any degree without further explanation commonly would be perceived as a vicious, violent, brutal sexual act. [The defendant's] criminal act, though reprehensible, did not involve any element of force and violence. Its probative value, if any, was substantially outweighed by the potential prejudice of the jury misunderstanding the nature of the crime [the defendant] committed, as well as the potential prejudice of the jury improperly drawing the inference that anyone who commits a brutal, vicious, violent crime like rape might be likely to commit a brutal, vicious, violent murder.[299]

Judge Chasanow also rejected the State's argument that a limiting instruction given by the trial court, directing the jury to use the evidence of the defendant's rape conviction only for evaluating the character witnesses' knowledge of the defendant, rendered the admission of the evidence harmless.[300] He explained that such an instruction is intended to mitigate prejudice when a jury is *appropriately* exposed to evidence of prior crimes, whereas in the instant case, the jury never should have been exposed to the prior conviction.[301]

F. Hearsay

1. State v. Harrell *and the Excited Utterance Exception.*—Given Judge Chasanow's expressed preference for uniformity between the Federal Rules of Evidence and Title 5 of the Maryland Rules, his opinion in *State v. Harrell*[302] is something of a puzzlement. The question in *Harrell* was the admissibility, under the excited utterance exception to the hearsay rule,[303] of an out-of-court statement the defendant's girlfriend made immediately after she had been battered by the defendant.[304] The statement addressed not only the battery, but the defendant's alleged theft of an automobile.[305]

At Harrell's trial for battery and theft of a vehicle, the arresting police officer testified that he had seen the defendant kicking the vic-

---

299. *Id.* at 57, 580 A.2d at 1071-72.

300. *Id.* at 58, 580 A.2d at 1072.

301. *Id.*

302. 348 Md. 69, 702 A.2d 723 (1997).

303. Maryland Rule 5-803(b)(2) defines an "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MD. R. 5-803(b)(2). Excited utterances are not excluded by the hearsay rule, even though the declarant may be available as a witness. MD. R. 5-803.

304. *See Harrell*, 348 Md. at 73-74, 702 A.2d at 725-26 (reciting the facts leading up to the out-of-court statement).

305. *Id.* at 74-75, 702 A.2d at 726.

tim, who was on the ground.[306] According to the officer, the defendant fled but was soon apprehended.[307] The officer testified that within two minutes of the beating, he interviewed the victim, who had minor cuts and bruises[308] and was "crying and appeared very emotional and upset."[309] The victim—Harrell's girlfriend—reportedly told the officer that the defendant "beat me up and he stole that car there."[310] The trial court admitted the statement as an excited utterance, and the defendant was convicted, although, according to the trial judge, "the only link to these offenses . . . [was] the excited utterance testimony of the girlfriend."[311] In an unreported opinion, the Court of Special Appeals affirmed the defendant's battery conviction, but reversed the theft conviction and remanded it for a new trial.[312] The State petitioned the Court of Appeals and the court granted certiorari.[313]

Writing for the court, Judge Chasanow held the statement inadmissible insofar as it related to the theft of the automobile.[314] Chasanow looked to the language of the excited utterance exception to the rule against hearsay[315] and explained that the statement at issue must not only be made under the stress of the exciting event, but it must also relate to that event.[316] In *Harrell*, the startling event was the defendant's battery of his girlfriend.[317] Thus, that part of the victim's statement having to do with the theft of the car was inadmissible as part of the excited utterance.[318]

---

306. *Id.* at 73, 702 A.2d at 725.

307. *Id.*

308. *Id.*

309. *Id.* at 74, 702 A.2d at 725 (internal quotation marks omitted).

310. *Id.*, 702 A.2d at 726 (internal quotation marks omitted). The officer was summoned to the scene to respond to the alleged domestic violence. *See id.* at 73, 702 A.2d at 725. Upon the officer's arrival, the victim indicated that the defendant had picked her up earlier in the evening in a 1984 Chevrolet Monte Carlo, which the defendant allegedly claimed to have stolen. *Id.* at 74-75, 702 A.2d at 726. The officer checked the license plate number and learned that the car had been reported stolen during the previous month. *Id.* at 75, 702 A.2d at 726. As a result, the defendant was arrested on charges of battery and theft over $300. *Id.*

311. *Id.* at 75, 702 A.2d at 726.

312. *Id.* at 76, 702 A.2d at 726-27.

313. *Id.*, 702 A.2d at 727.

314. *Id.* at 83, 702 A.2d at 730.

315. *See supra* note 303 (quoting the excited utterance exception).

316. *Harrell*, 348 Md. at 80, 702 A.2d at 728-29.

317. *Id.* at 82, 702 A.2d at 730.

318. *Id.* at 83, 702 A.2d at 730; *see id.* at 82-83, 702 A.2d at 730 (distinguishing between the victim's "conscious reflection" and "spontaneous reaction" and indicating that only the latter falls under the excited utterance exception).

The prosecution argued that "relating," as used in the Rule, should be interpreted broadly, and supported this by citing the analogous Federal Rule and the advisory committee's notes,[319] as well as cases from other jurisdictions.[320] According to Judge Chasanow, however, if the declarant's statement is unconnected to the exciting event, the likelihood of reflection and fabrication increases, and the trustworthiness of the statement is no longer sufficient to satisfy the requirements of a hearsay exception.[321] The State also urged that the two components of the statement—those mentioning the battery and the car theft—were so inextricably intertwined with the circumstances under which they were made that the trustworthiness of the former carried over to the latter.[322] Judge Chasanow rejected this argument as well, on essentially the same basis as the earlier argument: because the two components of the statement were insufficiently connected to each other, the statement about the car theft might have been the result of reflection or animus caused by the battery.[323]

Not long before *Harrell*, the Court of Appeals considered and rejected a similar argument applied to the statement against penal interest exception to the hearsay rule.[324] In *State v. Matusky*,[325] a declarant told his fiancée that he had driven the defendant to a murder scene and had waited in the car while Michael Matusky, the defendant, killed two women.[326] Thus, the statements that explained the declarant's involvement in the crime were self-inculpatory because they im-

---

319. *Id.* at 80-81, 702 A.2d at 729 (citing Federal Rule of Evidence 803 and the advisory committee's note, which states that, in the excited utterance exception, "the statement need only 'relate' to the startling event or condition, thus affording a broader scope of subject matter coverage").

320. *See id.* at 81, 702 A.2d at 729 (citing *Hawai'i v. Zukevich*, 932 P.2d 340, 345 (Haw. Ct. App. 1997), and *Utah v. Kinross*, 906 P.2d 320, 324 (Utah Ct. App. 1995), as liberally interpreting the term "relating," as is done in the Federal Rules).

321. *Id.* at 81-82, 702 A.2d at 729.

322. *See id.* at 82, 702 A.2d at 730.

323. *Id.* at 82-83, 702 A.2d at 730.

324. The "statement against interest" exception is set forth in Maryland Rule 5-804(b)(3). The Rule defines such a statement as:

> A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

MD. R. 5-804(b)(3).

325. 343 Md. 467, 682 A.2d 694 (1996).

326. *Id.* at 472-74, 682 A.2d at 696-97.

plicated the declarant as a criminal actor.[327] The portions of the statement implicating the defendant, however, were collateral to the self-inculpatory aspects of the statement.[328] The Court of Appeals, per Judge Raker, held that admissibility was limited to the portion of the statement that was individually self-inculpatory and that the extended statement was not admissible in its entirety.[329]

Prior to the adoption of Title 5, Maryland recognized the admissibility not only of statements against the interest of the declarant, but also of collateral statements "so closely connected with [such statements] as to be equally trustworthy."[330] The Court of Appeals found that the disputed statements in *Matusky* did not meet this standard.[331] Because Matusky's retrial would have been governed not by Maryland's common law of evidence but by Title 5, the Court of Appeals went on to consider whether the common law standard had survived adoption of the new Rules.[332] Relying on the Supreme Court's decision in *Williamson v. United States*,[333] which had decided essentially the same question under the analogous Federal Rule,[334] the Court of Appeals further restricted the statement against penal interest exception, limiting it to only those individual statements that "a reasonable person in the declarant's circumstances would have believed [to be] adverse to his or her penal interest at the time it was made."[335] Collateral statements, no matter how inextricably intertwined with the self inculpatory statements, were no longer to be admissible under the exception.[336]

In reaching its conclusion in *Matusky*, the Court of Appeals relied not just on *Williamson*, but also on a string of federal cases interpreting

---

327. *See id.* at 485, 682 A.2d at 702-03.

328. *Id.*, 682 A.2d at 703; *see also id.* (explaining that "the trial court should have redacted those portions of [the] declaration identifying Matusky as the murderer and suggesting Matusky's motive for the crime").

329. *Id.* at 484-85, 682 A.2d at 702-03.

330. *Id.* at 482, 682 A.2d at 701 (emphasis omitted) (quoting State v. Standifur, 310 Md. 3, 17, 526 A.2d 955, 962 (1987)). *Standifur* was decided in 1987, six years before Maryland adopted the Rules of Evidence. *See supra* note 27.

331. 343 Md. at 484-85, 682 A.2d at 702-03.

332. *See id.* at 486-92, 682 A.2d at 703-06.

333. 512 U.S. 594 (1994).

334. The issue in *Williamson* was the scope of the hearsay exception for statements against penal interests, as codified in Federal Rule 804(b)(3). *Id.* at 596. Rule 804(b)(3) states that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." FED. R. EVID. 804(b)(3).

335. *Matusky*, 343 Md. at 492, 682 A.2d at 706.

336. *Id.* at 491, 682 A.2d at 705-06.

the cognate Federal Rule.[337] Yet Judge Chasanow's opinion in *Harrell*, which presented an analogous problem under the excited utterance exception, relies almost exclusively on decisions of other state jurisdictions.[338] It displays no interest in the interpretation given to the cognate Federal Rule. Judge Chasanow's opinion in *Harrell* appears to ignore the methodological approach recently applied in *Matusky*. That in itself is remarkable. From a judge who claimed to be committed to some measure of uniformity between the Maryland and Federal Rules, it is more than a bit puzzling.

2. *The Adoption and Application of the Residual Hearsay Exception.*— Among the most contentious issues to arise during the consideration of the Maryland Rules of Evidence was whether to include residual exceptions to the hearsay rule, as had been done with the Federal Rules.[339] The Maryland Evidence Rules Subcommittee declined to follow the federal precedent in a closely divided vote.[340] The full committee, also closely divided, could not muster the votes to reverse the subcommittee's resolution of the question.[341] The Court of Appeals showed greater wisdom. Recognizing that there might be circumstances in which particularly trustworthy hearsay did not fit within one

337. *See id.* at 489-90, 682 A.2d at 704-05 (noting that the trial court must consider surrounding circumstances to determine whether an individual statement is self incriminating and citing *United States v. Sasso*, 59 F.3d 341, 349 (2d Cir. 1995); *United States v. Nagib*, 56 F.3d 798, 804 (7th Cir. 1995); *United States v. Canan*, 48 F.3d 954, 959-60 (6th Cir. 1995); *United States v. Rothberg*, 896 F. Supp. 450, 453 (E.D. Pa. 1995); *United States v. Sims*, 879 F. Supp. 828, 832 (N.D. Ill. 1995); *Ciccarelli v. Gichner Systems Group, Inc.*, 862 F. Supp. 1293, 1298-1300 (M.D. Pa. 1994)).

338. *See* State v. Harrell, 348 Md. 69, 79-81, 702 A.2d 723, 728-29 (1997) (citing case law from Michigan, Washington, Colorado, Hawai'i, and Utah).

339. Howard S. Chasanow & José Felipé Anderson, *The Residual Hearsay Exceptions: Maryland's Lukewarm Welcome*, 24 U. BALT. L. REV. 1, 2 (1994); *see also* FED. R. EVID. 807 (the residual exception to the hearsay rule). Maryland adopted its Rules of Evidence through an extended process, whereby the Maryland Evidence Rules Subcommittee, which had been established by the Court of Appeals, first studied Maryland's law of evidence and the experiences of federal and state courts that had adopted rules modeled on the Federal Rules. Next, the subcommittee used this information to propose a draft for the Maryland Rules of Evidence. The subcommittee completed this task in 1992, after which the full committee (the Committee on Rules of Practice and Procedure) discussed, modified, and revised the subcommittee's proposed rules. The full committee prepared a report, proposing Title 5 of the Maryland Rules of Practice and Procedure. After a period of public comment and a public hearing, the Court of Appeals voted to adopt Title 5. *See* Alan D. Hornstein, *The New Maryland Rules of Evidence: Analysis and Critique*, 54 MD. L. REV. 1032, 1033-34 (1995).

340. Chasanow & Anderson, *supra* note 339, at 2 n.7; *see also* State v. Walker, 345 Md. 293, 317-18, 691 A.2d 1341, 1352-53 (discussing the history of the residual hearsay exception).

341. Chasanow & Anderson, *supra* note 339, at 2 n.7; *see also Walker*, 345 Md. at 317-18, 691 A.2d at 1352-53.

of the specifically enumerated exceptions to the rule against hearsay, the court decided to include the residual exceptions in the Maryland Rules.[342] There is much to criticize in the federal residual exception, but an extended exegesis of the exception is beyond the scope of this Article.[343] Unfortunately, because no recommendation on the residual exceptions had been forwarded to the court, the only model before it was the language of the Federal Rules.

The only significant difference between the federal residual exception and the Maryland exceptions is the addition of the restrictive language in the Maryland Rules, "under exceptional circumstances."[344] Despite Judge Chasanow's concern with the departures in the Maryland Rules from the language of the Federal Rule, his opinion on the adoption of the Maryland Rules failed to note these restrictions, presumably because he favored a more restrictive hearsay exception than that provided by the Federal Rules, at least as interpreted. The residual exceptions to the hearsay rule provide that a hearsay statement that does not meet the requirements of one of the many enumerated exceptions may nonetheless be admissible if it possesses circumstantial guarantees of trustworthiness equivalent to the enumerated exceptions[345] and if other prerequisites are met.[346] As might be expected, there is a fair degree of judicial disagreement

---

342. *Walker*, 345 Md. at 318, 691 A.2d at 1353; *see also* MD. R. 5-803(b)(24); MD. R. 5-804(b)(5). The first residual exception, Rule 5-803(b)(24), which applies when the unavailability of the declarant is not required, reads:

> Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

MD. R. 5-803(b)(24). The second residual exception, Rule 5-804(b)(5), is identical to 5-803(b)(24) except that the word "available" is replaced by the word "unavailable" in the first sentence of the exception. *Compare* MD. R. 803(b)(24), *with* MD. R. 5-804(b)(5).

343. For a discussion of Maryland's residual exception, as found in Rules 5-803(b)(24) and 5-804(b)(5), see Hornstein, *supra* note 339, at 1074-75.

344. MD. R. 5-803(b)(24); MD. R. 5-804(b)(5); *see infra* note 347 and accompanying text.

345. *See* MD. R. 5-803(b)(24); MD. R. 5-804(b)(5); *supra* note 342 (setting forth the residual exceptions).

346. For example, an adverse party must be given notice that a declarant intends to use the hearsay exception. MD. R. 5-803(b)(24); MD. R. 5-804(b)(5).

about how liberally or grudgingly the residual exceptions should be interpreted.

Typically, the drafters expect that the exceptions will be rarely applied, but judges confronted with particular facts of particular cases may use the exceptions more expansively than the drafters might have envisioned. In an attempt to ensure that Maryland's residual exceptions would be more rigorously applied than their federal counterparts, the Court of Appeals approved a draft with the introductory clause, "under exceptional circumstances."[347] As might be imagined, there was some uncertainty within bench and bar concerning the reach of the residual exceptions in the new Rules. The first clue was provided by extrajudicial writing from Judge Chasanow, along with Professor Anderson of the University of Baltimore School of Law.[348] In their article, Chasanow and Anderson advocated codifying Maryland's evidence law based upon the federal model.[349] Yet despite Judge Chasanow's criticism of the Rules for less than complete fidelity to the federal language, the authors spoke approvingly of Maryland's more cautious approach to the residual exception: "The Maryland version of the residual hearsay exceptions manifests appropriate caution in introducing the residual hearsay concept to the Maryland courts."[350] And, in what would soon turn out to be an ironic prediction, the authors noted that "[t]his should reduce the divergent and inconsistent interpretations of the rule that have plagued the federal courts."[351]

Not long after the appearance of this article, Judge Chasanow urged a divergent and inconsistent interpretation of the Rule in his dissent in *State v. Walker*.[352] Walker had been convicted of robbery with a deadly weapon.[353] He had admitted to committing the robbery and had discussed with his then-girlfriend important details that only the perpetrator would be likely to know;[354] Walker's girlfriend had reported the conversation in detail to the police,[355] apparently in an

---

347. MD. R. 5-803(b)(24); MD. R. 5-804(b)(5). In addition, the advisory committee's note to Rule 5-803 states that "[i]t is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." MD. R. 5-803(b)(24) advisory committee's note.

348. *See generally* Chasanow & Anderson, *supra* note 339.

349. *Cf. id.* at 23 (noting Judge Chasanow's endorsement, with limited dissent, of the decision to codify selected Federal Rules of Evidence in Maryland).

350. *Id.* at 26.

351. *Id.*

352. 345 Md. 293, 691 A.2d 1341 (1997).

353. *Id.* at 295, 691 A.2d at 1342.

354. *Id.* at 296, 691 A.2d at 1342.

355. *Id.* at 296-97, 691 A.2d at 1342.

effort to get him help for his drug problem.[356] Two detectives made notes of her statements, and she signed both versions.[357]

By the time of trial, Walker and his girlfriend had married, and she elected to exercise her privilege to refuse to testify against her husband.[358] The State sought to introduce her statements to the police.[359] These statements were plainly hearsay.[360] Moreover, they fell within no specific exception to the hearsay rule. Nevertheless, the trial court, after finding her "unavailable," admitted her statements under the residual exception, along with the police officers' testimony about those statements.[361]

Writing for a majority of the court, Judge Wilner reviewed the development of the residual exception in the Federal and Maryland Rules, as well as the Maryland cases preceding the adoption of Title 5.[362] He found several requirements that must be met to admit a hearsay statement under Rule 5-804(b)(5), the residual exception for unavailable declarants.[363] A number of those requirements were not disputed in *Walker*: the claim of privilege rendered the witness unavailable, as defined by Rule 5-804(a); the statement was not specifically covered by any other exception; and appropriate notice was provided of the State's intention to offer the statement.[364] Nonetheless, Judge Wilner found it unnecessary to consider all of the other requirements to admissibility because he found that the "exceptional

---

356. *Id.* at 297, 691 A.2d at 1343.

357. *Id.*, 691 A.2d at 1342.

358. *Id.*, 691 A.2d at 1343.

359. *Id.*

360. *See* MD. R. 5-801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

361. *Walker*, 345 Md. at 298-99, 691 A.2d at 1343.

362. *See id.* at 304-18, 691 A.2d at 1346-54.

363. *See id.* at 318-19, 691 A.2d at 1353-54. Judge Wilner listed six conditions that must be satisfied to admit a statement under Rule 5-804(b)(5):

> (1) the witness must be "unavailable," as defined in [Rule 5-804(a)];
> (2) there must be "exceptional circumstances";
> (3) the statement must not be specifically covered by any of the other exceptions;
> (4) it must have "equivalent circumstantial guarantees of trustworthiness";
> (5) the court must determine that (i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts, and (iii) the general purposes of the rules and the interests of justice will best be served by admission of the statement into evidence; and
> (6) the proponent of the statement has given the requisite advance notice of its intention to use the statement.

Id. (footnotes omitted).

364. *Id.* at 319-20, 691 A.2d at 1354.

circumstances" required by the Rule were lacking.[365] He concluded, therefore, that the trial court had erred in admitting the statement.[366]

Having earlier taken the court to task for failing to be sufficiently subservient to the federal model and then apparently approving a departure from the federal model designed to make it more difficult to admit residual hearsay, Judge Chasanow once again faced the opposite direction, dissenting because he thought the court was applying the residual exception too grudgingly.[367] The crux of Judge Chasanow's disagreement with the majority concerned the existence *vel non* of "exceptional circumstances."[368] Interestingly, Judge Chasanow agreed that the fact of the declarant's marriage to the defendant did not constitute an exceptional circumstance sufficient to satisfy the requirement of the Rule, though for somewhat different reasons from those articulated by the majority.[369] In finding that the declarant's marriage to the defendant did not constitute an exceptional circumstance, the majority noted the long standing existence of the marital privilege, indicating that its invocation could hardly be said to be unforeseen or exceptional.[370] More analytically acute, Judge Chasanow understood that the marriage simply provided the basis for invocation of the privilege, making the witness unavailable.[371] And because the Rule required unavailability in any event, the fact of the marriage could not appropriately be considered an exceptional circumstance.[372]

In a careful analysis, Judge Chasanow first recognized the relationship between the exceptional circumstances requirement and the requirement that the statement bear circumstantial guarantees of trustworthiness:

> The exceptional circumstances requirement should not be read as a bar to all hearsay except hearsay statements made under bizarre, unique, and never previously contemplated situations. . . .
>
> . . . When we speak of exceptional circumstances, we mean exceptional circumstances that justify making the prof-

365. *Id.* at 330, 691 A.2d at 1359.

366. *Id.*

367. *See generally id.* at 334-36, 338-46, 691 A.2d at 1361-62, 1363-67 (Chasanow, J., dissenting).

368. *See id.* at 336, 691 A.2d at 1362.

369. *See id.* at 342, 691 A.2d at 1365.

370. *Walker,* 345 Md. at 326-27, 691 A.2d at 1357.

371. *See id.* at 342, 691 A.2d at 1365 (Chasanow, J., dissenting).

372. *See id.*

> fered hearsay an exception to the prohibition against hearsay, even if it does not fit into the traditional exceptions.[373]

He then turned to the facts and found five circumstances that he characterized as making the disputed hearsay statements "exceptional, trustworthy, and deserving of admission even though they do not fall within any of the other codified hearsay exceptions."[374] First was the declarant's motive for making the statement.[375] Because the declarant was motivated by her desire to get help for Walker's drug problem, not by a desire to harm him, Judge Chasanow believed she would be inspired to tell the truth.[376] But this is hardly a sequitur. Presumably, the declarant would have been motivated to say anything that she thought might have helped Walker with his drug problem, whether true or not. Second, Judge Chasanow found that the fact that the statement was made to the police enhanced its trustworthiness, based on the reasonable assumption that the police informed her that a false statement to the police under these circumstances was punishable by a jail penalty.[377] It is unclear just how reasonable this assumption is, or even whether, granting its reasonableness, it would have appreciably affected the declarant's motivation to be truthful.

The last three facts that Judge Chasanow identified have substantially greater force. First, the declarant must have known that her report would have been discredited by the victim were it untrue.[378] Second, and closely related, the details she recounted were self-verifying.[379] These were facts reported in extensive detail that could have been known only to the victim and to the perpetrator, and they were consistent with the victim's own version of the events.[380] Finally, though the declarant was unavailable to the prosecution—the proponent of the statement—because of her claim of privilege, she was not unavailable to the defendant.[381] Thus, if the defendant wished to impeach the out-of-court statement, the declarant could have been called to contradict or explain it[382]—though, of course, this would

373. *Id.* at 340, 691 A.2d at 1364.

374. *Id.* at 343, 691 A.2d at 1365; *see id.* at 343-44, 691 A.2d at 1365-66 (discussing the five circumstances).

375. *Id.* at 343, 691 A.2d at 1365.

376. *Id.*

377. *Id.*

378. *Id.*, 691 A.2d at 1365-66.

379. *Id.* at 343-44, 691 A.2d at 1366.

380. *See id.*

381. *Id.* at 344, 691 A.2d at 1366.

382. *Id.*

have subjected her to cross-examination by the prosecution, presumably an exercise the defendant wished to avoid.

As interesting as Judge Chasanow's careful analysis of the proper application of the residual exception to the facts are the positions he staked out that were unnecessary to the case. For example, Judge Chasanow and the majority disagreed over the limits imposed by the language of the exception requiring that the proffered statement not be covered by any of the categorical exceptions. According to the majority, this language imposes a condition on admissibility;[383] Judge Chasanow, however, found it to be merely descriptive.[384] It is noteworthy that this issue was not presented in *Walker* and that Judge Chasanow seemed to go out of his way to raise it. The issue becomes salient primarily in the so-called "near miss" cases. These are cases in which a particular statement meets almost but not all of the requirements of a specific exception to the hearsay rule and the evidence is offered under the residual exception. Courts that have considered whether "near miss" cases are admissible have not reached harmonious conclusions.[385]

Perhaps the most significant manifestation of the "near miss" issue is in the cases in which the grand jury testimony of an unavailable witness is admitted under the residual exception despite the lack of opportunity to cross-examine the declarant at the time the testimony was given. Under the rubric of "exceptional circumstances," Chasanow urges the admissibility of grand jury testimony of reliable witnesses who have been murdered since their appearances before the grand jury.[386] Now, we are not here talking about witnesses whose deaths can be tied to the defendant against whom the hearsay is proffered; there are other bases for admissibility in such cases. What we are considering is whether statements that would fit squarely within the prior testimony exception to the hearsay rule, but for the absence of the opportunity for cross-examination, may nonetheless be admitted under the residual exception. It is difficult to see how a statement that fails to meet one or more requirements of a particular exception designed to assure trustworthiness can nonetheless have equivalent circumstantial guarantees of trustworthiness. It would seem apodicti-

---

383. *See Walker*, 345 Md. at 318, 691 A.2d at 1353.

384. *Id.* at 335, 691 A.2d at 1361 (Chasanow, J., dissenting).

385. *See* Hornstein, *supra* note 339, at 1074-75 & 1074 n.226 (explaining that federal courts have issued conflicting opinions regarding the admissibility of "near miss" cases under the residual exception to the hearsay rule).

386. *Cf.* FED. R. EVID. 804(b)(6).

cally to fail the test of trustworthiness (unless there is some other factor not envisioned by the categorical exception).

IV. CONCLUSION—A MATTER OF DISCRETION

Judge Chasanow's rulings in the six areas discussed above speak well for his qualities as a judge and his status as a proponent of the continued development of the law of evidence in Maryland. But there is one final area of evidence law the consideration of which provides a fitting conclusion to the discussion of a judge who is leaving the appellate bench to spend at least some time and energy in a return to the trial court. One of the more difficult issues in *Walker* involved the appropriate standard of review of trial court decisions on the admissibility of evidence under the residual hearsay exceptions.[387] It is a commonplace that the standard of review of trial court rulings on the admissibility of evidence is the abuse of discretion standard.[388] A few years ago, the Supreme Court promised stricter control over the admissibility of untried so-called "scientific" evidence.[389] Yet not long after the more comprehensive test of admissibility was announced, the Court held that review of trial court determinations of admissibility of such evidence was to remain under the traditional abuse of discretion standard.[390] So, abuse of discretion has been firmly entrenched as the appropriate standard of review of evidentiary rulings. In the main, such a standard is generally appropriate. The trial judge has a sense of the context in which evidentiary rulings are made that cannot be duplicated by an inert record. This "feel" for when a particular piece of evidence is likely to be more prejudicial than probative, for example, gives the trial judge a unique vantage point from which to assess admissibility.

On the other hand, there are any number of evidentiary issues that turn less on an assessment of the particular facts than on ques-

387. *See Walker*, 345 Md. at 332-34, 691 A.2d at 1360-61 (considering the appropriate standard of review for "exceptional circumstances" cases).

388. *See, e.g.*, 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 102.04[2] (Joseph M. McLaughlin ed., 2d ed. 2000) ("The trial judge's broad discretion in applying the federal rules of evidence suggests that the trial judge's decision will be final except when clearly amounting to an abuse of discretion.").

389. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-95 (1993) (applying a multi-level review of "expert scientific testimony," including: scrutiny of the scientific validity of the reasoning or methodology underlying the testimony, the existence or lack of peer review and publication of the theory or technique, the known or potential rate of error of a particular technique, standards governing the technique's operation, and "general acceptance" in the scientific community).

390. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 139 (1997).

tions of doctrine or policy. For example, in *Williams v. State*,[391] Judge Chasanow concluded that the trial court erred in restricting the defense's cross-examination of a State expert witness.[392] At trial, the witness had testified regarding DNA testing that linked the defendant to the crime scene, including the procedures for the type of testing used and the steps taken to ensure that tests were properly performed.[393] During cross-examination, the defense was precluded from questioning the witness about the frequency of errors and contamination that occur during such testing.[394]

Judge Chasanow began his analysis by stating that "[a]s a general rule, great latitude should be allowed in the cross-examination of expert witnesses."[395] Further, where DNA evidence is admitted against an accused in a criminal trial, cross-examination questions should be allowed regarding how the DNA evidence was obtained, as well as the lab conditions under which the tests were conducted.[396] Judge Chasanow found the necessity for cross-examination regarding errors and contamination especially pertinent in *Williams*, based on the type of DNA testing used: "Possible contamination of samples is a major concern with the reliability of forensic use of PCR testing . . . ."[397] Judge Chasanow concluded that the defense's attempt to cast doubt on the reliability of the testing procedures was a valid way to respond to the DNA evidence—especially in light of the "well recognized" effects of contamination on the type of testing used in this case—and that such cross-examination could have been vital to the jury's weighing of the DNA test results.[398] Thus, the trial court erred in restricting the defense from engaging in a full cross-examination regarding testing errors and contamination during PCR testing.[399]

With respect to questions like that presented in *Williams*, in which the "feel" for particulars best acquired by participation in the trial itself are not especially helpful, the trial court is in no better position to decide evidentiary questions than the appellate court. Indeed, the collegial nature of appellate courts suggests that that forum is the su-

---

391. 342 Md. 724, 679 A.2d 1106 (1996).

392. *Id.* at 751-52, 679 A.2d at 1120.

393. *Id.* at 744-46, 679 A.2d at 1116-18.

394. *Id.* at 748-49, 679 A.2d at 1119.

395. *Id.* at 749, 679 A.2d at 1119 (citing 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 601, at 160 (13th ed. 1973)).

396. *Id.* (citing United States v. Bonds, 12 F.3d 540, 563 (6th Cir. 1993); State v. Cauthron, 846 P.2d 502, 512 (Wash. 1993)).

397. *Id.* (citing William C. Thompson & Simon Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 VA. L. REV. 45, 77-78 (1989)).

398. *Id.* at 751, 679 A.2d at 1120.

399. *Id.* at 751-52, 679 A.2d at 1120.

perior decisionmaker on such issues. Most courts, however, fail to recognize such a distinction, applying the abuse of discretion standard willy-nilly to all evidentiary issues. Perhaps they do so to avoid reversals and retrials. As most of us would admit were we entirely candid, it is virtually impossible to run an entirely error-free trial of any complexity. The objections and rulings simply come too thick and fast for serious deliberation, and shooting from the hip, no matter how generally well-informed the shooter, is not a recipe for an error-free record. Yet many of these rulings are close calls about which reasonable judges could disagree, and de novo review of such rulings is likely to fail any reasonable cost-benefit analysis—at least with respect to a particular case.

Viewed systemically, however, the abuse of discretion standard may fail to provide sufficient appellate control of evidentiary doctrine and policy. The Court of Appeals recognized this in *Walker*, and sought to control trial court discretion in two ways. First, Judge Wilner indicated that the abuse of discretion standard would not permit coherent development of new hearsay exceptions.[400] Inconsistent trial court decisions might well survive review under an abuse of discretion standard.[401] The court wished to maintain tight control over the development of the law in this area—a goal not easily achievable if review was limited to abuse of discretion.[402] Second, the court demanded explicit separate findings on each of the prerequisites to admissibility under the residual exception.[403] Unfortunately, the court did not go so far as to demand an account of how the trial court arrived at these findings.[404] Thus, *Walker* suggests that a mere conclusory recitation of findings would be sufficient. Although it is difficult to reconcile the need for trial court specificity, to allow meaningful appellate review, and the needs of the trial courts to simply get on with it, the Court of Appeals's compromise is not a happy one. It effectively returns us to a masked abuse of discretion standard.

400. State v. Walker, 345 Md. 293, 325, 691 A.2d 1341, 1356 (1997). As Judge Wilner concluded:

> Some of the subsidiary determinations made by a trial court in arriving at its findings and conclusions may well be purely factual or discretionary ones, and, as to them, we will continue to apply a clearly erroneous or abuse of discretion standard. As to the conclusion [whether to admit evidence under the residual exceptions], however, we shall apply a *de novo* standard of review.

Id.

401. *Id.*

402. *Id.*

403. *Id.* at 321-22, 691 A.2d at 1355.

404. *Id.* at 324, 691 A.2d at 1356 (noting that it would be "helpful" to know what factors the trial court considered, but failing to require such an explanation).

Judge Chasanow's approach was a bit more nuanced, suggesting which aspects of the trial court's determination should be subject to de novo review and which to an abuse of discretion standard. His conclusion is worth quoting:

> The preliminary fact findings made by the trial judge, in resolving whether residual exception hearsay is admissible, . . . should be affirmed unless clearly erroneous. On the other hand, any decision to admit residual exception hearsay involves some weighing and determinations that, in effect, create new hearsay exceptions by serving as precedent . . . for admitting hearsay not within the traditional exceptions. These policy aspects of the decision to admit residual exception hearsay deserve heightened appellate scrutiny.[405]

Unfortunately, Judge Chasanow failed to address directly the extent to which the trial judge should be required to make explicit findings on the record that the conditions necessary for the admission of residual hearsay are met, and, as important, to provide the basis for those findings. Indeed, Judge Chasanow has been less than consistent on this matter. He has, for example, insisted that the trial court state its reasons for admitting challenged evidence of other crimes or bad acts.[406] Yet he has also been as lenient as the Supreme Court on the standard of review governing the admissibility of expert testimony.[407] In other instances, Judge Chasanow has staked out a middle ground, finding discretion in the trial court, but articulating specific factors to guide the exercise of that discretion.[408]

These matters of the trial judge's discretion are likely to grow increasingly salient for Judge Chasanow; for after leaving the Court of Appeals he sometimes returns to his true legal love, sitting as a trial judge, where, once again, he has the opportunity to exercise his knowledge and understanding of the law of evidence and its principles and policies. There is little to fear from an expansive view of the trial court's discretion when judges like Howard Chasanow are on the

---

405. *Id.* at 333, 691 A.2d at 1360 (Chasanow, J., dissenting).

406. *See* Streater v. State, 352 Md. 800, 821, 724 A.2d 111, 121 (1999) (holding that "reversible error occurs where significant evidence of other crimes was admitted without any apparent on-the-record consideration by the trial court").

407. *See* Franch v. Ankney, 341 Md. 350, 364, 670 A.2d 951, 957 (1996) ("A trial judge's decision to admit or exclude expert testimony will be reversed only if it is founded on an error of law or some serious mistake, or if the judge has abused his discretion." (citing Hartless v. State, 327 Md. 558, 576, 611 A.2d 581, 590 (1992))).

408. *See* Clark v. State, 332 Md. 77, 92-93, 629 A.2d 1239, 1246-47 (1993) (reversing the trial judge on his application of the curative admissibility doctrine and identifying two factors that would have made the court "far less willing" to reach its decision had the trial judge taken notice of them).

trial bench. The citizens of Maryland, and especially the trial bar, should welcome the return of this barrister's judge to his natural habitat.