 Printed in U.S.A.
Vol. 118, No. 2

Articles

BENDING THE RULES OF EVIDENCE

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ABSTRACT—The evidence rules have well-established, standard textual meanings—meanings that evidence professors teach their law students every year. Yet, despite the rules' clarity, courts misapply them across a wide array of cases: Judges allow past acts to bypass the propensity prohibition, squeeze hearsay into facially inapplicable exceptions, and poke holes in supposedly ironclad privileges. And that's just the beginning.

The evidence literature sees these misapplications as mistakes by inept trial judges. This Article takes a very different view. These "mistakes" are often not mistakes at all, but rather instances in which courts are intentionally bending the rules of evidence. Codified evidentiary rules are typically rigid, leaving little room for judicial discretion. When unforgiving rules require exclusion of evidence that seems essential to a case, courts face a Hobson's choice: Stay faithful to the rules, or instead preserve the integrity of the factfinding process. Frequently, courts have found a third way, claiming nominal fidelity to a rule while contorting it to ensure the evidence's admissibility.

This Article identifies and explores this bending of the rules of evidence. After tracing rule bending across many evidence doctrines, the Article explores the normative roots of the problem. Codification has ossified evidence law, effectively driving judges underground in the search for solutions to their evidentiary dilemmas. Rather than trying to suppress rule bending, we advocate legitimizing it. Specifically, the Article proposes a residual exception that would enable trial courts to admit essential evidence in carefully defined circumstances. Such an exception would bring rule bending out of the shadows and into the light with benefits to transparency, legitimacy, and accountability. And perhaps most importantly, it will reestablish trial courts as a partner in the development of evidence law.

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Maggie Wittlin, and a Brown Bag at Vanderbilt Law School for helpful comments. Payton Hampton and Elodie Currier provided excellent research assistance, and Tanya Johnson and Mark Williams provided invaluable library assistance.

"[I]f you think the information is important, I would seriously consider bending the Rules of Evidence to allow [its] admission . . . ."

—Bradley v. West[†]

INTRODUCTION

The rules of evidence are at times an unforgiving edifice. Many evidentiary rules are indeed strict *rules*, as opposed to standards, and impose highly technical and unyielding mandates on judges. Further, their codification at the state and federal levels has removed courts' common law power to shape and develop necessary exceptions. At the same time, factfinding is at its core a practical enterprise, and trial judges are practical actors. The goal of trial is to arrive at accurate judgments that accord with empirical reality and with the community's sense of justice and fair play.[1] When an eminently practical activity meets an inflexible and technical set of rules, conflict is inevitable, creating a temptation to bend those rules.

At first glance, such bending of the rules of evidence may seem entirely inconsistent with the rule of law. But while judges may generally follow the

[†] No. 03CV3212NGGKAM, 2005 WL 3276386, at *14 (E.D.N.Y. Dec. 2, 2005).

[1] *See, e.g.*, Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth . . . ."); United States v. Bogers, 635 F.2d 749, 751 (8th Cir. 1980) ("The basic purpose of a trial is to search for the truth . . . .").

evidentiary code (warts and all), the temptation to bend certain rules can become irresistible for some kinds of seemingly critical evidence. Take, for example, the recent criminal trial of Bill Cosby, which is representative of many sexual misconduct cases in the #MeToo era. Faced with the difficulty of proving sexual assault in a single, specific case, the prosecution attempted to introduce prior bad act witnesses to demonstrate the defendant's pattern of behavior.[2] The trial court admitted this evidence, reasoning that it was not impermissible propensity evidence, but rather admissible evidence of a "common plan, scheme, or design," or in the alternative, evidence of "absence of mistake" regarding consent.[3]

Taken normatively, the trial court's admission of Cosby's previous allegations was certainly justifiable. Prior act evidence has been admitted in sexual assault cases with similar contours.[4] For example, testimony from five other accusers was admitted in Harvey Weinstein's trial on sexual assault charges, a decision that was upheld on appeal.[5] Moreover, the implicit, common-sense intuition motivating the *Cosby* trial court's admission of the evidence is inescapable: If you were a juror in the *Cosby* case, a case in which a previously well-respected and celebrated public figure was accused of drugging and sexually assaulting the victim, wouldn't you want to know that "numerous" other women had come forward with nearly identical allegations?[6] Or put differently: suppose you were a juror and voted to acquit in *Cosby* because you thought there had been reasonable doubt. If you found

[2] Commonwealth v. Cosby, 252 A.3d 1092, 1119–21 (Pa. 2021).

[3] *Id.* at 1121–24; *see also* PA. R. EVID. 404(b)(1)–(2). The "absence of mistake" argument relied heavily on the "doctrine of chances," which focuses on the objective probability that the defendant would repeatedly face such allegations if they were mere mistakes. *Cosby*, 252 A.3d. at 1122 (suggesting that the multiple witnesses lead "to the conclusion that [Cosby] found himself in this situation more frequently than the general population" (citations and internal quotation marks omitted)). In defending the trial court's decision, the prosecution later made precisely the same assertions before the Pennsylvania Supreme Court. *See* Oral Argument at 31:27, *Cosby*, 252 A.3d 1092 (No. 39 MAP 2020), https://www.youtube.com/watch?v=o1QGfMIyYvs [https://perma.cc/TVQ8-4JSP].

[4] *See, e.g.*, State v. Schlak, 111 N.W.2d 289, 290–91 (Iowa 1961) (affirming admission of evidence of a past act to show motive of gratifying lustful desire); State v. Bennett, 672 P.2d 772, 774 (Wash. Ct. App. 1983) (upholding trial court's admission of testimony of two prior victims to prove defendant's common plan). *But see* State v. Kirsch, 662 A.2d 937, 942–43 (N.H. 1995) (reversing trial court's admission of other bad acts to prove motive, intent, and a common plan, stating that the evidence was propensity evidence); *see also* Karen M. Fingar, *And Justice for All: Admissibility of Uncharged Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 514–30 (1996) ("As a result of judicial discretion and differing rationales for exceptions, the general rule barring uncharged misconduct evidence is not applied consistently. Many courts, while purporting to follow the general rule, have resorted to manipulating recognized exceptions in order to admit uncharged misconduct evidence in cases of sexual assault and child molestation.")

[5] People v. Weinstein, 207 A.D.3d 33, 63, 67 (N.Y. App. Div. 2022).

[6] *Cosby*, 252 A.3d at 1122.

out subsequently about the nineteen other complainants, wouldn't you feel deeply betrayed?[7]

But while such evidence may be normatively justifiable, the rules of evidence can be indifferent and uncompromising. Under Pennsylvania's existing evidentiary code, the prior acts admitted in *Cosby* violate the propensity rule. The so-called "permitted uses" listed under Rule 404(b), including absence of mistake and common scheme or plan, are only permissible if the past acts are not being used for a propensity rationale. Yet, that is exactly the purpose for which they were being offered in *Cosby*.[8] The defendant's previous alleged assaults increased the likelihood of his guilt in the current case only because they demonstrated a propensity for such behavior. In the absence of a specific exception for prior sexual misconduct like Federal Rule of Evidence 413—a rule that Pennsylvania does not have—the prior acts in *Cosby* fell within Rule 404(b)'s prohibition.[9]

Despite the rigidity of Rule 404(b), however, the *Cosby* trial court flouted the rule and admitted evidence of Cosby's past acts. What is going on here? Much of evidence literature would have us believe that a blundering trial court made a mistake: that the court's opinion was merely a misapplication of the confusing language defining the propensity prohibition under Rule 404(b).[10] In other words, these kinds of errors are the fault of Rule 404(b) and its allegedly bad drafting, and they are critically *mistakes*.

In this Article, we take a very different view. *Cosby*, and many cases like it, are not mistakes at all, but instead instances in which courts are

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[7] *Id.* at 1119. The prosecution in *Cosby* offered nineteen other complainants, but the trial court admitted only five, left to the prosecution's choice. *Id.* That this evidence can make a difference is seen in the *Cosby* case itself. In Cosby's first trial, the judge admitted only one of the other complainants, and the jury was hung. *Id.* at 1118–19. In the second trial, a year later, the judge admitted evidence from five of the complainants with similar stories, and the jury voted to convict. *Id.* at 1119, 1123.

[8] Attempts to articulate a nonpropensity purpose should also fail under Rule 403, as the danger of unfair prejudice (using the evidence for the propensity purposes) substantially outweighs the probative value (under the asserted nonpropensity purpose). *See infra* Section I.A.

[9] Some may argue that the past act evidence in *Cosby* was admitted according to the so-called "doctrine of chances," and therefore does not violate the propensity rule. As discussed in Section I.A.2, *infra*, however, the "doctrine of chances" is itself best understood as a form of propensity reasoning because it requires a factfinder to make inferences about the likelihood of future conduct based on a person's prior acts.

[10] *See, e.g.*, Dora W. Klein, *Exemplary and Exceptional Confusion Under the Federal Rules of Evidence*, 46 HOFSTRA L. REV. 641, 655–61 (2017) (arguing that judicial framing of the 404(b) permitted uses as "exceptions" has facilitated the admission of bad act evidence into trial without a more searching analysis of the potential prejudicial propensity inferences jurors may draw from that evidence); Steven Goode, *It's Time to Put Character Back into the Character-Evidence Rule*, 104 MARQ. L. REV 709, 712 (2021) (arguing that courts are often "markedly wrong" in their assessment of the relative probative value of other acts evidence); Frederic Bloom, *Character Flaws*, 89 U. COLO. L. REV. 1102, 1140 (2018) (arguing that the flaw in 404(b) is that the putative exceptions allow for the admission of impermissible propensity inferences).

intentionally circumventing the rules of evidence. There is nothing unclear about Rule 404(b). For years, treatises and the scholarly literature have identified and discussed this specific misapplication of Rule 404(b). And every year, evidence professors teach thousands of law students precisely not to make these errors. It thus strains credibility to think that trial judges continue routinely to make "mistakes." Rather, courts are purposely *bending* the rules of evidence to ensure the admission of essential evidence.

"Rule bending," as used herein to describe this evidentiary phenomenon, has two key characteristics[11]:

First, rule bending is the *intentional* misapplication of the rules of evidence. A genuine misunderstanding of the rules of evidence is therefore not an instance of bending, nor are misapplications of evidentiary rules due to sloppiness, confusion, or interpretive ambiguity in the doctrine. Instead, rule bending occurs when a clear-eyed court purposefully seeks to circumvent the admissibility outcome dictated by the rules. Indeed, given its intentional nature, rule bending often involves the repeated misapplication of the same rules in roughly the same way.

Second, in a corollary of the first requirement, rule bending has a discrete purpose. Courts circumvent the rules primarily because of a perception that the evidence—which would otherwise be excluded—is in some way essential to the case. Failing to bend the rule would lead to what the judge perceives to be an untenable result, such as a deeply flawed or inherently unfair trial. Notably, rule bending operates almost exclusively in favor of admitting evidence because courts already have a mechanism for excluding evidence when the circumstances are the reverse: Rule 403 and its state analogs permit courts to exclude probative evidence if its value is substantially outweighed by the risk of unfair prejudice.

Far from being confined to the character context and Rule 404(b), bending occurs throughout the evidentiary rules. It shows up in hearsay, privileges, the so-called "no impeachment rule," rape shield laws, and any other place where the evidentiary rules are inflexible but the perceived evidentiary need is great.[12] And while rule bending may occur for understandable reasons, the phenomenon obviously raises serious questions about desirability and legitimacy.[13] Is bending the evidentiary rules

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[11] *See infra* Part II.

[12] *See infra* Part I.

[13] For example, others have identified a tension between rule bending (or breaking) and legitimacy. *See, e.g.*, Mortimer R. Kadish & Sanford H. Kadish, *On Justified Rule Departures by Officials*, 59 CALIF. L. REV. 905, 906 (1971) (arguing that despite concerns about legitimacy, our legal system "may, at various critical points, furnish the justification for officials taking upon themselves actions that depart

something that trial judges should do? If so, how does the legal system ensure equity and prevent itself from sliding into ad hoc unruliness? If not, how does the legal system stop it? And what about transparency? One of the chief evils of rule bending is that it occurs under the radar. Judges depart from the existing evidentiary framework while claiming fidelity to them, obscuring their actual practices.[14] Surely, explicit declarations of evidentiary exceptions and open public debate are better than disingenuous arguments accepted with a wink and a nod.

At a broader level, evidentiary rule bending also raises questions highly related to classic problems in legal reasoning and statutory interpretation. Is bending simply another battleground in the enduring war between rules and standards?[15] Is it a mere iteration of the interpretive struggle between textualism and purposivism?[16] Does it just instantiate higher order conceptual debates between formalism and legal realism?[17]

There are certainly glimpses of those fault lines inherent within evidentiary rule bending, but there is also something more. Bending is not merely the product of rule aversion, or atextual interpretation, or even ends-oriented pragmatism in pursuit of substantive policy. Rather, rule bending is a bespoke phenomenon in which courts walk a tightrope between fealty to controlling evidentiary codes and their perception of the fair and legitimate adjudication of a case.

This Article takes a detailed look at evidentiary rule bending. In particular, Part I surveys various contexts in which evidentiary rules are bent. The pattern that emerges dispels the conventional wisdom that courts are merely making mistakes, and suggests that a deeper phenomenon is involved. It also demonstrates that such rule bending occurs throughout the rules of evidence.

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from some rule circumscribing their competence"); George C. Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 CALIF. L. REV. 1289, 1304 (1974) (describing strain on the system when jurors are empowered as moral agents who can depart from rules when either convicting or acquitting a criminal defendant); JEROME FRANK, LAW AND THE MODERN MIND 174 (1930) (arguing that legal legitimacy is in ways contingent upon meeting human predispositions in favor of certainty and substantiation).

[14] *See generally* Bloom, *supra* note 10.

[15] Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165, 166 (2015) ("Conventional wisdom holds that legal commands come in two varieties: rules and standards."); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992) ("Rules, once formulated, afford decisionmakers less discretion than do standards.").

[16] *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) (acknowledging that while textualism has evolved to become more sensitive to context and purpose, a distinction remains between textualism and purposivism).

[17] Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2057 (1995) ("[T]he rough outlines of American positivism had been set by the debate between realism and formalism.").

Part II analyzes, critiques, and rethinks the problem of evidentiary rule bending. It argues that rule bending is especially acute in the evidentiary context because of a trifecta of codification, a restrictive amendment process, and a text-focused interpretive culture. Under these conditions, if the rules fail to provide room for case-by-case balancing, and the rulewriters are unable to address potential issues proactively, courts will innovate through rule bending. This has costs to both transparency and uniformity, and it results in doctrinal confusion.

As an alternative, Part II proposes a unified solution to this evidentiary rule bending in the form of a generalized residual exception. This safety valve provision would provide trial courts with a legitimate path to admissibility, disincentivize rule bending, and increase transparency. Properly constructed, the proposed rule would also enable orderly appellate review and provide commentators—and, more importantly, rules committees—information on how the evidentiary rules need to evolve.

Part II also compares the proposed rule to other related but scattered doctrines in evidence law: the residual hearsay exception under Rule 807,[18] the rule of completeness codified in Rule 106,[19] the constitutional right to a defense under *Chambers v. Mississippi*,[20] and some common law "necessity" doctrines. In many ways, the proposed generalized residual exception would also act like a mirror image to Rule 403.[21] Rule 403 is a safety valve that allows a court to *exclude* otherwise admissible evidence when it would unduly harm the factfinding process.[22] The proposed residual exception conversely allows a court to *admit* otherwise inadmissible evidence when it appears critical to that endeavor. Finally, Part II responds to some likely objections to a generalized residual exception and argues why it is superior to alternative responses.

I. A SURVEY OF EVIDENTIARY BENDING

In this Part, we survey several areas in which courts have bent the evidentiary rules in response to a perceived evidentiary need. We begin with

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[18] FED. R. EVID. 807.

[19] *Id.* R. 106.

[20] 410 U.S. 284, 289–90 (1973).

[21] FED. R. EVID. 403.

[22] Paul Varnado, Note, *Books as Weapons: Reading Materials and Unfairly Prejudicial Character Evidence*, 31 WASH. U. J.L. & POL'Y 257, 260 (2009) ("Rule 403 serves as a safety valve for the breadth conferred by Rule 401, excluding otherwise relevant evidence where its admission could taint the outcome of the trial."); David Gallai, Note, *Polygraph Evidence in Federal Courts: Should It Be Admissible?*, 36 AM. CRIM. L. REV. 87, 115 (1999) ("It is Rule 403 that is designed to be the safety valve for the judicial system and the 'civil liberties of this country.'" (quoting Richard H. Underwood, *Truth Verifiers: From the Hot Iron to the Lie Detector*, 84 KY. L.J. 597, 633 (1995))).

propensity evidence and the admission of so-called "other acts" evidence under Rule 404(b).[23] We then take a detailed look at rule bending in hearsay and privileges, as well as a number of other specialized evidentiary doctrines.

Each of these contexts offers a somewhat different perspective on the rule bending phenomenon. The propensity rule is a bright-line prohibition with specific, albeit limited, exceptions. The hearsay rule is similar, though it features a largely unused residual exception under Rule 807. Privileges—at least so-called "complete" privileges—are also rule based, but they harbor the possibility of common law development under Federal Rule of Evidence 501.[24] States that have chosen to codify their law of privileges or to create strict, rule-like privileges by statute, however, may see more evidence of bending as they have eliminated that evolutionary mechanism.[25]

A. Character Evidence

The rule against propensity evidence—prohibiting the use of past acts to prove a similar act—has long been a source of seemingly inexplicable court decisions.[26] Understanding these decisions as instances of rule bending resolves many of these puzzles. As this Section discusses, such rule bending is far from surprising. Although evidence law generally bars propensity evidence, people make propensity inferences all the time in everyday life. We frequently characterize others as prompt or tardy, trustworthy or dishonest, dependable or fickle. Indeed, people are "constantly, subconsciously inferring character traits" from whatever information is available.[27] Thus, when courts encounter propensity evidence that appears especially probative or critical to a case, pressure builds to admit it.

Rule bending appears in three forms in the character context. First, it explains the courts' frequent misinterpretation of the "permitted uses" clause of Rule 404(b) as if those were true exceptions to the propensity rule. Second, the extreme lengths to which courts and commentators sometimes go to manufacture nonpropensity purposes for evidence is also a form of rule

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[23] FED. R. EVID. 404(b).

[24] *Compare, e.g.*, ARK. R. EVID. 502–12 (delineating specific rule-like privileges), *with* FED. R. EVID. 501 (providing that the "common law—as interpreted by United States courts in the light of reason and experience" governs privilege claims unless delineated exceptions apply).

[25] *See, e.g.*, ARK. R. EVID. 502–12.

[26] United States v. Salomon, 609 F.2d 1172, 1176 (5th Cir. 1980) ("The limitations of Rule 404(b) on the admissibility of evidence of extrinsic offenses have produced one of the most frequently litigated questions of evidence."); Willock v. State, 400 P.3d 124, 127 (Alaska Ct. App. 2017) ("[D]espite the apparently straightforward wording of Rule 404(b)(1), this rule has proved difficult for judges to apply in practice."); Solis v. State, 981 P.2d 28, 30 (Wyo. 1999) ("Other than hearsay rulings, Rule 404(b) rulings represent the most difficult evidentiary decisions required of the judiciary.").

[27] Teneille R. Brown, *The Content of Our Character*, 126 PENN. ST. L. REV. 1, 4 (2021).

bending. Once courts identify a nonpropensity use for character evidence, they often ignore Rule 403's requirement that this evidence be excluded if the nonpropensity value of the evidence is "substantially outweighed" by the danger that the jury will use the evidence to engage in propensity reasoning. And finally, the controversial sexual misconduct exceptions under Rules 413–15, as well as the habit exception under Rule 406, are important examples of ways in which the same forces that lead to rule bending have led to the codification and legitimization of exceptions that admit certain forms of evidence that would otherwise run afoul of the character propensity prohibition.

1. Misinterpretations of Rule 404(b)

The admissibility of "other acts" evidence under Rule 404(b) is among the most confused areas of evidence law, with scholars frequently identifying incorrect decisions by courts.[28] Textually, the rule is apparently straightforward. Rule 404(b) states:

> (1) *Prohibited Uses*. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.[29]

On its own terms, the rule bars litigants from offering past acts for the purpose of proving propensity, or action in accord with those past acts.

As in many areas of evidence law, a critical aspect of the propensity rule is the purpose inquiry. If a litigant offers a past act for a *nonpropensity* purpose, then that evidence does not violate the propensity bar. The permitted uses listed under Rule 404(b)(2) are merely examples, as denoted by the language "such as."[30] They are emphatically not enumerated exceptions. Any time a litigant offers past acts for a nonpropensity purpose, she can admit it without hindrance from the propensity bar, whether the purpose is listed in 404(b)(2) or not. Conversely, simply claiming that

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[28] *See, e.g.*, Klein, *supra* note 10, at 655–61 ("Some courts have further mistakenly considered the examples of non-prohibited purposes to define a universe of 'limited' or 'narrow' 'exceptions.'"); Goode, *supra* note 10, at 724–50 (laying out "how courts frequently and mistakenly deny that the probative value of other-acts evidence depends on a character-propensity inference"); Lisa Marshall, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1072–74 (2005) ("[T]he applicability and effects of Rule 404 remain notoriously inconsistent and confused, plagued by a conceptual incoherence that, as the remainder of this Part reveals, proves particularly acute in the field of employment discrimination.").

[29] FED. R. EVID. 404(b).

[30] *Id.* R. 404(b)(2).

evidence is being used to prove one of the enumerated purposes (for example, motive, intent, opportunity, and so on) is insufficient. For example, a defendant's previous violent acts toward the victim might indeed show that the defendant had an *intent* to harm the victim in this case, but that inference requires propensity reasoning and is thus still barred.[31] It is the kind of inference, not the label, that matters.

This conceptual understanding of Rule 404(b) has been well accepted for decades.[32] It is what appears on the bar exam and what instructors teach in classrooms nationwide every year. Yet as a number of scholars have observed, courts continue to repeatedly (and erroneously) treat the permitted uses listed under Rule 404(b)(2) as if they were true exceptions.[33] So if a past act is being used to prove intent—even if it involves a propensity inference—courts will at times admit the evidence "under 404(b)(2)."[34]

The conventional wisdom is that these errors in the application of 404(b)(2) are *mistakes*, caused by confusing statutory language or precedent. While that may be true in some cases, the sheer prevalence of the mistake is evidence that bending is at play. Many of these faux-404(b) cases feature "other act" evidence that courts perceive to be both highly probative and necessary to an accurate determination of the facts. This sense that the evidence is essential causes courts to misapply the rules in case after case, bending them to achieve the desired result of admitting the evidence.[35] Why this might happen in cases involving intent, where the prior crime is often the same as the charged crime or very similar, is no mystery. If judges believe in character traits, they are likely to view prior similar conduct as highly probative on the question of whether a defendant has engaged in the same or very similar conduct later on.[36] Framing this as evidence of "intent" allows

[31] *See, e.g.*, Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 778–87 (2018) (describing cases using propensity reasoning as evidence of intent, motive, opportunity, etc.).

[32] *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 7.01 (2021); 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:28 (4th ed. 2022); 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:38 (2023).

[33] *See* Klein, *supra* note 10, at 655–56 (2017); Ted Sampsell-Jones, Spreigl *Evidence: Still Searching for a Principled Rule*, 35 WM. MITCHELL L. REV. 1368, 1388 (2009); Dora W. Klein, *The (Mis)application of Rule 404(b) Heuristics*, 72 U. MIAMI L. REV. 706, 716–18 (2018).

[34] Klein, *supra* note 10, at 660–61.

[35] *See generally* Hillel J. Bavli, *An Aggregation Theory of Character Evidence*, 51 J. LEGAL STUD. 39, 40 (2022) (suggesting that courts' violation of Rule 404 has resulted from the "pressure created by the substantial probative value that other-acts character evidence frequently entails").

[36] Brown, *supra* note 27, at 28.

the intuition that the evidence is highly probative to trump Rule 404(b)'s clear restriction on such propensity reasoning.[37]

In addition to the #MeToo sexual assault context, which we discussed in the Introduction, consider employment discrimination cases. To prove discriminatory intent, a plaintiff will frequently offer the defendant's past history of adverse employment actions on the basis of age, race, gender, or disability. This desire is completely understandable as a matter of common sense. Absent a smoking gun, proving a discrimination claim can be extremely difficult since the defendant can raise various pretextual excuses. But if the defendant has a history of impermissible behavior, the case's entire complexion changes. The problem is that this "intent" evidence technically violates the propensity rule.[38] "Intent" is listed as a permitted use under 404(b), but again it is not a true exception to the propensity prohibition. A history of impermissible discrimination invites the factfinder to infer discrimination now on the basis of discrimination before. That is propensity, plain and simple.

Unsurprisingly, given the highly probative nature of the evidence, courts frequently bend Rule 404(b) in this context to admit such evidence.[39] Such nearly routine admissions may be understandable, perhaps even highly desirable and contemplated by employment law. But let us be clear: as a matter of black-letter evidence law, such admissions are incorrect. They are a classic instance of rule bending. In case after case, judges misapply the rule to admit evidence they perceive to be essential but that the rules technically bar from consideration.

2. Nonpropensity Purposes

Even when courts and commentators avoid misinterpreting the 404(b) examples as exceptions, they still often stretch the idea of a nonpropensity purpose to the breaking point. Once again, a familiar pattern repeats itself: evidence that would otherwise violate the prohibition on propensity evidence

[37] In England, the persistence of such workarounds led that country to abandon the propensity prohibition entirely in favor of evidentiary rules that favor admission of prior bad act evidence when it is most similar to the charged misconduct. *See* MIKE REDMAYNE, CHARACTER IN THE CRIMINAL TRIAL 5 (2015); James Goudkamp, *Bad Character Evidence and Reprehensible Behaviour,* 12 INT'L J. EVID. & PROOF 116, 128 (2008). In the United States, some misapplications are so frequent that commentators have begun to describe them as circuit splits. Capra & Richter, *supra* note 31, at 769 ("There is a war raging over the admissibility of the prior bad acts of criminal defendants in federal trials."). Capra and Richter note, "While many circuits treat Federal Rule of Evidence 404(b) as a rule of 'inclusion' and liberally admit such prior bad-acts evidence with predictably explosive effects on criminal juries, a few circuits are developing rigorous standards designed to foreclose prosecutorial use of such bad-acts evidence." *Id.*

[38] Marshall, *supra* note 28, at 1076–82.

[39] *Id.* at 1083; Bavli, *supra* note 35, at 53–54.

is found admissible where courts believe the evidence is essential to the case. In this context, litigants offer conceptually dubious nonpropensity routes for admitting character evidence, which indeed are used so often that they have gained a measure of legitimacy.[40] Such repetition suggests that these instances are indeed examples of bending, as opposed to mere mistakes.

One good example of such stretching is the so-called "doctrine of chances." The doctrine of chances is traditionally illustrated using *Rex v. Smith*,[41] the case of the brides in the bath. In *Smith*, the defendant's wife was found dead lying face up in her bathtub. The drowning occurred shortly after the victim had made out her will in the defendant's favor, and the defendant was charged with her murder. The prosecution offered evidence that the defendant's two previous wives also drowned in bathtubs after making out their wills in the defendant's favor.[42]

Does such evidence violate the propensity rule? The answer is controversial in the scholarly literature. Ed Imwinkelried argues that the inference is not propensity based, because it only points at the objectively low probability that an innocent defendant would suffer the same misfortune multiple times.[43] Paul F. Rothstein and Sean P. Sullivan both disagree, arguing that the probative value of the evidence rests in the comparison between the likelihood of the events if the defendant was innocent versus if the defendant was a murderer.[44] This latter half of the comparison involves impermissible propensity reasoning.

For the record, we find Rothstein and Sullivan's position persuasive. Much of the modern evidence scholarship concludes that the proof process is a comparative one between competing stories, explanations, or hypotheses, and thus the doctrine-of-chances evidence is only probative when accompanied by the propensity comparison.[45] Indeed, even if the

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[40] *See* Capra & Richter, *supra* note 31, at 799; *see also* Brown, *supra* note 27, at 16.

[41] 11 Cr. App. R. 229, 84 L.J.K.B. 2153 (1915).

[42] *Prisoner on Trial at the Old Bailey: The Death of Miss Mundy*, TIMES, June 23, 1915, at 5, *reprinted in* GEORGE FISHER, EVIDENCE 195–96 (3d ed. 2013).

[43] Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 438–39 (2006) ("[T]he doctrine is not merely superficially different than a character theory. Far more importantly, the doctrine is distinguishable from a character theory in terms of the policies which inspire the character prohibition.").

[44] Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1264 (1995) ("[T]he doctrine of chances does not provide a satisfactory way to reconcile the apparent internal inconsistency in Rule 404(b)."); Sean P. Sullivan, *Probative Inference from Phenomenal Coincidence: Demystifying the Doctrine of Chances*, 14 LAW, PROBABILITY & RISK 27, 39–40 (2015).

[45] *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520–21 (1991); Michael S. Pardo & Ronald J. Allen, *Juridical Proof*

objective probability purpose were not propensity based, the danger of inviting the jury to engage in highly prejudicial propensity reasoning would seem to substantially outweigh the probative value under Rule 403.

Despite these serious concerns, courts routinely accept the doctrine of chances as a nonpropensity purpose.[46] And the practical intuition that drives courts' acceptance of the doctrine of chances is unmistakable. How could the court in *Smith* conduct a legitimate trial while concealing the two previous "accidental" drownings from the factfinder? This is not garden-variety (and probatively weak) character evidence: the prosecution is not simply trying to show that the defendant had a prior conviction or previously engaged in dishonest acts. Here, the evidence about the prior drownings changes the entire complexion of the case. Suppose such evidence had been suppressed and the defendant acquitted. A juror would surely feel as if she had been tricked into participating in a sham proceeding. The public and the media would likewise be outraged. The legitimacy of the system itself would suffer.

Indeed, in his discussion of the doctrine of chances, Imwinkelried acknowledges precisely this undercurrent to the debate. He warns that excluding critical evidence in ways that violate common sense may "trigger a political and legislative backlash"[47]: "If the doctrine of chances is a spurious non-character theory but excluding such vital evidence offends common sense, then perhaps the character evidence prohibition itself must go."[48] Such sentiment might initially seem like the tail wagging the dog. After all, lawyers do not ordinarily ignore procedural rules simply because they do not like the result. But further reflection reveals the considerable merits of Imwinkelried's perspective. There is nothing sacrosanct about the propensity rule as it is currently memorialized in Rule 404. The evidentiary rules exist to help courts arrive at accurate and legitimate outcomes. If the rules do not, then courts will innovate around them. And if common law evolution is not available, then the bending of the rules is practically inevitable.[49]

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and the Best Explanation, 27 LAW & PHIL. 223, 233–42 (2008); Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1258, 1266 (2013). In addition, Bayesian theories about the probative value of evidence focuses on the likelihood *ratio*, which pits the probability of observing the evidence under one litigant's theory versus another. *Id.* Thus, while Imwinkelried is technically correct in arguing that doctrine-of-chances evidence could theoretically only focus on the innocent defendant, its worth is bound up in the propensity inference. So even if one narrowly cabined the evidence sufficiently to escape exclusion under Rule 404(b), it would ultimately be excluded under Rule 403.

[46] Imwinkelried, *supra* note 43, at 422 ("[T]he courts often invoke the doctrine of objective chances as the non-character theory to legitimate the introduction of the evidence.").

[47] *Id.* at 460.

[48] *Id.* at 424–25.

[49] *See infra* Section II.A.

The legitimacy of the "doctrine of chances" as a nonpropensity theory may perhaps be a closer call, but other traditional 404(b) nonpropensity arguments are far more dubious. For instance, modus operandi evidence is also conventionally admissible as involving a nonpropensity purpose.[50] Yet, consider the subtle, almost pedantic, argument for why it is admissible: "The permitted inference is *not* that 'this is the defendant's kind of crime'—that would amount to the crassest form of propensity reasoning. Rather the idea is 'this could not be *anyone else's* crime.'"[51] As far as the analysis goes, this statement is first-rate evidence lawyering. But does anyone really believe it? Obviously, modus operandi evidence is offered to prove that "this is the defendant's kind of crime"—that is what modus operandi means. Indeed, it is not even clear that the pedantic argument offers a valid nonpropensity purpose. Recall that the probative value of evidence arises through comparison. The low likelihood that someone else would chance upon the defendant's signature is only probative because of the high likelihood that the defendant would maintain his signature.

The key point is not whether the torturous nonpropensity argument for modus operandi evidence is logically correct, but rather the fact that courts and commentators readily accept it. And further, they readily accept it because of their belief that the evidence is essential. Suppose that a defendant is accused of making a bomb with a distinctive brand of rainbow wiring. If the defendant previously used that particular rainbow wiring in his bombs, how likely is it that a court will declare such evidence *inadmissible*? Evidence involving a unique or highly unusual signature is too probative and too necessary to exclude. And if the propensity rule disagrees, then courts will bend it until it admits the evidence. This imperative may explain why courts sometimes erroneously treat modus operandi almost as if it were a separate exception. The First Circuit, for example, requires a separate finding of "special relevance"—meaning a "high degree of similarity" and "sufficiently idiosyncratic" characteristics—before entertaining a modus operandi argument.[52]

Other examples of such questionable nonpropensity arguments appear elsewhere in the 404(b) space. For example, "absence of mistake" cases can technically involve a nonpropensity inference, but again invite propensity

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[50] FISHER, *supra* note 42, at 171.

[51] *Id.*

[52] United States v. Trenkler, 61 F.3d 45, 52–53 (1st Cir. 1995) (requiring "'special relevance' . . . as a prerequisite to admission"). The Federal Rules of Evidence impose no such test. They merely require a nonpropensity purpose and the usual check for unfair prejudice under Rule 403.

reasoning.[53] The same goes for some "narrative integrity" cases.[54] Frequent improper judicial application of these exceptions to 404(b) reinforces the point that courts are willing to bend the rules to admit necessary evidence.

3. Acknowledged Exceptions

The motivation for rule bending—the pressure to admit otherwise inadmissible evidence perceived to be highly probative and necessary—also explains some of the conceptually anomalous exceptions to Rule 404. These are in many ways instances in which rule bending became formally codified and thus legitimized. Take, for example, Federal Rules of Evidence 413–15, which create an exception to the propensity rule for prior instances of sexual misconduct. Before their adoption by Congress in the 1990s, courts at times dubiously misapplied the permitted uses in Rule 404 to admit such evidence or resurrected the common law "depraved sexual instinct" exception.[55]

The *Cosby* case discussed in the Introduction illustrates this practice. Pennsylvania did not adopt Rule 413, and so instead the trial court in *Cosby* bent the propensity rule to admit the defendant's prior sexual misconduct as evidence of a "common scheme or plan" or "absence of mistake."[56] In establishing Rules 413–15, Congress presumably felt similarly that such evidence was too probative to exclude. Indeed, the importance that Congress placed on this evidence is demonstrated by the fact that it imposed the

[53] Consider a gun cleaning hypothetical suggested by George Fisher. The defendant claims that his gun accidentally discharged, injuring his wife, while he was cleaning it. The prosecution wishes to offer evidence that the defendant's previous wife was killed in a "gun cleaning accident." FISHER, *supra* note 42, at 193–94. Here, unlike in *Rex v. Smith*, there exists a nonpropensity purpose: if the defendant had suffered the previous tragedy, then the defendant would have become more cautious about cleaning his guns, making the second "accident" unlikely. But surely the true probative force of this evidence is in its propensity inference—that the defendant killed his first wife and has done so again. The "learning" argument may escape the propensity rule, but it should not escape Rule 403. Courts, however, would be sorely tempted to admit such propensity evidence because it is so critical to understanding the case.

[54] The "narrative integrity" argument is that evidence of prior acts is necessary to construct a coherent story. In *United States v. DeGeorge*, the defendant was accused of scuttling his yacht in an attempt to fraudulently collect insurance proceeds. 380 F.3d 1203, 1207 (9th Cir. 2004). The prosecution introduced evidence that the defendant had "previously lost three insured vessels at sea." *Id.* at 1219. The Ninth Circuit affirmed the trial court's admission of those past acts, agreeing that they were "inextricably intertwined" with the facts of the case and thus necessary for narrative integrity. *Id.* at 1220. It reasoned that the prior losses explained why the defendant engaged in a series of sham transactions in order to obtain insurance on the yacht in question. *Id.* This explanatory purpose does not involve propensity reasoning, but again, where is the probative force of the evidence? It is not in the narrative explanation posited. The force of the evidence is in the propensity inference—that the defendant is engaging in an insurance fraud scheme involving sinking ships. As a technical matter, Rule 403 should have excluded it, yet both the district and appellate court held otherwise. *See id.*

[55] *See* Fingar, *supra* note 4, at 514–30 (discussing several courts' admission of uncharged sexual misconduct evidence under the pretext of motive, intent, identity, and plan, while other jurisdictions recognized a special exception applicable in sex crime offenses).

[56] *Supra* text accompanying note 3.

exceptions over the objection of the Advisory Committee on Evidence Rules, the Judicial Conference, and the overwhelming majority of commentators.[57]

To be clear, we do not support Rules 413–15 as currently written. Rules 413–15 are breathtakingly overbroad. They allow evidence of prior sexual misconduct even when it has all the worst aspects of character evidence—when it lacks heightened probative value and invites judging defendants for their "bad character" rather than their actions. Outside of #MeToo cases like *Cosby* or other cases in which identity or intent are very difficult to prove, we harbor significant doubts about the desirability of allowing such propensity arguments. But our focus here is not the merits of Rules 413–15. Our point is that some of the same pressure that causes rule bending also led to these exceptions to the propensity rule. And as we will discuss in Part II, explicit recognition of an exception and the public debate that inevitably follows such recognition are far better than admitting evidence sub rosa.

Though far less controversial, the habit exception under Rule 406 exhibits similar contours. Rule 406 allows the use of a "person's habit . . . to prove that on a particular occasion the person . . . acted in accordance with the habit."[58] In other words, propensity evidence is permissible, as long as the past acts are deemed "habits." Moreover, the case law suggests that courts tend to find habits when the actions are repetitive, unthinking, and lacking in (negative) moral content.[59] Putting on one's seat belt is a habit; being violent or getting drunk is not.[60]

If the rules did not have the habit exception, courts would undoubtedly bend the rules to create one in practice. Repetitive, nearly automatic behavior is highly probative, and such habits are often the only available evidence that a factfinder can use to infer what happened on a particular occasion. For example, did a defendant manufacturer's seat belt defectively release, or did the plaintiff simply not buckle it? A plaintiff's habit of buckling up is not only highly probative but also may be the best evidence available of whether he buckled up on the day in question. And if the habit lacks negative moral content, there is little concern about potential unfair prejudice. Hence, the rules have a well-established exception for habit evidence.

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[57] Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases, 159 F.R.D. 51, 52–54 (1995).

[58] FED. R. EVID. 406.

[59] *See, e.g.*, Hasan v. AIG Prop. Cas. Co., 935 F.3d 1092, 1100 (10th Cir. 2019); Nelson v. City of Chicago, 810 F.3d 1061, 1073 (7th Cir. 2016); Levin v. United States, 338 F.2d 265, 272 (D.C. Cir. 1964).

[60] *See* FED. R. EVID. 406 advisory committee's note to 1972 proposed rules ("[E]vidence of intemperate 'habits' is generally excluded when offered as proof of drunkenness in accident cases, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action." (citations omitted)).

B. Hearsay

Hearsay is another area where the temptation to bend evidentiary rules often proves overwhelming. Judges choose repeatedly to misapply hearsay exceptions in roughly analogous ways because of their sense that the evidence is in some way essential to the case. The hearsay context is unique, however, because licensed rule bending has now been expressly codified in this area in the form of the Rule 807 residual hearsay exception. We will address each of these observations in turn.

As in the character evidence examples, when a statement seems essential for the fair adjudication of a case, judges at times ignore the clear dictates of the hearsay prohibition. Few are upset when what seems like a highly probative piece of hearsay evidence is admitted, particularly when proceedings would feel illegitimate in its absence. And so, rather than strictly adhering to the hearsay rule's formalistic exclusionary mandates, courts in these instances view the hearsay prohibition as an "artificial restraint" worth circumventing.[61]

Before considering any modern rule in particular, consider hearsay doctrine writ large. The hearsay rule is riddled with exceptions.[62] Indeed, one scholar now charges that the hearsay exclusionary rule is actually "a rule of admission that is doing its subversive work under the cover of darkness."[63] This abundance of exceptions can be understood as the product of rule bending over the years. That is, when the hearsay prohibition excluded centrally important statements from trial, judges bent it. The hearsay rule, with its emphasis on live testimony and cross-examination, seems desirable in a vacuum, but in application, common law courts realized the need for exception after exception. After all, could a trial really be legitimate in the absence of seemingly essential statements like a defendant's confession or an eyewitness's immediate reaction to an event? The dozens of hearsay exceptions that exist today are the codification of a long history of courts addressing situations in which the evidence was thought too essential to exclude.

Consider, for example, the dying declaration exception codified under Rule 804(b)(2). The dying declaration exception is (at least nominally) premised on the notion that statements made by declarants facing imminent

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[61] *See, e.g.*, People v. White, 555 N.E.2d 1241, 1251 (Ill. App. Ct. 1990) (characterizing the hearsay rule's common law prohibitions preventing a physician from testifying "about what his or her patient told the physician for purposes of medical diagnosis or treatment" as "artificial restraints heretofore imposed by case law").

[62] *See* FED. R. EVID. 803–04.

[63] Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 800 (1992).

death will be inherently trustworthy.[64] But as one court candidly acknowledges, "[m]ore realistically, the dying declaration is admitted, because of compelling need for the statement rather than any inherent trustworthiness."[65] Put differently, a dying declaration's outsized importance, rather than its outsized reliability, justifies its exemption from the hearsay rule. Prior to the existence of any codified exception, it was that perception of importance that motivated early courts to bend the hearsay rule and ensure a dying declaration's admissibility.

Even in the modern era, despite the presence of so many hearsay exceptions, courts continue to bend when necessary. For example, unlike many state evidentiary codes,[66] the Federal Rules of Evidence do not contain a hearsay exception for child declarants. In practical terms, this omission means that the Rules require children who possess essential information in a case to endure the frequently traumatic process of testifying in court. Both direct and cross-examination can be difficult for judges, attorneys, and the children themselves, especially when the child has been a victim of abuse. The requirement may mean that the child does not testify at all, resulting in a loss of valuable evidence. After all, "[f]or many years, experts and the public have been concerned about the damage that can occur to a child who is forced to testify in court about abuse allegedly committed by the same defendant who is sitting nearby watching the child."[67]

What have courts done in the face of such difficult circumstances? Many have resorted to rule bending. Rather than strictly enforce Rule 802's hearsay prohibition—and thereby risk losing statements that are indispensable to the adjudication of a case—courts have instead bent hearsay exceptions to admit child statements.[68] For instance, in addressing child declarants, the Fourth Circuit materially discounted Rule 803(2)'s requirement that an excited utterance be "made while the declarant was under the stress of excitement that [a startling event] caused,"[69] repeatedly downplaying the significance of "[t]he lapse of time between the startling event and the out-of-court statement."[70] This is technically a misapplication

[64] United States v. Thevis, 84 F.R.D. 57, 63 (N.D. Ga. 1979).

[65] *Id.*

[66] *See, e.g.*, ARK. R. EVID. 803(25) (providing a hearsay exception for child sexual offense victims under the age of ten).

[67] Ashley E. Seuell, *Walking the Fine Line: How Alabama Courts Have Interpreted and Applied the Child Physical and Sexual Abuse Victim Protection Act*, 54 ALA. L. REV. 1427, 1428 (2003).

[68] Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 491 (1992).

[69] FED. R. EVID. 803(2).

[70] Morgan v. Foretich, 846 F.2d 941, 947 (4th Cir. 1988) (alteration in original) (quoting United States v. Iron Shell, 633 F.2d 77, 85 (8th Cir. 1980)).

of the rule. Rule 803(2) does not contain the strict temporal requirement of Rule 803(1)'s exception for present sense impressions,[71] but it is still strongly temporal.[72] Rule 803(2) is premised on an empirically questionable belief that a declarant in a state of shock following a startling event speaks with outsized trustworthiness due to her inability to fabricate.[73] A lapse of time affects this continuous state of shock.[74] Some courts, however, seem to have concluded that the consequence of strict enforcement of Rule 803(2)—the loss of essential child statements—is worse than ignoring the strict dictates of the rule.[75] To resolve the dilemma, courts bend the rules.

Courts have similarly bent Rule 803(4)'s exception for medical statements to doubly ensure the admission of child declarations. Under its plain text, Rule 803(4) only applies when, inter alia, a statement "is made for—and is reasonably pertinent to—medical diagnosis or treatment."[76] Again, strict enforcement of Rule 803(4) would often mean excluding damaging out-of-court statements from children.[77] Without question, in some abuse cases, doctors might need to rely on a broad narrative from a child to

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[71] FED. R. EVID. 803(1) (providing an exception to the hearsay prohibition for a "statement describing or explaining an event or condition, made *while or immediately after* the declarant perceived it" (emphasis added)).

[72] Bemis v. Edwards, 45 F.3d 1369, 1372 n.1 (9th Cir. 1995) ("In the case of an excited utterance, the contemporaneity requirement refers to temporal proximity to the 'startling event.'").

[73] FED. R. EVID. 803(2) advisory committee's note to 1972 proposed rules ("The theory of [803(2)] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."); United States v. Tocco, 135 F.3d 116, 127 (2d Cir. 1998) ("The rationale for [803(2)] is that the excitement of the event limits the declarant's capacity to fabricate a statement and thereby offers some guarantee of its reliability."); United States v. Boyce, 742 F.3d 792, 801 (7th Cir. 2014) (Posner, J., concurring) ("[O]ld and new studies agree that less than one second is required to fabricate a lie." (quoting Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 916 (2001))).

[74] United States v. Graves, 756 F.3d 602, 605 (8th Cir. 2014) (noting that Rule 803(2) requires courts to consider "whether the declarant's stress or excitement was continuous from the time of the event until the time of the statements" (quoting United States v. Wilcox, 487 F.3d 1163, 1170 (8th Cir. 2007))).

[75] In *Morgan v. Foretich*, the dynamic discussed in the text is readily apparent. Rather than affirming the district court's exclusion of a child's hearsay statement, the Fourth Circuit makes the atextual decision to solely consider the lapse of time between a child's "first real opportunity" to disclose abuse and the declaration (rather than the time lapse between the actual abuse and the declaration) for the purposes of Rule 803(2). 846 F.2d 941, 947 (4th Cir. 1988). Eleanor Swift previously criticized this opinion, noting that the court's expansive reading allows Rule 803(2) "to cover a child who does not report the startling events for hours or days." Swift, *supra* note 68, at 494.

[76] FED. R. EVID. 803(4).

[77] *See, e.g.*, United States v. Chaco, 801 F. Supp. 2d 1200, 1207 (D.N.M. 2011) ("A declarant's statement to a physician that identifies the person responsible for the declarant's injuries is ordinarily inadmissible under rule 803(4) because the assailant's identity is usually unnecessary either for accurate diagnosis or effective treatment.").

effectively pinpoint and treat potential injuries.[78] But, as a general rule, the Advisory Committee for the Federal Rules of Evidence admonishes that "[s]tatements as to fault would not ordinarily qualify under" Rule 803(4).[79] Nonetheless, in the face of the possible exclusion of statements of fault offered by child victims, courts have opted for a remarkably permissive approach to Rule 803(4).[80] Their approach has been so permissive that some scholars argue it effectively "eliminate[s] any requirement of treatment motive."[81] This application of Rule 803(4) is yet another example of bending. Courts intentionally stretch the rule's clear boundaries to admit statements of fault offered by children because they see such statements as essential to the case.

With appreciation for the important normative questions about how our evidentiary rules can better protect child declarants, our point here is merely a descriptive one—modern courts bend the hearsay rule to admit statements from child declarants. The Federal Rules of Evidence, dispassionately enforced, mandate the exclusion of most out-of-court statements that fail to satisfy the textual requirements of an exception. But because of the stakes involved with child declarants, courts have chosen instead to bend the rules.

Many other hearsay rules are also arguably sites of bending. For instance, courts have (mis)applied Rule 801(d)(2)(E), the rule admitting the hearsay statements of coconspirators, in implausibly broad ways,[82] providing a highway for admitting essential statements. Other courts have ignored the many requirements of the business records exception under Rule 803(6) in order to admit ad hoc (but essential) emails.[83]

Perhaps the biggest puzzle surrounding rule bending in the hearsay context is why it occurs at all. Rule 807's residual hearsay exception explicitly provides an avenue of admissibility for situations "in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact."[84] Rule 807

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[78] *See* United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980) ("It is enough that the information eliminated potential physical problems from the doctor's examination in order to meet the test of 803(4).").

[79] FED. R. EVID. 803(4) advisory committee's notes on 1975 proposed rules.

[80] *See, e.g.*, *Iron Shell*, 633 F.2d at 83 ("It is clear that Rule 803(4) significantly liberalized prior practice concerning admissibility of statements made for purposes of medical diagnosis or treatment.").

[81] *See* Swift, *supra* note 68, at 497–98.

[82] 30 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 6613 (2d ed. 2023) (observing that courts have defined "'conspiracy' expansively and far more broadly than its use in criminal law").

[83] *See, e.g.*, Pierre v. RBC Liberty Life Ins., No. 05-1042-C, 2007 WL 2071829, at *2 (M.D. La. July 13, 2007) (admitting emails solely because they were "prepared by . . . employees during the ordinary course of business").

[84] FED. R. EVID. 803(24) advisory committee's notes on 1975 proposed rules.

arguably exists precisely to combat rule bending. The Advisory Committee on the Federal Rules of Evidence expressly acknowledged that, absent the safety valve, "the specifically enumerated [hearsay] exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed)."[85] Yet, rather than openly embrace the residual hearsay exception, courts have instead shied away. Modern federal courts treat Rule 807 as an "extremely narrow" exception that is to be used only "sparingly" and "in the most exceptional circumstances."[86]

We will have more to say about Rule 807 and the reasons for its failure to thwart rule bending in Part II. As the examples above show, rule bending persists in the face of hearsay prohibitions despite Rule 807. When courts perceive evidence to be essential to a case, they have chosen to ignore the clear mandate of such prohibitions, instead creating the very "tortured" applications of hearsay exceptions that the Rules Committee feared.

C. Privilege Doctrine

Privileges typically have only narrow and closely guarded exceptions and lack balancing tests or other safety valves.[87] Thus, it is no surprise that they are another site for observing evidentiary rule bending. When judges perceive evidence that is facially privileged to be highly probative and critical, they get creative, reshaping privilege law in order to admit otherwise privileged evidence in case after case. Because privileges are policy driven, judges typically have an additional rationale for bending in these cases: their

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[85] *Id.*

[86] United States v. Mason, 951 F.3d 567, 574 (D.C. Cir. 2020). Indeed, to the extent courts do invoke Rule 807, it is often a method of last resort, used only after initial attempts at rule bending prove too perilous. Consider, for example, the D.C. Circuit's application of Rule 807 in *United States v. Slatten.* 865 F.3d 767, 805 (D.C. Cir. 2017). In *Slatten*, the defendant was convicted of first-degree murder after a co-defendant's confession was excluded at trial. *Id.* at 778, 809–10. The D.C. Circuit reversed the conviction, but disagreed over how the co-defendant's confession could be admissible under the enumerated hearsay exceptions. *See id.* at 810–811; *id.* at 824 (Rogers, J., concurring). After determining that the statement failed to meet even expansive interpretations of Rule 804(b)(3) and Rule 803(6), the majority turned to Rule 807, admitting the confession as an essential and sufficiently reliable component of the defendant's case. *Id.* at 806–07.

[87] A privilege is a rule that protects communications within certain relationships from compelled disclosure in a court proceeding. At the state level, privileges are generally carefully delineated by statutes or through judicial rules. *See, e.g.*, CONN. GEN. STAT. § 52-146(b)–(t) (listing narrow categories of privileged communications). At the federal level, privileges are enshrined in common law development. FED. R. CIV. P. 26(b) (excluding privileged communications from discovery). While some privileges, such as the reporter–source privilege, are qualified and subject to a balancing of the need for the evidence against the policy goals promoted by shielding the information, most create an absolute shield so long as the communication or privileged matter itself satisfies the requirements for the privilege. *See* 23A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5426 (1st ed. 2023) (covering the journalist privilege).

belief that disclosure would only minimally impact—or may even promote—the policies underlying the relevant privilege.

In the federal courts, the need for rule bending is reduced because Rule 501 left the federal law of privileges to common law development.[88] Yet many states have absolute privileges enshrined in their statutes or codes of evidence. In these jurisdictions, judges can be found bending the rules when they perceive privileged evidence to be essential to fairly and accurately adjudicating a case.[89]

1. Clergy–Penitent Privilege

As an example of rule bending in privileges law, consider *Morales v. Portuondo*, which involved the clergy–penitent privilege.[90] In *Morales*, the defendant was convicted of murder.[91] Prior to sentencing, the (presumed) real killer, Jesus Fornes, confessed to Father Joseph Towle, a Catholic priest.[92] Fornes revealed that he and two others had committed the murder, and that the defendant was innocent.[93] Fornes then died in an unrelated incident, and the question was whether Towle could testify about Fornes's confession on habeas review.[94]

Common sense screams yes. Fornes was dead, so there was very little benefit in preserving the privilege. At the same time, the evidence was both highly probative and essential.[95] Towle's testimony was pivotal to remedying a wrongful conviction, and his position as a clergy member unrelated to the defendant made his testimony especially powerful and convincing. Although the issue arose in the course of habeas proceedings, if it had been a trial, a juror would have surely wanted to know.

The clergy–penitent privilege, however, only has narrow exceptions, so in a rather convoluted opinion, the *Morales* court bent the rules to admit the evidence.[96] Its analysis of the applicability of the clergy–penitent privilege was questionable.[97] For example, under New York law, the privilege attaches

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[88] FED. R. EVID. 501 ("The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege . . . .").

[89] *E.g.*, ARK. R. EVID. 501–09 (establishing various privileges); TENN. R. EVID. 501 advisory committee's comments (listing statutes establishing various privileges).

[90] 154 F. Supp. 2d 706, 728 (S.D.N.Y. 2001).

[91] *Id.* at 709.

[92] *Id.* at 711.

[93] *Id.*

[94] *Id.* at 714, 718.

[95] *Id.* at 732.

[96] *Id.* at 731.

[97] Nominally, the case was decided on the constitutional right to present a defense under the Due Process Clause and the Compulsory Process Clause. *Id.* at 722, 732. However, the court's analysis of the

to "a confession or confidence made to [the clergy member] in his professional character as a spiritual advisor."[98] The court in *Morales* held that because in Father Towle's opinion the conversation was not a formal confession (a Catholic rite), but rather a "heart-to-heart" talk, the privilege did not attach.[99] The court further emphasized that the Archdiocese agreed with that characterization.[100] The privilege, however, does not require a formal confession in order to attach, presumably because such a requirement would limit its scope to the subset of religions that include formal confessions. Rather, the scope of the privilege is much broader, requiring only a confidential communication between the holder of the privilege and that person's spiritual advisor on a matter related to seeking spiritual advice.[101] Fornes sought out Towle "in his professional character as a spiritual advisor" and gave the information in confidence. And given that the penitent owns the privilege, doctrinally what counts is what Fornes thought, not what Towle thought.[102]

Again, the *Morales* court conducted its privilege analysis largely with an eye toward admitting evidence that was simply too probative and too critical to be excluded from trial. Although a strict reading of the privilege would almost certainly protect the statement indefinitely after Fornes's death, the court bent the rules. What might look on first glance like a mistake in applying New York's clergy–penitent privilege is no mistake at all.

2. Marital Privileges

"Persons connected by the marriage tie have . . . the right to think aloud in the presence of each other."[103] This is the basic premise behind the marital communications privilege, which allows a spouse to exclude confidential communications between spouses during their marriage from most court

priest–penitent privilege seemed to be devoid of constitutional content and entirely on the basis of New York privileges law. *Id.* at 728–29.

[98] N.Y. C.P.L.R. 4505 (CONSOL 2014).

[99] 154 F. Supp. 2d at 729.

[100] *Id.*

[101] N.Y. C.P.L.R. 4505 (CONSOL 2014).

[102] To be sure, the *Morales* court also argued that Fornes had waived his privilege by "disclos[ing] at least portions of his conversation to three different people." 154 F. Supp. 2d at 729. The validity or invalidity of this argument is less certain. It is unclear whether Fornes disclosed the underlying substance only, or actually recounted his conversation with Towle. Textbook evidence law suggests that only the latter constitutes waiver, although there is some ambiguous New York case law to the contrary. *See* Vincent C. Alexander, *Supplementary Practice Commentaries*, *in* N.Y. C.P.L.R. 4505 (MCKINNEY 2012) (arguing that waiver should only occur when not only the underlying substance is disclosed, but the fact of the privileged communication is disclosed as well).

[103] Hester v. Hester, 15 N.C. (4 Dev.) 228, 230 (1833).

proceedings.[104] In most states, this privilege has been codified into law.[105] Thus, like other rules of evidence, privilege law in these states has become constrained by fixed textual boundaries. And once again, courts faced with what they perceive to be essential evidence have bent those boundaries.

A common example of evidentiary bending within the martial communication privilege occurs in the context of spousal abuse. Here we see a familiar pattern emerge. Courts in many jurisdictions have found ways to "interpret[] a spousal crime exception into their confidential communication statute even though one was not expressly approved by the legislature."[106]

One way in which courts have done this is by holding that threats are not shielded communications. Some have reasoned that threats are "verbal" acts and thus they fall outside the category of "communications."[107] Other courts have held that communications in the context of abuse more generally fall outside the text of their statutes. New York courts, for example, characterize domestic abusers as not "relying upon any confidential relationship to preserve the secrecy of [their] acts and words."[108]

Still other state courts have created broad exceptions for spousal abuse cases when state statutes suggest legislative intent to the contrary. For example, the Iowa Supreme Court created an exception for the prosecution of crimes committed against a spouse despite statutory language that "prohibit[ed] disclosure of *any* communication without any express exceptions."[109] In Iowa, the absence of a statutory exception was particularly significant because the legislature *did* provide an express exception for crimes committed against a spouse in the separate spousal testimonial privilege.[110] Despite this seemingly clear legislative decision against creating such an exception, the Iowa court used the text of the statute to justify its

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[104] The marital communications privilege is in contrast to the spousal testimonial privilege, which typically permits a testifying spouse to refuse to offer adverse testimony against their spouse while they are married. *See, e.g.*, United States v. Brock, 724 F.3d 817, 822 (7th Cir. 2013) (explaining that the spousal testimonial privilege "covers testimony on any adverse facts, no matter how they might have become known to the witness-spouse").

[105] Nicole Scott, *Digital Love: Where Does the Marital Communications Privilege Fit in the World of Social Media Communications*, 32 J. MARSHALL J. INFO. TECH. & PRIV. L. 105, 109 (2016) (noting that the marital communications privilege is codified in forty-nine states).

[106] R. Michael Cassidy, *Reconsidering Spousal Privileges After* Crawford, 33 AM. J. CRIM. L. 339, 370 (2006).

[107] *See, e.g.*, State v. Greaves, 971 N.E.2d 987, 992 (Ohio Ct. App. 2012) ("Verbal threats and violent acts between spouses are not marital 'confidences' which the privilege was intended to shield from courtroom disclosure.").

[108] People v. Dudley, 248 N.E.2d 860, 863 (N.Y. 1969).

[109] State v. Klindt, 389 N.W.2d 670, 675 (Iowa 1986), *overruled on other grounds by* State v. Reeves, 636 N.W.2d 22, 26 (Iowa 2001).

[110] *Id.*

own exception. It determined that the spousal communications privilege should not apply to "those things, the direct tendency of which is, not only to destroy the confidence of the marital relation, but to destroy the relation itself."[111]

Finally, some states have used statutory language as a hook with which to bend the privilege. For example, the Connecticut spousal privilege applies to communications that are both confidential and "induced by the affection, confidence, loyalty and integrity of the marital relationship."[112] The Connecticut Supreme Court interpreted that statute in the context of a sensational case involving a married woman who was engaged in a love triangle with two coworkers, eventually killed her boyfriend's other lover, and later tried to kill her husband.[113] The supreme court held that the defendant's frequent discussions with her husband about a fictional friend at work who was engaged in a love triangle were not privileged.[114] Although these conversations were private, the court held that they did not meet the second statutory requirement for three reasons. First, the communications were "meant to deceive" her husband, second, the defendant was disloyal, and third, the defendant "engaged in the ultimate betrayal of the spousal relationship, attempting to murder her husband."[115]

The federal courts, which still apply a common law of privileges, are free to create explicit carveouts, and unsurprisingly they have. The D.C. Circuit, for example, held that threats made privately by one spouse to another are not privileged because "[e]ven under ancient common law" testimony that concerned "personal injuries inflicted against a spouse would have been admissible."[116] The ancient common law exception the D.C. Circuit invoked to support its claim was, fittingly, "Necessity."[117] Under a common law regime, the perception that evidence is essential has long been a sufficient reason to admit it in the face of doctrine to the contrary. Necessity doctrine offers a sanctioned route for bending, allowing for rules to evolve rather than forcing judges to torture statutory language or blatantly misapply a rule.

In contrast to common law evolution, which is more ordered and transparent, rule bending carries some notable pathologies. As we discuss in Part II, bending muddies the meaning of existing rules and raises broader

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[111] *Id.* (quoting Sexton v. Sexton, 105 N.W. 314, 316–17 (1905)).

[112] CONN. GEN. STAT. § 54-84b.

[113] State v. Davalloo, 128 A.3d 492, 494, 497, 499 (Conn. 2016).

[114] *Id.* at 503–05.

[115] *Id.* at 503–04.

[116] Morgan v. United States, 363 A.2d 999, 1004 (D.C. 1976).

[117] *Id.*

jurisprudential questions. When courts distinguish between a "verbal act" and a "communication," for example, they call into question the meaning of "communication" in a broader sense. Is an offer made to a spouse also not a communication because it is a verbal act? Or when courts suggest that lying to a spouse is not privileged because it is per se "not induced by affection, loyalty and integrity of the marital relationship," they beg very complex questions about the role of lying in marriage. Might lying sometimes be entirely motivated by a desire to preserve or foster the marital relationship? With no sanctioned route for modifying existing rules of exclusion, courts cannot meaningfully engage with these types of challenging substantive questions. Instead, their opinions necessarily focus on the very different task of (mis)characterizing otherwise inadmissible evidence such that it can be shoehorned into the trial.

D. Other Examples of Rule Bending

Beyond character evidence, hearsay, and privileges, courts bend the rules across evidentiary contexts to ensure the admissibility of essential evidence. The examples in this Section show two important sides of the rule bending spectrum. First, Rule 606, or the "no-impeachment rule," offers a rare instance when a bent rule led to actual rule changes. Second, the example of bending to avoid implementing the rape shield rule's exclusionary regime shows how bending can operate to thwart evidentiary reform.

Consider first the historical bending of the so-called no-impeachment rule. The no-impeachment rule, which is now codified in Federal Rule of Evidence 606, generally prevents jurors from testifying about the jury's decision-making process.[118] Specifically, if there is an "inquiry into the validity of a verdict or indictment," Rule 606(b)(1) prohibits juror testimony about "any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."[119] Of course, like most evidentiary restrictions, Rule 606's exclusionary rule is not absolute. Specifically, the rule allows jurors to testify about "extraneous prejudicial information" that affected juror deliberations or "outside influence[s] . . . improperly brought to bear on any juror."[120]

In its original form, the text of Rule 606 had problems. Most significantly, Rule 606 did not initially contain any exception that would allow jurors to testify about simple clerical mistakes on the verdict form.[121]

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[118] *See* FED. R. EVID. 606.

[119] *Id.* R. 606(b)(1).

[120] *Id.* R. 606(b)(2).

[121] *See id.* R. 606 advisory committee's note to 2006 amendment.

That omission naturally spawned vexing dilemmas for courts. For instance, in *TeeVee Toons, Inc. v. MP3.com, Inc.*, a jury was tasked with determining appropriate damages stemming from numerous copyright infringements.[122] Arithmetic in the jury room, however, can sometimes go awry.[123] The verdict form, prepared by a single juror, inaccurately calculated damages in the amount of $300,000.[124] But,

> [u]nanimously and unequivocally, the jurors stated that their decision had been to award a total verdict in the vicinity of $3 million and that the actual numbers entered on the verdict sheet were a result of calculation errors that had occurred in the process of converting the total award into awards for each individual infringement as required by the verdict sheet.[125]

Unfortunately, the juror's error was not discovered until the verdict was final.

The *TeeVee Toons* jury thus caused an evidentiary crisis. On the one hand, it was "manifest that the figures recorded in the verdict sheet, even though assented to in open court, [did] not reflect the verdict the jury actually agreed upon in their deliberations."[126] Stated differently, it was certain that the final verdict was inaccurate. On the other hand, the text of Rule 606(b) was clear. In its operative form at the time, it provided no exception allowing jurors to testify about mistakes on the verdict form.[127]

How did the court resolve the evidentiary dilemma? Rather than bowing to the text of Rule 606(b), it instead bent the rule. Despite the absence of a codified exception allowing juror testimony regarding clerical mistakes, the court unilaterally narrowed the text of Rule 606(b)(1).[128] In typical "bending" fashion, the court removed clerical mistakes from Rule 606(b)(1)'s scope by insisting that such mistakes were neither, in the language of the rule, "incident[s] that occurred during the jury's deliberations" nor something that

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[122] 148 F. Supp. 2d 276, 277 (S.D.N.Y. 2001).

[123] *See, e.g.*, U.S., Miss. Rd. Supply Co. v. H. R. Morgan, Inc., 542 F.2d 262, 269 (5th Cir. 1976) ("Although the jury ruled in favor of the company and clearly intended to award them all of the requested damages, an error in computation resulted in an award which was too large."); Lorquet v. People's Bank, No. 930309524, 2000 WL 775420, at *4 (Conn. Super. Ct. May 26, 2000) ("[T]he jury's award of economic damages in the amount of $73,294.21 is excessive due to an arithmetic error in the amount of $9921.98.").

[124] *TeeVee Toons*, 148 F. Supp. 2d at 277.

[125] *Id.*

[126] *Id.* at 278.

[127] *See id.* (noting that Rule 606(b) was "silent regarding inquiries designed to confirm the accuracy of a verdict" (quoting Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc., 836 F.2d 113, 116 (2d Cir. 1987))); *see also* FED. R. EVID. 606 advisory committee's note to 2006 amendment.

[128] *TeeVee Toons*, 148 F. Supp. 2d at 278.

would require consideration of a "juror's mental processes concerning the verdict or indictment."[129]

Few would argue against the merits of the court's decision in *TeeVee Toons*. Allowing an unquestionably mistaken verdict to stand merely for the sake of textualism is hardly a convincing justification. But it took rule bending to remedy the error and inspire change, both within the specific context of *TeeVee Toons* and in the evidentiary code itself. The modern, amended version of Rule 606(b) now contains an exception allowing jurors to testify about "a mistake . . . made in entering the verdict on the verdict form."[130] However, as the Advisory Committee notes acknowledge, the codification of the 2006 amendment to Rule 606(b) constitutes little more than a post hoc endorsement of prior, unsanctioned rule bending.[131] Indeed, in approving the new exception, the Advisory Committee expressly recognized that its genesis lay in "a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors."[132]

Other examples of rule bending prove more normatively questionable, and the practice can at times work against reform. Consider the bending of rape shield laws. Congress and almost all state legislatures enacted rape shield laws in the late 1970s and early 1980s.[133] These provisions responded to the problem that when women brought allegations of rape, the resulting trials often became focused on their own sexual histories.[134] This was due to a historical belief that women's past sexual conduct was relevant to their credibility or to proving whether they had consented to sex in a particular instance.[135]

Courts had previously admitted this evidence using a variety of evidentiary theories. In the federal system, courts used the exception for "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused" as it was then embodied in Federal Rule of Evidence 404(a)(2).[136] As Rosemary Hunter writes, this assumed misogynistically that female "unchastity" was itself a character trait, and that it might be pertinent

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[129] *Compare id.*, *with* FED. R. EVID. 606(b)(1).

[130] FED. R. EVID. 606(b)(2)(C).

[131] *Id.* R. 606 advisory committee's note to 2006 amendment.

[132] *Id.*

[133] Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 80.

[134] *Id.* at 92.

[135] *Id.* at 52–53.

[136] FED. R. EVID. 404(a)(2) (1994) (repealed 2000).

to the resulting trial.[137] Other courts held that because a woman's prior sexual history was relevant to whether she consented, it was admissible when a defendant sought to "negate the criminal element of nonconsent" or even "negate the element of force."[138]

Rape shield reforms were enacted to limit defendants' ability to center rape trials around the conduct of their alleged victims. Congress hoped thereby to protect the privacy of rape victims, prevent the degradation of victims, and encourage reporting of crimes. Despite those intentions, the decades since the initial enactment of rape shield laws have been doctrinally turbulent. Some judges have bent rape shield laws in order to admit evidence they see as essential to the case. In the first decade of these laws' existence, scholars observed appellate courts engaging in the usual gymnastics, ultimately allowing "the introduction of relevant sexual conduct evidence."[139] Courts did this through bending, often in the form of "circumventing the explicit statutory prohibitions and by relying instead on legislative history and underlying policy considerations."[140] In the third decade of rape shield laws' existence, courts were still bending to admit technically inadmissible evidence when the case "involved women previously intimate with the defendant, women who frequented bars to attract new sexual partners, prostitutes, or other women deemed similarly promiscuous."[141] As we discuss in Part II, though this experience may seem to counsel against a formal mechanism for bending, this final example is in fact an important case study that shows the need to bring bending into the open.

E. Conditions and Boundaries of Bending

The account of bending across the evidentiary landscape shows the phenomenon to be both omnipresent and significant. At the same time, it should not leave the impression that bending is happening anytime courts find flexibility in evidentiary principles or fail to follow the dictates in the rules. Bending, as we have defined it, has clear conceptual boundaries.

For a judicial action to constitute rule bending, the action must be intentional. Thus, mistakes are not examples of bending. This is an important point because evidence law is complicated, and judges will not always get

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[137] Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 134 (1996).

[138] Anderson, *supra* note 133, at 75–77 (2002).

[139] Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 773 (1986).

[140] *Id.*

[141] Anderson, *supra* note 133, at 55.

things right, especially as many evidentiary decisions are made on the spot. For instance, judges have been known to misstate the Rule 403 balancing test as a simple weighing of the probative value against the risk of unfair prejudice.[142] Textually, Rule 403 requires that the unfair prejudice *substantially* outweigh the probative value before the trial court may exclude such evidence. Such a mistake, whether consequential or not, is not an example of bending because it fails the intentionality requirement of bending.

Relatedly, bending must involve the *misapplication* of clear text or established evidentiary rules. Decisions interpreting statutory ambiguities or exercising judicial discretion do not qualify as bending. For example, a court using its judgment to decide precisely how excited a declarant needs to be to invoke the excited utterance exception under 803(2) is not bending. Such fuzziness in the doctrine may hinder consistent and predictable application, but making judgments within the space provided by a rule or doctrine is not bending.

Bending also typically involves judges giving the impression that they are following the existing legal regime. As the name implies, *bending* the rules is a way of stretching, distorting, or misapplying the rules in order to admit evidence, not explicitly declaring a new exception or framework that falls within its judicial purview. Thus, while Rules 413–15 may have been the culmination of years of rule bending, the codification of the rules itself was not an instance of bending. Similarly, declaring new exceptions to an evidentiary privilege under a common law regime is not bending, although doing so in a codified regime may be.[143]

Given the prevalence of rule bending, it is important to consider the consequences of current practice and its undesirable effects. The next Part explores these consequences and offers a potential solution.

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[142] *See, e.g.*, United States v. Lin, 131 F. App'x 884, 887 (3d Cir. 2005) ("Evidence that is properly admitted under Rule 404(b) must therefore be relevant to a proper purpose, and its probative value must outweigh the prejudice that is inherent in this kind of evidence."); Tolliver v. Liberty Mut. Ins. Co., No. C2:06-CV-904, 2010 WL 4053549, at *2 (S.D. Ohio Oct. 14, 2010) ("Pursuant to Rule 403 of the Federal Rules of Evidence, evidence will only be admitted when its probative value outweighs the risk of unfair prejudice.").

[143] The Confrontation Clause's treatment of dying declarations, FED. R. EVID. 804(b)(2), for example, is not an instance of rule bending. In *Crawford v. Washington*, Justice Scalia issued a caveat for dying declarations, noting that the exception had been around at the time of founding and therefore was *sui generis.* 541 U.S. 36, 56 n.6 (2004). This dictum has been applied routinely by lower courts. Peter Nicolas, *'I'm Dying to Tell You What Happened': The Admissibility of Testimonial Dying Declarations Post*-Crawford, 37 HASTINGS CONST. L.Q. 487, 492 n.24 (2010). Despite its application, the dictum does not conceptually cohere with *Crawford*'s testimonial framework. But it is not rule bending, as it was created explicitly by the body with authority to make the rules, in this instance the Supreme Court, and makes no effort to appear consistent with the rest of *Crawford*.

II. ORIGINS, CONSEQUENCES, AND A POTENTIAL SOLUTION

The case studies in the previous Part demonstrate that the rule bending phenomenon spans much of evidence law. Yet these instances are often characterized as mistakes, rather than what they really are—intentional misapplications of the evidentiary rules in order to admit evidence viewed to be essential to factfinding.

This Part focuses on the problem of bending and how to solve it. Section II.A explores the structural causes of evidentiary rule bending. Section II.B discusses the unique features and costs of evidentiary rule bending, and Section II.C proposes a solution in the form of a generalized residual exception, a safety valve that would allow judges to admit essential (but otherwise inadmissible) evidence under certain conditions. Section II.C also links the proposed residual exception to other safety-valve mechanisms elsewhere in evidence law and the law generally. Section II.D anticipates and responds to some of the primary objections to such a solution.

A. Why Do Courts Bend the Evidentiary Rules?

By now, one might wonder why rule bending is such a conspicuous phenomenon across evidence law. From character evidence to hearsay, privileges, and beyond, courts ensure the admission of essential evidence by refusing to give force to formalistic evidentiary prohibitions. But why is rule bending so necessary and prevalent?

Rule bending is arguably a byproduct of modern evidence law's rigidity.[144] In the common law era that preceded the codification of the Federal Rules of Evidence, rule bending was simply not necessary. Courts developed evidentiary doctrines incrementally, and what might now be considered rule bending was an inherent part of evidence law's common law evolution. For example, the hearsay exception for present sense impressions—now codified in Rule 803(1)—was a common law innovation carved out of the hearsay rule. James Bradley Thayer advocated in favor of formalizing the present sense impression exception only after recognizing that courts were *already* voiding the hearsay rule to admit contemporaneous observations.[145]

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[144] *See* G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 940 (2022) ("The arrival of the Federal Rules of Evidence ushered in an anomalous era in evidence law, an era marked by relative stagnation in the doctrinal space.").

[145] *See* James B. Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gesta*, 15 AM. L. REV. 71, 106–07 (1881); Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 HOW. L.J. 319, 327 (2009) ("Thayer cited a number of English cases that he contended, at least implicitly, recognized this exception.").

Dallas County v. Commercial Union Assurance Co., which was decided just a decade before the codification of the Federal Rules of Evidence in 1975, offers a classic vignette of this common law evidentiary evolution.[146] The case centered around a courthouse clock tower in Dallas County, Alabama that collapsed in 1957.[147] A dispute arose between Dallas County and its insurer about the cause of the accident. Dallas County insisted that a lightning strike caused the structural failure, meaning that the insurer was responsible for covering the resulting damage.[148] The insurer, however, sought to introduce a newspaper article from 1901 that reported that a fire occurred during the construction of the courthouse.[149] On the insurer's theory, it was the fire that caused the structural weaknesses that eventually resulted in the clock tower's collapse.

There was a significant problem with the insurer's evidence—the newspaper describing the historical courthouse fire was unquestionably hearsay.[150] It was an out-of-court news report offered by the insurer to prove its substance—that the clock tower has been burned in 1901. There was also no applicable hearsay exception. While the ancient documents exception might have covered the news article, the article referenced the observations of third parties, making it hearsay within hearsay.[151] Yet, there was no question that the news report was an essential piece of evidence. Since the fire occurred fifty-eight years before the trial, presumably no eyewitnesses could be located to directly testify about the event. The one link to the past was the news report. The news report effectively "needed" to be admissible.

With the evidentiary rules still uncodified, Judge John Minor Wisdom had no need to bend the rules in his opinion in *Dallas County*. He did not need to pretend that the article was not hearsay within hearsay, nor did he need argue that the ancient documents exception did not require firsthand knowledge. Instead, Wisdom candidly acknowledged that the news report was hearsay but, declaring the hearsay rule a "common law archaism[]," held that it should not preempt "the exercise of common sense in deciding the admissibility of hearsay evidence."[152] Because the court was convinced that the news report was "necessary and trustworthy, relevant and material," it

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[146] 286 F.2d 388 (5th Cir. 1961).

[147] *Id.* at 390.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 391–92 ("Of course, a newspaper article is hearsay, and in almost all circumstances is inadmissible.").

[151] FISHER, *supra* note 42, at 581.

[152] *Dallas County*, 286 F.2d at 391–92, 395–97.

declared the report admissible.[153] Evidence law simply took another step in its centuries-old common law journey.

Codification, however, eliminated this direct avenue for evidentiary development.[154] With the codification of the Federal Rules of Evidence in 1975, and their adoption by the vast majority of states, judges' ability explicitly to shape evidence law's substantive development ended.[155] To be sure, codification does not necessarily entail stagnation—rulemakers are positioned to continue the evolution of evidentiary doctrine. However, in practice, development in many doctrinal areas has slowed. For both institutional and political reasons, rule makers have assumed an "inherently conservative" posture toward the Federal Rules of Evidence.[156] Moreover, even when the rule makers do support a potential amendment to the Federal Rules of Evidence, implementing it is far from easy. To formally enact any change, a proposed amendment must gain approval (or, minimally, avoid resistance) from the Judicial Conference and the Standing Committee on Rules of Practice and Procedure, the Supreme Court, and both houses of Congress.[157] Only once amendments run that gauntlet do any changes to the Federal Rules of Evidence take effect.

Evidence doctrine has thus remained largely inert during the first fifty years of the Federal Rules of Evidence. Though rule makers do occasionally tinker with the federal evidentiary code, most changes by rule makers have been exceedingly modest.[158] For example, recent amendments have reworked the notice requirements for the admission of Rule 404(b) past acts,[159] changed the process for authenticating electronic evidence under Rule 902,[160] and slightly altered the language of Rule 807's residual hearsay exception.[161] Though these recalibrations are no doubt useful, widely recognized problems in evidence law—such as specious empirical claims and problematic cultural

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[153] *Id.* at 398.

[154] *See* Nunn, *supra* note 144.

[155] 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, 416 (1996) ("Congress continues to challenge the traditional, common-law judicial hegemony over evidence law.").

[156] Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 160 (2008) ("The evidentiary rulemaking process is inherently conservative.").

[157] Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 684 (2000); Teter, *supra* note 156, at 160.

[158] Significant changes, such as the rape shield law under Rule 412, and the sexual assault rules under Rules 413–15, have involved direct congressional legislation.

[159] FED. R. EVID. 404 advisory committee's note to 2020 amendment.

[160] *Id.* R. 902 advisory committee's note to 2017 amendment.

[161] *Id.* R. 807 advisory committee's note to 2019 amendment.

assumptions—remain conspicuously unaddressed.[162] The result is an evidentiary code that, in the words of a prominent judge, has fallen into a "dogmatic slumber."[163] While state statutory and constitutional evidence law have seen comparatively more evolution since 1975, in recent decades that evolution has also tended in the direction of fixing evidentiary boundaries.

This turn to codification has created a judicial conundrum. Courts must now apply rigid, formalistic rules when making evidentiary determinations, and these determinations purport to adhere strictly to the text of a particular rule or statute.[164] After all, the whole point of the rules of evidence was to produce uniform rules governing the admissibility of evidence at trial. On many occasions, such formal textual fidelity causes no headache. But what happens when the evidentiary code demands the exclusion of seemingly essential evidence? What happens when courts are presented with the choice between fidelity to the rules and an overwhelming sense that a certain piece of evidence must reach the jury for a fair determination of a case?

It is here that courts bend the rules. Baldly flouting the rules would be tantamount to judicial anarchy, and few judges take such a confrontational approach. But blind adherence to the rules is equally troubling. Excluding essential evidence merely to maximize compliance with the rules' text is not obviously better than ignoring the rules altogether. Thus, when it comes to essential evidence, courts split the difference. They express nominal fealty to the rules, but then they apply the rules in an analytically tortured fashion to engineer the desired admissibility outcome.

Rule bending is thus a product of necessity. Courts are cabined by restrictive and largely inert rules or statutory boundaries. They officially lack the power to unilaterally amend the dictates. Yet, at the same time, judges resolve to fulfill their roles as fair and just arbiters in admitting essential evidence into the courtroom. Courts therefore bend rules as they walk the tightrope between facial adherence to a codified rule and their firm conviction that certain pieces of evidence must be admissible.

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[162] *See* Nunn, *supra* note 144, at 941–43 ("[D]evelopments in both the empirical and normative literatures testify to the continuing necessity of broad-scale evidentiary reform.").

[163] United States v. Boyce, 742 F.3d 792, 801 (7th Cir. 2014) (Posner, J., concurring).

[164] In a famous 2015 speech, Justice Kagan famously quipped, "We're all textualists now," recognizing—albeit facetiously—that textualist interpretive methodology dominates the modern era. Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 18, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/86AP-PJ6R]. Evidence law proves no exception. Following the codification of the Federal Rules of Evidence, some scholars have effectively advocated for a moderate textualist reading of the Rules. *See, e.g.*, Imwinkelried, *supra* note 155, at 415–17 (noting Congress's continued intervention into the Federal Rules militates a stronger adherence to the Rules' text). That effort has yielded dividends as, today, "[s]trict application of the Federal Rules of Evidence is common; judicial consideration of the merits of that approach has been, to this point, quite rare." Nunn, *supra* note 144, at 980.

B. Evidence Law's Exceptionalism

But is *evidentiary* rule bending special? Is it a problem unique to evidence law? Since it mediates between formal legal dictates and a practical sense of necessity, one might argue that evidentiary rule bending is no different than many other areas in which courts bend rules or face interpretative quandaries. For instance, does rule bending just invoke the age-old debate about rules versus standards,[165] textualism versus purposivism,[166] or even legal formalism versus legal realism?[167] How is rule bending different from other atextual actions in response to moral–formal dilemmas in the law?[168]

To be sure, evidentiary rule bending contains elements of these various legal fault lines. Bending sees the rigidity of rule-based mandates lose force as a judge's discretion instead drives an admissibility determination, an approach to decisionmaking that is a core feature of standards.[169] The fundamental goal of trial—accurate adjudication—predominates when a judge decides to bend a rule to admit essential evidence, an interpretive approach that echoes purposivism's rejection of staunch textualism.[170] When judges bend, they have determined that the "right" answer to an admissibility question requires consideration of external realities beyond the narrow dictates of an evidentiary code, a clear-eyed approach to legal reasoning that is reminiscent of realism.[171]

But evidentiary rule bending is something more. Something unique. As hinted above, the evidentiary rules represent an especially extreme instance of judicial usurpation. Unlike many other forms of positive law, evidentiary codes do not contain broad generalities or sweeping language that the codes'

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[165] Parchomovsky & Stein, *supra* note 15, at 166 ("Conventional wisdom holds that legal commands come in two varieties: rules and standards."); Sullivan, *supra* note 15, at 57 ("Rules, once formulated, afford decisionmakers less discretion than do standards."); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992) ("Arguments about and definitions of rules and standards commonly emphasize the distinction between whether the law is given content *ex ante* or *ex post*.").

[166] *See, e.g.*, Manning, *supra* note 16, at 72 (commenting on the difficulties of effectuating congressional purpose when it seemingly does not align with the text).

[167] Sebok, *supra* note 17, at 2057 ("[T]he rough outlines of American positivism had been set by the debate between realism and formalism.").

[168] For example, as Robert Cover theorized, judges must often decide what to do when their "consciously held and articulated principles" collide. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 227 (1975).

[169] *See supra* Section I.A (discussing bending of FED. R. EVID. 404(b)).

[170] *See* Swift, *supra* note 68, at 491; United States v. Iron Shell, 633 F.2d 77, 85–86 (8th Cir. 1980).

[171] *See* TeeVee Toons, Inc. v. MP3.com, Inc., 148 F. Supp. 2d 276, 278 (S.D.N.Y. 2001).

enactors leave for judges to later resolve.[172] That is, the Rules of Evidence are not the Constitution, nor even a typical statute. Instead, evidentiary codes are meant to entirely displace the judiciary's common law control over the development and evolution of evidence law.[173] Detailed and specific provisions now standardize and systemize evidentiary practice across jurisdictions; ad hoc judicial proclamations, which might upset the rules' uniformity, no longer have any formal place in the system.[174] The sole responsibility of a judge is to hew closely to codified rules, using only the narrow windows of discretion explicitly provided, and leaving any questions about potential changes in evidence law to committees.[175] Thus, the evidentiary rules are, perhaps in the deepest sense the law can offer, *rules*.

Yet evidence law is a curious place to so fervently sideline judicial discretion. After all, evidence law does not exist in a vacuum. Rather, it is a structural apparatus intended to enable courts to achieve the higher order goal of fair and accurate verdicts.[176] Thus, regardless of formal delegations of authority, evidentiary rules that seem to hinder (rather than help) the attainment of a correct verdict in a case will face intense scrutiny.

And therein lies a singular feature of evidence rules. When tasked with resolving a question of law, some might suggest that it is defensible—even laudable—for a judge to wholly defer to legislators' enacted text, even if such deference might produce what is, in the judge's view, a suboptimal legal outcome.[177] When tasked with resolving an empirical question of fact, however, few, if any, would suggest that a judge should wholly defer to rules

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[172] Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 745 (1990) ("The Court has indicated that the plain language of the Rules now controls outcomes without regard to policy, history, practical operation of the law of evidence, or new conditions.").

[173] Edward J. Imwinkelried, *"Importing" Restrictions from One Federal Rule of Evidence Provision to Another: The Limits of Legitimate Contextual Interpretation in the Age of Statutes*, 72 OKLA. L. REV. 231, 232 (2020) ("The Congress that enacted the Federal Rules of Evidence was a legislature jealous of its constitutional prerogatives, in part because it had recently battled Richard Nixon over claims of executive privilege in federal court during the Watergate investigation.").

[174] Imwinkelried, *supra* note 155, at 412–13 (setting forth a political case for giving the text of the Federal Rules of Evidence great relative weight).

[175] *Id.* at 405–06 (highlighting another commentator's concession that nontextualist approaches to interpreting the Federal Rules of Evidence do not offer "the absolute certainty and predictability of results that some legal theorists would like." (quoting Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1815 (1995))).

[176] *See* FED. R. EVID. 102.

[177] William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant.").

committees' codes if such deference will risk a factually incorrect verdict.[178] For example, few would dispute the importance of admitting evidence that a particular employer previously passed over six women for promotions in favor of less qualified male colleagues in an employment discrimination case despite rules of evidence that unambiguously require the exclusion of such evidence. Stated more simply, "bad" legal outcomes are widely recognized as a fairly common, if unfortunate, feature of our juridical system. That is, there is a general consensus that people can and will disagree on what the substantive law demands. By contrast, "bad" factual outcomes—meaning factual findings that fail to comport with empirical reality—are universally derided as anathema and unacceptable.[179]

Deference to evidentiary rules is therefore likely to run up against conceptions of practical necessity in a unique way. Given evidence law's primary influence over resolving questions of fact—the very questions for which "wrong" answers are uniquely unacceptable—a judge must couple her adherence to the text of the rules of evidence with the equal (if not greater) imperative to produce an accurate verdict.[180] Where those two interests work together, as is often the case, judicial deference to text is right and appropriate. But where those two interests conflict, bending is the result—not merely because the judge believes it to be a superior analytical or jurisprudential approach, but instead because she believes it to be fundamentally *essential*.[181]

Thus, evidentiary rule bending, despite its familiarities, is not just another instantiation of existing jurisprudential debates. Though, like standards, evidentiary bending spurns the confining dictates of rules, it invokes judicial discretion only when rule deference would lead to a seemingly repugnant outcome. Though, like purposivism, bending departs from the rules' strict text, it is oriented toward the higher order moral imperative of achieving accurate verdicts, an objective that may require—or seem to require—spurning legislative intent. And though, like realism, bending incorporates external factors in legal decisionmaking, it uniquely does so in the paramount pursuit of factual accuracy.

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[178] *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free.").

[179] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *352 ("[B]etter that ten guilty persons escape, than that one innocent suffer."); Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997).

[180] *See, e.g.*, Tehan v. United states *ex rel.* Shott, 382 U.S. 406, 416 (1966); United States v. Bogers, 635 F.2d 749, 751 (8th Cir. 1980); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.").

[181] *See supra* Part I.

Effectively, then, evidentiary rule bending is not merely a dispassionate interpretive tool; it is a safety valve, safeguarding a judge's oath to "administer justice."[182] In this way, it is perhaps most analogous to a judicial tool for reconciling the formal commands of the legal rules with the moral imperative of seeking just outcomes.

Rule bending's unique features, however, come at a unique cost. While it may often seem to produce more just outcomes, using bending as a tool to reconcile formal rules and the goal of factual accuracy is problematic.[183] Bending generally bypasses the need to be explicit about why certain evidence is important and what rules stand in its way. By pretending that the proverbial square peg fits in the round hole, judges often avoid directly confronting problems with the rules.[184] In other words, transparency and an important avenue for legal evolution is lost.

Rule bending has other costs as well. When courts bend rules to admit evidence, they covertly instantiate their own sense of pragmatic or moral necessity.[185] While those judicial intuitions may often be correct, bending has occurred in contexts where a judge's conviction in the necessity of evidence controversially cuts against reform measures, as in the bending of rape shield provisions.[186]

And even if normatively correct, bending renders the underlying rules less able to function properly in ordinary cases. For instance, once a judge offers a nonpropensity excuse for admitting evidence that clearly sounds in propensity, future courts and litigants may take advantage of new pathways around otherwise sound rules of evidence.[187] Even when such pathways

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[182] 28 U.S.C. § 453.

[183] Michael D. Gilbert, *Insincere Rules*, 101 VA. L. REV. 2185, 2217–18 (2015) ("Dishonesty . . . may yield good consequences, but it may also yield bad ones . . . [that are] particularly acute in one area, judicial decision making.").

[184] *See id.*; *see also* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990–91 (2008) (advocating for judges to be forthright with their legal justifications); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("[C]andor is the sine qua non of all other restraints on abuse of judicial power . . . .").

[185] *See* Robert J. Pushaw Jr., *Comparing Literary and Biblical Hermeneutics to Constitutional and Statutory Interpretation*, 47 PEPP. L. REV. 463, 488 (2020) ("The main problem with pragmatism is that, as applied, it gives judges vast discretion, which is usually exercised to reach outcomes that conform to their political, ideological, or personal preferences.").

[186] *See supra* Section I.D.

[187] As Justice Oliver Wendell Holmes, Jr. memorably described a version of this process:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate

prove chimerical, they create uncertainty and unpredictability, undermining one of the main rationales for having rules in the first place.

So, what is to be done? Fortunately, the distinctive context of evidentiary rule bending points toward a natural solution. And this solution can simultaneously capture important advantages of bending while also retaining the transparency, accountability, and uniformity offered by a codified evidentiary regime. If the rules of evidence are currently straining under the tension of bending, it is time we make the rules more flexible.

C. Codifying Rule Bending: A Proposal

Given the significant doctrinal costs of evidentiary rule bending, we offer a doctrinal fix in this Section that solves the bending problem we have discussed throughout this Article. Our doctrinal solution creates space for controlled and transparent common law evolution of the evidentiary rules, while simultaneously removing the pressure and incentives to bend around them.

Specifically, we propose adding the following generalized residual exception to the rules of evidence:

> **Rule 107. Generalized Residual Exception**
>
> (a) In General. Under the following conditions, a court may admit evidence that is otherwise inadmissible under these rules if:
>
> (1) the evidence is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
>
> (2) the general purposes of these rules and the interests of justice will best be served by admission of the evidence.
>
> (b) Notice. The evidence is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the evidence so that the adverse party has a fair opportunity to respond.
>
> (c) Standard of Review. Appellate courts shall review *de novo* any evidence admitted under this rule.

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interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

The perceptive reader will no doubt recognize that this draft language draws heavily from the original and current language of the residual hearsay exception (Rule 807). That parallel is entirely intentional.[188] Our point is that as radical as our position may initially seem, a generalized residual exception has longstanding conceptual underpinnings. We already have a residual exception to the hearsay rule, but there is no reason to confine it to hearsay. The proposed rule would effectively generalize the hearsay residual exception to encompass all of the evidence rules, and would be placed in Article I of the Federal Rules of Evidence to emphasize its general nature.[189]

1. Features

Several aspects of our proposed Rule 107 deserve special attention. Subsection (a) limits the rule's operation to the essential types of evidence that have prompted evidentiary bending, evidence that is highly probative and necessary for a fair determination of the case. The exception also applies only when the policies behind the various exclusionary rules are attenuated. In the character context, that means, among other things, less danger of the jury convicting the defendant out of animus for past bad acts. In the hearsay context, that means the evidence is likely reliable. And in the privileges context, that means the evidence raises diminished privacy concerns.

Subsection (b) is a basic notice provision found throughout the rules of evidence. Since Rule 107 will be a relatively unusual argument, fairness dictates that the opposing party should be given notice and an opportunity to prepare a response. The notice requirement means that courts will typically resolve these questions through motions in limine.

The standard of review in Subsection (c) creates an important, asymmetric standard of review for admissions made under the proposed Rule 107. The asymmetry further highlights the extraordinary nature of the generalized residual exception. If the Rule 107 exception is denied by the trial court, the usual appellate review for abuse of discretion follows. However, if the trial court in its discretion admits evidence under Rule 107, then the appellate court reviews the decision de novo. If evidence is truly essential for the fair determination of a case, then both the trial and appellate courts should agree on that score. De novo review is also conceptually

[188] An alternative way of phrasing the scope of the generalized hearsay exception is to use a reverse 403 test, in which evidence is admitted only if the probative value substantially outweighs the unfair prejudice. *Cf.* FED. R. EVID. 609(b) (using a reverse 403 test for the admission of convictions greater than ten years old). The idea of unfair prejudice, however, can be confusingly self-referential in the context of a residual exception, since the jury's use of evidence for an inadmissible purpose is often a form of "unfair prejudice." The proposal thus avoids the "unfair prejudice" language.

[189] As chance would have it, the first open rule number in Article I is 107, which conveniently ties it back to its hearsay formulation in Rule 807.

appropriate. By invoking Rule 107, the court effectively creates a new, albeit somewhat case-specific, exception to the existing rules of the evidence. Whether such an exception should exist is a question of law, and should be reviewed accordingly by the appellate court.

Finally, despite the asymmetric standard of review, trial court judges should still have plenty of incentives to invoke the generalized residual exception as opposed to bending the rules. Bending the rules by definition is an abuse of discretion, as it involves the misapplication of the rules. Use of the generalized residual exception involves only de novo review.

2. Other Evidentiary Analogs

In addition to Rule 807, other analogs within the law of evidence demonstrate that such a generalized residual exception is not radical. The rule of completeness, codified under Rule 106, for example, allows the admission of potentially inadmissible evidence for the purpose of correcting a misleading impression.[190] The rule of completeness is motivated by fairness and accuracy, and frequently features arguments analogous to the generalized residual exception.[191] For example, the completion is admissible because it is necessary and highly probative to the factfinder's understanding of the evidence, and the unfair prejudice concerns are reduced, as the opponent perpetrated the distortion or misunderstanding.

Another analog to proposed Rule 107 is the somewhat amorphous constitutional doctrine often attributed to *Chambers v. Mississippi*[192] and *Rock v. Arkansas*.[193] This doctrine is variously described as the right to present a defense, compulsory process, or simply a form of due process. The *Chambers* rule gives criminal defendants the right to offer otherwise inadmissible evidence if it is critical to the defense and the policy rationales of the relevant evidentiary rule are attenuated.[194] The *Chambers* rule, however, is obviously much narrower than proposed Rule 107. *Chambers* is a constitutional doctrine and can be raised only by defendants in a criminal case. Indeed, the evidentiary rules should arguably avoid such potential

[190] *See* Daniel J. Capra & Liesa L. Richter, *Evidentiary Irony and the Incomplete Rule of Completeness: A Proposal to Amend Federal Rule of Evidence 106*, 105 MINN. L. REV. 901, 905, 910 (2020); Edward J. Cheng & Brooke Bowerman, *Completing the Quantum of Evidence*, 105 MINN. L. REV. HEADNOTES 323, 323–25 (2021).

[191] *See* Capra & Richter, *supra* note 190, at 902.

[192] *See* 410 U.S. 284, 294, 302 (1973).

[193] *See* 483 U.S. 44, 52 (1987).

[194] *See Chambers*, 410 U.S. at 302.

constitutional violations by having safety valves like a generalized residual exception.[195]

A final analog is the common law principle of necessity. As discussed, federal courts have referenced this principle in creating an exception to the spousal testimonial privilege for cases of spousal abuse.[196] But the common law "necessity principle" has far deeper, cross-substantive roots in evidence law. In the context of spousal privileges, Wigmore suggests that necessity principles were operating even at a time when interested parties, and by extension their spouses, were disqualified from testifying.[197] It allowed a spouse to testify despite this prohibition in situations where it was thought to be "impossible" to obtain the evidence through other witnesses.[198]

At common law, there was also a "necessity principle" in the hearsay context. Indeed, Wigmore argued for grouping the exceptions to the hearsay rule "based upon the differing nature of the Necessity principle."[199] This grouping will be familiar to modern students of evidence law. It orders necessity exceptions to hearsay according to whether the "declarant is shown to be personally unavailable as a witness by reason of death or the like," or if the statement is necessary for some other reason and may be admitted "without showing the personal unavailability of the declarant at all."[200] As Wigmore explains, hearsay exceptions at common law were almost uniformly justified by the necessity principle, though the shape of the necessity and whether courts would look for additional indicia of reliability might vary.[201]

This latter carveout for necessity has echoes in the creation of the residual exception to the hearsay rule.[202] Proposed Rule 107 extends this

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[195] The rape shield provisions contain a similar carveout for evidence necessary to preserve the defendant's constitutional rights, which would likely no longer be necessary in light of the generalized residual exception.

[196] *See supra* Section I.C.2.

[197] 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 612 (2d ed. 1923) ("The rules of interest-disqualification always recognized certain exceptions founded on a supposed necessity.").

[198] *Id.* (describing exception for actions "by the husband for *injury to the wife*" and cases where necessity would allow one spouse to testify against the other).

[199] *Id.* § 1426.

[200] *Id.* (emphasis omitted).

[201] *Compare id.* § 1522 (describing circumstantial guarantees of trustworthiness to bolster necessity rationale in context of business records exception), *with id.* § 1431 (describing the necessity caused by the death of the witness as "all that need be shown" in order to admit dying declarations).

[202] FED. R. EVID. 807 advisory committee's note to 2019 amendment (describing how the "necessity requirement" will "prevent the residual exception from being used as a device to erode the categorical exceptions").

logic. It creates a rule-based way to instantiate the principles that grounded the necessity doctrine across evidentiary contexts.

3. The Advantages of Transparency

The most obvious advantage of a generalized residual exception over the current world of rule bending is transparency. Rather than having judges bend the rules to achieve justice in the individual case, proposed Rule 107 would provide a legitimate and transparent mechanism for admitting essential evidence. And, importantly, by encouraging transparency, the proposed rule reempowers judges to participate in the development of evidentiary rules.

Transparency has a number of beneficial effects. First, it promotes uniformity and predictability. Rule bending occurs behind the scenes, on an ad hoc basis, and with limited appellate review. As a result, bent rules offer little predictability to litigants. Because proposed Rule 107 invites open appellate review, an exception can quickly become established law in a circuit, informing litigants in future cases.

Second, the transparency of Rule 107 prevents the doctrinal confusion wrought by rule bending. The major selling point of an evidence code is that it is clear and easy to apply. Bent evidentiary rulings muddy the clarity of a code with mystifying interpretations that appear contrary to the statutory text. If courts make explicit exceptions rather than bend the rules, those exceptions can be separated for independent analysis, leaving the codified rules intact.

Last, proposed Rule 107 reempowers courts to participate in the evolution of the evidentiary rules. In a world with a generalized residual exception, trial courts can declare new exceptions in cases involving essential evidence. The appellate courts will then rule upon these explicit exceptions, building an easily observed body of case law. If other appellate courts concur, then a consensus for a new rule of evidence will emerge that the rules committee can easily codify. If other appellate courts disagree, then the Supreme Court or the rules committee can resolve the split. And in all cases, developments will be transparent such that commentators can further advance and systematize the debates. In this respect, Rule 107 has the potential to reinvigorate evidence scholarship and rulemaking, and to combat stagnation in the development of evidence rules.

The genius of the common law was its bottom-up, evolutionary approach.[203] And when it comes to evidence, such innovation naturally

[203] Charles L. Barzun, *The Common Law and Critical Theory*, 92 U. COLO. L. REV. 1221, 1230–31 (2021) (noting how Justice Souter "stressed the value of taking a 'bottom-up' approach to deciding cases").

occurs at the trial level, where judges confront the proof process on a daily basis. Codified rules offer uniformity and clarity, but they suffer from the rigidity of a top-down approach. No matter how capable a rules committee is, it must rely substantially on the observations of the individual judges, which is why prior work has shown that the federal Advisory Committee operates primarily as an ex post codifier, as opposed to an ex ante innovator.[204] Proposed Rule 107 facilitates innovation and evolution within a rule-based structure, as transparency provides insight into the trial judge's decision-making process for admitting evidence. Relatedly, Rule 107 will also allow for scrutiny of judicial decisions that would thwart such innovation and evolution by refusing to implement codified rule reforms.

All told, the generalized residual exception allows trial judges to become part of evidentiary development again. And indeed, to the extent that the Federal Rules of Evidence exercise outsized influence on legal development at the state level, proposed Rule 107 allows state courts to become more involved as well by explicitly encouraging them to declare new exceptions in the case law.

4. Illustration

As a quick illustration of how proposed Rule 107 would operate, let us return to the *Cosby* case from the Introduction.[205] In *Cosby*, the testimony of the other accusers is textually impermissible propensity evidence, but a court could admit it under the generalized residual exception. Through its specificity and degree of repetition, the pattern of conduct is highly probative: it bolsters the victim's allegation, and it strongly rebuts claims that the incident was a misunderstanding or fabrication. As described above, their probative value does not change the fact that these logical chains all depend on propensity. Cosby seems more likely to have engaged in the conduct at issue because he engaged in an extremely similar pattern many times previously. At the same time, the danger of character-based unfair prejudice is reduced in cases involving such pervasive patterns. Finally, the evidence is essential. The *Cosby* case provides a particularly stark example of how necessary the other acts evidence was because it was tried twice. In the first trial, the judge excluded testimony about his past assaults on other women and the jury was hung.[206] In the second trial, once some of that evidence was admitted, Cosby was convicted.[207] One motivation behind the

[204] *See, e.g.*, Nunn, *supra* note 144, at 977 (surveying amendments to the Federal Rules of Evidence and demonstrating that the majority have their genesis in judicial decisions or circuit splits).

[205] Commonwealth v. Cosby, 252 A.3d 1092 (Pa. 2021).

[206] *Id.* at 1118–19.

[207] *Id.* at 1119, 1123.

propensity rule is to prevent defendants from being "punished" for their past misdeeds repeatedly. Here, however, the past acts are necessary to prevent the defendant from unfairly benefiting from the exclusion of reliable and inculpatory evidence against him.

Under Proposed Rule 107, gone are the disingenuous arguments that the past acts are offered for a nonpropensity purpose, or the erroneous one that they fall under an "exception" such as intent, common scheme or plan, or absence of mistake. Under proposed Rule 107, the prosecution can acknowledge the evidence as propensity, but then argue directly that an exception should apply. Trial court recognition of any such exception would then be subject to appellate de novo review. Approval at the appellate level would establish a new exception in highly similar sexual assault cases, and place pressure on the Pennsylvania rules committee to codify it into the rules. All the while, commentators could directly debate the merits of such an exception to the propensity rule. And all participants would be spared the necessity of finding a convoluted or arcane argument as to why the past acts evade the propensity bar.

D. Objections

Any innovation to the evidentiary rules, especially one as broad as a generalized residual exception, is sure to raise objections. In this Section, we address some major objections to our proposed Rule 107.

1. Judicial Error

One of the most serious objections to any attempt to legitimize evidentiary rule bending is that judges may be wrong, and the codified rules may be right. At times, legislatures have had to intervene in certain evidentiary areas because judicial intuition or common sense led to the systematic admission of evidence that proved unreliable or unfairly prejudicial in case after case.[208]

For example, what if courts chose to use Rule 107 to admit evidence excluded under the rape shield statutes? As outlined above, rape shield reforms were enacted to limit defendants' ability to center rape trials on the conduct of the women they were accused of raping.[209] Congress hoped thereby to "protect[] the privacy of rape victims, prevent[] the degradation and humiliation of victims, and encourag[e] rape victims to come

[208] *See* Erin Wilson, Note, *Let's Talk Specifics: Why STI Evidence Should Be Treated as a "Specific Instance" Under Rape Shield Laws*, 98 N.C. L. REV. 689, 692 (2020) (noting that, in sexual assault cases, the "harsh treatment of victims caused victims' rights advocates to question the propriety of a rule that allowed such expansive probing into a victim's past behavior," so much so that nonjudicial calls for reform "ultimately led Congress to enact Federal Rule of Evidence 412").

[209] *See supra* Section I.D.

forward."[210] Yet, these reforms have long cut against evidentiary intuition. Rape shield laws have been described as eliminating "an exception to the general rules on character evidence" that "remain[s] contested in legal minds and legal practice."[211]

To the extent that legal intuition is still split on the importance of admitting the prior sexual history of complainants in rape cases—and there is reason to believe that it may be[212]—our proposed Rule 107 exception might be criticized for opening the door to courts seeking a way around the evidentiary constraints of rape shield provisions. In one sense, this is true. Our proposed Rule 107 would permit motivated judges to opt out of the constraints of rape shield laws when they believe sexual history evidence is essential to the case. Yet, for the reasons described below, we believe that by opening Rule 107's door to this evidence, we would close others that have proved far wider and less subject to scrutiny. In other words, we would rechannel the bent evidentiary decisions that have long circumvented rape shield prohibitions by offering a legitimate path for such evidence accompanied by a robust process for appellate review.

To see why this is the case, we must first recognize that judges have already long bent rape shield laws in order to admit evidence they see as essential to the case.[213] As previously discussed, rape shield jurisprudence is an area that already suffers from so much bending that it has "render[ed] the shield a sieve,"[214] and where evidentiary strictures are at times "inconsisten[t] with our intuitions about the right judgments."[215] The question therefore remains whether our proposed Rule 107 will merely legitimize undesirable work-arounds to admit sexual history evidence. For the reasons canvassed above, we believe that it will not.[216] As we explain, proposed 107(a) imposes a heightened requirement of probativity. Thus, a proponent would have to show that the desired sexual history evidence is more probative on the point than any other evidence. Crucially, this requires that the proponent actually explain the way in which sexual history evidence is not merely relevant but essential to a question in the case. So to take a typical example, the proponent will need to spell out why evidence that a woman spends time in bars is more

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[210] Hunter, *supra* note 137, at 134.

[211] *Id.* at 136.

[212] *See* Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. WOMEN'S J.L. & GENDER 183, 207–10 (2017); Corey Rayburn Yung, *Sex Panic and Denial*, 21 NEW CRIM. L. REV. 458, 476–80 (2018) (attributing ongoing cultural "unwillingness to believe victims of sexual violence" as a result of converging forces of sex panic and denial).

[213] *See supra* Section I.D.1.

[214] Capers, *supra* note 212, at 205.

[215] *Id.* at 215.

[216] *See supra* Part II intro.

probative than any other evidence on the question of whether she consented to sex with a particular man at a particular time than any other available evidence.

Further, proposed 107(a) requires that the admission of the evidence serve the purposes of the rules.[217] If the rules contain a rape shield provision, this would incorporate by reference the purpose of shielding women who come forward about their rapes from having their sexual history aired in the courtroom and the concern that this evidence will unfairly prejudice the jury. Finally, the de novo standard of review required by 107(c) would mean that a reviewing court would review any admission of sexual history evidence de novo, ensuring that it was more probative than other evidence and that it would serve the purpose of the rule and the interests of justice.

Rape shield statutes at present contain a fuzzy, constitutionally based residual exception that applies when excluding the sexual history evidence would "violate the defendant's constitutional rights."[218] Although evidence admitted in this way does not involve bending, the exception suffers from problems common to bending. It is unpredictably applied and its boundaries are amorphous. Cases applying this exception have left open central questions, such as how a court should "balance the state interests against a defendant's constitutional right" or whether it matters how strong the evidence is, or what standard the court should apply "in judging the importance of the evidence to the defense" and which way a tie should go.[219]

Our rule offers a number of improvements to current rape shield doctrine beyond the potential elimination of bending. Our proposed Rule 107 answers these questions while still protecting a defendant's constitutional rights by making sure that there is an avenue for admission of truly probative and irreplaceable evidence. It places the emphasis squarely where it should be, on the probative value of the evidence and its necessity.[220] It suggests that the defendant has a right to the evidence if it is more probative on the point than any other evidence and the general purposes of the rules and the interests of justice will be best served by admitting it. A tie means the evidence would stay out because it is not "more probative." In addition, two courts must agree on these findings in order for them to survive review.

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[217] *See* FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

[218] *Id.* R. 412(b)(1)(C).

[219] Capers, *supra* note 212, at 207.

[220] In this way, our proposal is in line with reforms proposed by Capers, who argues for a test that focuses on "relevancy and . . . reliability." *Id.* at 216.

This returns us to the main advantage of our proposal: transparency.[221] Rather than using a combination of bending and the constitutional carveout to admit sexual history evidence in the face of the rape shield prohibition, courts would have a clear path for doing so in cases where they believe it is truly warranted. Providing this path offers benefits to uniformity and predictability. Courts can easily review how their peers have viewed the admission of sexual history evidence under the Rule. The doctrinal confusion occasioned by the plethora of routes courts have used to circumvent the rape shield laws would be ameliorated. In addition, any problematic patterns in the application of Rule 107 in sexual assault cases will be easier to identify and address.

Rule 107 has a final potential benefit. By making it clear when courts are skirting rape shield or other rules, Rule 107 can provide an avenue for public debate about the policies behind the rules and how best to accomplish them. When bending is allowed to continue unchecked, it pushes controversial rule innovations underground, making them hard to contest openly in all but the most highly publicized cases. Even those who believe there should be no rape case in which a woman's sexual history is admitted should prefer a public dialogue about the de facto exceptions to rape shield rules that courts are creating over the status quo in which those exceptions are much harder to track and expose. By legitimizing bending under certain conditions, and in a way that renders other carveouts largely unnecessary, Rule 107 will centralize information about what courts are doing in response to evidentiary rules. This, in turn, means that rules committees, high courts or legislatures can identify more effective steps to take to address problems when judicial intuition proves to be producing biased or otherwise problematic decisions under Rule 107 in the run of cases.[222]

2. Standards as a Superior Response to Bending

The categorical nature of many evidentiary rules contributes to rule bending. Codified *rules*, as opposed to standards, leave little wiggle room for courts to address difficult cases, causing them to bend. An alternative

[221] *See* Schwartzman, *supra* note 184, at 1010–11; Shapiro, *supra* note 184, at 737; *see also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–72, 388 (1978) ("By and large . . . the fairness and effectiveness of adjudication are promoted by reasoned opinions.").

[222] The argument in this Section applies with equal force to concerns that judges will follow their intuition to admit propensity evidence against defendants in criminal cases even when such evidence is not exceptionally probative or essential. In short, it is clear that this is already happening with alarming regularity. But it is done by courts that continue to pay lip service to the propensity prohibition even as they blatantly misapply it in case after case. While it may not entirely remedy this problem, giving judges a formalized avenue for displaying their bad intuitions about propensity evidence and providing for robust appellate review will surely be an improvement on the status quo, in which these decisions spread confusion and inconsistency, and in which if they are even appealed, they are labeled "harmless error."

solution might therefore be to replace the categorical rules with standards. For example, in the hearsay context, some commentators have advocated for replacing the categorical exceptions with an expansive balancing test.[223] Or in the privileges context, one could replace absolute privileges with conditional ones that balance evidentiary need with privacy interests.

Yet, a wholesale move to standards is an excessive solution to the problem of bending. A move to standards in evidence would entail a much larger debate about the goals of the evidentiary system and how best to achieve them. We need not engage that debate here. Suffice it to say that in typical cases, categorical evidentiary rules work reasonably well, and judges and lawyers appear to prefer their certainty and ease of application.[224] Rule bending is a problem only in particular contexts, and rule-based solutions like proposed Rule 107 would make an incremental improvement without requiring the wholesale restructuring of the law of evidence.

Replacing evidentiary rules with standards would forego the specific benefits of rules in the evidentiary context. Standards are arguably less effective at establishing evidentiary norms than categorical rules. Having a categorical propensity rule, hearsay rule, and certain absolute privileges ingrains legal norms against character-based reasoning, out-of-court statements, and the use of certain confidential communications. Without an absolute privilege, for example, there would be little certainty about the confidentiality of attorney–client communications, hindering such discussions. So rather than reducing the attorney–client privilege to a balancing test, one should prefer an absolute privilege with a general residual exception for extraordinary cases. Such a structure enables evidence law to remain largely certain and predictable.

In other contexts, by contrast, fluidity itself is part of the structure of the rules. For example, the Federal Rules of Civil Procedure are designed around the idea that they will only work in conjunction with extensive judicial discretion.[225] Rule 16 of the Federal Rules of Civil Procedure, which provides for pretrial conferences, exemplifies this as the "hallmark of a

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[223] *See* United States v. Boyce, 742 F.3d 792 (7th Cir. 2014) ("Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.").

[224] *See* Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1904 (2015); David DePianto, *The Costs and Benefits of a Categorical Approach to Hearsay*, 67 FLA. L. REV. F. 258, 259–61 (2016).

[225] *See, e.g.*, Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80 (1989) ("The federal rule drafters . . . relied to a large extent on trial judge discretion to shape optimal lawsuit structure for each dispute.").

regime in which judges are given broad authority to manage the cases before them without undue ex ante rule interference."[226]

Evidence is different. When the rules of evidence offer discretion, it is generally channeled through unidirectional balancing tests that offer only one use for that discretion: to *exclude* evidence. For example, Rule 403's open-ended balancing test gives judges discretion to exclude otherwise admissible evidence.[227] Although both the rules of evidence and of civil procedure contain similar invocations to judges to apply them in ways that serve justice, fairness, and efficiency,[228] those statements of purpose necessarily have very different constructions within the body of rules to which they belong. While the reference to justice and efficiency at the outset of the rules of civil procedure reinforces the flexibility and discretionary scope offered by those rules, the invocation of similar values at the outset of the evidence rules reads instead as an imprecation to *follow* the rules so that proceedings can be fair and efficient. In short, as the phenomenon of bending itself attests, from their purpose to their instantiation as rules, the Federal Rules of Evidence reinforce real and intentional boundaries on the exercise of judicial discretion.

3. Underuse (or Overuse?)

The final concern is whether—and to what extent—courts will use a rule like Rule 107. After all, Rule 807 exists but is rarely used by courts today.[229] There are several reasons to be hopeful about a generalized residual exception. First, declaring an explicit Rule 107 can help change the existing culture regarding evidentiary rules. At the moment, evidentiary practice tends to be rigidly rule based, with Rule 807 being an anomalous exception limited to the hearsay context. A general exception may have greater prominence and thus experience greater use.

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[226] Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 697 (2014).

[227] FED. R. EVID. 403. Balancing under Rule 403 is the quintessential example of this unidirectional discretion. The rule itself is called "Excluding Relevant Evidence," and there is no provision for admitting otherwise inadmissible evidence. This is in contrast to the Federal Rules of Civil Procedure, whose rules are often very standard-like in the most capacious sense of the word. *See, e.g.*, Effron, *supra* note 226, at 721 (describing the benefits of rules offering expansive judicial discretion in the Federal Rules of Civil Procedure).

[228] The Federal Rules of Civil Procedure instruct judges to construe them to administer proceedings in a manner that is "just, speedy, and inexpensive," FED. R. CIV. P. 1, and the Federal Rules of Evidence say that the rules should be construed for fairness, efficiency, and to "promote the development of evidence law." FED. R. EVID. 102.

[229] Modern federal courts treat Rule 807 as an "extremely narrow" exception that is to be used only "sparingly" and "in the most exceptional circumstances." United States v. Mason, 951 F.3d 567, 574 (D.C. Cir. 2020) (quoting United States v. Slatten, 865 F.3d 767, 807 (D.C. Cir. 2017)).

Second, the current unpopularity of Rule 807 may stem from earlier statutory language restricting its use to instances "not specifically covered" by the other enumerated hearsay exceptions.[230] Although controversial,[231] some courts ruled 807 was not applicable to so-called "near miss" cases—cases in which hearsay evidence was close to but did not meet an enumerated exception.[232] The broader language found in the current Rule 807 was added only in 2019, so courts' true willingness to use Rule 807 is still unknown.[233]

Third, a well-recognized generalized residual exception should prove more attractive than rule bending. Rule bending is extralegal, and by definition is an abuse of discretion.[234] Use of Rule 107, by contrast, would be explicitly sanctioned, and it offers a mechanism by which trial courts can join the conversation on how the evidentiary rules should evolve. Further, reviewing courts may be more willing to intervene after obvious bending if trial courts have ignored Rule 107's invitation to legitimize a facially erroneous evidentiary ruling. If this is true, litigants may become more willing to appeal problematic evidentiary rulings because they will have a greater chance of success.

On the flip side, is there a concern about *overuse*? Could Proposed Rule 107 become so popular that the exception swallows the evidentiary rules, effectively converting them into a standard? We find this contingency highly unlikely. For one thing, the balancing test and the procedural hurdles associated with Rule 107 will restrict its use to only unusual cases. For another, the aforementioned judicial culture surrounding Rule 807 suggests that courts are a long way from abusing any available safety valve.

CONCLUSION

Rule bending is a conspicuous phenomenon in modern evidence law. Codified rules of evidence normally control the admissibility of evidence in

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[230] FED. R. EVID. 807 (2018).

[231] *See* United States v. Laster, 258 F.3d 525, 532–35 (6th Cir. 2001) (Moore, J., dissenting).

[232] Elizabeth DeCoux, *Textual Limits on the Residual Exception to the Hearsay Rule: The "Near Miss" Debate and Beyond*, 35 S.U. L. REV. 99, 102–03 (2007).

[233] *Compare* FED. R. EVID. 807 (2018) (amended 2019), *with id.* R. 807 (2019) (changing the rule's language).

[234] Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 798 (9th Cir. 2005) ("An abuse of discretion is 'a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.'" (quoting Wing v. Asarco, Inc., 114 F.3d 986, 988 (9th Cir. 1997))); Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 822 (10th Cir. 2007) ("A district court abuses its discretion when it issues an 'arbitrary, capricious, whimsical, or manifestly unreasonable judgment.'" (quoting Coletti v. Cudd Pressure Control, 165 F.3d 767, 777 (10th Cir. 1999))).

courtrooms today, but courts will often resist when the rules exclude a necessary, essential piece of evidence. The result is rule bending.

The goal of this Article is not to suggest that such court innovation—the bending of the evidentiary rules—is necessarily undesirable. Indeed, as explored above, rule bending often helps factfinders arrive at fair, just, and accurate verdicts. Moreover, it is perhaps the only avenue courts have to evolve and optimize evidence law in a codified world. But rule bending is also problematic. Each instance of clandestine rule bending risks muddying doctrine, as it necessarily requires obfuscation. Rule bending also detracts from transparency, uniformity, and the very legitimacy of the rules of evidence. And it may lead to unjust outcomes that are insulated from review.

This Article suggests a solution to the problem of bending. The proposed generalized residual exception, which we have labeled Rule 107, offers a clear mechanism through which courts can explicitly admit what they perceive as essential evidence excluded by other rules. It incentivizes transparent rule *evolution* rather than surreptitious rule *bending*.

As a parting note, we should emphasize that a generalized residual exception—a sanctioned means by which courts could reclaim some control over evidence law's development—could yield benefits that ripple beyond the immediacies of one particular case. Indeed, a generalized residual exception could perhaps reinvigorate the evidence academy itself. Before and immediately after the enactment of the Federal Rules of Evidence, scholars engaged in rich debates over the normative tradeoffs inherent within evidence law and the codification movement.[235] But that well has long since run dry. Recent decades have seen a marked decline in evidence scholarship, a decline that is likely attributable to the broader stagnancy in evidence law itself. With evidence law's substantive development extinguished, only embers of scholarly discussion remain—evidence now finds itself, untenably, as the least-cited discipline in the legal academy.[236] To change its fate, evidence law must innovate. This Article offers a tangible first step in that direction.

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[235] *See, e.g.*, 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, 1597 (1999) (arguing that the Federal Rules of Evidence eliminated courts' common law powers to prescribe additional rules); Scallen, *supra* note 175, 44 AM. U. L. REV. 1717, 1719 (1995) (arguing that the Federal Rules of Evidence should be interpreted according to practical reasoning); 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, 1545 (1999) (arguing that the Federal Rules of Evidence should not be interpreted as a statute); Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO STATE L.J. 393, 396 (1994) (rebutting Imwinkelried).

[236] Brian Leiter, *Citation Counts Vary by Field*, BRIAN LEITER'S L. SCH. REPS. (Aug. 9, 2021), https://leiterlawschool.typepad.com/leiter/2021/08/citation-counts-vary-by-field.html [http://perma.cc/SQ23-V3YB].