COMPLETING THE RULE OF COMPLETENESS: AMENDING RULE 106 OF THE FEDERAL RULES OF EVIDENCE

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† JD, The Ohio State University Moritz College of Law, December 2017. I would like to thank Professor Deborah Merritt for her help in developing this topic, and Ashley Baker for her continuing support.
ABSTRACT

The rule of completeness, embodied in Rule 106 of the Federal Rules of Evidence, has received relatively little attention in the courts and scholarship, regardless of the fact that there is currently a three-way circuit split in its application. Today, several circuits view the Rule 106 as a mere rule of timing—allowing otherwise admissible evidence to be admitted at a more advantageous time when necessary for completion. Others interpret Rule 106 to have a trumping function, finding that it makes any evidence admissible, for the purpose of completion, regardless of whether such evidence would be admissible on its own. Still other circuits have opted to let judicial discretion rule on how Rule 106 should function in any given proceeding. While such a circuit split clearly signifies an issue worthy of correction and unification, a more significant issue lurks beneath the split: Fifth Amendment violations for criminal defendants who would choose not to take the stand. In circuits which have adopted a narrow construction of Rule 106, meaning that the Rule of Completeness cannot trump exclusionary rules, inculpatory statements made by a defendant can be used against him or her, while exculpatory statements, even those objectively necessary for completion or to correct a misunderstanding, can only be introduced with the defendant on the stand. Thus, the only way for a criminal defendant to introduce exculpatory completion evidence in many circuits is for him or her to waive his or her constitutional rights and take the stand. This Article proposes amending the Federal Rules of Evidence to unify the circuits and to protect the constitutional rights of criminal defendants.

I. INTRODUCTION

In a criminal trial for a bank robbery, it is easy to imagine an officer testifying: “The defendant told me he was the fourth member of the ‘crew,’ and that he was the getaway driver.” That testimony may
well be accurate, and courts regularly accept it.\textsuperscript{1} However, it can be unclear what may be admissible when the entire testimony could just as accurately have been: “The defendant told me he was the fourth member of the 'crew,' and that he was the getaway driver. But, the defendant also told me that he slept through the entire robbery.” The statements contained in that testimony include both an admissible incriminating statement and an exculpatory statement, the latter being generally inadmissible as hearsay.\textsuperscript{2} Whether the exculpatory portion of the defendant’s statement can be introduced by defense counsel to correct the misleading portion elicited by the government is typically governed by the Rule of Completeness\textsuperscript{3} as embodied in Rule 106 of the Federal Rules of Evidence.\textsuperscript{4}

As stated in the Federal Rules of Evidence, the Rule of Completeness provides, “[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”\textsuperscript{5} The rule was codified to allow for correction of misleading impressions created by out of context statements, and to provide for more advantageous timing in the introduction of necessary contextual evidence.\textsuperscript{6} Though its language seems clear, courts have consistently wrestled with whether evidence admissible under Rule 106 (as necessary to complete or correct a misleading statement) should be excluded if, absent such admissibility under Rule 106, the rules would make that evidence inadmissible—such as statements generally excluded under the Rule Against Hearsay.\textsuperscript{7} Further, courts have found relatively lit-

\textsuperscript{1} See Fed. R. Evid. 801(d)(2) (providing that statements of an opposing party are excluded from the rule against hearsay, when offered against that opposing party, and are thus admissible).

\textsuperscript{2} See id. Exculpatory statements are not admissible as statements of an opposing party, as they are not being offered against an adverse party. As these statements can be considered self-serving, they appear to lack the adequate indicia of reliability necessary for admission. See infra note 82 and accompanying text.

\textsuperscript{3} Throughout the history of Rule 106 and the common-law Rule of Completeness, “rule” and “principle” have been used interchangeably. The original sources herein are unchanged in their terminology, and for the purposes of this discussion, “rule” and “principle” will be used interchangeably.

\textsuperscript{4} As discussed infra in Sections III.C and IV, the Rule of Completeness does not govern such evidence on its own. Rather, there is often friction between completeness and exclusionary rules.

\textsuperscript{5} Fed. R. Evid. 106 (emphasis added).

\textsuperscript{6} See Fed. R. Evid. 106 advisory committee’s note to 1972 proposed rules (“The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial.”).

\textsuperscript{7} See Fed. R. Evid. 802 (“Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.”).
tle guidance in the advisory committee’s notes in applying the Rule 106 doctrine. This struggle may be best exemplified through the court’s admission of oral statements under a completeness rationale,\(^8\) buttressed by the broad discretion granted to the court under Rule 611(a).\(^9\) Although the courts ultimately used Rule 611(a) to admit oral statements, such admission was plainly discouraged, as the advisory committee noted that “[f]or practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.”\(^10\)

Even though courts have found methods to allow for admission of oral statements in addition to those written or recorded, exactly what evidence contained in those statements is admissible is currently up in the air. Today there are three different interpretations across the circuit courts,\(^11\) and the United States Supreme Court has yet to provide any substantive guidance.\(^12\) Beyond the question of what is currently admissible—and where—is the question of what should be admissible. More limited interpretations not only have the potential to adversely affect the fairness of a trial, but may even compel a criminal defendant to take the stand in order to offer completion evidence necessary to correct a misleading statement, even where the same defendant would not need to do so in other circuits.\(^13\) And so the question remains: is Rule 106 a rule of completeness, or is it simply a rule of timing?\(^14\)

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8. See United States v. Verdugo, 617 F.3d 565, 579 (1st Cir. 2010) (“[T]he district court retained substantial discretion under Fed. R. Evid. 611(a) to apply the rule of completeness to oral statements. . . .”); United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993) (“[B]y its terms [Rule 106] refers to written or recorded statements. However, Rule 611(a) gives the district courts the same authority with respect to oral statements and testimonial proof . . . . And the Seventh Circuit has applied a Rule 106 analysis with respect to oral statements and testimonial proof.”) (citations omitted).

9. Fed. R. Evid. 611(a)(1) (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: make those procedures effective for determining the truth . . . .”)

10. Fed. R. Evid. 106 advisory committee notes. Neither the 1987 nor the 2011 rule amendments changed the scope of the rule as it applies to oral statements; rather, the advisory committee opted to make only technical or stylistic changes. See id. “The amendments are technical. No substantive change is intended.” Id. “These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.” Id.

11. See infra Section IV.


13. For a discussion of compelled testimony that a similarly situated defendant may be forced to give as completion evidence, see infra Section V.

14. Rule 106 may simply govern timing where the court will not allow otherwise inadmissible evidence to be admitted under the rule, instead allowing only evidence that would be admissible on its own to be introduced contemporaneously, i.e. not during
This Article proposes amending Rule 106 to allow it to serve its purpose as the Rule of Completeness, to avoid constitutional concerns, to promote fairness, and to finally provide unity across the circuits. Further, this Article proposes that circuits not currently allowing Rule 106 to override other exclusionary rules revisit their interpretations, and allow for expansive admission of necessary completion evidence. Section II examines a brief history of the common-law Rule of Completeness, along with the approach codified in the Federal Rules of Evidence.\textsuperscript{15} Section III provides a background discussion of the various rules of evidence discussed or referenced herein, with an emphasis on the purposes of those rules. Section III further discusses the history of the most prominent exclusionary rule of evidence, the Rule Against Hearsay.\textsuperscript{16} Section IV provides an analysis of the varied interpretations currently employed by the circuit courts since \textit{Beech Aircraft Corp. v. Rainey},\textsuperscript{17} the last United States Supreme Court case addressing Rule 106.\textsuperscript{18} Section V examines the Fifth Amendment right against self-incrimination, the history and purpose of that right, and what constitutes compulsion.\textsuperscript{19} Further, the Fifth Amendment will be discussed with regard to the potential erosion of the right against self-incrimination in circuits that narrowly interpret Rule 106. Section VI proposes an amendment to Rule 106, providing for uniform application and clarity in the rule. Section VI will also discuss how such an interpretation both conforms with the stated purposes of the Federal Rules of Evidence, and protects a criminal defendant’s constitutional right against self-incrimination. Finally, Section VI will propose that in the interim, prior to the adoption of an amendment to Rule 106, circuits adopt a broader interpretation of Rule 106, more in line with a true rule of completeness.\textsuperscript{20} Section VII concludes with a final discussion of why a rule amendment is needed, and what purposes would be served by an amendment.\textsuperscript{21}

\begin{footnotesize}
the party's case. True completeness is used for the purposes of this Article where Rule 106 trumps exclusionary rules, defaulting to admissibility.
\end{footnotesize}
II. RULE 106—THE RULE OF COMPLETENESS: A BRIEF HISTORY

Rule 106 of the Federal Rules of Evidence is the codification of the common-law Rule of Completeness.22 Thus, to grasp the current, codified iteration of the Rule of Completeness, one must understand its history. Put simply, Rule 106 evolved from the common law, was adopted as a state rule, and was finally codified in the Federal Rules of Evidence.23 Although its actual evolution was not significantly more complex than that, it is still important to have a firm grasp on the scope of the history of the rule such to understand, or to dispute as the case may be, the scope of the current rule.

John Henry Wigmore described the common-law Rule of Completeness in his famed treatise, stating: “The general principle, then— which may be termed the principle of completeness—that the whole of a verbal utterance must be taken together, is accepted in the law of evidence; for the law in this respect does no more than recognize the dictates of good sense and common experience.”24 The rule—or principle as described by Wigmore—was not a novel concept when he first drafted his treatise.25 In fact, Wigmore went on to note immediately after memorializing the principle, that “[i]t appears clearly conceded and consciously applied as early as the 1600s.”26 It is important to

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22. 7 JOHN HENRY WIGMORE ET AL., EVIDENCE IN TRIALS AT COMMON-LAW § 2094, at 604 (4th ed. 1978) (identifying and discussing the common-law principle of completeness). See also FED. R. EVID. 106 advisory committee note (“The rule is an expression of the rule of completeness.”). It should also be recognized that although Wigmore provides significant discussion of the common-law rule, and is often cited by commentators, the advisory committee specifically cited to McCormick’s more brief presentation of the common-law rule. See id.; see also CHARLES T. MCCORMICK, HANDBOOK OF THE LAWS OF EVIDENCE § 56, at 131 (1st ed. 1954).


24. WIGMORE ET AL., supra note 22, § 2094. Wigmore went on to note that “[t]here are in the application of [the principle] important qualifications and exceptions, but the recognition of the principle, and the reason for it, are unquestionable.” Id. Interestingly, this passage came immediately after Wigmore’s assertion that the rule is based on “good sense and common experience,” thus suggesting that the principle should not be rigid and inflexible—much as the current rule is interpreted in some circuits—but that it should be utilized in a measured and informed manner. If Rule 106 is truly a codification of that common-law principle, the logical conclusion would be that judicial discretion should rule, not narrow interpretations of rule language and rule interplay. See infra Section IV.A.

25. The commonly cited version of Wigmore’s treatise identifying the modern principle of completeness was published in 1978. However, the principle was described in treatises much earlier than 1978. See, e.g., MCCORMICK, supra note 22, § 56 (discussing with regard to completeness that although “the cases are not consistent . . . the prevailing practice seems to permit the proponent to prove any relevant part that he desires”).

26. WIGMORE ET AL., supra note 22, § 2094 n.9 (citing several examples of the application of a completeness doctrine, starting in a dissenting opinion in 1571, and with a majority opinion in 1613).
acknowledge that the completeness principle was not a black-letter rule, but was rather a contoured standard. The contours of that standard go beyond the scope of this discussion, but suffice it to say, the contours did not include a requirement that the completion evidence be admissible on its own.

Discussing the common-law principle in 1954, Charles McCormick noted the dangers of misleading impressions created by incomplete statements. Specifically, McCormick observed that one could easily quote the Bible as saying “there is no God” by simply discounting that the entire statement says, “The fool hath said in his heart, there is no God.” While this example does not necessarily run afoul of exclusionary rules, the damage done by “[t]he distorted impression may sometimes linger, and work its influence at the subconscious level.” Thus, it is necessary not only for completion evidence to be admissible, but for the evidence to be offered contemporaneously.

Beyond the need for contemporaneous admission, McCormick briefly discussed what should be done in the event that completion evidence may be otherwise inadmissible. The suggestion there, as appears to have been consistent in the case law, is that “the trial judge should exclude [the evidence] if he finds that the danger of prejudice outweighs the explanatory value.”

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27. See id. § 2094 (“A simple thought requires but a simple utterance; a complex thought, a complicated utterance. When, therefore, we obey the cannon that the whole of the utterance must be considered, the scope of the survey may be very variable . . . .”).
28. See id.
29. McCormick, supra note 22, § 56.
30. Psalms 14:1 (King James) (emphasis added). Psalm 14 goes even further in the selected passage, saying, “The fool hath said in his heart, there is no God. They are corrupt, they have done abominable works, there is none that doeth good.” Id. Such language makes the out-of-context claim that “[t]here is no God” even more misleading when one realizes the extent of the claims against the “fool” who made such a claim. See also McCormick, supra note 22, § 56 (discussing possibilities of “distorted impression[s]” created by the use of incomplete statements to form and/or prove arguments).
31. McCormick, supra note 22, § 56. McCormick also worried about wasting time and attention by “cumbering the trial and the record, in the name of completeness, with passages and statements which have no bearing on the present controversy.” Id. See also Psalm 14 (there being a total of seven chapters, only one of which being relevant to the comment, “There is no God.”).
32. McCormick, supra note 22, § 56.
33. See Fed. R. Evid. 611(a). While based on the risk of prejudicial effect, the discretion necessary under the McCormick standard does not rise to the level of a Rule 403 balancing test. See Fed. R. Evid. 403 (requiring exclusion only when probative value is “substantially outweighed” by the risk of prejudicial effect); McCormick, supra note 22, at 132 (“Admission is subject to the qualification that where the remainder is incompetent, not merely as to form as in the case of secondary evidence or hearsay, but because
The common-law doctrine of completeness functioned much the same as the current Rule 106 does in circuits adopting a broad approach, or even a judicial discretion approach. That is to say that admissibility is based not on a narrow interpretation guided by exclusion as the default, but rather on the need to conform to the purposes of the rules embodied in Rule 102. Fairness then is the threshold question, not blanket admissibility. Although superseded, at least in part, by Rule 106, it should be noted that Beech Aircraft Corp. v. Rainey suggests that the common-law Rule of Completeness is not dead; rather, it remains as a counterpart to the codified rule.

The common-law approach was mirrored in section 1844 of the California Code of Civil Procedure, the California version of the Rule of Completeness. California’s rule includes many of the same concepts as those found in the common law, and thus provides an opportunity to examine current jurisprudence that would be analogous to the common-law rule of completeness, which has not received significant attention in federal courts. With Rainey in mind, and given the opportunity to examine current jurisprudence, it is interesting to note that, although it was this form that guided the introduction of completeness to the Federal Rules of Evidence, the paths of the rules have diverged significantly. However, regardless of the divergence in re-
cent jurisprudence, the common-law Rule of Completeness was ultimately (partially) codified as Rule 106 of the Federal Rules of Evidence.\footnote{42. See Act to Establish Rules of Evidence for Certain Courts and Proceedings. The original language adopted by the United States Supreme Court and codified by Congress read: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” \textit{Id.}} The final rule language succinctly states: “If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”\footnote{43. \textit{Fed. R. Evid.} 106.} Meant as “an expression of the rule of completeness,”\footnote{44. \textit{Fed. R. Evid.} 106 advisory committee notes to 1972 Proposed Rules.} as set forth by McCormick,\footnote{45. See McCormick supra note 22, § 56.} Rule 106 has undergone only two amendments—in 1987 and 2011—neither of which substantively changed the rule.\footnote{46. See \textit{Fed. R. Evid.} 106 advisory committee notes (“The amendments are technical. No substantive change is intended.”).} Thus, it is this language, virtually (and substantively) unaltered since its inception, and its history with which the courts must wrestle.

III. THE RULES OF EVIDENCE: FAIRNESS, EXCLUSION, AND RELIABILITY

To adequately discuss Rule 106, it is important to first orient oneself to the guiding principles of the Federal Rules of Evidence, including the major exclusionary rules against which Rule 106 must so often compete. First, the guiding principles embodied in the rules must be discussed as they inform a court’s interpretation. Second, the exclusionary rules must be accounted for as they, and their overarching principles, are the primary opposition to a broad interpretation of Rule 106.\footnote{47. Rule 106 functions with at least a timing component in all circuits, allowing for contemporaneous introduction of completion evidence. Such function has been explicitly contained in the rule from the time it was first codified. \textit{See supra} note 42. Thus, it is the second function of Rule 106—completeness—that is often at odds with the exclusionary rules of evidence.}
A. THE PURPOSES OF THE FEDERAL RULES OF EVIDENCE

It is worth noting that the second rule of the Federal Rules of Evidence—coming after only scope and definition—presents the purposes by which “[the] rules should be construed.” There are four basic purposes embodied in Rule 102 that guide interpretation: fairness, the development of evidence law, truth, and justice. These purposes serve essentially as the backbone of any rules-based discussion, as the Federal Rules of Evidence are to be construed with those purposes in mind. Outside the Federal Rules of Evidence, an analog to the purposes set forth in Rule 102 can be found, for example, in Rule 2 of the Federal Rules of Criminal Procedure. Such guiding principles, codified in the codes of civil and criminal procedure, as well as the rules of evidence, clearly indicate that these principles form the foundation of our adversarial system embodied in our courts. Thus, it is critical that we adhere to these principles in interpretation and application of procedural rules.

Fairness, a seemingly simple concept, something we are taught and practice for most of our lives, is still an idea many wrestle with. For example, in practice, what one attorney finds fair may appear entirely unfair to his or her opposing counsel. Broadly, fairness can be defined as a concept “marked by impartiality and honesty” and “free

48. Fed. R. Evid. 101 (providing the scope and definitions of the Federal Rules of Evidence). It is worth noting, simply for orientation of this discussion, that the Federal Rules of Evidence “apply to proceedings in United States courts,” with limited exceptions. Id. See also Fed. R. Evid. 1101 (providing for more detailed applicability of, and exceptions to, the rules).

49. Fed. R. Evid. 102.

50. Id. For the purposes of this discussion, elimination of “unjustifiable expense and delay” has been excluded from these principles. While there has been some cause for concern regarding delay in admitting completion evidence, none of the modern interpretations lend credence to such a concern. See McCormick, supra note 22, § 56.

51. McCormick, supra note 22. Even if the rules were not bound by Rule 102’s purposes, Rule 611(a) would require such construction. See Fed. R. Evid. 611(a)(1)-(3) (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.”); see also Fed. R. Evid. 611(a) advisory committee’s notes (“[M]any other questions arise[e] during the course of a trial which can be solved only by the judge’s common sense and fairness in view of the particular circumstances.”).

52. See Fed. R. Crim. P. 2 (“These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”) (emphasis added); see also Fed. R. Civ. P. 1 (“These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”) (emphasis added); Fed. R. Evid. 102 advisory committee notes (“For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, Rule 1 of the Federal Rules of Civil Procedure, California Evidence Code section 2, and New Jersey Evidence Rule 5.”).
from self-interest, prejudice, or favoritism.”  Frankly, it is a concept that requires, and has received, little formal discussion in cases. Beech Aircraft Corp. v. Rainey is one of the United States Supreme Court’s interpretations of fairness. There, the Court implicitly addressed fairness in using a relevance analysis (i.e., the evidence was so relevant as to warrants admission on those grounds) to resolve a potential completion evidence question.

Beyond fairness, the rules are guided by the need to “ascertain[] the truth and secure[] a just determination.” The goals here may be considered the next logical step from fairness—that is to say that a fair proceeding must bring out the truth and result in a just determination. Further, these goals diminish much of the subjective nature implicit in fairness.

As noted above, these goals form a significant portion of the foundation of our adversarial system. Evidence must be tested, and subjected to the crucible that is the American justice system. To allow evidence to be mischaracterized or to misguide the trier of fact would be to undermine that system. Thus, the discussion of whether a rule is proper as implemented must begin with an understanding of first, what principles guide the interpretation, and second, what is at risk if the rule is misinterpreted.


54. It appears that the courts are implicitly guided by fairness, whether as a doctrine or simple common sense principle, such that there is no significant substantive discussion of the principle. However, such limited attention suggests that beyond implicit guidance, there has been no particular need for fairness to be litigated as a distinct concept.


56. See Beech Aircraft Corp. v Rainey, 488 U.S. 153, 171-72 (1988) (“We take [the advisory committee notes to Rule 106] to be a reaffirmation of the obvious: that when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant and therefore admissible under Rules 401 and 402.”); see also Fed. R. Evid. 401 (providing the general test for relevance of evidence); Fed. R. Evid. 402 (providing for general admissibility of relevant evidence, subject to the Rule 401 test).

57. The concept of fairness, that it is free from bias or prejudice, is open to subjective concerns where one is on the losing side of a “fair” determination. However, such subjectivity must be reduced (though not necessarily eliminated) when the determination is informed not only by a supposed lack of bias or prejudice, but also by truth—a generally objective standard.

58. See supra pp. 290-91.

59. Mischaracterization of evidence is such a concern that it is not only addressed in the Rules, but it is also a common trial objection. See, e.g., JOHN H. BLUME & EMILY C. PAAVOLA, CORNELL LAW SCHOOL: OBJECTION HANDBOOK 22 (2008), http://www.lawschool.cornell.edu/research/death-penalty-project/upload/Objection-20Handbook.pdf.
B. JUDICIAL DISCRETION IN THE ADMISSION OR EXCLUSION OF EVIDENCE

It is the role of the trial court to determine the admissibility or exclusion of evidence. In performing that role, the trial court is generally afforded significant discretion with regard to its determinations—though it is important to note that fairness is again explicitly provided as a guiding principle. However, that role has been limited in some circuits with regard to completion evidence. Still, the advisory committee notes suggest that the trial court judge is in the best position to understand the circumstances surrounding the evidentiary question, and thus to make the best ruling for a particular case. Indeed, it is the trial court’s intimate relationship with all aspects of a particular case that put it alone in the best position to determine whether evidence should be admitted, to what extent it should be admitted, and for what purposes it may be admitted. Further, the trial court is aided in its role by several additional provisions in the rules of evidence—provisions that also serve to protect the litigants.

The first provision protecting both the proponent and opponent of potentially inadmissible evidence, and a tool that further allows for judicial discretion, is found in Rule 104. Importantly, Rule 104 allows the court to hear the evidence outside of the jury’s presence to

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60. Fed. R. Evn. 611(a) (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.”).

61. See, e.g., United States v. Verdugo, 617 F.3d 565, 579 (1st Cir. 2010); United States v. Haddad, 10 F.3d 1252, 1257 (7th Cir. 1993). Both Verdugo and Haddad found that Rule 106 itself did not apply to oral statements; however, the courts still held that the trial court has the necessary discretion under Rule 611(a) to admit oral statements as completion evidence under Rule 106. Verdugo, 617 F.3d at 579; Haddad, 10 F.3d at 1257.

62. Fed. R. Evn. 611(a)(1) advisory committee’s note (suggesting problems may be best solved by the “judge’s common sense and fairness in view of the particular circumstances”). Further, fairness is implied as a necessary part of seeking truth in the language of Rule 611(a)(1). See id. (providing that the court should “make [its] procedures effective for determining the truth”). Id.

63. See id. The rule states:

Item (1) restates in broad terms the power and obligation of the judge as developed under common-law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions . . . [,] the order of calling witnesses and presenting evidence . . . [,] the use of demonstrative evidence . . . [,] and the many other questions arising during the course of a trial which can be solved only by the judge’s common sense and fairness in view of the particular circumstances.

Id. (citations omitted).

64. Fed. R. Evn. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”).
determine admissibility.\textsuperscript{65} This shield between the judge and counsel, and the jury affords an opportunity for potentially inadmissible evidence to be discussed in depth, as to both the reason the evidence is needed and the legal argument as to why it may be objectionable. Such protection is reaffirmed by the exceptions to the applicability of the rules found in Rule 1101.\textsuperscript{66} Thus, the court not only is able to fully apprise itself of the potential need for the evidence in question, but it can do so by looking at any other evidence necessary, regardless of whether it would be admissible in another setting.

The second provision protecting both the proponent and opponent of evidence is found in Rule 105.\textsuperscript{67} Rule 105 requires the court to give a limiting instruction upon request, thus allowing the trial court to admit evidence, but only for a limited purpose.\textsuperscript{68} The court is thus able to allow a piece of objectionable evidence to be heard, while simultaneously limiting the damage such evidence could incur should it be heard without instruction. Admittedly, and concerningly, a limiting instruction may not effectively “unring the bell” if evidence is heard in its entirety prior to the limiting instruction.\textsuperscript{69} However, such an issue is precluded with the use of both the Rule 104 and Rule 105 protections.

Where Rule 104 and Rule 1101 protections are properly utilized, the trial court is given the opportunity to review the evidence, any other evidence or testimony necessary to understand the evidence in question, and make a determination as to admissibility outside the view of the jury. In the context of completion evidence, the judge is able to view the entire statement, along with the arguments as to why it is necessary to complete a misunderstanding. However, in many

\begin{table}[h]
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\caption{Inadmissible Evidence Table}
\begin{tabular}{|c|c|c|}
\hline
Type of Evidence & Inadmissibility & Legal Argument \hline
Confession & 1 & (1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and so requests; or (3) justice so requires.\textsuperscript{67} It would seem clear that justice requires the court to conduct a hearing on the admissibility of completion evidence outside the presence of the jury in order to protect from any potential lingering “distorted impression” that may result otherwise. See McCormick, supra note 22, § 56.\textsuperscript{67} \\
Court Determination & 2 & (providing that the rules do not apply to “the court’s determination, under Rule 104(a), on a preliminary question of fact governing admissibility”).\textsuperscript{67} \\
Confession & 3 & (Id. (“If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.”)).\textsuperscript{67} \\
Completion Evidence & 4 & (Maness v. Meyers, 419 U.S. 449, 460 (1975) (“Remedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable, and orderly processes are imperative to the operation of the adversary system of justice. When a court during trial orders a witness to reveal information, however, a different situation may be presented. Compliance could cause irreparable injury because appellate courts cannot always ‘unring the bell’ once the information has been released.”)).\textsuperscript{67} \\
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circuits this determination is precluded by rules disallowing evidence otherwise inadmissible under the rules to be admitted under Rule 106.70 Such complications aside, where the judge is able to conduct an in camera review and make a ruling,71 the parties are then able to exercise their Rule 105 protections to request a reasonable limiting instruction, should it be necessary. In combination, these rules allow the trial court to exercise considerable discretion in terms of the presentation and admission of evidence, while still protecting the rights of the parties—as well as adhering to the purposes embodied in Rule 102.72

C. EXCLUSIONARY EVIDENCE: THE RULE AGAINST HEARSAY

Governing the admission of completion evidence—even when only with respect to the timing of introduction—Rule 106 is often confronted by exclusionary rules of evidence that would, in many cases, preclude the admission.73 The primary exclusionary rule against which Rule 106 is forced to compete is the Rule Against Hearsay.74 Thus, it is one of the most important topics to discuss before analyzing

70. Discussing this trend in a later edition of the McCormick's treatise, the authors noted, "It is sometimes stated that the additional material may be introduced only if it is otherwise admissible. However, as a categorical rule, that statement is unsound." 1 KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 56, at 395 (7th ed. 2013). Brown went on to note that the contextual (completion) evidence is so necessary that it should "become admissible on a nonhearsay theory." Id. at 396. In order for the evidence to be admissible on a non-hearsay theory, it is likely that it would need to be introduced for a purpose other than proving the truth of the matter asserted. See FED. R. EVID. 801(c). In order to achieve that without misleading the jury, Rule 105 could be used to limit the jury's consideration of the statement to context. See supra notes 67-68 and accompanying text.
71. See FED. R. EVID. 104(c) (allowing the court to conduct evidentiary hearings outside the presence of the jury where "justice so requires").
72. See supra Section II.A.
73. See, e.g., FED. R. EVID. 802 ("Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court."). It is important to note here that although Rule 802 explicitly allows evidence to circumvent the Rule Against Hearsay if other rules so allow, Rule 106 contains no such provision to make completion evidence admissible under a Rule 802 exception. See id.; FED. R. EVID. 106.
74. See, e.g., United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993). The court stated:
At the trial Elgin Police Officer Linder testified that the defendant, after his arrest, admitted knowing that the marijuana was under his bed. However, when defendant's counsel attempted to elicit from Linder that Mr. Haddad had, at the same time, denied knowledge of the gun, the Court sustained an objection to that exculpatory portion of defendant's statement. The defendant claims this was error since the exculpatory remarks were part and parcel of the one statement which also included the inculpatory reference to defendant's knowledge of the marijuana.
Haddad, 10 F.3d at 1258. Haddad illustrates well the tension between inadmissible hearsay and what may be necessary completion evidence.
and attempting to resolve admissibility questions with regard to Rule 106.

Article VIII of the Federal Rules of Evidence encompasses the hearsay rules. Generally, the reluctance to admit hearsay evidence—given that it is by definition introduced for the truth of the matter asserted—can be traced back to the trial and subsequent conviction of Sir Walter Raleigh. Raleigh was tried, convicted, and sentenced to death with the primary evidence offered against him being the signed confession of his friend and alleged co-conspirator, Henry Brooke, Eleventh Baron Cobham. Over Raleigh’s objections, the trial court refused to call Cobham to testify, instead relying entirely on his confession. Ultimately, this hearsay evidence offered against Raleigh was enough for him to be found guilty.

Raleigh’s case was tragic in that his pleas to confront his accuser, and to put the evidence against him to the test, were flatly ignored. Those very concerns embodied in Raleigh’s pleas still drive the Rule Against Hearsay as it strives to make inadmissible any evidence lacking adequate indicia of reliability. The idea that evidence being of-


76. Fed. R. Evid. 801(c) defines hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” For a discussion of the concerns underlying the truth of the matter asserted, see Justice Marshall’s dissent in United States v. Inadi, 475 U.S. 387, 404 (1986) (Marshall, J., dissenting) (“The question here must be whether we have so much confidence in the factual accuracy of statements made by conspirators in furtherance of their conspiracy that we deem the testing of these statements by cross-examination unnecessary to guarantee the reliability of a trial’s result.”).


78. Id. at 180.

79. Id. at 180.

80. Id. at 186.

81. See id. (“Raleigh was unjustly and wickedly convicted by the highest officers of the State exercising their most solemn functions.”).

82. See Deborah J. Merritt & Ric Simmons, Learning Evidence: From the Federal Rules to the Courtroom 425 (3d ed. 2015) (“All of hearsay doctrine stems from one simple idea: Firsthand accounts are more reliable than secondhand ones.”).
ferred against a person in a criminal case such as Raleigh's is so important that it is embodied in the Confrontation Clause of the United States Constitution. It is these significant concerns that a proponent of completion evidence must compete with as he or she seeks admission under Rule 106.

With the background of the Rule Against Hearsay in mind, it is worth taking the time to note that even though the Rule Against Hearsay is generally an exclusionary rule, Article VIII also provides for myriad exceptions to the rule. However, for the limited purpose of understanding the interplay between exclusionary rules and Rule 106, this discussion may be limited to Rule 801(d)(2). Under Rule 801(d)(2), statements of an opposing party are excluded from the Rule Against Hearsay. In these statements, the inculpatory portions are clearly admissible. However, exculpatory portions of the same statement are not covered under any hearsay exception and are thus inadmissible. It is this interplay that drives the most significant concerns discussed in this Article.

IV. A THREE-WAY SPLIT: DISCORDANT APPLICATION ACROSS THE CIRCUITS

In interpreting Rule 106, circuits have come to three differing conclusions. First, the rule may be treated to govern only the timing of presenting evidence. Second, the rule may be treated as one that trumps exclusionary rules. And third, the rule's use may be left to the discretion of the trial judge, without black-letter limits. A fourth

83. U.S. Const. amend. VI. Here, adequate indicia of reliability goes beyond simply informing the rule, and becomes a test unto itself where there is a question of whether hearsay should be precluded based on the Confrontation Clause. See United States v. Gomez, 191 F.3d 1214, 1220 (10th Cir. 1999) (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)) ("Hearsay statements are deemed sufficiently reliable to allow their admission without the benefit of cross-examination when the statements (1) 'fall[] within a firmly rooted hearsay exception,' or (2) contain 'adequate indicia of reliability.'").

84. Rule 801(d) provides that neither a declarant-witness's prior statement nor an opposing party's statement is considered hearsay. Rule 802 provides for exceptions where provided by "a federal statute; the[] rules; or other rules prescribed by the Supreme Court." Rule 803(1)-(23) provides for exceptions regardless of whether the declarant witness is available to testify. Rule 804(b)(1)-(6) provides for exceptions where the declarant witness is unavailable. Rule 807 provides for a final exception where the statement is not covered by an enumerated exception found in Rule 803 or 804. In all, there are thirty-one enumerated exceptions to and exclusions from the Rule Against Hearsay.

85. Rule 801(d)(2) provides that an opposing party's statement is not hearsay when the statement was made or adopted by, and offered against, that party. It is this rule that allows inculpatory statements to be introduced against an opposing party, while simultaneously excluding exculpatory statements made by that party. Fed. R. Evid. 801(d)(2).

86. Id.

87. See Fed. R. Evid. 802.
method of interpretation goes beyond the others, finding relevance rather than completeness guides admissibility.88

A. A RULE OF TIMING: A QUESTION ONLY OF THE ORDER OF PROOF

The first option followed by many courts is to treat Rule 106 not as a literal rule of completeness but as a rule of timing. That is to say that the rule is interpreted to govern only such evidence that would otherwise be admissible under the rules, simply allowing for its introduction at a more appropriate time, i.e. contemporaneous introduction. The United States Court of Appeals for the Sixth Circuit held that “[a]s codified, Rules 106 and 611(a) merely affect the order of the trial. To forestall any misleading impression created by taking a statement out of context, the proponent’s adversary may present the context along with the statement rather than later in the trial.”89 The court, aligning with the United States Court of Appeals for the Ninth Circuit, went on to succinctly describe the rule of timing limitations, holding that “the [Rule of Completeness] doctrine ‘does not make inadmissible evidence admissible.’”90

The primary concern driving this limited construction appears to be the potential of allowing a doctrine under which parties could effectively circumvent major exclusionary rules. The court in United States v. Shaver91 reasoned that “[c]ompleteness, a common-law doctrine, does not outweigh the hearsay rules, because ‘[h]earsay is not admissible except as provided by these rules or other rules prescribed by the Supreme Court pursuant to statutory authority.’”92

88. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171-73 (1988). Though the most recent United States Supreme Court case discussing Rule 106, the Court ultimately decided that a completion analysis was not required; rather, because the evidence was ipso facto relevant, it must be admissible under Rules 401 and 402. Rainey, 488 U.S. at 172. Unfortunately, the Court did not define when relevance rules, nor when a completion analysis, is required. See id. at 171-73. Thus, the lower courts appear to have opted against relevance analyses, choosing completion analyses instead. See infra Sections IV.A and IV.C. For the purposes of this Article, no significant discussion of the relevance approach is necessary. However, writing on the current circuit split regarding Rule 106, Michael Hardin discussed and advocated for such an approach. See Michael A. Hardin, Note, This Space Intentionally Left Blank: What to Do When Hearsay and Rule 106 Completeness Collide, 82 FORDHAM L. REV. 1283, 1316-28 (2013).

89. United States v. Shaver, 89 F. App’x 529, 532 (6th Cir. 2004) (internal quotations omitted).

90. United States v. Cosgrove, 637 F.3d 646 (6th Cir. 2011) (quoting United States v. Howard, 216 F. App’x 472-73 (6th Cir. 2007)). See also United States v. Mitchell, 502 F.3d 931, 1003 n.9 (9th Cir. 2007) (“Rule 106 applies only to written and recorded statements, not unrecorded oral confessions, and Rule 106 does not render admissible otherwise inadmissible hearsay.”).

91. 89 F. App’x 529 (6th Cir. 2004).

92. Shaver, 89 F. App’x at 533 (quoting Fed. R. Evid. 802). See also supra note 46 and accompanying text. Troublingly, the court in Shaver did not address whether the language in Rule 106 provided an implicit exception under Rule 802. Instead the court
Any such exploitation of the rules of evidence is particularly concerning where a defendant could be allowed to introduce otherwise inadmissible, self-serving exculpatory statements, without testifying, under the guise of completeness. While “[n]o guarantee of trustworthiness is required in the case of an admission,”93 the inverse need not be true. For to allow introduction of self-serving exculpatory statements, without a guarantee of trustworthiness as prescribed by the rules of evidence, would undermine the adversary system in which the rules operate.94 Thus, many courts have chosen this application of Rule 106, maintaining the integrity of the remaining rules of evidence by precluding admission of otherwise properly excluded evidence.

B. A Rule of Completeness: The Need for Completion Trumps Inadmissibility

The second option is to treat Rule 106 as a true rule of completeness. That is to say that the rule is interpreted to allow contemporaneous admission of otherwise inadmissible evidence to complete or clarify a writing or statement offered by the opposing party. Just as succinctly as the Sixth Circuit framed its timing approach, the United States Court of Appeals for the First Circuit framed its completeness approach, holding its case law “unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.”95 Similarly, in the United States

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93. Fed. R. Evid. 801 advisory committee note to subdivision (d). The rule provides:

The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

Id.

94. See id. (“Admissions by a party opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.”).

95. United States v. Bucci, 525 F.3d 116, 133 (1st Cir. 2008). The court in Bucci went on to note that regardless of the fact that other circuits have opted for a narrow interpretation, the First Circuit will “adhere to its own precedent.” Id. See also United States v. Simonelli, 237 F.3d 19, 28 (1st Cir. 2001) (holding that otherwise inadmissible
District Court for the Eastern District of Pennsylvania, a district court held that “the Rule permits the introduction of evidence that is otherwise inadmissible under other Federal Rules.”

Explaining the background for this approach, the United States Court of Appeals for the D.C. Circuit reasoned that “every major rule of exclusion in the Federal Rules of Evidence contains the proviso, ‘except as otherwise provided by these rules . . . .'” However, the court found the lack of such limiting language in Rule 106 indicates “that [it] should not be so restrictively construed.” In its analysis, the D.C. Circuit looked to the history of Rule 106. First, the court looked to the broad nature of the common-law doctrine of completeness. Second, the court looked to the California doctrine on which Rule 106 was modeled, finding it unrestricted by the other rules of evidence. Third, the court noted that following a request by the Justice Department to include a limiting proviso, the Senate Judiciary Committee declined to do so. Further, the court opined that “Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence . . . .” Following the United States
v. Sutton reasoning, the United States Court of Appeals for the Fourth Circuit further held that “[t]he rule simply speaks the obvious notion that parties should not be able to lift selected portions out of context.”\textsuperscript{104}

Though this interpretation allows the function of Rule 106 to most closely match its colloquial name, many circuits have rejected such an expansive reading.\textsuperscript{105} Further, although recognized as a true rule of completeness, and herein referred to as such, this approach is subject to limitations such as relevance,\textsuperscript{106} undue prejudice,\textsuperscript{107} and general judicial discretion under Rule 611(a).\textsuperscript{108}

C. A Rule of Discretion: The Need for Judicial Discretion in Completion

The third interpretation option is to treat Rule 106 neither as a simple rule of timing nor as a sweeping rule of completeness. Rather, this option defers to judicial discretion in determining what otherwise inadmissible evidence may be admitted under Rule 106. Adopted by the United States Court of Appeals for the Second Circuit, this interpretation “permits a defendant to introduce the remainder of a statement not otherwise admissible only if it is necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion.”\textsuperscript{109} Such an interpretation is in accord with

\textsuperscript{103} See 801 F.2d 1346 (D.C. Cir. 1986).
\textsuperscript{104} United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988) (citing Sutton, 801 F.2d at 1366-69). Interestingly, the court in Gravely described the rule as speaking to an “obvious notion.” Id. Obvious though this interpretation may have been to the Gravely court, many other circuits have found that such an interpretation is far from obvious. See supra Section IV.A. Behind the flat description of an obvious interpretation, the court there implicitly followed a fairness analysis to determine that completion evidence should not be excluded simply because it may be inadmissible standing on its own. For a discussion of fairness as a guiding principle of the Rules, see supra Section III.A.
\textsuperscript{105} See supra Sections IV.A and IV.C.
\textsuperscript{106} See Fed. R. Evid. 401, 402 (providing both the test for relevance, and that courts may exclude evidence that is not relevant).
\textsuperscript{107} Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).
\textsuperscript{108} Fed. R. Evid. 611(a), (b) (providing that courts may use their discretion to control the presentation of evidence and the scope of cross-examination).
\textsuperscript{109} United States v. Gonzalez, 399 F. App’x 641, 645 (2d Cir. 2010) (quoting United States v. Castro, 813 F.2d 571 (2d Cir. 1987)) (internal quotations omitted). The fairness and impartiality lines of reasoning are not unique to Rule 106 analyses, but linking those qualities with other discretionary criteria goes beyond what other courts have done. Compare Gravely, 840 F.2d at 1163 (using an implicit fairness analysis), with Gonzalez, 399 F. App’x at 645 (providing several additional discretionary criteria beyond simple fairness).
Rule 611(a), as “it is the trial court’s responsibility to exercise common sense and a sense of fairness to protect the rights of the parties while remaining ever mindful of the court’s obligation to protect the interest of society in the ascertainment of the truth.”

In *United States v LeFevour*, Judge Posner refined this approach by emphasizing judicial discretion in application of Rule 106. In *LeFevour*, the trial court “implicitly treated Rule 106 as merely regulating the order of proof.” Judge Posner, however, went on to explain that such a description is misleading where “otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106 . . . or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too.”

Judge Posner further opined that “[t]he party against whom that evidence is offered can hardly care which route is taken,” as the damaging evidence is either completed—for that limited purpose—or excluded entirely.

This interpretation functions as an idealized hybrid between the two more extreme, bright-line options. Though both the first and second options do allow for judicial discretion, this interpretation depends on that discretion to function at all. Indeed, the curative measure—and the necessary analysis leading to that point—can only function through judicial discretion under Rule 611(a). However, to this point very few courts adopt this interpretation, and none have

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110. *United States v. Castro*, 813 F.2d 571, 576 (quoting FED. R. EVID. 611(a)). See also FED. R. EVID. 611(a) (charging the court with the responsibility to exercise common sense discretion and to protect the process); FED. R. EVID. 102 (providing the overarch- ing purposes of the rules, including fairness and truth). The advisory committee note to Rule 611(a) makes clear the goal embodied in the rule, stating that “[t]he ultimate responsibility for the effective working of the adversary system rests with the judge. The rule [simply] sets forth the objectives which he should seek to attain.” FED. R. EVID. 611 advisory committee note.

111. 798 F.2d 977 (7th Cir. 1986).

112. *United States v LeFevour*, 798 F.2d 977 (7th Cir. 1986).

113. *LeFevour*, 798 F.2d at 981.

114. *Id.*

115. *Id.* The court reasoned that “Rule 106 was not intended to override every privilege and other exclusionary rule of evidence in the legal armamentarium, so there must be cases where if an excerpt is misleading the only cure is to exclude it rather than to put in other excerpts.” *Id.* (emphasis added).

116. Both the completeness approach and the timing approach essentially function as bright-line, all or nothing interpretations. Note that under a completeness approach evidence may be made inadmissible, but it will be either for prejudice or because the evidence is not necessary for completion. See FED. R. EVID. 403. Under a timing approach, otherwise inadmissible evidence simply remains inadmissible. See supra Section IV.

117. Though several courts have cited *LeFevour* as precedent for the value of admitting otherwise inadmissible evidence under Rule 106, they have not adopted the approach implied by Judge Posner that would require judicial discretion under Rule 611(a) to determine the ultimate admissibility question. See, e.g., *United States v.*
yet followed Judge Posner’s suggestion in LeFevour that, on occasion, the entirety of the misleading evidence must be made excluded.118

V. THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION: COMPULSION TO TESTIFY FOR COMPLETENESS

One of the fundamental protections afforded to Americans, not just criminal defendants, is the privilege against self-incrimination.119 Although that privilege protects those who are not yet charged with a crime, its use may be best known as a protection for criminal defendants.120 “The proposition that a criminal defendant cannot be compelled to take the stand is so well understood that it hardly requires citation of authority to support it . . . ”121

A. SELF-INCRIMINATION GENERALLY

The Constitution provides that “no person . . . shall be compelled in any criminal case to be a witness against himself.”122 While the protection afforded to criminal defendants, or those who may expose themselves to criminal liability,123 is often shown as a TV/movie trope, the privilege itself is one of the core components of our justice system.124

Reese, 666 F.3d 1007, 1019 (7th Cir. 2012) (citing LeFevour as precedent for admitting otherwise inadmissible evidence under Rule 106).

118. See, e.g., United States v. Pendas-Martinez, 845 F.2d 938, 944 n.10 (11th Cir. 1988) (citation omitted) (describing Judge Posner’s suggestion as dictum).

119. See U.S. CONST. amend. V. The Supreme Court described the Fifth Amendment right against self-incrimination, holding it reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.


120. See Kastigar, 406 U.S. at 444-45.

121. CHARLES ALAN WRIGHT & PETER J. HENNING, 2A FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 407 (4th ed. 2017). See also Ouber v. Guarino, 293 F.3d 19, 28 (1st Cir. 2002) (“It is apodictic that a defendant cannot be compelled to testify in a criminal case.”).

122. U.S. CONST. amend. V.

123. See Hoffman v. United States, 341 U.S. 479, 486 (1951) (“The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.”).

124. See Hoffman, 341 U.S. at 486 (quoting Feldman v. United States, 322 U.S. 487, 489 (1944)) (“This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure.”); Arndstein v. McCarthy, 254 U.S. 71, 72-73 (1920) (“This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, ‘was added to the original Constitution in the conviction that too high a price
Although contained in the Bill of Rights, and affirmed in Escobedo v. Illinois,125 it was not until Miranda v. Arizona126 that the reality that no one may be compelled to incriminate oneself became clear.127 Still, the United States Supreme Court in Miranda did not claim to be breaking new ground with its holding. Rather, the Court recognized at the outset that the “holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied.”128 Thus, Miranda was not an introduction of a right, but a formal recognition of that right. American jurisprudence has held firm to the principle that a criminal defendant must be afforded his or her full constitutional right against compelled testimony and self-incrimination, even extending that right by precluding the prosecution from commenting on a defendant’s failure to testify.129

Even given the absolute nature of the privilege against self-incrimination, that privilege may be waived.130 Indeed, a defendant who takes the stand “gives up his [or her] right to refuse to answer
questions that fall within the proper scope of cross examination."\(^{131}\)

The limits of a defendant's waiver, should he or she choose to testify, are then left up to the trial judge under Rule 611(b).\(^{132}\)

B. Compulsion to Testify: The Potential Role of Compelled Testimony Needed to Correct Incomplete or Misleading Statements

Generally, to compel means “to cause or bring about by force, threats, or overwhelming pressure.”\(^{133}\) And, “the proposition that a criminal defendant cannot be compelled to take the stand is so well understood that it hardly requires citation of authority to support it, and indeed there are so few violations of this rule that it has arisen in very few reported cases.”\(^{134}\) Indeed, the sparse case law suggests an implicit understanding, common across all parties, that any compulsion to testify is impermissible.\(^{135}\) However, even though the right appears well understood, and even well defined,\(^{136}\) there may still be instances where there is no traditional compulsion, but rather an implied mandate that testimony is necessary.\(^{137}\) In such a case, the question then must be asked: can there be compulsion when there is no external force acting on the defendant; rather, there is only a choice between correcting and completing testimony or allowing the jury to be misled? Is it not the case that allowing the jury to hear misleading evidence—that cannot be completed without the defendant testifying—creates “overwhelming pressure”\(^{138}\) such that when “considering the totality of the circumstances, the free will of the [defendant may be] overborne”?\(^{139}\)

\(^{131}\) United States v. Spinelli, 551 F.3d 159, 167 (2d Cir. 2008) (citing Rogers v. United States, 340 U.S. 367, 373 (1951)).

\(^{132}\) See Fed. R. Evid. 611(b) (“Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.”).

\(^{133}\) Compel, Black's Law Dictionary (9th ed. 2009).

\(^{134}\) Wright & Henning, supra note 121.

\(^{135}\) Still, there is some case law that provides a test by which we can measure whether one has been compelled to testify against her rights. See United States v. Hou. Found. of Am., 176 F.2d 665, 666 (3d Cir. 1949) (“The plain difference between the privilege of witness and accused is that the latter may not be required to take the stand at all. We need only say in this case that the accused was required to take the stand and to testify over his objection and in violation of the right protected both by the Constitution and the common-law.”); United States v. Washington, 431 U.S. 181, 188 (1977) (“The constitutional guarantee is only that the witness be not compelled to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne.”).

\(^{136}\) See supra note 133 and accompanying text.

\(^{137}\) See infra note 152 and accompanying text.

\(^{138}\) See supra note 133.

\(^{139}\) Washington, 431 U.S. at 188.
VI. COMPLETING THE RULE OF COMPLETENESS

“[A] criminal defendant should not be forced to choose between leaving the government’s distorted presentation unanswered and surrendering the Fifth Amendment right not to testify.”140 The Rule of Completeness embodied in Rule 106 is one dictated by fairness and guided by the desire to achieve a just result.141 However, in many jurisdictions, the limitations imposed on Rule 106 adversely affect fairness, could lead to an unjust result, and very likely violate the constitutional rights of some criminal defendants. For example, in United States v. Adams,142 during cross-examination, the jury heard the following exchange (amongst other similar exchanges):

[ Witness]: He asked me, um, oh, how I become an election officer over again. Did you appoint me to election officer.
[ Defendant]: Did I appoint you? (Laugh)
[ Witness]: Yeah.143

Ultimately though, “[t]he district court excluded [the defendant’s] response: ‘I don’t really have any authority to appoint anybody.’”144 Most concerningly, the court went on to hold, “[a]lthough we agree that these examples highlight the government’s unfair presentation of the evidence, this court’s bar against admitting hearsay under Rule 106 leaves defendants without redress.”145 Even with such a ruling, the case was not appealed further.

Given the unlikely set of circumstances that must exist for a case to be appealed to the United States Supreme Court146—not the least
of which being a party’s willingness to appeal—and the consistent application of discordant precedent throughout the circuits, the only method of truly providing for the proper interpretation of Rule 106; the protection of the principles of fairness, reliability, truth, and justice; and the protection of criminal defendant’s constitutional rights is to amend the rule itself. However, the amendment process also takes significant time.\textsuperscript{147} Prior to an amendment being adopted, the circuits that have thus far adopted an interpretation that disallows the “trumping function”\textsuperscript{148} of the Rule of Completeness\textsuperscript{149} should change their interpretation to allow for broad admission and judicial discretion aligned with constitutional rights and guiding principles.

A. Proposed Amendment to Rule 106 and its Associated Advisory Committee Notes

Rule 106’s current text reads: “If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”\textsuperscript{150} The Advisory Committee Notes currently read:

The rule is an expression of the rule of completeness. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

2010, there were 5,910 petitions for a Writ of Certiorari filed with the Supreme Court, but cert was granted for only 165 cases. That is a success rate of only 2.8% . . . . Over half the petitions submitted come from pro se and/or indigent criminal defendants or civil litigants. Since these petitions are drafted by non-attorneys, they enjoy a considerably lower success rate. Focusing only on attorney-submitted petitions, the success rate is closer to 6% . . . .”\textsuperscript{2010}.

\textsuperscript{147} See Pending Rules and Form Amendments, U.S. Cts., http://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments (last visited Mar. 17, 2017) (“An amendment to a federal rule usually takes about three years.”). The three-year time frame exists due to the process by which rules are amended, given that “a proposed rule change is generally considered by an advisory committee and published for comment, then considered by the Committee on Rules of Practice and Procedure (the ‘Standing Committee’), the Judicial Conference, the Supreme Court, and [finally] Congress.” Id.

\textsuperscript{148} See Quinones-Chavez, 641 F. App’x at 731 (Fisher, J., dissenting) (describing the need for “trumping function” of Rule 106).

\textsuperscript{149} See supra Section IV.B.

\textsuperscript{150} Fed. R. Evid. 106.
For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.\textsuperscript{151}

While neither the rule language nor the advisory committee notes explicitly disallow admission of otherwise inadmissible evidence, courts have consistently found such a limitation.\textsuperscript{152} Concerningly, courts have found such limitation even when the advisory committee notes could fairly be read as implicitly endorsing the admission of otherwise inadmissible evidence, subject to judicial discretion. Where the advisory committee cites the first consideration of Rule 106 as “the misleading impression created by taking matters out of context,”\textsuperscript{153} it is no stretch to see an implicit command that the important matter is avoiding misleading the trier of fact, not a command to strictly adhere to exclusionary rules that very likely preclude correction of misleading impressions.\textsuperscript{154} Thus, little guidance beyond structure can be found in the current iteration of Rule 106 and the associated notes. For that reason, an explicit and lasting change must be made to the rule itself.\textsuperscript{155}

\textsuperscript{151} Fed. R. Evid. 106 advisory committee note (citing McCormick, supra note 22; Cal. Evid. Code § 356).

\textsuperscript{152} See supra Section IV.A. Some courts however have found that the rule language as codified lacked the language necessary disallow admission of otherwise inadmissible evidence, and thus must be read to allow for the admission of any such evidence. See, e.g., United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (citing Charles Alan Wright & K Graham, Federal Practice and Procedure: Evidence § 5078, at 376 (1977 & 1986 Supp.) (“Every major rule of exclusion in the Federal Rules of Evidence contains the proviso, ‘except as otherwise provided by these rules,’ which indicates ‘that the draftsmen knew of the need to provide for relationships between rules and were familiar with a technique for doing this.’ There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed.”).

\textsuperscript{153} Fed. R. Evid. 106 advisory committee’s note.

\textsuperscript{154} See, e.g., Quinones-Chavez, 641 F. App’x at 725-28. In Quinones-Chavez, the court allowed admission of inculpatory statements made to an officer while excluding exculpatory statements made at the same time. The court reasoned flatly that “[i]f Quinones wished to communicate his version of events, he could have testified.” Id. at 725. Concerningly, the court’s reasoning not only undercuts the purpose of avoiding misleading the trier of fact, it comes very close to what would be considered compulsion to testify were such direction given at the trial level. See supra Section V.

\textsuperscript{155} Although the proposed rule language provides explicit direction with regard to admitting inadmissible evidence, revised advisory committee notes are necessary to account for still-lingered questions that rule language alone cannot address. Therefore, any substantive change to the rule language—such as that proposed in this Article—must be accompanied by relevant advisory notes. It must also be acknowledged that the rule amendment proposed herein is not meant to set out a rigid definition of what is admissible and when. Rather, this amendment is meant to guide courts while maintaining a reasonable level of judicial discretion. For analogous guidance, see Fed. R. Evid. 611 advisory committee note (“Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge.”).
In proposing a rule amendment to correct and unify the varied interpretations of Rule 106, there are two primary concerns. First, the rule must be structured in a way that provides clear guidance in its general application. Second, the rule must prevent the harm to criminal defendants that may be suffered in the event of narrow interpretations of the rule. With those concerns in mind, the proposed text of amended Rule 106 would read:

If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part—or any other statement—that in fairness ought to be considered at the same time.

A) A statement admissible under this rule should not be excluded under the rule against hearsay.

B) In a criminal case, if evidence admissible under this rule, and offered by the defendant, is excluded under any other rule, the entire statement must be excluded.

The amended language alone more clearly allows for broad admission of evidence necessary to correct a potentially misleading statement, but on its face the rule may not be read to allow for any significant judicial discretion. Because a rule would become unwieldy were it to include reference to any and all foreseeable issues, this Article further proposes amending the advisory committee notes.

The advisory committee notes inform the rule, but they are neither binding nor mandatory interpretations. Thus, the language of the rule is paramount to its success. However, with the rule language suitably precise and narrowly targeted such to correct and prevent the major concerns, the advisory committee notes can be used as necessary to aid courts in their individual interpretations as questions may arise. To that end, the advisory committee notes to Rule 106 should be modified to reflect the rule changes by removing the third paragraph in its entirety, and amending the first paragraph to read:

This rule is an expression of the common-law Rule of Completeness. It does not in any way limit the court’s ability to give limiting instructions under Rule 105. Nor does it in any way limit the court’s discretion under Rule 611(a).

156. For example, the concern that improper interpretation and implementation of Rule 106 could compel a defendant to waive his Fifth Amendment right against self-incrimination. See infra pp. 309-11 and note 148; see also supra Section V. Further, the precision of the text is meant to constrain the circuits to a more universal interpretation such to prevent the wildly different approach used through the circuits with the existing rule. See supra Section IV.

157. For the purposes of this Article, and with the prior discussion of the common-law rule in mind, no citations have been added to the proposed notes. However, should this amendment be adopted, it is suggested that the advisory committee notes cite to the seventh edition of McCormick on Evidence. Brown et al., supra note 70. This is specifically suggested due to the assertion therein that the Rule of Completeness has
The effect of the change to the first paragraph is to reinforce the goals of the newly drafted language, making it clear that even within the presumption of broad admissibility, the trial court’s judgment, on a case-by-case basis, is not to be limited. Further, the second paragraph is not affected by this proposed amendment. For practical purposes, the second paragraph merely lays out the purposes of the rule and does not limit its interpretation. Finally, the third paragraph must be removed to ensure that, across all circuits, completeness does not apply only to writings or recorded statements.

B. RULE LANGUAGE: THE NEED FOR BOTH SPECIFICITY AND FLEXIBILITY IN THE AMENDED RULE’S LANGUAGE

The amended rule language suggested in this Article is meant to provide for broad admissibility, tempered by the judgment of the trial courts—those in the best position to determine the need for evidence to be made admissible or inadmissible in accord with the underlying purposes of the Federal Rules of Evidence. In an effort to ensure such admissibility, and to ensure its limits, this rule amendment has three primary sections: the body, subsection (A), and subsection (B). Each of those parts was drafted to serve a distinct purpose in solving the issues presented herein, and to guide the courts in applying a fair, uniform rule.

First, the body was drafted to closely mirror the current Rule 106 language as a framework, or vessel, with which many courts and practitioners are already comfortable. Allowing the existing framework to continue, rather than creating an entirely new rule structure, serves to soften the drastic change in interpretation from that current interpretation.

Id.

Further, the McCormick treatise is preferred due to its explicit preference for a trumping function that is tempered by discretion. Id. Here, the same purposes exist: avoiding misleading impressions, and acknowledging the inadequacy of delayed repair. See Fed. R. Evid. 106. Because the amended rule language is explicit in identifying the trumping function, it is unnecessary to add such a purpose to this paragraph.

See supra Section III (discussing the purposes of the Federal Rules of Evidence, specifically as they relate to completion evidence and overall fairness).

The amended advisory committee notes notwithstanding.

Rule 106 has not seen any substantive change since its codification. See Fed. R. Evid. 106 advisory committee note. Because courts and practitioners have likely grown accustomed to the general framework of the rule, this Article proposes changes only to the function. See Adrian Furnham, Resistance to Change, Psychol. Today (Oct. 28, 2016), https://www.psychologytoday.com/blog/sideways-view/201610/resistance-change (“Target the resistors of change; work on them and get their trust. It will more negativity and resistance through ambivalence and indifference to the possibility that they will embrace change happily and effectively.”).
rently followed in many circuits. Indeed, one of the primary goals of Rule 106, the contemporaneous introduction of completion evidence, sees no change in the amended language. Thus, the courts need not grapple with their interpretations of that timing function, allowing more time and energy to be spent on the necessary substantive changes to admissibility. With the existing framework, and the successes of Rule 106 as it applies to timing, only minor substantive changes need be made to the language in that regard. To that end, the clauses referring to written or recorded statements now read simply as “statements.” While a minor change, this has the effect of allowing any type of statement—most likely oral statements—to be admitted for the purposes of completion. While some courts have already found such an interpretation through Rule 611(a), others have not. Thus, this language further unifies the circuits and maintains fairness by precluding the introduction of irrebuttable misleading evidence.

Next, subsection (A) was newly drafted in its entirety to unify the circuits, and preclude another split with regard to the trumping function of Rule 106. The language of subsection (A) is meant to be explicit, with the goal of identifying Rule 106 as a rule that is not subservient to the exclusionary Rule Against Hearsay. Rather, the language is crafted to identify a presumption of admissibility over exclusion, subject to judicial discretion. With that goal in mind, the explicit language found in this part is tempered by the non-mandatory use of “should.” The absence of “shall” or any other mandatory

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162. See supra Section IV.A. One goal here is to appease those who may be classified as “routine seeking” personalities, resistant to change. Furnham, supra note 161 (“Many people like a stable routine. They would rather be bored than surprised. They take comfort in their little daily rituals which change threatens to destabilize.”).

163. See Fed. R. Evid. 106 (“An adverse party may require the introduction of completion evidence, at that time.”) (emphasis added); see also Fed. R. Evid. 106 advisory committee note (“The second [of the two primary considerations] is the inadequacy of repair work when delayed to a point later in the trial.”).

164. See supra note 60 and accompanying text. This change is meant to eliminate the need for courts to look outside this rule in order to find a pathway toward introduction of necessary completion evidence.

165. To be fair, some evidence offered under limited interpretations (e.g., those courts that do not allow oral statements to be admitted on a completeness rationale) may be introduced as a part of the opposing party’s case. However, the need to call a witness to rebut the misleading oral statement may implicate the Fifth Amendment constitutional concerns discussed above. See supra Section V.

166. See, e.g., United States v. Quinones-Chavez, 641 F. App’x 722, 731 (9th Cir. 2016) (Fisher, J., dissenting), cert. denied, 137 S. Ct. 94 (2016) (discussing the importance of the “trumping” function.).

167. It is worth briefly discussing that as this proposed rule language evolved, it became clear that the use of non-mandatory language is necessary to allow the rule to function as intended. Previous iterations contained no such provision and would likely have functioned almost exclusively as a true rule of completeness, limiting not admissibility on a case-by-case basis, but rather the judicial discretion necessary to make the case-by-case decisions.
language is meant to indicate that judicial discretion may be used to preclude admission where necessary. This is meant to again allow the trial courts to use their informed judgment to identify a distinct lack of adequate indicia of reliability, or other issues such as prejudicial effect, such that to follow the presumption of admissibility would be to undermine the purposes of the Federal Rules of Evidence in much the same way as blanket inadmissibility.

Finally, subsection (B) was drafted with the significant constitutional concerns found in the misapplication of Rule 106 in mind—where timing over completeness may mislead a jury and thus compel a defendant to testify. In order to preclude any semblance of compulsion to testify, the first clause of this part identifies that it is only relevant in a criminal case. Further, the third clause provides that this part is only relevant where the evidence is offered by the defendant. These two limitations were crafted first, to prevent this rule being widely exploited by parties who wish to keep damning evidence, that may be admissible under Rule 106, from being heard by the jury at all; and second, to clearly identify the concerns implicit in allowing misleading statements to remain incomplete, unless the defendant testifies. With those limitations in mind—likely confining the application of subsection (B) to but a small subset of cases—and the need to guarantee the protection of a criminal defendant’s constitutional


169. The trial court, being best positioned to make any such determinations, should be granted the discretion necessary to properly administer, and indeed protect, the adversarial process. See FED. R. EVID. 611 advisory committee note to subsection (a).

170. See MERRITT & SIMMONS, supra note 82 (“Judges developed the hearsay ban and all of its exceptions to force litigants to present the best possible testimony in the courtroom.”).

171. See supra Section IV. One concern with blanket admissibility of completion evidence is that intentionally self-serving statements could be rendered per se admissible under a true rule of completeness. With that concern in mind, the amended rule language is specifically intended to allow for judicial discretion. That discretion, discussed above with regard to reliability, may be exercised in any way permissible under Rule 611, thus preempting such criticisms. See FED. R. EVID. 611(a).

172. It is important to note that such constitutional concerns should be confined almost exclusively to criminal cases where the defendant may be compelled to testify. While it must be acknowledged that the Fifth Amendment right against self-incrimination extends beyond just criminal cases, the constitutional concern underlying Rule 106 is not simply self-incrimination in general, but rather the implicit compulsion to testify. See supra notes 134, 152 and accompanying text; supra Section V.B.

173. Admittedly, this is a small subset of cases. However, regardless of the size, the effect on those cases may be dramatic. See, e.g., supra pp. 309-11.
rights, this subsection was drafted to include the exclusionary remedy suggested in *United States v. LeFevour* by Judge Posner. In effect, the only way to truly guarantee a criminal defendant’s right not to take the stand, where completion could only be accomplished by his taking the stand, is to exclude the misleading portion in its entirety. And, as Judge Posner suggested, “[t]he party against whom that evidence is offered can hardly care . . . provided he honestly wanted the otherwise inadmissible evidence admitted only for the purpose of pulling the sting from evidence his opponent wanted to use against him.” Therein lies the final goal of total exclusion if the completion evidence is otherwise made inadmissible: precluding gamesmanship by the defendant, should he or she want the completion evidence admitted for some purpose other than completion (e.g., seeking to introduce self-serving statements under the guise of completeness).

C. The Purposes Served by Amendments to Rule 106 and the Advisory Committee’s Notes: Precluding Both Policy and Constitutional Concerns

A circuit split could hardly be more pronounced with regard to the interpretation of a single rule than it is with Rule 106. Many circuits hold that the Rule of Completeness is anything but, while others hold that the Rule of Completeness governs just that, completion. Even still, a small minority defers to traditional judicial discretion in determining admission of evidence under the Rule of Completeness. Ultimately, the admissibility of explanatory completion evidence is unclear at best. Such discord exists not only across vast geographic—and occasionally ideological—lines, but even between sister circuits.

Difference in interpretation in and of itself is not substantially burdensome on practitioners who must know the rules of the courts in which they practice, nor is Rule 106 particularly troublesome for the courts once an interpretative scheme is adopted. Accordingly, on 174. 798 F.2d 977 (7th Cir. 1986).
175. United States v LeFevour, 798 F.2d 977, 980-81 (7th Cir. 1986).
176. LeFevour, 798 F.2d at 981.
177. See supra Section IV.
178. Id.
179. Compare United States v. Baker, 432 F.3d 1189, 1223 (11th Cir. 2005) (following a completeness approach, the court held that “the exculpatory portion of a defendant’s statement should be admitted if it is relevant to an issue in the case and necessary to clarify or explain the portion received”), with United States v. Cosgrove, 637 F.3d 646, 661 (6th Cir. 2011) (quoting United States v. Howard, 216 F. App’x 463, 472-73 (6th Cir. 2007)) (“This circuit has stated, however, that the [completeness] doctrine ‘does not make inadmissible evidence admissible.’”).
180. The doctrine of *stare decisis* binds the lower courts, and “[t]his obligation is not dependent on the correctness of the Circuit’s decision.” Brewster v. County of Shasta,
the face of the issue, one could argue that the circuit split has not “so far departed from the accepted and usual course of judicial proceedings” as to justify the United States Supreme Court weighing in.\textsuperscript{181} However, discordant application of Rule 106 does have a substantial impact on the evidence introduced both to inculpate and exculpate a defendant at trial.\textsuperscript{182} The potential impact on defendants’ cases across circuits due to the shifting application of Rule 106 calls forth a host of practice and policy questions. For example, as discussed above, Rule 102 provides that “[t]he rules should be construed so as to administer every proceeding fairly . . . to the end of ascertaining the truth and securing a just determination.”\textsuperscript{183} If the rules of evidence are to be properly construed as rules governing a fair trial, the idea that a defendant cannot attempt to introduce relevant exculpatory writings or statements, guided by Rule 106, in order to complete or rebut inculpatory statements is difficult to reconcile.\textsuperscript{184} Further, the fact that similarly situated defendants, separated not by fact, but by geographic location within the United States, can experience wildly different results should they attempt to introduce evidence under Rule 106 is nigh impossible to reconcile. Though this circuit split clearly exists, to date the United States Supreme Court has only once addressed Rule 106 in any depth.\textsuperscript{185} Even then, the Court opted not to define the contours of the rule, instead simply using a relevance analysis that has not been used substantially in the lower courts.\textsuperscript{186} Thus, it is necessary to introduce a solution that is not dependent on the appellate process to bring a Rule 106 issue before the Court again.\textsuperscript{187}

\textsuperscript{112} F. Supp. 2d 1185, 1191 (E.D. Cal. 2000) (citing Hutto v. Davis, 454 U.S. 370, 375 (1982)). Trial courts are further insulated in their decisions as the standard of review for a completeness question is abuse of discretion. See United States v. Vallejos, 742 F.3d 902, 905 (9th Cir. 2014) (citing United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996)).

\textsuperscript{181} Sup. Ct. R. 10.

\textsuperscript{182} See, e.g., United States v. Adams, 722 F.3d 788, 827 (6th Cir. 2013); see also supra pp. 309-11.

\textsuperscript{183} Fed. R. Evid. 102 (emphasis added).

\textsuperscript{184} United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988) (“The rule simply speaks the obvious notion that parties should not be able to lift selected portions out of context.”).


\textsuperscript{186} See Rainey, 488 U.S. at 171-73.

\textsuperscript{187} Given that the last time the United States Supreme Court addressed the issue of Rule 106 in any depth was in Rainey, twenty-eight years ago, it is difficult to suggest that the issue will be addressed any time soon. Thus, it is necessary to resolve the discordant interpretations through other methods, precluding the need for an appropriate case to be granted certiorari, such that the Supreme Court could resolve the conflict. See Sup. Ct. R. 10. Further, even if a case with appropriate facts is granted certiorari, and is heard by the Court, Rule 106 may still be left undecided, just as in Rainey. See Rainey, 488 U.S. at 172 (“While much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy
The disparate approaches in application of Rule 106, with the associated policy concerns—concerns that seemingly undermine the enumerated purposes of the Federal Rules of Evidence—demand unification. Rule 106 is applied today with little guidance from the advisory committee notes and with no substantial guidance from the United States Supreme Court. However, where the rights of parties to present evidence, which in fairness ought to be admitted, is determined by the circuit in which the case is being heard, rather than by standardized, consistent rules of evidence, it is reasonable to argue that the United States Supreme Court must resolve the conflict. Such a resolution could clearly define the current rule's limitations, eliminate the rule entirely in favor of limited admission under a relevance analysis, or completely redefine the rule. However, generally, for any such resolution to take effect, a case would have to be appealed all the way to the United States Supreme Court, be granted certiorari, be heard, and ultimately be decided on that issue. Unfortunately, since 1988 no such case has made it to the United States Supreme Court, and even then, the Court ultimately decided the issue via relevance, not completeness. With those steps in mind, the alternative to a traditional resolution, needing to be decided by the Court, would be to seek a rule amendment. The United States Supreme Court is still obviously an integral part of the rules amendment process, but that method is not entirely dependent on the adversarial trial process. Rather the amendment process can allow for a more expedient method of remedying the interpretative split, allowing the Court to address the concerns discussed above—especially with regard to constitutional concerns—without waiting for a party with both the motivation and the money necessary to take the issue to task.

permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106.”

188. See supra Section IV.
189. Rainey, 488 U.S. at 172.
190. See U.S. Cts., supra note 147 (“[A] proposed rule change is generally considered by an advisory committee and published for comment, then considered by the Committee on Rules of Practice and Procedure (the ‘Standing Committee’), the Judicial Conference, the Supreme Court, and Congress.”).
191. See id. (“Any change to the federal rules must be designed to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”).
192. See supra note 147.
193. See, e.g., Robert Barnes, A Priceless Win at the Supreme Court? No, it has a price, Wash. Post: Pol. (July 25, 2011), https://www.washingtonpost.com/politics/a-priceless-win-at-the-supreme-court-no-it-has-a-price/2011/07/25/gIQAvOsPZI_story.html?utm_term=650487708ace (noting anecdotally that “[a] big victory at the Supreme Court isn’t priceless, after all. It costs somewhere north of $1,144,602.64”). Barnes further noted that one attorney charges an hourly rate of $765 for supreme court litigation, a price “similar” to what others charge ‘in the relevant market of attorneys who regularly practice before the Supreme Court . . . .” Id.
Aside from the timeliness of the rules amendment process, the proposed rule language and notes make clear across the board exactly what Rule 106 must become. There can be little doubt that the amended rule would finally embody the common-law Rule of Completeness. The explicit language therein further disallows limited approaches from being construed in light of occasionally imprecise language from case law. Further, the proposed advisory committee notes make clear that Rule 106 does not simply allow a party to entirely circumvent the hearsay rules by playing the system to introduce exculpatory statements without testifying. Rather, judicial discretion clearly remains with regard to limiting instructions, and even exclusion where necessary. Thus, an adverse party may receive an instruction limiting completion evidence to just that, evidence necessary to complete the statement and give context. If that statement includes exculpatory language, the trial court can effectively limit that language to be used not for the truth of the matter asserted, but only to provide context. Retaining judicial discretion better allows all the purposes of the rules of evidence to be met without substantial risk of allowing a defendant to circumvent the occasional need to testify by simply allowing him or her to make exculpatory statements during questioning, wait for the prosecution to open the door, and finally introduce those statements under the guise of completeness.

Though the amendment process may likely be quicker than the appeals process, it still does not grant an immediate change to the current interpretation of Rule 106. Thus, even if the rules are to be amended, we are still left with the varying interpretations of Rule 106 across the circuits for some time. So the remaining question must be, what should be done in the interim?

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194. See supra Section III.
195. An intelligent and driven defendant, or even a party in a civil case, could make statements under questioning that he knows would be admissible as opposing party statements, but make those statements with necessary exculpatory portions that would circumvent the need to testify. See FED. R. EVID. 801(d)(2).
196. Moreover, significantly under-limited exculpatory testimony not only could not be subjected to cross-examination when the defendant has not taken the stand, but accuracy may be further compromised as “[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession’s non-self-inculpatory parts.” Williamson v. United States, 512 U.S. 594, 599 (1994).
197. Even if a case is appealable, and has a Rule 106 question, there is no way to tell whether that question is substantial nor whether the case is of the nature that certiorari would be granted for United States Supreme Court review. Further, there is no way to know at what point such a case may present itself, and even then, whether the party affected would seek to appeal. Thus, the average three-year time frame for amendments is likely quicker than the trial process. See supra note 147.
198. See supra Section IV.
D. **Interim Interpretation: Awaiting the Amendment**

In the interim period while Rule 106 is going through the amendment process, its interpretation will remain inconsistent, absent any other guidance. In order to unify the circuits, and to do so in a manner consistent with the proposed amendment, the purposes of the rules,\(^{199}\) and the constitutional rights of a criminal defendant,\(^{200}\) this Article proposes that the circuit courts adopt the *United States v. LeFevour*\(^{201}\) interpretation of Rule 106 used by the United States Court of Appeals for the Seventh Circuit.\(^{202}\) In order for Rule 106 to adequately fulfill its function, some otherwise inadmissible evidence must be admitted when necessary for completion. However, in the interest of achieving fairness\(^{203}\) in circuits that have thus far operated under a rule of timing approach,\(^{204}\) it is not necessary for all circuits to immediately change to a true rule of completeness approach. Rather, the trial courts should be allowed to exercise their discretion in determining whether to admit completion evidence, and to what extent the admitted evidence may be used.\(^{205}\) The courts should be encouraged to decide on a case-by-case basis, unconstrained by either narrow or broad interpretations,\(^{206}\) whether any proffered completion evidence is necessary to avoid misleading the jury. In exercising this discretion, the courts are further encouraged to use limiting instructions where reliability concerns may be found.\(^{207}\) This approach stops short of applying the presumption of admissibility with regard to completion evidence that the proposed rule change makes. Further, it does not encourage use of the remedy found in subsection (B) where misleading evidence must be excluded if the completion evidence is excluded. The lack of such a remedy in the interim period is due to its harsh nature.

\(^{199}\) See supra Section III.

\(^{200}\) See supra Section V.

\(^{201}\) 798 F.2d 977 (7th Cir. 1986).

\(^{202}\) United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986) (requiring that if completion evidence is made inadmissible, the misleading statement must also be excluded).

\(^{203}\) This again is a central component of not just the Federal Rules of Evidence, but of our adversarial system. See supra pp. 290-91; Fed. R. Evid. 102; see also Fed. R. Evid. 106 (providing for introduction of evidence that “in fairness ought to be considered at the same time”) (emphasis added).

\(^{204}\) See supra Section IV.A.

\(^{205}\) In circuits that have thus far followed a rule of timing approach, the courts should indicate that the default preference is admissibility. From there, the trial court may use its discretion to determine whether to follow that preference on a case-by-case basis.

\(^{206}\) Thus, the interim approach is not limited solely to timing jurisdictions, but also applies to completeness jurisdictions.

\(^{207}\) Specifically, the court should limit the evidence to context, instructing the jury that they are not to consider the completion evidence for “the truth of the matter asserted.” See Fed. R. Evid. 801(c)(2).
Rather than attempt to introduce such a remedy without a guiding rule section, the interim period would be better served by focusing on simple admissibility. Regardless, this approach does allow a trial court to avoid constitutional concerns in the absence of the presumption of admissibility by examining the facts specific to the case and making its determination based solely on those facts. Further, this approach clarifies the muddied analysis presented in *Beech Aircraft Corp. v. Rainey*\(^{208}\) requiring a court to evaluate completion evidence not under Rule 106, but rather under rules of relevancy to circumvent inadmissibility by finding *ipso facto* relevance.\(^{209}\)

It must be acknowledged that the interim approach is not perfect. Indeed, it allows for varied interpretations of Rule 106 not just across circuits, but initially across the district courts. However, the varied interpretations would no longer vary based on whether evidence may be admissible at all. Rather, the interpretations would vary based on whether the trial court views the evidence as necessary, and to what extent the trial court believes that evidence should be used. In that regard, the interim approach is far preferable to the current circuit split, and could exist fairly until such time as Rule 106 is formally amended.

**VII. CONCLUSION**

The Rule of Completeness is currently well understood throughout the circuits. Unfortunately, it is not understood in a uniform manner. Rather, the circuits have split in three directions with regard to how they approach questions of completion evidence admissibility when it conflicts with exclusionary rules of evidence. While some circuits allow completion evidence to trump exclusionary rules, others rely on judicial discretion, while still others hold that the Rule of Completeness has no trumping function and cannot make other inadmissible evidence admissible. In an effort to provide a uniform interpretation of a rule that currently both implicates the purposes of the Federal Rules of Evidence and may run afoul of a criminal defendant’s Fifth Amendment rights, the Federal Rules of Evidence should be amended to allow for a presumption of admissibility of completion evidence. Further, the advisory committee notes should be amended such to illustrate not only a preference for broad admissibility, but also for judicial discretion in the trial court. Thus, overbroad admissibility may be limited both by the judge under 611(a) and by a request by the party against whom the evidence is offered under a limiting instruction. Ultimately, amending the rule and its advisory notes


would serve to unify the circuits and avoid associated constitutional concerns that have as of yet only been acknowledged in dissenting opinions.