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This Space Intentionally Left Blank: What To Do When Hearsay and Rule 106 Completeness Collide

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THIS SPACE INTENTIONALLY LEFT BLANK: WHAT TO DO WHEN HEARSAY AND RULE 106 COMPLETENESS COLLIDE

*Michael A. Hardin**

Federal Rule of Evidence 106 provides that when one party in a trial or hearing offers into evidence a portion of a statement in a misleading way, the opposing party can offer the rest, or some other portion of, that document or recorded statement at the same time if it is necessary for the factfinder to understand and contextualize the first part. Sometimes, however, the other portion, or “remainder,” would be inadmissible if it were offered by itself, either because it is hearsay or for some other reason. This leaves the court in a difficult position: Should it allow the remainder to be entered into evidence in violation of some other rule that would exclude it? Or should the court exclude the remainder and allow the initial misleading portion to stand, uncorrected?

Some circuits have held that Rule 106 must trump the other rules of evidence in order to do its job. These courts admit otherwise inadmissible hearsay evidence for its truth. Other circuits have held that if no independent hearsay exception exists for the remainder, it must be excluded despite Rule 106. Finally, some opinions have suggested that Rule 106 allows the remainder of a statement to be admitted for the narrow purpose of contextualizing the initial misleading portion.

*This Note argues the following: if one party offers a misleading portion of a statement into evidence, the opposing party should be able to offer the remainder, but the jury should only be allowed to use it for context. The evidentiary basis for doing so is not Rule 106, but rather the U.S. Supreme Court case *Beech Aircraft Corp. v. Rainey*, which holds that remainders necessary to correct misleading impressions are automatically relevant for a nonhearsay purpose. The end of this Note offers courts a step-by-step process for judges to follow when ruling on whether to admit remainders.*

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INTRODUCTION

As Gerardo Lopez-Medina sat next to his attorney at the defense table, on trial for possession of methamphetamine with intent to distribute, his half-brother's ghost spoke out from the witness stand, and testified that the two of them had possessed those drugs together.¹ Lopez-Medina heard it, the jury heard it, and in closing argument, it was not lost on the prosecutor, who said that when the defendant's "own half brother finger[ed] him," it was "the final nail in the coffin."² In reality, Rogelio Lopez-Ahumado, the defendant's half-brother, was sitting (very much alive) in a jail cell miles away. He had already pled guilty to possessing the very same methamphetamine, stashed in the same truck, but had refused to testify for either the government or the defense in his half-brother's trial.³ As a condition of his plea, Lopez-Ahumado had written a statement to the court admitting that the truck, where the authorities had found the drugs, belonged to Lopez-Medina, and that the drugs had belonged to both brothers.⁴ The "ghost" was actually Officer Johnson, reading from the very same statement that Lopez-Ahumado had to write before he could plead guilty.⁵

However, the defendant (or rather his attorney) had a hand in summoning this ghost. The defense strategy was to ask Officer Johnson whether Lopez-Ahumado had already been arrested and had pled guilty to possessing the drugs in question.⁶ When the officer affirmed Lopez-Ahumado's arrest and guilty plea, it was true, but it was not the entire story. So, the court allowed the prosecution to have Officer Johnson read Lopez-Ahumado's statement implicating Lopez-Medina. The court permitted this reading to ensure that the jury would not mistakenly believe that Lopez-Ahumado had admitted to being the *only* person to whom those drugs belonged.⁷ From that point forward, the prosecution was free to treat what Lopez-Ahumado wrote in that statement as though he had said the words in open court.⁸

In the Federal Rules of Evidence, when one party offers a statement that is misleading because it is incomplete, Rule 106, known as a version of the "rule of completeness," allows the other side to stop the proceedings and "complete" the statement before any other evidence is presented.⁹ But what happens when another rule of evidence renders the remainder of the statement inadmissible? Does the court have the power to admit it anyway, because completeness trumps one of the carefully crafted prohibitions on what may be received in evidence? Should the court let the misleading

1. United States v. Lopez-Medina, 596 F.3d 716, 724–25 (10th Cir. 2010).

2. *Id.* at 729 (internal quotation marks omitted).

3. *Id.* at 722–23.

4. *Id.* at 723.

5. *Id.* at 725.

6. *Id.* at 723–25.

7. *Id.* at 725–26.

8. *Id.* at 729.

9. FED. R. EVID. 106.

statement stand and allow the jury to form the wrong idea about what was said? Or can the judge fashion some kind of compromise?

The federal circuit courts continue to split on how to analyze and rule on proposed completions of misleading statements under Rule 106.¹⁰ This Note examines Rule 106's role in the trial process, its relationship with the other rules of evidence, and the different ways the courts have solved this problem. Moreover, this Note provides courts with a step-by-step approach to Rule 106 "completeness" problems as they arise at trial.

This Note is divided into three parts. Part I serves as a primer, not only on Rule 106, but also on hearsay, the rule of evidence that Rule 106 must trump most often when it allows an out-of-court statement to be completed.¹¹ Part I also discusses various other rules of evidence that may interact or conflict with Rule 106, as well as a U.S. Supreme Court case that addressed a completeness issue without invoking Rule 106.¹² Part II breaks down the various analytical approaches that circuit and district courts have taken to determine whether Rule 106 trumps other evidence rules. Finally, Part III argues that while Rule 106 technically should not trump any other rules of evidence, this does not mean that the remainder of a statement cannot be admitted. Rather, if admitting the remainder of a partial statement is necessary to avoid misleading the factfinder, the remainder will almost never violate the rules of evidence in the first place: it will not be hearsay, and it will serve a relevant purpose that does not prohibit its admission.

I. THE COMPLETE PICTURE: RULE 106'S PLACE AMONG THE FEDERAL RULES OF EVIDENCE

Part I.A covers relevant evidence rules, including jury instructions limiting the purposes for which evidence is admitted. Part I.B introduces the concept of "limited admissibility"—that is, the way evidence rules distinguish between proper and improper purposes for which juries may consider evidence. Part I.C covers the concept of hearsay, discussing hearsay exceptions and exemptions, nonhearsay purposes of statements, and some of the inherent asymmetries in who is allowed to offer statements into evidence. Part I.D discusses Rule 106's basic function and how to determine if a remainder ought to be considered contemporaneously with the portion of the statement initially offered into evidence.¹³

10. See *infra* Part II.

11. See FED. R. EVID. 802.

12. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988).

13. For clarity, this Note will use the following terminology: "proponent" will mean the party who initially offers a portion of the statement, document, or recording; "portion" will mean the original part of a statement, document, or recording that the proponent offers; "opponent" will mean the party against whom the portion is offered; and "remainder" will mean the other part or parts of the statement that the opponent wishes to offer to complete the portion.

A. Basic Evidentiary Principles

This section introduces a few basic rules of evidence that inform the discussion of other rules and evidentiary analysis in general.

1. Relevance and Rule 403

Rule 401 states that evidence is relevant if it tends to make any fact of consequence more or less probable than that fact would be without such evidence.¹⁴ Rule 402 states that relevant evidence is generally admissible, except if admitting it would violate the U.S. Constitution, a federal statute, the other Federal Rules of Evidence, or other Supreme Court rules.¹⁵ Rule 403 allows the judge to exclude relevant evidence on grounds of undue prejudice, if the probative value of that evidence is substantially outweighed by (among other things) its unfairly prejudicial effect or its ability to mislead the jury.¹⁶ The Advisory Committee on Evidence Rules defines undue prejudice as “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”¹⁷

2. Judges’ Control over Proceedings

Federal Rule of Evidence 611(a) gives the court “reasonable control over the mode and order of examining witnesses and presenting evidence.”¹⁸ This is so the court can make the examinations and presentations effective for determining the truth, avoid wasting time, and protect witnesses from being harassed or embarrassed on the witness stand.¹⁹ Some courts have interpreted this rule to allow judges to apply Rule 106 to oral statements in addition to writings or recordings.²⁰

Rule 105 mandates that judges give proper jury instructions. It reads: “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.”²¹ Many of the Federal Rules of Evidence prohibit the use of evidence for one or more particular purposes but allow it for any other purpose.²² For this reason, judges must tell the jury how to use a piece of evidence in coming to a verdict.²³ Limiting instructions may prevent undue prejudice by cautioning the jury against using evidence the

14. FED. R. EVID. 401.

15. *Id.* R. 402. Compare *id.*, with *id.* R. 106 (including no similar limitations on admissibility).

16. *Id.* R. 403.

17. *Id.* R. 403 advisory committee’s note.

18. *Id.* R. 611(a).

19. *Id.*

20. See *infra* Part I.D.

21. FED. R. EVID. 105.

22. See *infra* Part I.B.

23. 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 105.02[1] (10th ed. 2011).

wrong way.²⁴ However, sometimes a jury instruction is insufficient, because the risk of the jury misusing the evidence substantially outweighs whatever probative value the evidence has when used correctly.²⁵ In these instances, the evidence will be inadmissible under Rule 403.²⁶

When one party introduces a piece of evidence that is inadmissible for one purpose but admissible for a different purpose, the opposing party has the duty to object and request a limiting instruction from the judge.²⁷ The judge has no discretion to deny this limiting instruction.²⁸ If the opposing party does not object, the evidence may be used for any purpose.²⁹

It is unclear how effective limiting instructions are at preventing juries from using evidence for prohibited purposes. Jurors, uneducated in the law, may struggle to understand the difference between the permitted and prohibited purpose.³⁰ Moreover, even if jurors understand the distinction, they still might unconsciously draw a forbidden inference.³¹ On the other hand, limiting instructions do constrain the attorneys. In closing arguments, neither attorney may ask the jury to draw those forbidden inferences or make an argument using the evidence for an improper purpose.³²

*B. "Limited Admissibility" and Exclusion of Evidence:
Relevant for the Right and Wrong Reasons*

This section discusses the "limited admissibility" principle inherent in the Federal Rules of Evidence and gives examples of rules embodying this principle.

1. General Examples

Many Rules of Evidence are "purpose-specific"; they bar the use of a certain kind of evidence for one particular purpose, but not other purposes.³³ This general principle has been called "limited admissibility."³⁴

24. *Id.* § 105.02[4].

25. *Id.*

26. *Id.*

27. *Id.* § 105.02[2].

28. *Id.*

29. *See id.* (citing *Gray v. Busch Entm't Corp.*, 886 F.2d 14 (2d Cir. 1989)).

30. *See* Daniel D. Blinka, *Ethical Firewalls, Limited Admissibility, and Rule 703*, 76 FORDHAM L. REV. 1229, 1235 (2007). *But see* 1 MCCORMICK ON EVIDENCE § 59, at 259–60 (John W. Strong ed., 5th ed. 1999) ("Realistically, the instruction may not always be effective, but admission of the evidence with the limiting instruction is normally the best reconciliation of the competing interests.").

31. *See* Blinka, *supra* note 30, at 1235.

32. *See id.* at 1236.

33. 1 SALTZBURG ET AL., *supra* note 23, § 105.02[1].

34. 1 MCCORMICK ON EVIDENCE, *supra* note 30, § 59, at 259. The limited admissibility approach is not without its critics. One criticism is that it allows for "lawyerly 'mischief,'" namely, that attorneys will use the existence of a single permissible purpose as a pretext to admit evidence that they hope the jury will actually consider for its impermissible purposes. *See* Blinka, *supra* note 30, at 1237–41.

For example, under Rule 404(b), a party cannot use evidence of a person's prior crimes, wrongs, or acts in order to prove that the person has a certain character trait and acted in accordance with that trait on a particular occasion.³⁵ Policy concerns underlie this rule: evidence of a person's character "subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."³⁶ However, this kind of evidence can be used for any other purpose besides proving that the person acted in conformity with the character trait.³⁷

Another policy-driven rule is Rule 407: if A gets injured, and subsequently, B takes precautions that would have made A's injury less likely had those precautions been taken earlier, A cannot use those subsequent precautions as evidence that B was at fault for A's injury.³⁸ A major justification for this rule is that if our legal system admitted this evidence to prove fault, it would punish people for fixing dangerous situations.³⁹ Accordingly, defendants would be deterred from fixing the alleged cause of an injury for fear that the injured person would have a stronger case against them.⁴⁰ However, evidence of subsequent precautions is admissible if offered for any other purpose.⁴¹

Some rules, however, are exclusionary rather than inclusionary. Instead of allowing evidence for any purpose that is not improper, they bar certain types of evidence outright, or admit evidence only if it is offered for a specific, proper purpose.⁴² These rules may also be based in policy considerations.⁴³

35. FED. R. EVID. 404(b).

36. *Id.* R. 404 advisory committee's note (quoting 6 CAL. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 615 (1964), available at <http://clrc.ca.gov/pub/Printed-Reports/Pub054.pdf>).

37. *Id.* R. 404(b).

38. *Id.* R. 407.

39. See 2 SALTZBURG ET AL., *supra* note 23, § 407.02[2].

40. See *id.* For a criticism of this rationale, see *id.*

41. See FED. R. EVID. 408 advisory committee's note (stating that, while evidence of an offer to settle a claim cannot be used as evidence of the claim's validity or amount, or for impeachment purposes, because of a policy to promote settlement, it may be used for any other purpose); *id.* R. 409 advisory committee's note (stating that an offer to pay medical, hospital, or similar expenses for an injury is not admissible to prove liability, so as not to discourage people from making humane gestures); *id.* R. 411 (stating that, while having or not having liability insurance cannot be used to prove or disprove negligence, so as to prevent juries from deciding cases on improper grounds, it can be used for other purposes).

42. See, e.g., *id.* R. 412 (prohibiting the use of a victim's sexual history or predisposition and providing only limited and definite exceptions); *id.* R. 704(b) (unqualifiedly barring an expert opinion as to whether or not a criminal defendant had a "mental state or condition that constitutes an element of the crime charged or of a defense").

43. See, e.g., *id.* R. 412 advisory committee's note (stating that the Rule protects alleged victims from intrusions into privacy, embarrassment, and sexual stereotyping).

2. Rules Governing the Use of Original Documents and Recordings

Several rules restrict witness testimony concerning the contents of written documents and recordings. Rule 1001 says that a “‘writing’ consists of letters, words, numbers, or their equivalent set down in any form.”⁴⁴ Similarly, a “‘recording’ consists of letters, words, numbers, or their equivalent recorded in any manner.”⁴⁵ Under Rule 1002, if a party seeks to prove the content of a writing or recording, she must provide the original, unless one of several exceptions is met.⁴⁶ This does not mean that if a statement was made and a writing or recording of that statement exists, the party offering that statement *must* offer that writing or recording into evidence in order to prove that the statement was made.⁴⁷ Instead, it means that if a party wants to use the writing or recording itself as proof of the information it contains, the party must introduce the original⁴⁸ or a duplicate,⁴⁹ rather than have a witness or other document simply summarize or retell the information contained therein.⁵⁰ However, not all testimony about what a document or recording contains is for the purpose of proving its content. For example, the rule may permit an expert witness to explain how she relied on information contained in a document when coming to her conclusion.⁵¹

In addition to the exception allowing duplicates,⁵² there are several other exceptions to the requirement of originals. The proponent of a document or recording can prove the content of a writing or recording without offering the original if “all the originals are lost or destroyed, and not by the proponent acting in bad faith,”⁵³ if “an original cannot be obtained by any available judicial process,”⁵⁴ if the opponent controlled the original but failed to produce it after notice that it “would be a subject of proof at the

44. *Id.* R. 1001(a).

45. *Id.* R. 1001(b).

46. *Id.* R. 1002. An original writing or recording “means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it.” *Id.* R. 1001(d).

47. 5 SALTZBURG ET AL., *supra* note 23, § 1002.02 [1].

48. FED. R. EVID. 1002.

49. *Id.* R. 1003. “A ‘duplicate’ means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.” *Id.* R. 1001(e). A duplicate may be used in lieu of an original “unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.” *Id.* R. 1003.

50. 5 SALTZBURG ET AL., *supra* note 23, § 1002.02[1]; *see* R.R. Mgmt. Co. v. CFS La. Midstream Co., 428 F.3d 214, 216–17 (5th Cir. 2005) (holding that affidavits and an excerpted and redacted version of a written agreement were offered to prove the contents of the agreement and thus were inadmissible under Rule 1002).

51. *See, e.g.*, United States v. Smith, 566 F.3d 410, 412–14 (4th Cir. 2009) (holding that an expert witness could testify to information he read in books and databases to come to his conclusion about where certain guns were manufactured).

52. *See supra* note 49 and accompanying text.

53. FED. R. EVID. 1004(a).

54. *Id.* R. 1004(b).

trial or hearing,”⁵⁵ or if the writing or recording is “not closely related to a controlling issue.”⁵⁶ Furthermore, if an opposing party testifies or writes about the contents of a document, Rule 1007 allows the proponent of the document or recording to prove its content using the opponent’s testimony, deposition, or writing; the proponent does not need to have the original.⁵⁷

C. *Primer on Hearsay: A Barrier with Many Gaps*

This section discusses the definition of hearsay, the various exceptions and exemptions to the rule prohibiting its admission, and ways that statements may be admitted for a different purpose than to prove the truth of the matters they assert.

1. Hearsay Defined

Hearsay is a statement, made outside of the current trial or hearing, that is offered into evidence to prove the truth of the matter asserted.⁵⁸ In other words, hearsay is offered to prove that a fact asserted in the statement is actually true. Hearsay generally is not admissible, except as provided by Supreme Court rules, federal statute, or the Federal Rules of Evidence.⁵⁹

Notably, a statement can be admissible despite the hearsay rule in three distinct ways. First, a statement can be admitted pursuant to a hearsay exception.⁶⁰ Under Rule 803, a hearsay statement is admissible if something about the statement indicates that it is sufficiently important and reliable.⁶¹ For example, if the “declarant” (the person who makes the statement) makes a statement to a medical doctor for the purposes of being diagnosed or treated, this statement is excepted from hearsay because the declarant has a strong motivation to be honest.⁶² A statement about a startling event made by a declarant who still feels startled is excepted because the declarant has little time to reflect and is less capable of deception.⁶³ Statements “describing or explaining an event or condition, made while or immediately after the declarant perceived it” are considered reliable for the same reason.⁶⁴ Rule 803(3) excepts statements about the declarant’s own state of mind, emotion, sensation, or physical condition as it exists at the moment the statement is made.⁶⁵ The rules deem these

55. *Id.* R. 1004(c).

56. *Id.* R. 1004(d).

57. *Id.* R. 1007.

58. *Id.* R. 801(a)–(c).

59. *Id.* R. 802.

60. *See generally id.* R. 803; *id.* R. 804.

61. 4 SALTZBURG ET AL., *supra* note 23, § 803.02[1].

62. FED. R. EVID. 803(4) advisory committee’s note.

63. *Id.* R. 803(2) advisory committee’s note.

64. *Id.* R. 803(1) advisory committee’s note.

65. *Id.* R. 803(3).

statements reliable because they are contemporaneous and based on one's own unique perception.⁶⁶

Rule 804 provides additional hearsay exceptions for instances when the declarant is unavailable.⁶⁷ A declarant is deemed unavailable if she falls into one of several delineated categories that preclude her from testifying.⁶⁸ One hearsay exception conditioned upon unavailability is if the statement, "when made, . . . had so great a tendency . . . to expose the declarant to civil or criminal liability" that "a reasonable person in the declarant's position would have made [it] only if the person believed it to be true."⁶⁹

Second, a hearsay statement may be admitted under one of the Rule 801(d) hearsay exemptions,⁷⁰ which are discussed below.⁷¹

Third, a statement may bypass the hearsay rule if it does not meet all the criteria for hearsay.⁷² For example, because hearsay must be offered for the truth of the matter asserted, if a statement is not offered into evidence for the purpose of proving a fact that it asserts, it is not hearsay, and it may be admissible.⁷³ The statement must still be relevant⁷⁴ and not substantially more prejudicial than probative.⁷⁵ To be relevant, the fact that the statement was made must tend to prove or disprove something independent of the truth of the statement itself.⁷⁶ But offering a statement to prove something other than its truth creates a risk that the jury may nevertheless accept the statement as true.⁷⁷ Therefore, for that statement to be admissible under Rule 403, that particular risk must not substantially outweigh the probative value of the nonhearsay purpose for which the statement is offered.⁷⁸

Of particular importance to this Note's discussion of Rule 106 is the potential not-for-truth use of statements to help the factfinder better

66. 4 SALTZBURG ET AL., *supra* note 23, § 803.02[4][a].

67. *See* FED. R. EVID. 804.

68. *See id.* R. 804(a). For example, the declarant may be dead, *see id.* R. 804(a)(4), may refuse to testify despite a court order, *see id.* R. 804(a)(2), or may be exempted from testifying by privilege, *see id.* R. 804(a)(1).

69. *Id.* R. 804(b)(3)(A). This particular exception requires "corroborating circumstances that clearly indicate its trustworthiness." *Id.* R. 804(b)(3)(B).

70. *Id.* R. 801(d). Hearsay "exemptions" are a different category than hearsay "exceptions" under Rules 803 and 804.

71. *See infra* Part I.C.4.

72. *See* FED. R. EVID. 801(a)–(c).

73. 4 SALTZBURG ET AL., *supra* note 23, § 801.02[1][b]. Upon request, the judge must instruct the jury to consider this evidence only for the purpose for which it was offered, not as proof of the truth of the matter asserted. *See* FED. R. EVID. 105.

74. FED. R. EVID. 402.

75. *Id.* R. 403.

76. 4 SALTZBURG ET AL., *supra* note 23, § 801.02[1][b].

77. *Id.*

78. *Id.*; *cf.* *Shepard v. United States*, 290 U.S. 96, 98, 103–04 (1933) (holding that a wife's hearsay statement that her husband had poisoned her could not be restricted in purpose to prove only that she wanted to live, rather than the truth of the matter asserted, where "[t]he reverberating clang of those accusatory words would drown all weaker sounds").

understand a conversation, event, or the subsequent actions of a person who heard the statement.⁷⁹ In other words, a statement can be used not to prove the truth of the matter asserted, but rather to provide “context.”

2. Nonhearsay Purpose: Statements Offered for Context

Parties may use a statement for many purposes other than to prove the truth of the matter asserted. For example, in *United States v. Colón-Díaz*,⁸⁰ the First Circuit found that it was not plain error to admit statements suggesting that the defendant was the owner of a drug-selling location when the statements were only offered for the context of a law enforcement investigation.⁸¹ In that case, the district court properly admitted the statements insofar as they explained why the investigators went to a particular location and why some investigators gave certain directions to each other.⁸² Moreover, each time such a statement was elicited, the judge gave the requested instruction to the jurors that they were not to accept any of the statements as proof that the defendant owned the location.⁸³

But Rule 403 places limits on using such statements for this limited purpose. In *United States v. Johnson*,⁸⁴ the Second Circuit strongly criticized the district court for admitting several statements only as context to explain a subsequent investigation.⁸⁵ In *Johnson*, the district court allowed a Drug Enforcement Agency (DEA) special agent to testify to many incriminating statements from various informants (including drug-purchasing customers) that corroborated suspicions the DEA already had about the defendant’s illegal activity.⁸⁶ Although the Second Circuit upheld the conviction because of overwhelming evidence of guilt,⁸⁷ the court scolded the prosecution for abusing “context” as a justification.⁸⁸ In particular, the agent should have explained that the DEA’s actions were based on conversations with informants without disclosing the highly prejudicial substance of those conversations.⁸⁹

In this way, Rule 403 constrains nonhearsay use of prejudicial statements for context.⁹⁰ Often, though, the probative value of context increases when

79. See 4 SALTZBURG ET AL., *supra* note 23, § 801.02[1][b].

80. 521 F.3d 29 (1st Cir. 2008).

81. *See id.*

82. *Id.* at 33–35.

83. *Id.*

84. 529 F.3d 493 (2d Cir. 2008).

85. *Id.* at 497–98.

86. *Id.*

87. *Id.* at 502.

88. *See id.* at 501–02.

89. *Id.*

90. *See id.* at 501 (“When the evidence is proper with respect to an unimportant issue but improper and prejudicial on a crucially important issue, it is unlikely to pass the balancing test of Rule 403.”); *see also, e.g.*, *United States v. Williams*, 133 F.3d 1048, 1050–52 (7th Cir. 1998) (finding error in allowing an FBI agent to testify about an anonymous tip that the defendant was the person who robbed a bank, because the testimony’s prejudicial value in

it responds to an argument or suggestion that the opposing party has made; this can tip the scales in favor of admitting the evidence.⁹¹

Another type of context is a “reciprocal and integrated utterance;”⁹² the statement is offered not for the truth but to understand something said in response. In *United States v. Sorrentino*,⁹³ the court admitted a recorded conversation between the defendant and a confidential informant, offered by the prosecution.⁹⁴ The court reasoned that the defendant’s statements were not hearsay because they were statements by a party opponent under Rule 801(d)(2)(a), and the informant’s statements were not hearsay because they were only offered to make the conversation understandable.⁹⁵

3. Nonhearsay Purpose: Explaining Expert Witness Testimony

Another nonhearsay use, not unlike “context,” is when a party wants to elicit otherwise inadmissible evidence upon which an expert has relied in forming her opinion. Under Rule 703, a court may allow testimony that might otherwise be hearsay, not to prove the truth of the matter asserted, but instead to help the jury understand and evaluate the expert’s opinion.⁹⁶ However, unlike context, statements that are offered under Rule 703 must pass a different balancing test than the one in Rule 403: their probative value must substantially outweigh their prejudicial effect, rather than the other way around.⁹⁷ If the court admits this evidence, the judge, upon request, must instruct the jury to consider it only to evaluate the expert’s opinion, not as substantive evidence.⁹⁸ Without this limitation, an expert could testify to an inadmissible fact because it supported and explained her opinion, and then on closing argument, the attorney could use that testimony to argue that the same fact had been proven.⁹⁹

implicating the defendant substantially outweighed the probative value of explaining the investigation).

91. For example, in *United States v. Gilliam*, the trial court did not abuse its discretion when it permitted testimony that, after leaving the crime scene, the police officer received an anonymous tip about a second gun at that crime scene. *United States v. Gilliam*, 994 F.2d 97, 103–04 (2d Cir. 1993). The defendant had implied on cross-examination that the only reason the officer returned to the scene was to harass the defendant and his friend. *Id.* This increased the probative value of the fact that the anonymous tip was made (regardless of whether or not it was true), because it tended to show that the officer went to the scene to recover the gun, not to harass the defendant. *See id.*

92. *United States v. Metcalf*, 430 F.2d 1197, 1199 (8th Cir. 1970).

93. 72 F.3d 294 (2d Cir. 1995).

94. *Id.* at 298.

95. *Id.*; *see also* *United States v. Catano*, 65 F.3d 219, 225 (1st Cir. 1995); *United States v. Beal*, 940 F.2d 1159, 1161 (8th Cir. 1991).

96. *See* FED. R. EVID. 703 (“[I]f the facts or data [underlying an opinion] would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”); 3 SALTZBURG ET AL., *supra* note 23, § 703.02[4].

97. FED. R. EVID. 703.

98. *Id.* R. 703 advisory committee’s note.

99. *See* Ian Volek, Note, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 FORDHAM L. REV. 959, 973 (2011).

Limiting instructions in this context may be particularly hard for a jury to understand.¹⁰⁰ If an expert has testified that she credited this hearsay evidence as true and used it to come to a conclusion, how can a juror use that hearsay to evaluate the opinion without crediting it as true as well?¹⁰¹ Because of this difficulty, some commentators have argued that experts should not disclose any inadmissible underlying data, while others have said that all inadmissible underlying data should be received without limiting instructions.¹⁰²

However, the use of limiting instructions avoids the problems with either of these extremes. As one commentator notes, without disclosing any underlying data, two competing experts could testify that they consulted the same data and came to opposite conclusions, and the jury would have to choose one blindly over the other.¹⁰³ But if a jury is allowed to consider everything the expert says as substantive evidence, this gives the expert too much power to decide what is relevant and even what is admissible.¹⁰⁴ Thus, perhaps courts consider the use of limiting instructions the best of flawed options.¹⁰⁵ Notably, these instructions once again restrict the attorneys' ability to use the underlying data for an impermissible purpose, that is, as proof of the truth of the matter asserted.¹⁰⁶

The reverse balancing test was added when Rule 703 was amended in 2000, and reflects a policy consideration: it weighs heavily against using experts as "conduits" for hearsay by having them simply repeat what they have been told without relating it to their opinions.¹⁰⁷ Again, these kinds of statements can be prejudicial in the sense that a lay jury might use them as proof of the truth of the matter asserted.¹⁰⁸

4. Party Opponent and Other Asymmetries in Who Can Offer Statements Under Various Rules

There are several rules of evidence that may allow one party to offer a statement, document, or recording into evidence while the other party cannot.¹⁰⁹ The most obvious example is the party opponent exemption to

100. See *supra* Part I.A.2.

101. See Volek, *supra* note 99, at 973.

102. Compare Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 584–86 (1986) (arguing that experts should only be allowed to briefly describe inadmissible documents upon which they have relied), with Paul R. Rice, *Inadmissible Evidence As a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 586 (1987) (arguing that reliance by an expert should except statements from hearsay).

103. See Volek, *supra* note 99, at 998.

104. See *id.* at 998–99.

105. See *id.* at 999.

106. See *id.* at 1000.

107. 3 SALTZBURG ET AL., *supra* note 23, § 703.02[4].

108. See *id.*

109. Professor Nance discusses at length these asymmetries and their interactions with both Rule 106 and common law completeness. See Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825, 876–80 (1995) [hereinafter Nance, *A Theory*]

hearsay. Under Rule 801(d)(2), a statement is not hearsay if offered against the party who made the statement, even when used to prove the truth of the matter asserted.¹¹⁰ Under this rule, however, the party who made that same statement would not be allowed to offer it herself to prove the truth of the matter asserted.¹¹¹

This exemption to the hearsay rule is a product of the adversarial system.¹¹² Normally, hearsay is objectionable because the person who made the statement is not testifying and cannot be cross-examined on the reliability of that statement.¹¹³ But the opposing party cannot complain that the speaker is untrustworthy, not present, or not subject to cross-examination when she herself is the one who made the statement.¹¹⁴

However, the same reasoning does not apply when a party, such as a criminal defendant, offers her own out-of-court statements (usually through someone else's testimony) into evidence to prove the truth of the matter asserted.¹¹⁵ The rule is concerned with preventing a party from making "an end-run around the adversarial process by, in effect, testifying without swearing an oath, facing cross-examination, or being subjected to first-hand scrutiny by the jury."¹¹⁶

An asymmetry could also arise if a criminal defendant testified at her first trial but was retried for the same offense and chose not to testify a second time.¹¹⁷ Rule 804(a) determines whether a witness is considered unavailable for the purpose of applying the hearsay exceptions of Rule 804.¹¹⁸ Under Rule 804(a)(1), a defendant in this situation would be unavailable to the prosecution because, as the defendant in a criminal trial, she would be exempted from testifying if she chose not to.¹¹⁹ But because not testifying is her choice, she would not be "unavailable" to herself as a witness.¹²⁰ Rule 804(b)(1) excepts certain kinds of prior testimony from the hearsay rule, but only if the declarant is unavailable.¹²¹ Therefore, the

(discussing asymmetry created by hearsay rules as well as original document requirements); Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 TEX. L. REV. 51, 92-96 (1996) [hereinafter Nance, *Federal Rules*] (discussing asymmetry in the admissibility requirements of Rule 801(d)(1)(A) and Rule 801(d)(1)(B) that would prevent an opponent from entering the remainder of a witness's prior statement).

110. FED. R. EVID. 801(d)(2)(A). Rule 801(d)(2) contains other rules that treat statements made by others as though they were made by an opposing party. *See id.* R. 801(d)(2)(B)-(E).

111. *Id.* R. 801(d)(2)(A).

112. 4 SALTZBURG ET AL., *supra* note 23, § 801.02[6][a].

113. *Id.*

114. *Id.*

115. *Id.* § 801.02[6][c].

116. *United States v. McDaniel*, 398 F.3d 540, 545 (6th Cir. 2005).

117. *See* Nance, *A Theory*, *supra* note 109, at 876.

118. FED. R. EVID. 804(a).

119. *Id.* R. 804(a)(1); *see* Nance, *A Theory*, *supra* note 109, at 876.

120. *See* Nance, *A Theory*, *supra* note 109, at 876.

121. FED. R. EVID. 804(b)(1).

prosecution could offer the defendant's prior testimony to prove the truth of the matter asserted, but the defendant could not.¹²²

Asymmetries like this are not limited to hearsay rules. For example, a situation might arise concerning the rules governing original documents and recordings¹²³ in which a document is unavailable at trial because it is in the possession of a third party.¹²⁴ Party A could call Party B as an adverse witness and question her about the document to prove its contents under Rule 1007.¹²⁵ But because Rule 1007 only allows a party to question the *opposing* party about a document, after Party A's attorneys finished, Party B's attorneys would not be able to question Party B any further to prove the contents of that document unless they could produce the original.¹²⁶

These asymmetries can create a Rule 106 problem. When one party is allowed to offer a statement and the other is not, the first party might offer an incomplete or misleading version of that statement. It is unclear whether the opposing party is then able to offer the remainder in response.¹²⁷

D. Rule 106: Finishing Each Other's Sentences

This section discusses Rule 106's stated purpose, the equivalent common law "rule of completeness," how Rule 106 functions in a proceeding, and the scope of the "fairness test" that defines the kinds of statements to which it applies. This section also summarizes the only Supreme Court case to thoroughly address Rule 106 and the policy concerns underlying the Rule.

1. Completeness Purposes of Rule 106

Federal Rule of Evidence 106 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."¹²⁸ According to the Advisory Committee notes, this rule has two goals. First, it tries to prevent the "proponent" from selectively presenting statements in a misleading way.¹²⁹ It achieves this by allowing the "opponent" to provide the context in which the original portion of the statement should be understood.¹³⁰ Second, it allows the opponent to provide that context *immediately*, to reduce the risk that a jury will be

122. See Nance, *A Theory*, *supra* note 109, at 876–77.

123. See *supra* Part I.B.2.

124. See Nance, *A Theory*, *supra* note 109, at 877–78.

125. FED. R. EVID. 1007; see Nance, *A Theory*, *supra* note 109, at 877–78.

126. See Nance, *A Theory*, *supra* note 109, at 877–78.

127. For a discussion of this problem, see *infra* Part II.

128. FED. R. EVID. 106; cf. FED. R. CIV. P. 32(a)(6) ("If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.").

129. FED. R. EVID. 106 advisory committee's note.

130. *Id.*

prejudiced or misled if the remainder is not presented until later in the trial.¹³¹

Rule 106, notably, does not contain a proviso stating that it may only admit evidence subject to the other Federal Rules of Evidence.¹³² When Rule 106 was drafted, the Justice Department requested a proviso be inserted after “any other writing or recorded statement” that would have read, “which is otherwise admissible or for which a proper foundation is laid.”¹³³ The Advisory Committee declined to adopt this proviso, claiming, without explanation, that it was implicit in Rule 106.¹³⁴ Even after subsequent requests for clarification, the Advisory Committee did not take a position on whether the rule would allow inadmissible evidence for the purposes of completeness, but said only that the “fairness” test would be sufficient to exclude inadmissible evidence.¹³⁵

2. Rule 106’s Common Law Roots

Rule 106 is “an expression of the rule of completeness.”¹³⁶ It has been said that “[t]he rule of completeness, both at common law and as partially codified in Rule 106, functions as a defensive shield against potentially misleading evidence proffered by an opposing party.”¹³⁷ The rule of completeness is a common law doctrine that treats evidence and testimony about statements differently than evidence and testimony about actions.¹³⁸ Unlike a sequence of events, which can be broken down into individual acts, the law has long recognized that a sequence of words often attempts to express a single idea, one that a jury can only fully understand when it hears all of the words.¹³⁹ Common law verbal completeness is concerned both with creating verbal precision and having all the parts of a statement.¹⁴⁰

When a statement is incomplete, either because it is imprecise or because part of it is missing, common law completeness distinguishes between mandatory completeness (the evidence must be complete before it is admissible at all) and optional completeness (the opponent may request admission of the remainder).¹⁴¹ Of the two, optional completeness more

131. *Id.*

132. *See* *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986).

133. 21A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5071 (2d ed. 2005).

134. *Id.*

135. *Id.* § 5078.1. For a more detailed discussion of the legislative history of Rule 106, see Andrea N. Kochert, Note, *The Admission of Hearsay Through Rule 106: And Now You Know the Rest of the Story*, 46 *IND. L. REV.* 499, 513–16 (2013).

136. *FED. R. EVID.* 106 advisory committee’s note.

137. *Echo Acceptance Corp. v. Household Retail Servs., Inc.*, 267 F.3d 1068, 1089 (10th Cir. 2001).

138. 7 *JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW* § 2094 (James H. Chadbourne ed., 1978).

139. *Id.*

140. *Id.*

141. *Id.* § 2095.

closely resembles Rule 106, because the opponent is the party who wants to admit the remainder.¹⁴²

Optional verbal completeness uses a three-prong test to determine whether the opposing party may enter the remainder of an incomplete statement that has been admitted. The three prongs are as follows:

- (a) No utterance irrelevant to the issue is receivable;
- (b) No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable;
- (c) The remainder thus received merely aids in the construction of the utterance as a whole, and is not itself testimony.¹⁴³

Prong (a) makes sure that the only remainders admitted are actually relevant to understand the portion; if a remainder is irrelevant, it does not matter that they are made at the same time or contained within the same writing as the portion.¹⁴⁴ Prong (b) has come to mean “the whole of what was said at the same time on the same subject.”¹⁴⁵ According to Wigmore, prong (c) recognizes that the remainder would be hearsay if it asserted facts or tended to prove the truth of the matter asserted.¹⁴⁶ Instead, it can only be admitted for a limited purpose: to help the factfinder interpret the portion correctly.¹⁴⁷ Wigmore gives the following example from the Bible: “There is no God” is a misleading portion if the full statement is “[t]he fool hath said in his heart, there is no God.”¹⁴⁸ The remainder—“the fool hath said in his heart”—does not have to be true; adding it to the beginning of the statement need only clarify that this biblical passage does not deny the existence of God. According to Wigmore, the remainder’s only permissible purpose is to help the listener understand this point.¹⁴⁹ However, prong (c) has never been universally accepted,¹⁵⁰ and one can see how the remainder might be used as the speaker’s affirmation of a faith that only a fool would deny.

When an opponent invokes common law verbal completeness, the appropriate time to admit the remainder is during cross-examination of the

142. Compare *id.*, with FED. R. EVID. 106 (“If a party introduces . . . a writing or recorded statement, *an adverse party* may require [its] introduction” (emphasis added)). On the other hand, only mandatory verbal completeness seems to require that the remainder be admitted at the same time as the portion, since the evidence is admitted either in its entirety or not at all. 7 WIGMORE, *supra* note 138, § 2095.

143. 7 WIGMORE, *supra* note 138, § 2113 (emphasis omitted); see *People v. Schlessel*, 90 N.E. 44, 45 (N.Y. 1909).

144. 7 WIGMORE, *supra* note 138, § 2113.

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

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. See, e.g., *Simmons v. State*, 105 So. 2d 691, 694 (Ala. Ct. App. 1958) (holding that the principle of verbal completeness “makes admissible self serving statements which otherwise would be inadmissible”).

proponent's witness or else in the opponent's case in chief.¹⁵¹ This usually applies to oral statements because, at common law, writings were almost always admitted in their entirety.¹⁵²

3. How Rule 106 Functions in the Context of a Proceeding

Unlike common law completeness as described above, Rule 106 affects the point in the trial at which the opponent can introduce a remainder.¹⁵³ At common law, in most cases the opponent would often have to wait until her case in chief, or at least until cross-examination, before entering a remainder into evidence.¹⁵⁴ Rule 106 allows the party entering the remainder to interrupt as soon as the portion is offered, whatever examination is being conducted at the time.¹⁵⁵ In this way, Rule 106 addresses the risk that the jury will be irreparably misled by the portion if they are forced to wait for the remainder.¹⁵⁶

The Advisory Committee notes to Rule 106 clarify that, unlike at common law, "[f]or practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations."¹⁵⁷ However, many courts have found that Rule 611(a) gives the judge the same discretion to apply the principles of Rule 106 to oral statements.¹⁵⁸ Also, a party may be able to use Rule 106 to enter a document or recording into evidence, even if the proponent does not offer any portion of it directly, if the proponent instead uses a substantial part of the written or recorded statement to cross-examine a witness.¹⁵⁹

Rule 106 does not exclude initially offered portions that are misleading. Instead, it offers the opponent a chance to offer a remainder if necessary for a fair interpretation.¹⁶⁰ However, if there is no remainder available that could correct the misleading impression, the court may exclude the portion

151. 7 WIGMORE, *supra* note 138, § 2115.

152. *Id.* § 2116.

153. 21A WRIGHT & GRAHAM, *supra* note 133, § 5072.1. One exception is when, in mandatory common law completeness, the proponent must offer the entire statement at the same time or else not offer any of it. 7 WIGMORE, *supra* note 138, § 2095.

154. *See* 21A WRIGHT & GRAHAM, *supra* note 133, § 5072.1.

155. *Id.*

156. *Id.*

157. FED. R. EVID. 106 advisory committee's note. One such practical reason is that a written or recorded statement has finite boundaries and can be "completed" simply by reading the whole document or playing the whole recording, whereas defining the boundaries of an oral statement is more difficult. *See* James P. Gillespie, Note, *Federal Rule of Evidence 106: A Proposal To Return to the Common Law Doctrine of Completeness*, 62 NOTRE DAME L. REV. 382, 388 (1987).

158. *See, e.g.*, *United States v. Range*, 94 F.3d 614, 620–21 (11th Cir. 1996); *United States v. Li*, 55 F.3d 325, 329 (7th Cir. 1995); *United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987). *But see* *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir. 2007); *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996); *United States v. Terry*, 702 F.2d 299, 313–14 (2d Cir. 1983). This Note takes no position on which is the correct view, but does not exclude from consideration cases concerning oral statements if they are useful examples.

159. *United States v. Rubin*, 609 F.2d 51, 63 (2d Cir. 1979).

160. 21A WRIGHT & GRAHAM, *supra* note 133, § 5078.

under Rule 403.¹⁶¹ When an opponent wants to admit a remainder, the burden is on the opponent to identify which portions of the statement are necessary to qualify the portion that has already been admitted.¹⁶² Failure to identify these portions at trial may prevent an appellant from asserting a Rule 106 error on appeal.¹⁶³ But, if the opponent fails to object under Rule 106 at the time the portion is offered, the rule does not preclude her from trying to admit the remainder later in the trial, such as during cross-examination or in the opponent's case in chief.¹⁶⁴

4. Rule 106's Scope: What Must Be Admitted in "Fairness"?

When a court decides whether to admit a remainder, it should not be overinclusive or underinclusive. If a court does not admit a remainder, a proponent's incomplete portion could go unexplained and mislead the jury.¹⁶⁵ On the other hand, admitting all or too much of the remainder may clutter the record or waste time if that remainder does not actually help the jury understand the portion.¹⁶⁶ The Supreme Court has not defined the scope of Rule 106; in fact, it has only once discussed Rule 106 at length.¹⁶⁷ However, circuit courts have articulated various tests to determine whether a remainder "in fairness ought to be considered at the same time."¹⁶⁸ For the purposes of this Note, these tests will be called "fairness tests."

For example, in *United States v. McCorkle*,¹⁶⁹ the Seventh Circuit held that the doctrine of verbal completeness does not extend to remainders that are either (1) "irrelevant to the issue," or (2) "more of the remainder . . . than concerns the same subject, and is explanatory of the first part."¹⁷⁰ Meanwhile, several circuits have articulated positive fairness tests to determine whether Rule 106 applies: the remainder must be "necessary to (1) explain the admitted portion, (2) place the admitted portion in context,

161. *Id.*

162. *United States v. Sweiss*, 814 F.2d 1208, 1212 (7th Cir. 1987).

163. *See id.* at 1213.

164. FED. R. EVID. 106 advisory committee's note.

165. *See* 1 MCCORMICK, *supra* note 30, § 56, at 248–52.

166. *See id.*

167. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). The Court in *Rainey* declined to decide the scope of Rule 106 by finding that the evidence had a nonhearsay use. *Id.* at 172–74.

168. FED. R. EVID. 106.

169. 511 F.2d 482 (7th Cir. 1975).

170. *Id.* at 487. The court held that this test was not met when the defendant sought to introduce a remainder of his admissions to IRS agents because none of his statements in the remainder contradicted or explained the portion, namely, that the defendant failed to file his tax returns on time. *See id.* at 486–87. This decision interprets the common law doctrine of verbal completeness, rather than Rule 106. *See id.* at 486–87. The decision predates Rule 106. *See Gillespie, supra* note 157, at 384 n.24. However, many courts subsequently have treated *McCorkle* as though its holding is applicable to Rule 106. *Id.*; *see, e.g., United States v. Sutton*, 801 F.2d 1346, 1369 (D.C. Cir. 1986); *United States v. Crosby*, 713 F.2d 1066, 1074 (5th Cir. 1983).

(3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding.”¹⁷¹

5. The Fairness Test in Practice¹⁷²

In practice, courts often—but not always—apply the fairness test first to determine whether Rule 106 should apply at all before analyzing other potential evidentiary problems with the remainder. Sometimes a remainder is necessary to give meaning to a word in the portion. In *United States v. Perryman*,¹⁷³ the prosecution entered into evidence part of a transcript of the defendant’s sworn statements when an attorney examined him regarding an insurance claim.¹⁷⁴ In one of the statements that the government entered, the defendant agreed with the attorney that he “obviously didn’t pay it.”¹⁷⁵ The court found that an excerpt from one page earlier was necessary for the jury to understand that “it” was a promissory note, and held that the defendant should be allowed to enter this excerpt.¹⁷⁶

Other times, the remainder may not be necessary to give meaning to a word in the portion, but rather to dispel an improper inference the jury might draw from the incomplete version of the statement. For example, in *United States v. Harper*,¹⁷⁷ the prosecution entered into evidence a part of the defendant’s postarrest statement in which he stated that he would probably be charged with possession of stolen property after the police found guns in his house.¹⁷⁸ The court allowed the defendant to offer the remainder because it explained his prediction. His guns looked like hunting guns, and because nobody in the house had a hunting license, the defendant assumed the police would think he had stolen them.¹⁷⁹ Presumably, the remainder could rebut the inference that by predicting he would be charged with possession of stolen property, the defendant was admitting that the guns were stolen.¹⁸⁰

171. *United States v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984) (citing *United States v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982)); see *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992) (articulating a test weighing the same four factors but with an “and” instead of an “or”); see also *United States v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996) (holding that Rule 106 applies only to remainders that are relevant and necessary either to qualify, explain, or contextualize the portion); *United States v. Alvarado*, 882 F.2d 645, 651 (2d Cir. 1989) (“[T]he rule is violated only where admission of the statement in redacted form distorts its meaning or excludes information substantially exculpatory of the declarant.”).

172. Because some courts subject oral statements to the same tests as written or recorded statements, some of the following examples will be oral statements because they are able to illustrate what passes the fairness test.

173. No. 11–CR–0100–CVE, 2012 WL 1664198 (N.D. Okla. May 11, 2012).

174. *Id.* at *1.

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

176. *Id.*

177. No. 05–CR–6068L, 2009 WL 140125 (W.D.N.Y. Jan. 20, 2009).

178. *Id.* at *4.

179. *Id.*

180. See *id.* at *7.

In *United States v. Castro-Cabrera*,¹⁸¹ the defendant was charged with reentering the United States after being deported.¹⁸² During a previous deportation hearing, the defendant was asked twice in a row to which country he claimed citizenship; the first time, he answered, “Hopefully United States through my mother,” while the second time, he answered, “I guess Mexico until my mother files a petition.”¹⁸³ After the government offered only the second answer into evidence, the court found that the first answer was admissible as a remainder because it gave a fairer understanding of the defendant’s answer.¹⁸⁴ Without the remainder, the portion was a clear admission of Mexican citizenship, whereas both answers together suggested that the defendant was unsure or thought he had dual citizenship.¹⁸⁵

In *United States v. Haddad*,¹⁸⁶ the defendant admitted to the police that he was aware of marijuana found under a bed, but not the gun that was found inches away from it.¹⁸⁷ The Seventh Circuit held that once the prosecution elicited testimony that the defendant admitted knowing about the marijuana, the defendant should have been allowed to elicit the part about not knowing the gun was there.¹⁸⁸ The court reasoned that the jury might infer that because he knew about the hidden marijuana, the defendant also knew about the gun right next to it.¹⁸⁹ In contrast, another Seventh Circuit case held that a defendant who admitted to smoking marijuana but claimed not to know about crack cocaine hidden in the car was not allowed to use Rule 106 to elicit the second part of this statement.¹⁹⁰ The court distinguished *Haddad* because merely admitting to smoking marijuana near hidden crack cocaine did not imply that the defendant knew it was there the

181. 534 F. Supp. 2d 1156 (C.D. Cal. 2008).

182. *Id.* at 1157.

183. *Id.* at 1160 (internal quotation marks omitted).

184. *Id.* at 1160–61.

185. *Id.* at 1160.

186. 10 F.3d 1252 (7th Cir. 1993).

187. *Id.* at 1258.

188. *Id.* at 1259.

189. *Id.* *Haddad*’s reading of Rule 106 to dispel misleading inferences is probably too broad. In *Harper* and *Castro-Cabrera*, the inferences concerned what the defendants’ incomplete statements meant. See *supra* notes 181–85 and accompanying text. In *Haddad*, however, the misleading inference was not that the defendant, by confessing he knew about the drugs, was also confessing he knew about the gun. Instead, the “misleading” inference was that because the defendant knew about the drugs, he also knew about the gun. See *Haddad*, 10 F.3d at 1259. In this sense, the incomplete statement to the effect of, “I know about the drugs,” is not really a misleading statement because that statement does not confess to knowing about the gun. It merely proves a fact—he knew about the drugs—that would make it more likely he also knew about the gun right next to it, which he denied. Determining the proper bounds of the fairness test is beyond the scope of this Note, but understanding how broad some courts have made those bounds is helpful to understanding the correct approach to admitting remainders. See *infra* Part III.

190. *United States v. Doxy*, 225 F. App’x 400, 402–03 (7th Cir. 2007).

way that knowing about hidden marijuana right next to a hidden gun would imply that Haddad knew that both objects were there.¹⁹¹

There are limits on using a remainder to dispel inferences. Generally, a remainder under the fairness test has to be explanatory of the portion that it completes, not just of the defendant's theory of the case. In *United States v. Lewis*,¹⁹² Defendant Billingsley, charged with firearm possession and conspiracy to possess cocaine, could not elicit testimony from the agent who interviewed him about how Billingsley never mentioned any of his co-defendant's criminal associates by name.¹⁹³ The court found that although this remainder could rebut the government's theory about the level of the defendant's involvement in the conspiracy and explained the defendant's theory of the case in general, it did not contextualize any of the defendant's statements to which the agent had already testified. Accordingly, no remainders were necessary.¹⁹⁴

A remainder is often more likely to fail the fairness test when it was made at a different time or on a different day than the portion. In *United States v. McAllister*,¹⁹⁵ the prosecution elicited testimony from the defendant's bankruptcy attorney that the defendant had made omissions in his bankruptcy documentation.¹⁹⁶ The court did not allow the defendant to use Rule 106 to enter a recording from his bankruptcy hearing, partially because the hearing took place weeks after the documents had been filed and the government had not entered any portion of that hearing into evidence.¹⁹⁷ Likewise, in a mail and wire fraud conspiracy case, the prosecution entered into evidence an instant message from the defendant stating that he had work for the recipient if the recipient "abandon[ed his] morals."¹⁹⁸ The defendant was not allowed under Rule 106 to submit text messages from several weeks earlier that said he believed their operation was not a scam, because the court found that it was too far removed in time to be contextually related.¹⁹⁹ However, not all remainders need to be from the same conversation or the same day in order to pass the fairness test.²⁰⁰

191. *Id.*

192. 641 F.3d 773 (7th Cir. 2011).

193. *Id.* at 784–85.

194. *Id.* The court noted that the proper way to present this theory would be for the defendant to take the stand and explain it, rather than depend on self-serving hearsay, and that this method did not violate the defendant's Fifth Amendment rights by forcing him to take the stand. *Id.* But see *United States v. Marin*, 669 F.2d 73, 85 n.6 (2d Cir. 1982) (expressing concerns that excluding a remainder would unfairly force defendants to waive their Fifth Amendment rights).

195. 693 F.3d 572 (6th Cir. 2012).

196. *Id.* at 585.

197. *Id.* at 584–85. The court also found that there was no contradiction between the statements made in the portion and in the remainder. *Id.*

198. *United States v. Crosgrove*, 637 F.3d 646, 661 (6th Cir. 2011).

199. *Id.*

200. See, e.g., *United States v. Sutton*, 801 F.2d 1346, 1369–71 (D.C. Cir. 1986) (holding that portions of a phone conversation ought in fairness to be admitted under Rule 106 after

Finally, the simplest rationale for excluding an offered remainder under the fairness test is that it does not explain the portion. For example, in *United States v. Gonzalez*,²⁰¹ the court found that the trial court did not err in the following scenario: after the prosecution offered the defendant's postarrest statement in which he implicated his co-defendant as someone who robbed drug dealers, the court prohibited the defendant from eliciting the remainder, indicating that his brother kept him out of the drug business.²⁰² The court reasoned that there was nothing misleading about the portion—that the co-defendant robbed drug dealers—in the absence of the remainder, which was only self-serving hearsay.²⁰³ For similar reasons, Rule 106 does not often apply to self-exculpatory statements and protests of innocence that do not otherwise explain the portion.²⁰⁴

One scholar has attempted to categorize the various ways that a remainder might be necessary to complete a portion, in an effort to identify which of these categories do and do not fall within the scope of Rule 106 as it has been applied by various courts.²⁰⁵ First, a remainder might change the grammatical understanding of the portion.²⁰⁶ Second, a remainder might directly reduce the probability that the portion is true.²⁰⁷ Third, a remainder might undermine the credibility of the portion.²⁰⁸ Fourth, a remainder might change or qualify the inference drawn from the portion.²⁰⁹ Finally, a remainder might raise a related but distinct factual inference than the one that the portion raises.²¹⁰ The scholar notes that the fourth and fifth categories have the potential to be excluded because they are not remainders in the most restrictive sense.²¹¹

the government offered into evidence several other phone conversations from different days and with different speakers).

201. 399 F. App'x 641 (2d Cir. 2010).

202. *Id.* at 645.

203. *See id.*

204. *See, e.g., United States v. Vargas*, 689 F.3d 867, 876–77 (7th Cir. 2012) (holding that the portion of the defendant's arrest video, in which he explains he was only present with money to buy a truck, was not a necessary remainder under Rule 106 after the government played the portion of the tape in which the defendant says there is money in his shoebox).

205. Nance, *A Theory*, *supra* note 109, at 832–33.

206. *Id.* at 832 (portion: “Yes, I sawed him then”; remainder: “*but I ain't seen him later that day*”).

207. *Id.* at 832–33 (portion: “I killed him”; full statement: “*I may have killed him*”).

208. *Id.* (portion: “I killed him”; remainder: “*as I would kill any invader from Mars*”).

209. *Id.* (portion: “I shot right at him”; remainder: “*but I missed*”).

210. *Id.* (portion: “I killed him”; remainder: “*in self-defense*”).

211. *See id.* at 833.

6. The Supreme Court Avoids Defining the Scope of Rule 106

In *Beech Aircraft Corp. v. Rainey*,²¹² the Supreme Court used relevance principles to address the use of a remainder.²¹³ Declining to decide whether Rule 106 was implicated, a seven-justice majority held 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.”²¹⁴ Importantly, the Supreme Court resolved a completeness problem without resorting to Rule 106.

In *Rainey*, a product liability suit against an aircraft manufacturing company for equipment malfunction, plaintiff Rainey was the widower of one of the pilot-victims.²¹⁵ The defense called Rainey as an adverse witness, and questioned him about two statements he made in a letter written several months after the fatal accident, which purported to give his opinion as to the cause of the accident.²¹⁶ The first such statement was that his wife attempted to cancel the fatal flight because she was concerned about her pilot student’s fatigue, and the second statement was that the proximity of his wife’s plane to another plane may have caused one of his wife’s crew to turn the plane suddenly to the right.²¹⁷

On cross-examination, Rainey’s own attorney asked him whether that same letter concluded that the cause of the accident was mechanical malfunction and not pilot error.²¹⁸ That was, in fact, Rainey’s conclusion in the letter, but the trial court excluded his answer as an improper opinion.²¹⁹

The Supreme Court held that exclusion of this answer was reversible error because Rainey was not allowed to correct a misleading impression.²²⁰ The defense’s questions may have given the impression that Rainey’s letter attributed the crash to pilot error, when in fact the letter explicitly attributed it to mechanical malfunction.²²¹ The Court found that the plaintiff should have been allowed to clarify this.²²² The Court reasoned that such testimony was not an improper opinion because the plaintiff only offered it to rebut the defense’s implication that Rainey had since changed his mind about the cause of the accident because of the lawsuit.²²³ Talking about the portion of the letter in which Rainey

212. 488 U.S. 153 (1988).

213. *Id.* at 172.

214. *Id.* (emphasis added).

215. *Id.* at 156.

216. *Id.* at 159.

217. *Id.* at 159–60.

218. *Id.* at 160.

219. *Id.* at 160.

220. *Id.* at 172–73.

221. *See id.*

222. *Id.*

223. *Id.*

explicitly attributed the crash to mechanical failure was the only way to counteract that impression.²²⁴

Furthermore, even though the defense had not objected to Rainey's letter on hearsay grounds, the Court found that the statement was not hearsay.²²⁵ The Court explained that the statement was not offered for the truth of the matter asserted but rather "to prove what Rainey had said about the accident six months after it happened, and to contribute to a fuller understanding of the material the defense had already placed in evidence."²²⁶ Thus, the Court concluded that a correct understanding of the hearsay rule would not bar Rainey from offering this remainder.²²⁷

II. COMPLETE CHAOS: THE CIRCUITS SPLIT ON ADMISSIBILITY AND METHODOLOGY

The circuit courts have been split for decades over whether Rule 106 allows into evidence a remainder that would otherwise be inadmissible, for hearsay reasons or otherwise.²²⁸ Even today, circuit and district court opinions acknowledge this split, but do not try to resolve it.²²⁹ Nor does the Supreme Court seem likely to resolve it, since the only Supreme Court case to discuss Rule 106 declined to use the rule to decide the case.²³⁰

The simplest way to express this circuit split is as a yes or no question: If the remainder of a statement "in fairness ought to be considered at the same time"²³¹ as the portion offered by the proponent,²³² must it nevertheless be excluded or limited if it violates a different rule of evidence, such as hearsay? Or, does Rule 106 allow a remainder to trump rules of evidence that would otherwise exclude or limit it?

But this split is a bit more complicated than answering these questions with a "yes" or "no." On the one hand, *United States v. Sutton*²³³ represents the school of thought that Rule 106 was specifically designed so that it would not be subject to any of the other rules of evidence.²³⁴ On the other hand, many courts insist that Rule 106 should be subject to all the other

224. *See id.*

225. *Id.* at 173 n.18.

226. *Id.*

227. *See id.*

228. Compare *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously."), with *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) ("Rule 106 . . . would not render admissible the evidence which is otherwise inadmissible under the hearsay rules.").

229. *See, e.g.*, *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008) ("Other circuits have held differently, but we adhere to our own precedent." (citation omitted)).

230. *See Rainey*, 488 U.S. at 172.

231. FED. R. EVID. 106.

232. The tests for determining whether the remainder meets this requirement are discussed above. *See supra* notes 170–71 and accompanying text.

233. 801 F.2d 1346 (D.C. Cir. 1986).

234. *Id.* at 1368.

rules of evidence. These courts typically do so in dicta, because they also find that the remainder fails the fairness test.²³⁵

United States v. LeFevour represents the middle-ground interpretation.²³⁶ In *LeFevour*, Judge Posner suggested in dicta that if an otherwise inadmissible remainder is necessary to correct a misleading impression, two solutions exist: either the remainder becomes admissible for the limited purpose of correcting the misleading impression, or else the portion must be excluded if a consideration such as privilege renders the remainder inadmissible.²³⁷ This section of the Note considers these three possibilities and their implications.

A. *The United States v. Sutton Approach:
The Remainder Is Admissible*

At least seven circuits have held at various times that if a remainder passes the fairness test, no other rule of evidence should exclude it from being entered under Rule 106. These include the D.C.,²³⁸ First,²³⁹ Second,²⁴⁰ Third,²⁴¹ Fourth,²⁴² Seventh,²⁴³ and Tenth Circuits.²⁴⁴

First, in *Sutton*, the D.C. Circuit noted that Rule 106 is contained in the section of the rules that broadly governs the more familiar rules of admissibility.²⁴⁵ The court also explained that, unlike the other “major rule[s] of exclusion,”²⁴⁶ Rule 106 has no proviso subjecting it to any other rules.²⁴⁷ Therefore, the D.C. Circuit concluded that it should be construed broadly, reasoning that the drafters would have known to write it more narrowly had it been intended to be subject to the other rules.²⁴⁸

235. See, e.g., *United States v. Lentz*, 524 F.3d 501, 526 (4th Cir. 2008). In cases like this, the remainders never fell within the scope of Rule 106 in the first place, because they would not pass the “in fairness” standard. See *supra* notes 170–71 and accompanying text.

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

237. *Id.* at 981.

238. See *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986).

239. See *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008); *United States v. Awon*, 135 F.3d 96, 101 (1st Cir. 1998).

240. See *United States v. Johnson*, 507 F.3d 793, 796 (2d Cir. 2007).

241. See *United States v. Green*, 694 F. Supp. 107, 110 (E.D. Pa. 1988), *aff’d*, 875 F.2d 312 (3d Cir. 1989).

242. See *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988).

243. See *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986). In this case, however, the court qualified the admissibility of the evidence, allowing it only for the limited purpose of avoiding a misunderstanding of the portion. See *id.*

244. See *United States v. Lopez-Medina*, 596 F.3d 716, 735–36 (10th Cir. 2010).

245. See *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986).

246. See *id.* at 1368 & n.16 (citing FED. R. EVID. 402, 501, 602, 613(b), 704, 802, 806, 901(b)(10), 1002).

247. An example of this kind of proviso is found in each of the cited rules. See *supra* note 246. For instance, Rule 402 subjects the admissibility of relevant evidence to exceptions provided by “the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court.” FED. R. EVID. 402.

248. See *Sutton*, 801 F.2d at 1368.

Moreover, the court considered Rule 106's legislative history, stating that it showed that the drafters considered and rejected a proviso subjecting Rule 106 to the other rules of evidence.²⁴⁹ The court found, therefore, that any evidence necessary to contextualize the portion should be admitted, subject only to common law relevance.²⁵⁰

As applied to *Sutton's* specific facts, once the prosecution admitted portions of phone conversations between the defendant and his former co-conspirator that tended to show consciousness of guilt, the defendant should have been allowed to enter other portions of another phone conversation with the same person, separate in time, to counter that inference, despite that conversation otherwise being inadmissible hearsay.²⁵¹

More recently, in *United States v. Lopez-Medina*,²⁵² the Tenth Circuit relied on *Sutton's* reasoning when it allowed the prosecution to admit otherwise inadmissible hearsay testimony from the defendant's half-brother under Rule 106.²⁵³ The way this case used *Sutton's* Rule 106 approach was particularly expansive.²⁵⁴ The government offered Lopez-Ahumado a sentence reduction in exchange for his cooperation, but Lopez-Ahumado refused to testify against Lopez-Medina or anyone else.²⁵⁵ Prior to trial, the defense proffered evidence that the half-brother had pled guilty to establish

249. *See id.* at 1368 n.17.

250. *Id.* at 1369.

251. *Id.* at 1366–69. Defendant Sucher was convicted of various bribery- and conspiracy-related charges when he sold information and confidential documents from the Department of Energy to defendant Sutton through several intermediaries. *Id.* at 1348–49. The government introduced several recorded phone conversations between Sucher and one of the intermediaries, Peacock (who was secretly cooperating with the investigation), tending to show Sucher's consciousness of guilt, because they tended to show he was afraid that two of the other intermediaries were going to turn him in. *Id.* at 1366–67. At trial, Sucher sought to introduce a portion of the recording of yet another conversation with Peacock, which occurred close in time to the ones introduced by the government, but the government objected on hearsay grounds. *Id.* at 1367. The trial court wrongly (according to the circuit court) excluded four portions of the conversation, all of which were Sucher's statements. *Id.* Each statement tended to clarify that he had not known he was doing anything illegal when he gave the documents to one of the intermediaries. *Id.* Sucher claimed that the statements would show he was not afraid that the intermediaries would truthfully report his role, but rather that he was afraid they would falsely implicate him. *Id.* at 1368. The trial court rejected this argument. *Id.*

As a side note, to the extent that the statements offered as remainders showed Sucher was afraid of being falsely implicated at the time he made them, *see id.*, they probably could have been admitted independently of Rule 106 as statements of his then-existing state of mind. *See* FED. R. EVID. 803(3).

252. 596 F.3d 716 (10th Cir. 2010). For the narrative of this case, see *supra* notes 1–8 and accompanying text.

253. *Lopez-Medina*, 596 F.3d at 735–36.

254. The Tenth Circuit in *Lopez-Medina* declined to decide the case on other potential grounds, namely, whether the defendant waived his Confrontation Clause rights by questioning Officer Johnson about Lopez-Ahumado's plea, because the court found Rule 106 to be sufficient grounds to justify the admission of this testimony despite the Confrontation Clause. *See id.* at 734–35. The Confrontation Clause and how it may interact with Rule 106 is beyond the scope of this Note.

255. *Id.* at 723.

that Lopez-Ahumado had possessed the drugs by himself.²⁵⁶ The prosecution initially objected to the plea as inadmissible hearsay, but eventually agreed to its admission so long as the factual allocation implicating Lopez-Medina could be admitted as well.²⁵⁷ The defense acknowledged that the factual allocation could be admitted if the defense sought to enter the plea.²⁵⁸ The judge tentatively agreed.²⁵⁹

During trial, defense counsel cross-examined an officer about the half-brother pleading guilty to possession of the drugs.²⁶⁰ The judge then allowed the prosecution to enter the factual allocation of the plea into evidence.²⁶¹ Defense counsel did not object but sought to enter the entire plea agreement, which showed that the government had offered Lopez-Ahumado a sentence reduction in exchange for cooperation.²⁶² The trial court refused to receive that part of the agreement.²⁶³

In closing argument, the prosecutor used Lopez-Ahumado's factual allocation as affirmative evidence of the defendant's guilt, arguing that the drugs in the truck belonged to the defendant just like Lopez-Ahumado stated in his plea.²⁶⁴ After the prosecutor argued that "the final nail in the coffin for [Lopez-Medina] was his half-brother's admission under oath in court," and remarked that "his own half brother [sic] fingers him,"²⁶⁵ defense counsel posed a rhetorical question in response. He asked, "Why did he implicate his brother? I didn't get a chance to go there with you. You saw the evidence, all of you. Use your common sense. Read what's there. People make deals in this business."²⁶⁶

The Tenth Circuit ruled that Rule 106 made the factual allocation admissible.²⁶⁷ Using a positive fairness test similar to that described above,²⁶⁸ the court found that the plea allocation was necessary to correct the misleading impression that Lopez-Ahumado possessed the drugs by himself.²⁶⁹ The court agreed with *Sutton* that Rule 106 allows otherwise inadmissible evidence to be entered because it is not subject to the other rules of evidence.²⁷⁰

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 724.

260. *Id.* at 724–25.

261. *Id.* at 725.

262. *Id.*

263. *Id.*

264. *Id.* at 729.

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

266. *Id.*

267. *Id.* at 734.

268. See *supra* notes 170–71 and accompanying text.

269. *Lopez-Medina*, 596 F.3d at 735.

270. *Id.* at 735–36.

B. The “Remainder Is Not Admissible” Approach

At least five circuits have at times endorsed the opposite proposition to the *Sutton* approach, holding that a remainder must otherwise be admissible or else be excluded. These include the Second,²⁷¹ Fourth,²⁷² Sixth,²⁷³ Seventh,²⁷⁴ and Ninth Circuits.²⁷⁵ Almost all of these decisions seem to support the proposition in dicta,²⁷⁶ but more recently, a case in the Sixth Circuit based its exclusion of a remainder solely on the understanding that Rule 106 does not make hearsay admissible.²⁷⁷

In *United States v. Terry*,²⁷⁸ the Second Circuit held that (1) Rule 106 did not apply to oral statements and (2) even if it did apply, the rule could not make the defendants’ self-serving hearsay statements admissible.²⁷⁹ A prosecution witness testified that the defendants refused to have their palm prints taken, but the trial court would not allow the defendants to enter the remainder of their statement under Rule 106: that they would not give palm prints *until they had spoken with their lawyers*.²⁸⁰ The Second Circuit found no error in this interpretation of Rule 106.²⁸¹ However, the court held that the statement should have been admitted under Rule 803(3), the state of mind exception.²⁸²

In *United States v. Wilkerson*,²⁸³ the Fourth Circuit held Rule 106 inapplicable when a defendant sought to enter part of his own statement in a conversation.²⁸⁴ The court reasoned that Rule 106 did not make inadmissible evidence admissible, but also held the rule inapplicable because the defendant’s statement was oral and because no part of the

271. See, e.g., *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) (“Rule 106 does not render admissible evidence that is otherwise inadmissible.”).

272. See, e.g., *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (“[E]ven if, as Wilkerson claims, Rule 106 had applied to this testimony, it would not render admissible the evidence which is otherwise inadmissible under the hearsay rules.”).

273. See, e.g., *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982) (“The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded.”).

274. See *United States v. Vargas*, 689 F.3d 867, 876 (7th Cir. 2012) (“[A] party cannot use the doctrine of completeness to circumvent Rule 803’s [sic] exclusion of hearsay testimony.” (citation omitted)).

275. Compare *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir. 2007) (observing that Rule 106 “does not render” otherwise inadmissible evidence admissible), with *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (stating that the rule “‘does not compel admission’” (quoting *Phx. Assocs. III v. Stone*, 60 F.3d 905, 913 (2d Cir. 1995))).

276. See Nance, *Federal Rules*, *supra* note 109, at 64–66.

277. See *United States v. Adams*, 722 F.3d 788, 826–27 (6th Cir. 2013); see also *infra* notes 291–306 and accompanying text.

278. 702 F.2d 299 (2d Cir. 1983).

279. *Id.* at 313–14.

280. *Id.*

281. *Id.*

282. *Id.* The remainder was evidence of the defendants’ then-existing state of mind insofar as their statement was to the effect of, “we intend to refuse giving palm prints until we speak with our lawyers first.” See *id.* at 314.

283. 84 F.3d 692 (4th Cir. 1996).

284. *Id.* at 696.

conversation that the defendant wanted to quote had been offered into evidence.²⁸⁵

More recently, in *United States v. Crosgrove*,²⁸⁶ the Sixth Circuit recited a blanket rule that Rule 106 does not make hearsay admissible.²⁸⁷ The circuit court then reasoned that the defendant's desired remainder, an instant message sent weeks before the portions (also instant messages) were ever sent, was too far removed in time to clarify anything about the portions.²⁸⁸

A particular pattern emerges in these cases. Courts of this view often state that Rule 106 cannot render inadmissible remainders admissible, but then go on to find other reasons not to admit the remainder: the remainder may fail the fairness test,²⁸⁹ or may be an oral statement,²⁹⁰ rendering Rule 106 inapplicable depending on the jurisdiction. Thus, the statement itself that Rule 106 does not trump the other rules is usually dicta.

Research does not uncover a case in which a court explicitly found that a remainder passed the fairness test and yet excluded it as hearsay. Recently, though, in *United States v. Adams*,²⁹¹ the Sixth Circuit strongly intimated that the prosecution's presentation of a recording was unfair within the meaning of Rule 106, but adhered to precedent by upholding the trial court's exclusion of the remainder.²⁹²

In *Adams*, defendant Maricle, a state court judge, was accused of conspiring to buy votes and to help appoint corrupt members of the Clay County Board of Elections, among other things.²⁹³ The government was allowed to present portions of a phone recording in which two cooperating witnesses told Maricle about questions they had been asked during their grand jury testimony.²⁹⁴ Cooperator Kennon relayed that he had been asked whether Kennon had used Maricle's influence to procure votes for a particular candidate.²⁹⁵ Maricle responded by asking, "Did you promise anybody I'd do anything for them?" to which Kennon responded, "Only one was that Downy boy; Bobby Downy's brother."²⁹⁶ Maricle was not allowed to present his very next response, "'That's one thing I did very seldom, promised to do, I never promised anybody that I would help somebody in a Court case . . . I don't believe having cases held over head

285. *See id.*

286. 637 F.3d 646 (6th Cir. 2011).

287. *Id.* at 661.

288. *See id.* at 661.

289. *See id.*

290. *See Wilkerson*, 84 F.3d at 696.

291. 722 F.3d 788 (6th Cir. 2013).

292. *See id.*

293. *Id.* at 799–800.

294. *Id.* at 826–27.

295. *Id.* at 826.

296. *Id.* at 826–27.

forever for some political thing.”²⁹⁷ Moreover, later in the same recording, Maricle denied knowing anything about the “Downy boy.”²⁹⁸

Then the government presented another recording in which cooperator White told Maricle that she had been asked at grand jury whether Maricle had appointed her as an election officer.²⁹⁹ Maricle responded, “Did I appoint you? (Laugh),” and White said “Yeah.”³⁰⁰ Once again, Maricle was not allowed to present the next thing he said, “I don’t really have any authority to appoint anybody.”³⁰¹

The defense argued that these omissions changed the meaning of the defendant’s statements.³⁰² Although the Sixth Circuit agreed that “these examples highlight[ed] the government’s unfair presentation of the evidence,”³⁰³ it adhered to its precedent in *United States v. Costner*, holding that Rule 106 “is not designed to make something admissible that should be excluded.”³⁰⁴ The court noted that such a rule “leaves defendants without redress” for unfair presentation,³⁰⁵ and suggested that the Sixth Circuit revisit its interpretation of Rule 106 en banc.³⁰⁶

Sometimes, courts that would require a hearsay exception to admit a remainder under Rule 106 will find that no exception exists even before analyzing the remainder under the fairness test. In *United States v. Vargas*,³⁰⁷ the Seventh Circuit found that Rule 106 did not allow a defendant to show another part of his arrest video (a portion of which had already been shown) because there was no hearsay exception for his statement that he was there buying a truck.³⁰⁸ The court never decided whether the remainder, the statement about the truck, passed the fairness test as necessary to explain the defendant’s statement in the portion: that the defendant had money in his shoebox.³⁰⁹ Likewise, in *United States v. Fisher*,³¹⁰ a district court in Michigan held that Rule 106 did not apply to the defendant’s offered remainder because there was no applicable hearsay exception, and only then commented that even if there were a hearsay exception, the remainder was not sufficiently related to the portion to pass the fairness test.³¹¹ Conducting the analysis in this order suggests that even if the remainder had passed the fairness test, it still may have been excluded

297. *Id.* at 827.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *See id.*

303. *Id.*

304. *Id.* at 826 (quoting *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982)).

305. *Id.* at 827.

306. *Id.* at 826 n.31.

307. 689 F.3d 867 (7th Cir. 2012).

308. *Id.* at 876.

309. *See id.* at 870, 876.

310. No. 06-CR-20415-2, 2008 WL 2605405 (E.D. Mich. July 1, 2008).

311. *Id.* at *1.

because there was no hearsay exception.³¹² Finally, in *United States v. Whaley*,³¹³ the district court said in dicta that “[a]rguably, the redacted version of the statement distorts its meaning,” but found that Rule 106 would not permit the defendant to offer the redacted portions into evidence because they were his own out-of-court hearsay statements.³¹⁴

On the other hand, in *United States v. McDarrah*,³¹⁵ the Southern District of New York held that a remainder’s value in understanding the portion was an acceptable nonhearsay purpose.³¹⁶ The law enforcement agent had taken notes and written a summary of his postarrest interrogation of the defendant.³¹⁷ On direct examination, the agent did not testify about the contents of those notes or the summary.³¹⁸ On cross-examination, the defense attorney asked repeatedly about how some of the defendant’s statements to which the agent had just testified were missing from the summary, and how the statements in the summary purported to be the agent’s words, not the defendant’s.³¹⁹ The agent stated several times that the summary of the interview was not comprehensive and that he had paraphrased, but the defense attorney continued to cross-examine him on the subject.³²⁰ Finally, the judge allowed the prosecution to enter the report under Rule 106 (even though the rule does not allow hearsay to be admitted) because it would be the best available way to clarify for the jury whether the agent’s testimony was credible or not.³²¹

These cases demonstrate that this approach has a few subdivisions: although all agree that hearsay is not admissible under Rule 106, some courts will end the analysis once they determine there is no hearsay exception and bypass the fairness test altogether,³²² while others perform the fairness analysis first and recognize that a necessary remainder may not be hearsay at all.³²³

C. A Middle Ground: *United States v. LeFevour*

United States v. LeFevour,³²⁴ a prosecution of a corrupt former state court judge,³²⁵ represents a middle ground between the most permissive and most restrictive approaches to remainder admissibility.

312. *See id.* at *1.

313. No. 3:10-CR-169, 2011 WL 3843699 (E.D. Tenn. Aug. 26, 2011).

314. *Id.* at *7.

315. No. 05 Cr. 1182(PAC), 2007 WL 273799 (S.D.N.Y. Jan. 31, 2007).

316. *Id.* at *10.

317. *Id.* at *1.

318. *Id.* at *2-3.

319. *Id.*

320. *Id.*

321. *Id.* at *10; *see also* Greener v. Cadle Co., 298 B.R. 82, 91-92 (N.D. Tex. 2003) (holding that two additional business documents that were necessary for context were not hearsay at all when offered for that purpose).

322. *See supra* notes 307-14 and accompanying text.

323. *See supra* notes 315-21 and accompanying text.

324. 798 F.2d 977 (7th Cir. 1986).

In *LeFevour*, the prosecution offered the recording of an entire conversation between the defendant and a cooperating traffic court officer who helped the defendant take bribes.³²⁶ The recorded conversation tended to show that the defendant knew who the witness had retained as a lawyer.³²⁷ The defense tried unsuccessfully to enter the remainder of the recording, in which the cooperating witness told an FBI agent that he did his best to scare the defendant into talking during the conversation they had just had; the defendant was not on this part of the recording.³²⁸ Ultimately, the Seventh Circuit affirmed the trial court's exclusion of this remainder because it was not necessary to correct a misleading impression.³²⁹

In his opinion for the *LeFevour* panel, Judge Posner set forth a different Rule 106 formulation. On the one hand, he criticized the opinion in *Costner*³³⁰ for describing Rule 106 as only regulating order of proof, that is, for suggesting that Rule 106's only purpose is to force the presentation of the remainder immediately, rather than later in the trial.³³¹ Judge Posner stated that Rule 106 also allows the admission of otherwise inadmissible evidence.³³²

However, Judge Posner qualified this by saying that when otherwise inadmissible evidence is entered through Rule 106, it is for the limited purpose of correcting what would be a misleading impression.³³³ He went on to say that, "if [the remainder] is inadmissible (maybe because of privilege), the misleading evidence must be excluded too."³³⁴ Judge Posner reasoned that an opponent seeking to admit a remainder should only be concerned with "pulling the sting from evidence [the proponent] wanted to use against him."³³⁵ Either excluding the entire statement, or admitting the remainder only to correct the misleading impression, would be enough to neutralize the portion without "overrid[ing] every privilege and other exclusionary rule of evidence in the legal armamentarium."³³⁶

Despite articulating a test, *LeFevour* is very infrequently cited as authority on Rule 106. Research does not disclose a case that applies

325. *Id.* at 979.

326. *Id.* at 980–81.

327. *Id.* at 981.

328. *Id.*

329. *Id.* at 981, 985.

330. 684 F.2d 370 (6th Cir. 1982).

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

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* Judge Posner's "pulling the sting" rationale has been criticized as too narrow. See Nance, *Federal Rules*, *supra* note 109, at 98 (arguing that the proponent of an incomplete statement runs the risk that the jury may use the remainder "to reach a conclusion more favorable to the opponent than it would have reached if neither part were introduced").

LeFevour to admit a remainder for the limited purpose of correcting a misleading impression.³³⁷

III. COMPLETELY BLINDSIDED: *RAINEY*, NOT RULE 106, GOVERNS ADMISSIBILITY

Does Rule 106 allow a remainder that has passed the fairness test to be admitted into evidence despite being inadmissible under a different rule? This turns out to be a trick question. If a remainder is truly necessary to understand a misleading portion, then, as the Supreme Court makes clear in *Rainey*, it is ipso facto relevant for the limited nonhearsay purpose of providing context or dispelling the misleading impression that the jury might get without it.³³⁸ So, if a remainder passes the “necessary” test in *Rainey*, it becomes admissible for “context” regardless of Rule 106, not because of it.³³⁹

This Part first discusses the theory of limited admissibility for remainders articulated in *Rainey* and inherent in the Federal Rules of Evidence. Next, it discusses the role of Rule 106, and why using Rule 106 to trump other rules of evidence is both unnecessary and undesirable. Third, it describes the confusion created by the proposition that Rule 106 does not make inadmissible evidence admissible, and explains the methodological problems both of that approach and Judge Posner’s approach. Fourth, this Part suggests steps a judge should take to decide a Rule 106 objection.

A. *No Further than Needed: Toward a Limited Admissibility Approach to Necessary Remainders*

Rainey’s theory of remainder admissibility is just another example of the limited admissibility approach that the Federal Rules of Evidence embody in general.³⁴⁰ In most cases, determinations of admissibility are driven by the purpose for which the evidence is used, not by some artificial category

337. In the few instances where *LeFevour* has been cited in a case with an arguably inadmissible remainder, the remainder did not pass the fairness test to fall within the scope of Rule 106. *See* *United States v. Reese*, 666 F.3d 1007, 1018–20 (7th Cir. 2012) (holding that self-serving hearsay did not come in under Rule 106 because the remainder was a conversation with a different person and not contextually related to the proponent’s offered portion); *United States v. Pendas-Martinez*, 845 F.2d 938, 943–44 (11th Cir. 1988) (holding that asking a few questions on cross-examination about a document summarizing the government’s case theory did not effectively enter a portion of the document into evidence so as to allow the prosecution to offer the rest as a remainder); *United States v. Vargas*, No. 08 CR 630, 2011 WL 116826, at *2 (N.D. Ill. Jan. 6, 2011) (holding that a defendant who made inculpatory statements in a conversation—offered by the prosecution in its entirety—was not entitled to offer exculpatory statements from a later conversation).

338. *See supra* note 214 and accompanying text; *see also* Donald F. Paine, *The Rule of Completeness*, 38 TENN. B.J. 31, 31 (2002) (“The best approach is to handle the problem with an instruction to the jury. If the contextual statement is otherwise inadmissible hearsay, the judge should instruct the jury to consider it only as affecting the weight given the original statement.”).

339. *See supra* note 226 and accompanying text.

340. *See supra* Part I.B.

into which the evidence falls. Evidence of a prior bad act is not inherently inadmissible; it is only inadmissible if used to show bad character.³⁴¹ An out-of-court statement is hearsay only if its purpose is to prove the truth of the matter asserted, and not merely that the words were said.³⁴² Testimony about a document is inadmissible only if that testimony is offered to “prove the content” of that document.³⁴³

In all of these cases, however, the same evidence is admissible if it can be used for a purpose other than the prohibited one. Of course, evidence must always be relevant, and cannot be more prejudicial than probative: unlike many rules, Rules 401, 402, and 403 are not subject to limited admissibility analysis.³⁴⁴ On the other hand, when a rule bars the admission of certain kinds of evidence without regard to its purpose, or does so subject only to limited exceptions, this expresses a preference for excluding this kind of evidence that is stronger than normal.³⁴⁵

Rainey stays true to these concepts. Though it is improper to admit an out-of-court statement to prove the truth of the matter asserted (absent an exception), it is proper to admit the same statement for a not-for-truth purpose, so long as that use is relevant.³⁴⁶ *Rainey* declares remainders ipso facto relevant for “context” when they are “necessary.”³⁴⁷ If limited in this way, as *Rainey* makes clear, we need not worry about the hearsay rule, because providing context or dispelling misleading impressions is not the same as using the remainder to prove the truth of the matter asserted.³⁴⁸

Of course, just as with any other application of limited admissibility analysis, a “necessary” remainder offered for “context” should be excluded if it is substantially more prejudicial than probative, in the sense that no limiting instruction could prevent the jury from using the remainder for the prohibited purpose.³⁴⁹ Yet, if a remainder is necessary to avoid a misunderstanding, especially one that the proponent created by offering misleading evidence, the probative value of a necessary remainder will often be weighty enough to pass the Rule 403 balancing test.³⁵⁰

341. *See supra* notes 35–37 and accompanying text.

342. *See supra* notes 72–73 and accompanying text.

343. *See supra* note 46 and accompanying text.

344. *See supra* notes 14–17 and accompanying text. It would not make sense to say, for example, that irrelevant evidence is admissible if it is offered for a different purpose than the one for which it is irrelevant. Nor, for that matter, would it make sense to say that evidence that is substantially more prejudicial than probative is still admissible for a different purpose, because “undue prejudice” is defined as using evidence for an impermissible reason. *See supra* notes 16–17 and accompanying text.

345. *See supra* note 42.

346. *See supra* notes 72–78 and accompanying text.

347. *See supra* note 214 and accompanying text.

348. *See supra* note 226 and accompanying text.

349. *See supra* notes 21–25 and accompanying text.

350. *See supra* notes 16–17 and accompanying text. *Gilliam* provides a good analogy: when the defense tried to mislead the jury by making it look like the officer’s reason for returning to the scene was to harass the defendant, rather than to respond to the anonymous phone call about the second gun, the probative value of admitting the statement about the

Consider the following example: in a personal injury suit, immediately after the injury occurs, the plaintiff says to the defendant, “Oh, by the way, when I testify against you next week in your assault trial, I’m going to lie in court to make you pay for assaulting my brother last year.” At trial, the defendant testifies that the plaintiff said, “I’m going to lie in court.” The plaintiff seeks to elicit the entire statement, either by cross-examining the defendant, or testifying in rebuttal, but the defendant objects both on grounds that it is hearsay³⁵¹ and that it is evidence of the defendant’s prior bad act.³⁵² The plaintiff can argue that the remainder is necessary for context, to dispel the misleading impression that the plaintiff was talking about the present lawsuit. This solves both the hearsay problem and the Rule 404(b) problem: a necessary remainder is not hearsay,³⁵³ and the evidence is not being offered to prove that the defendant is a violent person, but rather so that the jury can understand what was said.³⁵⁴

Admittedly, it is a bit harder to justify using “context” as a permissible purpose to get around the restrictions of the original document rule. Consider the problem discussed above: under Rule 1007, the proponent questions the opponent about an unavailable document that has been the subject of previous testimony or writing by the opponent, in order to prove a misleading portion of its contents.³⁵⁵ The opponent is barred by Rule 1002 from testifying to prove the remainder of the document on redirect examination.³⁵⁶ Under *Rainey*, the remainder is both relevant and nonhearsay,³⁵⁷ but Rule 1002 prohibits testimony to prove the content of the document without the original.³⁵⁸

Research does not disclose a case (applying Rule 106 or otherwise) in which this particular problem arises. The best solution, however, is to draw an analogy between using a “context” statement not to prove the truth of the matter asserted³⁵⁹ and using it not to prove the content of the document.³⁶⁰ The remainder of the document would be offered, not to prove the content

gun for “context” increased. *See* *United States v. Gilliam*, 994 F.2d 97, 103–04 (2d Cir. 1993); *supra* note 91 and accompanying text. Of course, if a portion is so misleading that a remainder is necessary, but the misleading impression it creates is not particularly damaging, while the remainder is highly prejudicial, the court would be right to exclude the remainder. *See* FED. R. EVID. 403.

351. The defendant would have offered this statement under the party-opponent exemption because the plaintiff is the party-opponent, but the plaintiff is not the party-opponent to herself, and thus could not offer her own statements under this exemption. *See supra* notes 110–11 and accompanying text.

352. *See supra* notes 35–37 and accompanying text.

353. *See supra* notes 224–25 and accompanying text.

354. *See supra* notes 35–37 and accompanying text.

355. *See supra* notes 123–26 and accompanying text.

356. *See supra* notes 123–26 and accompanying text.

357. *See supra* notes 214, 225–26 and accompanying text.

358. *See supra* note 46 and accompanying text.

359. *See supra* notes 72–76 and accompanying text.

360. *See supra* note 46 and accompanying text.

of the remainder but only to clarify the content of the portion by providing context.³⁶¹

The *Rainey* understanding of remainder admissibility also squares well with the asymmetrical aspects of the Federal Rules of Evidence.³⁶² Just as limiting admissibility based on the *purpose* of the evidence reflects policy concerns,³⁶³ so too does limiting admissibility based on who is offering it.³⁶⁴ For example, the reason defendants are barred from admitting their own exculpatory hearsay statements is so that they cannot, in effect, testify without being cross-examined.³⁶⁵ But when a proponent takes advantage of an asymmetry to offer a misleading portion, knowing that the rule is unavailable to the opponent, the limited admissibility approach strikes the correct balance. On the one hand, it prevents the proponent from offering evidence that cannot be rebutted. On the other hand, it respects the policy reasons behind those asymmetries by keeping the opponent from using remainders for any purpose but “context.” This prevents the opponent from overriding the rules by offering the remainder as substantive proof.³⁶⁶

Finally, the *Rainey* approach has at least some support in the common law. Although common law roots are never absolutely uniform, the three-pronged test that Wigmore recognized resembles this approach in the sense that the first two prongs resemble various versions of the Rule 106 fairness test,³⁶⁷ and the third prong similarly limits the remainder’s purpose to interpreting the portion.³⁶⁸

But can we really say that a remainder that would otherwise be hearsay is offered for some other reason than to prove the truth of the matter asserted? To use one of Nance’s examples, “I shot right at him, *but I missed*,”³⁶⁹ it seems strange to say that “but I missed” could clarify “I shot right at him” without being accepted as true. It can be even less clear when the words of the portion are not misleading but give rise to a misleading impression. Using *Lopez-Medina* as another example, it is strange to think that the inference to the effect of, “those are my drugs and mine alone” could be

361. *Smith* provides another good analogy in the expert witness context: the court found that testifying to the contents of documents to explain expert conclusions was not the same as testifying to prove the content of those documents. See *United States v. Smith*, 566 F.3d 410, 412–14 (4th Cir. 2009); *supra* note 51 and accompanying text. For further discussion of the analogies between nonhearsay use under Rule 703 and for “context” of necessary remainders, see *infra* notes 371–77 and accompanying text.

362. See *supra* Part I.C.4.

363. See *supra* Part I.B.

364. See *supra* notes 112–16 and accompanying text.

365. See *supra* notes 115–16 and accompanying text.

366. *Rainey*’s holding that a necessary remainder is not hearsay solves all of the asymmetries of the hearsay rule. See *supra* notes 110–22 and accompanying text. For a discussion of how this theory of remainder admissibility solves the asymmetries of the original document rule, see *supra* notes 355–61 and accompanying text.

367. Compare *supra* note 143 and accompanying text, with *supra* notes 170–71 and accompanying text.

368. See *supra* notes 143–50 and accompanying text.

369. See Nance, *A Theory*, *supra* note 109, at 832.

given any clarification without accepting the gist of the remainder, “those drugs belong to both my brother and myself” as true.³⁷⁰

This is somewhat similar to the difficulty of instructing jurors on how to use otherwise inadmissible facts and data to evaluate expert testimony.³⁷¹ But this analogy also offers a solution: when we say that a statement is not hearsay, we do not mean that the jury cannot evaluate whether the statement is true, but only that they may not use it as affirmative *proof* of that truth. After all, hearsay is an out-of-court statement offered to *prove* the truth of the matter asserted.³⁷² Therefore, the jury in *Lopez-Medina* could have been instructed that they could consider whether the statement to the effect of, “those drugs belong to both my brother and myself” would dispel the inference that Lopez-Ahumado had said that the drugs were his alone,³⁷³ but not as independent evidence tending to prove that Lopez-Medina possessed the drugs.³⁷⁴ This may be a razor-thin distinction, but it remains valuable because it constrains the attorneys, as well.³⁷⁵ The prosecutor in *Lopez-Medina* would not have been allowed to argue, essentially, “we know the defendant is guilty because his brother says so.”³⁷⁶ There is certainly value in preventing attorneys from telling the jury to use evidence incorrectly. And, just as in the Rule 703 context, admitting the remainder as nonhearsay and giving limiting instructions is a better option than either trumping all other rules of evidence or leaving the jury completely in the dark.³⁷⁷

More generally, though, the *Rainey* approach resembles other legitimate, similar nonhearsay uses. In *Sorrentino*, the statements of the person talking to the defendant became admissible for context because the conversation

370. See *supra* notes 256–57 and accompanying text.

371. See *supra* notes 100–06 and accompanying text.

372. FED. R. EVID. 801 (emphasis added).

373. See *supra* notes 256–57 and accompanying text.

374. See Paine, *supra* note 338, at 31. In fact, it is possible to analyze each of Nance’s categories in this way. See *supra* notes 205–11 and accompanying text. In category I, “but I ain’t seen him later that day” does not prove that the declarant did not see the person, but only that when the declarant said “I sawed him then,” “sawed” does not mean “to cut with a saw.” See *supra* note 206 and accompanying text. In category II, the remainder, “may have,” is not affirmative proof that the declarant “may have” killed someone, but rather it shows that the statement, “I killed him” is not certain. See *supra* note 207 and accompanying text. In category III, the remainder, “as I would kill any invader from Mars,” need not prove the declarant’s steadfastly violent patriotism for Earth, but need only qualify the inference that “I killed him” is a credible confession. See *supra* note 208 and accompanying text. In category IV, “but I missed” may be credited as true for the purposes of dispelling the inference that “I shot right at him” means “I shot him,” but not as independent evidence that the speaker missed, were such proof relevant for some reason. See *supra* note 209 and accompanying text. Finally, in category V, the remainder “in self-defense” could be used to counter the inference that “I killed him” was an unqualified confession, but not as affirmative proof that the declarant did kill in self-defense. Thus, if the declarant had the burden to prove self-defense, this statement could not be used to meet that burden and the judge should instruct the jury accordingly. See *supra* note 210 and accompanying text.

375. See *supra* note 106 and accompanying text.

376. See *supra* note 265 and accompanying text.

377. See *supra* notes 100–05 and accompanying text.

would be unintelligible without it,³⁷⁸ not unlike an incomplete portion. Or sometimes, like in *United States v. Gilliam*, where the defense painted a misleading portrait of a police officer's motivations, context becomes more relevant when it can dispel incorrect inferences, again, not unlike a remainder.³⁷⁹ It should not be a particularly controversial idea that when a statement provides "context" or helps a jury understand the underpinnings of something important, it is probably relevant for some reason besides proving the truth of the matter asserted.

In short, the purpose of a *Rainey* remainder is not to act as affirmative proof, but only to negate any incorrect inference that would necessarily arise from leaving the portion incomplete. The remainder cannot prove what it says; it can only show the jury that the portion does not mean what the proponent says it means.

*B. Unnecessary Trumping: Why Rule 106 Need Not
Wipe Out the Other Rules*

Where does Rule 106 come into play in all of this? For any "necessary" remainder within the meaning of *Rainey*, Rule 401 and Rule 402 do all of the work to make it admissible.³⁸⁰ But is that enough for Rule 106 to accomplish its purpose?³⁸¹

It should be. The reason it is so difficult to draw the distinction between Rule 106 and the ipso facto relevance of necessary remainders in *Rainey* is because the tests are very similar. If a remainder passes the Rule 106 fairness test, it must be necessary to understand the portion.³⁸² If that remainder is necessary to understand the portion, it is ipso facto relevant under *Rainey*.³⁸³ If it is relevant under *Rainey*, then, per *Rainey*, it also has a legitimate nonhearsay purpose.³⁸⁴ Therefore, any statement that passes the fairness test of Rule 106 is ipso facto relevant and has a legitimate nonhearsay use: to clarify the portion or dispel any improper inference it suggests.

Put simply, if a remainder passes the fairness test of Rule 106,³⁸⁵ it will pass *Rainey*'s "necessary" test³⁸⁶ and be admissible. Conversely, if a remainder is not necessary under *Rainey*, it will not pass the fairness test of Rule 106, and Rule 106 should not apply at all.

What, then, is Rule 106's purpose? The answer is written right into the language of the rule: it allows the opponent to interrupt the proponent as

378. See *supra* notes 93–96 and accompanying text.

379. See *supra* note 91 and accompanying text.

380. See *supra* note 214 and accompanying text.

381. See *supra* notes 128–31 and accompanying text.

382. See *supra* notes 170–71 and accompanying text.

383. See *supra* note 214 and accompanying text.

384. See *supra* note 226 and accompanying text.

385. See *supra* notes 170–71 and accompanying text.

386. See *supra* note 214 and accompanying text.

soon as a misleading portion has been offered.³⁸⁷ This was not part of the common law³⁸⁸ and it is not something that the *Rainey* rule can accomplish by itself.³⁸⁹ In addition, particularly in cases where the remainder is admissible independent of *Rainey*, like a remainder that falls into a hearsay exception,³⁹⁰ Rule 106's fairness test³⁹¹ still applies to determine whether the remainder must be presented immediately, or if it can wait until a later point in the trial.³⁹²

What about using Rule 106 to make the remainder admissible for some purpose other than "context" or dispelling misleading inferences, as in *Sutton* and *Lopez-Medina*?³⁹³ If it is true, as this Note argues,³⁹⁴ that the "context" purpose for which a remainder is admitted under *Rainey* is sufficient to clarify the portion, then Rule 106 need not go any further than that.³⁹⁵ To interpret Rule 106 otherwise is to ignore the value of limited admissibility evident in the federal rules without accomplishing anything that Rule 106 sets out to do. Though these cases may correctly admit the remainder, they incorrectly allow use of that remainder without restriction, or as substantive evidence of what the remainder asserts.

The Advisory Committee clearly states two goals for Rule 106: correcting misleading impressions created by a lack of context, and preventing the harmful effect of delaying that correction to a later point in the trial.³⁹⁶ The ability of the rule to interrupt testimony addresses this second concern; it ensures that the remainder can be offered immediately, so that the jury is not left with a misleading impression for so long that it cannot be corrected.³⁹⁷ It follows, then, that the fairness test addresses the first purpose, by defining what remainders are "necessary" to correct those misleading impressions.³⁹⁸

If a remainder is relevant under *Rainey* and admitted for the limited purpose of correcting a misleading impression, then it has already

387. See *supra* notes 153–56 and accompanying text.

388. See *supra* note 153 and accompanying text.

389. Perhaps Rule 611(a), which controls order of proof, would allow a judge the discretion to admit the remainder as soon as the portion is offered, see *supra* notes 19–20 and accompanying text, but Rule 106 insists upon it more forcefully and is more explicit. See *supra* notes 153–56.

390. See *supra* notes 60–67 and accompanying text.

391. See *supra* notes 170–71 and accompanying text.

392. FED. R. EVID. 106 advisory committee's note.

393. See *supra* Part II.A.

394. See *supra* Part III.A.

395. Other commentators have found differently. See Nance, *Federal Rules*, *supra* note 109, at 96 ("[T]he remainder should be admissible for any purpose as to which the original incomplete part is admissible and as to which the former qualifies or explains the latter."); Kochert, *supra* note 135, at 517–18, 527 (endorsing Judge Posner's view in *LeFevour*).

396. See *supra* notes 128–31 and accompanying text.

397. See *supra* notes 153–56 and accompanying text.

398. See *supra* notes 173–204 and accompanying text.

accomplished Rule 106's stated purpose.³⁹⁹ The misleading impression has been countered because the opponent has used the remainder to show why the initial portion might not mean what the proponent wants the jury to think it means.

In a case like *Lopez-Medina*, the remainder might be devastating to the proponent's misleading inference: the defendant's attorney wanted the jury to believe that the defendant's brother had taken sole responsibility for possessing the drugs, yet the brother's complete statement flatly contradicted that inference, crippling the credibility of that argument.⁴⁰⁰ That is enough to accomplish Rule 106's stated purpose. Although using the brother's full statement was undoubtedly helpful to the prosecution's case,⁴⁰¹ to the extent that it was used as affirmative proof of the defendant's guilt, it was not helpful for the reasons Rule 106 was intended to be helpful.⁴⁰² It was used as a sword, to shoehorn inadmissible evidence into the record, not a shield, to prevent a misunderstanding.⁴⁰³

If using Rule 106 to trump rules of evidence does very little to advance the rule's goals, then the benefit of allowing inadmissible evidence is very small. This only makes the costs seem that much higher in comparison. By

399. See *supra* notes 128–31 and accompanying text; see also *supra* notes 335–36 and accompanying text (discussing how the rule in *LeFevour* limited the use of remainders to “pulling the sting” of misleading evidence).

400. See *supra* notes 260–62 and accompanying text. *Lopez-Medina* is an unusual example because there is no clear evidentiary basis for admitting the half-brother's plea in the first place, which is why the prosecution objected initially. See *supra* note 257 and accompanying text. One might argue that this entire case falls outside the scope of Rule 106 because the portion was not admissible, and thus its instructive value is limited. However, this fear is unfounded, because it is possible to imagine an alternate fact pattern in which Lopez-Ahumado's statement that the drugs were his would be excepted from hearsay while his statement incriminating his brother would not be. For example: Imagine Lopez-Ahumado is speaking to a confidential informant who, unbeknownst to him, is wearing a recording device. When the police arrive at Lopez-Ahumado's home, he watches as they approach the truck and confiscate the methamphetamine from inside of it. He turns to the informant as this is happening, becomes agitated, and yells, “Those officers are taking my drugs!” A few moments pass, Lopez-Ahumado calms himself, and the police have moved away from the truck when Lopez-Ahumado says to the informant, “Looks like the police took the drugs that belonged to me and my brother.” At trial, the defense seeks to enter the first part of the statement as an excited utterance, and is successful because it is an exception to hearsay. See FED. R. EVID. 803(2); *supra* note 63 and accompanying text. When the defense offers the first part at trial to argue once again that Lopez-Ahumado was the sole possessor of the drugs, the remainder would not be excepted from hearsay if Lopez-Ahumado were no longer excited or agitated when he said it, so the remainder could not come in for the truth. The court would be left to decide whether the remainder, implicating the brother, ought in fairness to be admitted under Rule 106. See *supra* Part I.D.4.

401. See *supra* notes 264–65 and accompanying text.

402. See *supra* notes 128–31 and accompanying text.

403. In this context, Nance's criticism of *LeFevour* seems unfounded. See *supra* note 336. Here, while it may have been tactically unwise for the defendant to enter his brother's plea into evidence, the consequence that his brother's statement became affirmative evidence of his guilt is too important to be explained away as a “risk” he had to “bear” when introducing the statement. See Nance, *Federal Rules*, *supra* note 109, at 98. Here, merely using the remainder to “pull[] the sting” is a fairer result. See *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986).

allowing the jury to consider the factual allocution for its truth, that Lopez-Ahumado actually did possess the drugs jointly with the defendant, the admitted remainder gave the government an extra witness whose testimony was never subject to cross-examination.⁴⁰⁴ This flies in the face of the reasons behind the hearsay restriction⁴⁰⁵ for little benefit.

Or, to return to the hypothetical about the personal injury suit above,⁴⁰⁶ if Rule 106 trumped the prohibition on hearsay, the plaintiff would be allowed to offer the remainder as affirmative proof that three years prior the defendant assaulted his brother. Even worse, if Rule 106 trumped Rule 404(b), the plaintiff's attorney would be allowed to argue to the jury that the defendant is more likely to have caused the plaintiff's injury because he is a violent person. Rule 404(b) exists precisely to prevent these kinds of arguments from being made.⁴⁰⁷

The only situation in which Rule 106 might need to trump a rule of evidence to get the remainder admitted would be if the rule in question did not allow evidence for "context" at all.⁴⁰⁸ But again, these rules likely manifest a stronger preference than other rules for exclusion by delineating particular exceptions or allowing no exceptions at all, and ought to be respected rather than trumped by Rule 106.⁴⁰⁹

404. See *supra* notes 260–66 and accompanying text.

405. See *supra* note 113 and accompanying text.

406. See *supra* notes 351–54 and accompanying text.

407. See *supra* notes 35–36 and accompanying text. This problem is only compounded when courts apply a fairness test that is broader than it probably should be. Under the *Sutton* approach, in *Haddad*, the remainder to the effect of, "I didn't know about the gun," would be admitted for its truth, rather than merely to clarify for the jury that the defendant had not confessed to possessing everything under the bed. See *supra* notes 186–89 and accompanying text. Absent a limiting instruction, the defense attorney could then argue that statement as though the defendant said it in court. See *supra* note 32 and accompanying text. This would open a back door through the party opponent rule for remainders that probably were not necessary in the first place. See *supra* notes 115–16 and accompanying text; *supra* note 189.

408. See *supra* note 42.

409. See *supra* notes 42, 345 and accompanying text. *United States v. West* provides an interesting example of what this might look like. *United States v. West*, 962 F.2d 1243 (7th Cir. 1992). Although not a Rule 106 case, *West* implicates "completeness." In a bank robbery case, a court-appointed doctor examined the defendant to assist him in preparing an insanity defense. *Id.* at 1244–45. The doctor found that, although the defendant had a schizoaffective disorder on the day he robbed the bank, he still understood the wrongfulness of the crime as he was committing it. *Id.* at 1245. Because not understanding the difference between right and wrong is the standard for legal insanity, such a finding was inconsistent with that defense. *Id.* However, the doctor's conclusion that the defendant knew right from wrong when he robbed the bank was inadmissible because Rule 704(b) bars an expert from testifying as to whether the defendant was legally insane. *Id.* at 1246–47; see *supra* note 42. The Seventh Circuit held that the doctor should have been allowed to testify, in support of the insanity defense, that the defendant had the psychological disorder, but should have been barred from testifying that the defendant knew right from wrong on the day of the crime. *Id.* at 1250. The court conceded that this result made little sense, but found that the legislative policy behind Rule 704(b) demanded it. *Id.* at 1248–49.

This case addresses a similar concern as Rule 106: if the doctor testified that the defendant had a psychological disorder (this is like the portion), the jury might be misled

C. *Right on Rule 106, Wrong on Rainey:
The Other Two Approaches*

This section will discuss the erroneous reasoning in both the most restrictive approach to remainder admissibility and the moderate analysis in *LeFevour*.

Courts that take the restrictive view and insist Rule 106 does not make inadmissible hearsay admissible⁴¹⁰ do not misunderstand Rule 106, but often misunderstand *Rainey*. If a judge skips the fairness test and excludes the remainder only because no hearsay exception applies,⁴¹¹ she has ignored the fact that, if the remainder passes the fairness test, it will automatically be admissible, not for the truth, but for context.⁴¹² On the other hand, cases like *McDarrah* correctly recognize that remainders are capable of a nonhearsay use.⁴¹³ Thus, when courts claim that Rule 106 does not make inadmissible evidence admissible, they are correct, but fail to recognize that a necessary remainder was never inadmissible in the first place.

This understanding could have answered the Sixth Circuit's concerns in *Adams*.⁴¹⁴ After determining that the government had unfairly presented the recorded phone conversations in a way that changed their meaning,⁴¹⁵ the trial court could have admitted any remainders necessary for the purpose of clarifying that, when Maricle was asking questions about the accusations leveled against him, he was not admitting to doing the things of which he was accused.⁴¹⁶ Thus, without revisiting the question of whether

into thinking the doctor concluded the defendant did *not* know right from wrong when he committed the robbery, when in fact the doctor reached the exact opposite conclusion (the remainder). *See id.* at 1246–47. The court in *West* was willing to reach what it found to be an illogical result because Rule 704(b) clearly excluded the remainder without qualification. *See id.* at 1247–50.

Under the same rationale, Rule 106 should not be interpreted to admit a remainder that violates a strict exclusionary rule of evidence. One can imagine, for example, a remainder concerning an alleged victim's sexual behavior that, if offered during the defendant's case in chief, would be barred by Rule 412 unless it met one of the exceptions. *See supra* note 42. The policy concerns underlying this strong prohibition should not change just because the sexual behavior evidence is contained within a necessary remainder. *See supra* note 43. If the portion without the remainder is so misleading as to be unduly prejudicial, the entire statement may still be excluded under Rule 403. *See supra* note 334 and accompanying text.

410. *See supra* Part II.B.

411. *See supra* notes 307–14 and accompanying text. Because courts have misunderstood the role of Rule 106, they have often applied the fairness test rather than applying the test in *Rainey*. *See supra* notes 307–14 and accompanying text. But what they are actually skipping is the *Rainey* test.

412. *See supra* notes 338–43 and accompanying text.

413. *See supra* notes 315–21 and accompanying text.

414. *See supra* notes 309–13 and accompanying text.

415. *See supra* notes 309–10 and accompanying text.

416. *See supra* notes 302–08 and accompanying text.

Rule 106 trumps other rules, the Sixth Circuit could have given the defendant his “redress.”⁴¹⁷

The error in the *LeFevour* approach⁴¹⁸ is subtler. This approach is consistent with *Rainey*'s theory of remainder admissibility except where it credits Rule 106 itself with making inadmissible evidence admissible for the same kind of limited purpose.⁴¹⁹ *LeFevour*⁴²⁰ was decided before *Rainey*,⁴²¹ so it is not surprising that Judge Posner found this power within Rule 106 itself, and it does the same thing as *Rainey* without using the rule directly.⁴²² Nevertheless, it is sounder to base admissibility on relevance as *Rainey* does because relevance is fundamental to admissibility,⁴²³ and because it avoids suggesting that Rule 106 trumps other evidence rules.

D. A Complete Walkthrough: Handling a Rule 106 Objection

In a trial or other proceeding, when the proponent offers a portion of a statement and the opponent objects under Rule 106, the judge should assess the objection in several steps.

First, the judge should require the opponent to identify the parts of the remainder that she would like to have admitted contemporaneously with the proponent's portion.⁴²⁴

Second, the judge should allow the proponent to object to the court receiving the remainder or remainders at that time. If the proponent does not object, the judge should admit the evidence without qualification.

Third, if the proponent objects, the judge should examine the remainder or remainders that the opponent has offered. If the objection is to hearsay, the judge should determine if there is any independent hearsay exception or exemption under which it falls.⁴²⁵ Likewise, if the objection is not to hearsay but rather to the original document rule, the judge should determine whether any of the exceptions apply.⁴²⁶

If there is an applicable exception, the evidence is admissible, but the court must still determine whether the evidence should be received immediately or if it may be delayed until later in the trial. If it passes the fairness test,⁴²⁷ the judge should admit the remainder or remainders under the applicable exception and should not give the jury a limiting instruction.⁴²⁸ If the evidence fails the fairness test, the judge should allow

417. *See supra* notes 312–13 and accompanying text.

418. *See supra* Part II.C.

419. *See supra* notes 330–34 and accompanying text.

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

421. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988).

422. *See supra* notes 330–34 and accompanying text.

423. *See supra* notes 14–15, 212–14 and accompanying text.

424. *See supra* notes 163–64 and accompanying text.

425. *See, e.g.*, FED. R. EVID. 801(d), 803–804.

426. *See* FED. R. EVID. 1003–1004, 1007.

427. *See supra* notes 170–71 and accompanying text.

428. *See* FED. R. EVID. 105. Of course, if a limiting instruction would be required for any other reason unrelated to this analysis, it should still be given.

it to be admitted at an appropriate later time, because it is admissible but not necessary to complete the portion at that time.⁴²⁹

In this step or in any other step, the judge should apply the fairness test as follows: weigh whether the offered statements are necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact about what was said or meant, or (4) insure a fair and impartial understanding.⁴³⁰ No remainders that (1) are irrelevant to the issue of what was said or (2) go beyond explaining the portion pass this test.⁴³¹

If the objection is on any other grounds besides hearsay or the original document rule, the judge should skip this third step.⁴³²

Fourth, if no hearsay or original document rule exception applies, or if the proponent's objection is based on a rule that excludes evidence for specific impermissible purposes but allows it for any other purpose,⁴³³ the judge should apply the fairness test⁴³⁴ to determine whether the remainder may be offered at that time for "context." If the remainder fails the fairness test, the judge should not admit it at that time.

However, if the proponent objects on grounds that the remainder violates a rule of evidence for which there are no exceptions⁴³⁵ or limited, delineated exceptions,⁴³⁶ the judge should exclude the remainder.⁴³⁷ If the portion without the remainder is then substantially more misleading than it is probative, the judge should exclude the portion as well.⁴³⁸

Fifth, if the remainder passes the fairness test, the judge should consider whether admitting it for the limited purpose of "context" would be substantially more prejudicial than probative; that is, whether the jury is likely to use the remainder for the impermissible purpose despite being instructed otherwise, and how harmful that improper use would be.⁴³⁹ If the objection is to hearsay, the judge should consider specifically whether the jury is likely to use the remainder as affirmative proof of the truth of the matter asserted, and whether that improper use would be harmful to the proponent.⁴⁴⁰ If the remainder fails the Rule 403 balancing test,⁴⁴¹ the judge should exclude the remainder. If the portion without the remainder is

429. *See supra* notes 170–71 and accompanying text.

430. *See supra* note 171 and accompanying text.

431. *See supra* note 170 and accompanying text.

432. This is because other kinds of objections will likely require the court to determine whether the evidence is admitted for a proper purpose, and the admission of such remainders will turn on whether the remainder is correctly offered for "context." *See supra* Part I.B.

433. *See supra* Part I.B.

434. *See supra* notes 430–31 and accompanying text.

435. *See, e.g.*, FED. R. EVID. 704(b).

436. *See, e.g., id.* R. 412.

437. *See supra* notes 408–09 and accompanying text.

438. *See supra* notes 408–09.

439. *See supra* notes 16–17, 21–25 and accompanying text.

440. *See supra* notes 21–25, 100–06 and accompanying text.

441. *See* FED. R. EVID. 403.

then substantially more misleading than it is probative, the judge should exclude the portion as well.⁴⁴²

Sixth, if the remainder passes the Rule 403 balancing test, the judge should allow the opponent to offer it into evidence at that time. Upon request, the judge should instruct the jury that it is not to consider this evidence for whatever impermissible purpose that would have made it inadmissible.⁴⁴³ If the remainder would be hearsay if offered to prove the truth of the matter asserted, the judge should add the following instruction: “[Proponent] presented the statement, [portion]. Then, [Opponent] offered you the statement, [remainder]. This latter statement is admitted for only one purpose: so that you may better understand what the first statement actually meant.⁴⁴⁴ You may consider this latter statement to be true insofar as it changes your understanding of what was meant by the first statement.⁴⁴⁵ But you may not consider the latter statement as proof that any fact it asserts on its own is actually true.”⁴⁴⁶

Since an otherwise inadmissible remainder becomes admissible for context through Rules 401 and 402, and not Rule 106, failure to raise a timely objection should not preclude remainders coming in for context or any other permissible purpose later on in the case.⁴⁴⁷

If a remainder was admitted for context, then before closing arguments, the judge should instruct the attorneys that they may not argue using the remainder for any other purpose than that for which it was admitted.⁴⁴⁸ If the remainder would have been hearsay but for limiting its purpose to providing context, the judge should instruct the attorneys that they are not to use any statement asserted in the remainder as affirmative proof, namely that a fact is true because the declarant said so in the remainder.⁴⁴⁹

CONCLUSION

In an evidentiary system where the purpose for which evidence is offered matters, having the correct interpretive framework for admissibility can make a tremendous difference, even if in subtle ways. This is an area in need of clarity and uniformity, both so that misleading statements are not presented without correction, but also so the rule is not abused as a back door to admit improper testimony, or proper testimony for improper reasons.

Limiting the admissibility of remainders so that they achieve no more than their proper purpose strikes the right balance. It preserves the policy

442. *See id.*

443. *See supra* notes 21–24 and accompanying text.

444. *See supra* notes 214, 226 and accompanying text.

445. *See supra* notes 371–77 and accompanying text.

446. *See supra* notes 371–77 and accompanying text.

447. *See supra* note 214 and accompanying text; *see also* FED. R. EVID. 106 advisory committee’s note.

448. FED. R. EVID. 105.

449. *Cf. supra* note 106 and accompanying text.

decisions inherent in the Federal Rules of Evidence while still allowing parties to correct misleading impressions. The methods described above should help courts untangle a complex problem, and should ensure that no more incriminating ghosts speak out from the witness stand in the name of completeness.