Response

COMPLETING THE QUANTUM OF EVIDENCE

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INTRODUCTION

In *Evidentiary Irony and the Incomplete Rule of Completeness,* Professors Daniel Capra and Liesa Richter comprehensively catalog the many shortcomings in current Federal Rule of Evidence 106 and craft a compelling reform proposal.[1] Their proposal admirably solves the identified problems, keeps the rule reasonably succinct, and furthers the accuracy and fairness goals of the rules of evidence.[2] In this Response, we focus on Capra & Richter's proposal to formally recognize a "trumping" power in Rule 106, which would allow an adverse party to offer a completing statement even if it would be "otherwise inadmissible under the rule against hearsay."[3]

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1. Daniel J. Capra & Liesa L. Richter, *Evidentiary Irony and the Incomplete Rule of Completeness: A Proposal to Amend Federal Rule of Evidence 106*, 105 MINN. L. REV. 901 (2020).

2. Professors Capra and Richter propose the amendment language:

> Rule 106. Remainder of or Related Statements a) Introducing the Statement. If a party introduces all or part of a statement, an adverse party may require the introduction of or may introduce any other part – or any other statement – that in fairness ought to be considered together with the initially introduced statement. The adverse party may do so even if the completing statement is otherwise inadmissible under the rule against hearsay; b) Timing the Introduction. The completing statement should be admitted at the same time as the initial statement. But the court may in its discretion, allow completion at a later time.

Id. at 957–58.

3. *Id*. at 958 (2020).

As the reader will recall, "trumping" situations typically arise from asymmetric evidence rules.[4] For example, if the prosecution offers only part of the defendant's confession under the hearsay exception for statements of party opponents under Rule 801(d)(2)(A), the defendant will have trouble offering the completion because of the rule's built-in asymmetry. The defendant after all is not his own party opponent. The question then becomes: what is the effect of Rule 106? Does Rule 106 trump the hearsay rule and cure the inadmissibility?

As commentators have noted, federal courts have sharply split on this question.[5] Some courts say no,[6] viewing Rule 106 as a timing rule. An adverse party may introduce a completion immediately to minimize downstream prejudice,[7] but that completion must be admissible on its own. Other courts offer a "limited purpose" solution to the question.[8] If the adverse party offers the completion only for the purpose of providing context and not for its substantive truth, then it is not hearsay and admissible.[9] Finally, some courts hold that Rule 106 acts as a trump card. Under this interpretation, the adverse party may

4. *Id*. at 934.

5. *Id.* at 917; Louisa M. A. Heiny & Emily Nuvan, The Incomplete Rule of Completeness: Taking a Stand on Federal Rule of Evidence 106 4 (June 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3558905 [https://perma.cc/PN3T-EBQM].

6. *E.g.*, United States Football League v. Nat'l Football League, 842 F.2d 1335, 1375–76 (2d Cir. 1988) ("The doctrine of completeness, Fed. R. Evid. 106, does not compel admission of otherwise inadmissible hearsay evidence."); United States v. Lentz, 524 F.3d 501, 526 (4th Cir. 2008); United States v. Ford, 761 F.3d 641, 651–52 (6th Cir. 2014); United States v. Ramos-Caraballo, 831 F.2d 1390, 1395 (8th Cir. 1987); United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996).

7. FED. R. EVID. 106, adv. comm. notes ("The rule is based on two considerations . . . [t]he second is the inadequacy of repair work when delayed to a point later in the trial."); 21A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5072.1 (2d ed. 2020) ("The opponent may suffer prejudice from the delay because the jury's evolving view of the case may have already been tainted by the time they hear the completing material."); Heiny & Nuvan, *supra* note 5, at 11 ("Distorted impressions, once perceived, 'can sometimes linger and work [their] influence at the subconscious level.'").

8. United States v. Lopez-Medina, 596 F.3d 716, 735 (10th Cir. 2010) ("Even if the [statement] would be subject to a hearsay objection, that does not block its use when it is needed to provide context for a statement already admitted."); *see also,* State v. Johnson, 479 A.2d 1284, 1290 (Me. 1984) ("Although the remainder of a statement, introduced pursuant to the rule of completeness, may itself be admissible for some independent reason, it may also come in for the limited purpose of removing the misleading effect of the fragment already introduced.").

9. FED. R. EVID. 801(c) ("'Hearsay' means a statement that . . . a party offers in evidence to prove the truth of the matter asserted in the statement.").

admit the completion for its substantive truth, regardless of its admissibility prior to the distortion.[10]

Capra & Richter advocate for adoption of the "trump card" interpretation in large part on policy grounds, and we agree.[11] Rule 106 must have what amounts to a trumping function to prevent distortion[12] and ensure fairness[13] Policy arguments, however, can only take us so far. For one thing, the "limited purpose" solution also addresses many of the concerns about distortion and unfairness.[14] The limiting purpose solution, to be sure, has disadvantages: highly technical limiting instructions seem fictive,[15] invite misinterpretation,[16] and are simply difficult to understand.[17] Yet, evidence law uses limiting instructions all the time, not only in the hearsay context, but with character impeachment,[18] 404(b) other act evidence, and elsewhere. For another thing, call us formalists, but we believe that the Federal Rules generally have an elegance and coherence that aids our interpretation and understanding of them. Tinkering with the rules on exclusively

10. 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."); United States v. Bucci, 525 F.3d 116, 133 (1st Cir. 2008) ("[O]ur case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.").

11. Capra & Richter, *supra* note 1, at 915. They also raise interesting arguments based on legislative history and Rule 106's structural location in the Rules. *Id.* at 933, 935.

12. *Id*. at 917.

13. *Id*.

14. *Id*. at 914.

15. Dale A. Nance, *Verbal Completeness and Exclusionary Rules under the Federal Rules of Evidence*, 75 TEX. L. REV. 51, 92 (1996) [hereinafter Nance, *Exclusionary Rules*] ("It is not surprising that neither courts nor commentators have addressed the issue [using the limited purpose solution], since it has a fictionalist character that does not sit well with most modern jurists."); Capra & Richter, *supra* note 1, at 945 ("Limiting instructions are notoriously confusing for jurors to comprehend and follow. Requiring completing remainders to be accompanied by limiting instructions in every case will lead to confusion at least and fairness defeating rejection of the remainder at worst.") (citation omitted).

16. Capra & Richter, *supra* note 1, at 946 ("Jurors may interpret a perplexing instruction to limit their use of the defendant's completing statement to 'context' as code, cautioning them to *disbelieve* it.").

17. GEORGE FISHER, EVIDENCE 244 (3d ed., 2013) (arguing that such limiting instructions about purpose are rarely clear); Capra & Richter, *supra* note 1, at 947 (decrying adding "unnecessary complexity to the trial process.").

18. *E.g.*, Michelson v. United States, 335 U.S. 469, 472–73 n.3 (1948).

policy grounds without an overarching conceptual framework risks creating unforeseen problems or controversies down the road.

Thus, in this Response, we offer an additional conceptual reason why Capra & Richter's proposal is correct. Perhaps the Rule of Completeness is ultimately motivated by fairness, but conceptually it also embodies a discretized perspective of evidence. This discretization places limits on how a party can present its evidence, and it explains why a completion should almost always be admissible.

I. EVIDENTIARY QUANTA

In quantum theory, atoms can only occupy discrete states. They absorb or transmit energy only in discrete packets called quanta, and in-between states are forbidden.[19] One can view the Rule of Completeness as framing evidence in a roughly analogous way. Evidence—whether a statement, a recording, or a piece of physical evidence—cannot be chopped up and presented however a party likes. Instead, parties must offer evidence in defined chunks, and for each chunk, they must either offer the whole or nothing at all.

From this perspective, the Rule of Completeness is not just an afterthought for correcting distortions created by the parties. Rather, it is a fundamental rule that determines the "unit" of evidence that the evidentiary rules act upon. When a judge admits a hearsay statement under Rule 801(d)(2)(A), Rule 106 defines what constitutes a "statement" by the party opponent.[20] For efficiency reasons, courts may aggregate many such quanta into a single evidence ruling, but the completeness rule delineates the minimum unit of consideration. Functionally of course, this framework prevents distortion, and so perhaps legal realists will think it an unnecessary formalism. We, however, believe that the conceptual framework is critical for understanding not only Rule 106, but other areas of evidence as well.

This idea of "wholeness" often animated traditional discussions of the common law rule of completeness.[21] Let us be clear: defining wholeness is no easy task. It is not objective and almost surely context dependent, but as Dale Nance argues, "[a]lthough the identification of verbal events [quanta] may present difficult problems, that is not to

19. *See generally* Sharon Bertsch McGaryne, George F. Bertsch & James Trefil, *Atom*, ENCYCLOPAEDIA BRITANNICA (2020), https://www.britannica.com/science/atom [https://perma.cc/NP6R-H9FL].

20. FED. R. EVID. 106.

21. Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825 (1995) [hereinafter Nance, *A Theory*].

say that it cannot practically be performed."[22] Courts and commentators have historically used various methods for defining quanta. Wigmore, for example, took a relevance approach, limiting the completion to material that is the "same subject" and "explanatory of the first part."[23] Current Rule 106 defines the quantum more narrowly, focusing on fairness.[24]

II. THE TRUMPING FUNCTION

So how does thinking about evidentiary quanta help us think about the trumping rule proposed by Capra & Richter? For one thing, we should not view trumping as merely an ad hoc patch for remedying a few isolated problems like 801(d)(2)(A). Rather, trumping flows directly from the quantum perspective and the rules themselves. The proponent may either admit a complete quantum or none of it, so when an adverse party seeks to "admit" a completion, he is not conceptually admitting any new evidence at all. The adverse party is objecting to the *proponent's* evidence as incomplete, effectively forcing the proponent to perform her duty to present complete evidence.

We can use an example found in Capra & Richter to make this point more concrete.[25] Suppose the prosecution offers the defendant's confession that he purchased the murder weapon but conveniently leaves out the defendant's claim that he sold the weapon three months prior to the murder.[26] The confession is of course hearsay, but the prosecution is entitled to an exception under 801(d)(2)(A). When the defendant attempts to admit the completion under Rule 106, however, he faces an obstacle, because he is not entitled to offer his own out-of-court statement under 801(d)(2)(A). Capra & Richter's proposed rule solves this problem through an explicit carve-out.[27] Under the quantum perspective, however, the admissibility of the completion happens as a matter of course. Because the prosecution is required to

22. *Id.* at 830.

23. *Id.* at 881 (citing 7 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2113 (Chadbourn rev. 1978)).

24. FED. R. EVID. 106 ("any other part . . . that in fairness ought to be considered at the same time."); *see also* Capra & Richter, *supra* note 1, at 902 (noting with approval that federal courts have uniformly "interpreted the fairness threshold for invoking the Rule narrowly, recognizing the need for completion only when the first-introduced statement creates an inaccurate and distorted inference about its true meaning.").

25. Capra & Richter, *supra* note 1, at 901.

26. *See* United States v. Bailey, 322 F. Supp. 3d 661, 664 (D. Md. 2017) (offering the fact pattern as a "classic example.").

27. Capra & Richter, *supra* note 1, at 958 ("The adverse party may do so even if the completing statement is otherwise inadmissible under the rule against hearsay.").

admit the whole quantum or none of it, the completed statement is already in evidence. Indeed, conceptually, Rule 106 never "trumps" anything. It simply defines what was admitted under 801(d)(2)(A) in the first place.

This perspective of completeness is not new. Dale Nance, in his two seminal articles on the rule of completeness, is the strongest proponent of the view, and we owe much to his comprehensive and insightful development of it.[28] Nance suggests that the completion is the proponent's duty, and that the rule involves "a forced presentation by the proponent"[29] even if the proponent does not make the "actual physical introduction."[30] Wigmore too seemed to agree, at one point defining compulsory completeness as "requir[ing] the *proponent* of an utterance to present the completing portion."[31] Wigmore, however, seems to have ultimately backed away from the full ramifications of the construct, preferring the aforementioned "limited purpose" solution instead.[32] Like Wigmore, courts at times have shown a reluctance to embrace this quantum perspective wholeheartedly.[33]

Current Rule 106 itself is textually ambiguous on the question of who proffers the completion. It states that "an adverse party *may require* the introduction" of the completing statement,[34] the passive construction leaving unclear who exactly does the introducing.[35] Capra & Richter's proposed rule seems to take an adverse-party-centered perspective[36] with some flexibility on timing. They allow the adverse

28. Nance, *A Theory*, *supra* note 21, at 842 ("The opponent invokes completeness by way of saying, 'If you are going to use what you claim to be my out-of-court statement, for whatever purpose, then you must at least use the entire statement relevant thereto.'"); Nance, *Exclusionary Rules*, *supra* note 15, at 57.

29. Nance, *A Theory*, *supra* note 21, at 866.

30. *Id*. at 845 (suggesting that the completion "is being offered by the proponent, in principle, if not in practice.").

31. 7 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2095 at 607 (Chadbourn rev. 1978).

32. Capra & Richter, *supra* note 1, at 909.

33. Nance, *Exclusionary Rules*, *supra* note 15, at 92 (worrying that the view that the proponent introduces the completion has a "fictionalist character" and may seem "a dodge of the practical reality of the situation."); *see also* Nance, *A Theory*, *supra* note 21, at 845 (noting that the "conception is understandably difficult to accept, given the identity of the party demanding admission of the remainder.").

34. FED. R. EVID. 106 (emphasis added).

35. Nance, *Exclusionary Rules*, *supra* note 15, at 59. *But see* Nance, *A Theory*, *supra* note 21, at 848 (noting that the common law "typically takes the form of requiring the proponent to present the remainder.") (emphasis omitted).

36. Capra & Richter, *supra* note 1, at 905, 944. For example, they describe the rule of completeness as "allowing an adversary to interject with completing evidence," and note that "[a] litigant creates her adversary's right to complete by selectively

party to "introduce" or "require the introduction of" the completion.[37] At least conceptually, this perspective differs from the quantum perspective, since under a quantum perspective, the adverse party does not "do" anything. Completeness is an objection, not a (rather rare) inclusionary rule. So if it were up to us, we would probably choose to draft the revision differently, but such subtle distinctions are likely to be lost in the rough-and-tumble of trial anyway.

III. BROADER IMPLICATIONS

Aside from justifying Rule 106's trumping function, the quantum perspective can also help answer a number of important follow-up questions that are sure to arise if one adopts Capra & Richter's proposal. For example, for what purposes can the opponent use the completion? If Rule 106 were a true trumping rule, the answer might be *any* purpose. The quantum perspective, however, naturally limits use of the evidence to the proponent's original purpose.[38]

Can the proponent withdraw his proffered evidence in the face of a completeness objection?[39] The answer is yes. As just mentioned, under a quantum perspective, completeness is not an inclusionary rule, but rather a more typical exclusionary one: if the proponent fails to offer the complete quantum, then the original evidence is excluded.[40] To prevent unfair prejudice and irrevocably tainting the jury, perhaps the parties should work out these issues *in limine*, but at least in principle, the proponent should be able to withdraw the original proffer once the evidentiary implications are made clear.

Finally, should the trumping function be limited to hearsay objections? Here, the quantum perspective suggests that Capra & Richter's proposed text is too narrow. While hearsay asymmetries may constitute the bulk of the distortion problem in practice, nothing inherently limits the problem to hearsay. Indeed, as Nance has shown, other asymmetric rules, like the original document (or "best evidence") rule, can generate the same problem.[41] The quantum view readily handles them all.

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presenting [evidence]."

37. *Id*. at 957.

38. *See* Nance, *A Theory*, *supra* note 21, at 896 (proposing a completeness rule that limits use of the completion to "the same purposes as to which the original proffer is admissible."); Nance, *Exclusionary Rules*, *supra* note 15, at 96.

39. *See* Nance, *A Theory*, *supra* note 21, at 59.

40. *See also id.* at 848 ("What is essentially inclusionary in function takes on a conditional exclusionary form.").

41. *Id.* at 877.

The quantum framework could prove useful for other areas of evidence as well. For one thing, there are other evidentiary rules with completeness-type clauses. As Capra & Richter suggest, Rule 502 extends waiver of the attorney-client privilege to undisclosed communications if the communication "ought in fairness to be considered together" with the disclosed communication.[42] Rule 502 defines the quantum of privileged evidence that is waived; the proponent again may not pick and choose as she likes. Rule 410(b)(1) creates an exception for statements during plea negotiations if "another statement made during the same plea or plea discussions has been introduced" and "if in fairness the statements ought to be considered together."[43] Rule 410(b)(1) is yet another provision defining the size of the evidentiary quantum. What is "fair" and thus the precise size of the quantum may change with context, but the conceptual framework is the same.

There are also several areas in which courts have struggled to define the scope of the word "statement." These too are essentially debates over how to define the size of evidentiary quanta. When Rule 804(b)(3) creates a hearsay exception for statements against interest, how large is that "statement"? *Williamson v. United States* defined that quantum at the level of a snippet.[44] The court must check whether each snippet is against interest (and not currying favor with the prosecution), and not whether the overall document or confession is against interest.[45] Yet, for official statements under Rule 803(8), *Beech Aircraft v. Rainey* seemingly defined a much larger quantum, more at the level of a report or chapter than a snippet.[46] The Supreme Court held that a "statement of a public office . . . [that] set[] out . . . factual findings from a legally authorized investigation"[47] includes accompanying opinions and conclusions.[48] Which interpretation is right? Why? And what about other areas—for example, what unit should govern

42. FED. R. EVID. 502; Capra & Richter, *supra* note 1, at 940 (suggesting that Rule 502 was modelled on Rule 106).

43. FED. R. EVID 410.

44. Williamson v. United States, 512 U.S. 594, 599 (1994) (noting that the text of the rule does not define "statement" as a "a single declaration or remark," but that "the principle behind the Rule, so far as it is discernible from the text, points clearly to [this] narrower reading.") (internal quotation marks omitted).

45. *Id*. at 600–01 ("In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.").

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

47. FED . R. EVID. 803(8).

48. *Beech Aircraft*, 488 U.S. at 153.

Rule 803(4)'s exception for statements made for medical diagnosis? We could carve out snippets involving fault, but what if those snippets are integral to the overall "statement"? These questions are beyond our scope here, but they are all ultimately about evidentiary quanta. They are about the unit of evidence on which the rules of evidence operate.

Finally, if we are going to be serious about quanta, how do we analyze a quantum that has both admissible and inadmissible aspects? In a world without evidentiary quanta, this question never arises, because one can always further cut up the evidence into admissible and inadmissible pieces. But the rule of completeness and the quantum perspective it embodies brings this question to the fore. Since some evidence must accompany other evidence, judges will inevitably face quanta in which only parts are admissible under the rules. Judges will likely need to consider the entire quantum in applying the evidentiary rule and take a preponderance-type approach. For example, is a statement, taken as a whole, made for purposes of medical diagnosis? If so, all of it becomes admissible under the exception.

CONCLUSION

Capra & Richter make a compelling argument for amending Rule 106. We agree in large part with their proposal, but have supplemented it here with a broader conceptual framework, identifying some quibbles along the way. This conceptual framework, based on the idea of evidentiary quanta, also shows us how the rule of completeness fits in with the rest of the evidentiary rules. The evidence rules operate on discrete units of evidence, and a proponent must offer whole units. Rule 106 is an objection to violations of this principle, and a completion is thus part of the *proponent's* original proffer, rather than an ex post remedy for distortion. This perspective eliminates the problems created by asymmetric evidence rules and yet elegantly avoids the need for ad hoc trumping provisions.

More broadly, we have suggested that the idea of evidentiary quanta may have uses beyond resolving Rule 106's trumping controversy. It helps answer follow-up questions that are sure to arise on how to apply Capra & Richter's proposed amendment, and it also helps us tie together other related questions about evidentiary units throughout the rules.