A Theory of Verbal Completeness

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A Theory of Verbal Completeness

Dale A. Nance*

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I. INTRODUCTION

Countless times a day, witnesses in court are sworn to tell "the whole truth." But do we mean it? The simple fact is that our adversarial legal culture condones a large measure of selective reporting by witnesses as well as selective presentation of documentary or real evidence. This tolerance for partial truths is premised on the theory that the partiality of one side will be offset by the partiality of the other. Amid this adversarial clash, one wonders whether the mandate to tell "the whole truth," as distinct from the mandate not to lie, has any practical significance.

Of course, the adversarial contest is governed by a variety of procedural rules that regulate the partiality of the evidence introduced. The most significant are rules of discovery, which allow parties access to the information needed to supply that which their adversaries omit, and rules requiring witnesses to submit to cross-examination. Collectively, these rules enhance and protect the capacity of the system to provide adversarial cures for adversarial partiality. Also of considerable importance, though less so since the expansion of discovery rights, are the rules of admissibility. Many of these rules control partiality more directly by exerting pressure on parties to present preferred forms of evidence, such as assertions subject to cross-examination and documents subject to direct inspection.

The so-called "rule of completeness" is different. It constitutes the most direct way that the law of evidence manifests a commitment to override adversarial partiality in the presentation of evidence. Whereas most admissibility rules are exclusionary, operating against a background preference for the admissibility of relevant evidence, the completeness rule is explicitly inclusionary. It affirmatively provides for the admission of evidence needed to understand other evidence already admitted.

2. The problem of selective questioning of witnesses is exacerbated in this country by the fairly pervasive practice of coaching witnesses. See generally John S. Applegate, Witness Preparation, 58 Tex. L. Rev. 227 (1989).
3. See generally Dale A. Nance, The Best Evidence Principle, 75 Iowa L. Rev. 227 (1988) [hereinafter Best Evidence]. To be sure, the exclusionary rules sometimes generate their own distorting side effects. See, e.g., Stephen A. Saltzburg, A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence, 66 Cal. L. Rev. 1011 (1978) (discussing problem of jury discounting for failure to produce evidence when, unbeknownst to jury, party who would be expected to present such evidence has tried unsuccessfully to introduce it).
4. See, e.g., Fed. R. Evid. 402 (providing that all relevant evidence is admissible except as limited by explicit rule). See generally James B. Thayer, A Preliminary Treatise on Evidence at the Common Law 263-70 (1896).
5. See generally Charles T. McCormick, McCormick on Evidence § 56 (3d ed. 1984). Besides the completeness rule, the only general inclusionary rules, other than constitutional limitations on the exclusion of reliable evidence, are the doctrine of curative admissibility, id.
This root idea—favoring the "whole" evidence, if not the whole truth—provides a potentially wide open door to the admission of evidence, since relevant evidence will almost always aid in understanding other information presented on the same material issue. It thus carries the potential to undermine the entire system of evidence rules. If one side introduces evidence $E_1$ on some material issue, an adversary may want to introduce evidence $E_2$ that affects what the trier of fact infers from $E_1$ about that issue or about other issues in the case. If the presentation of $E_2$ is blocked by some exclusionary or regulatory evidence rule, the adversary may appeal to the principle of completeness in an effort to override the obstruction. And if this is to be allowed, what evidence rule could remain intact?

Not surprisingly, the completeness principle has been constrained so as to apply only in certain special contexts. For example, the most commonly encountered codification of the doctrine is Federal Rule of Evidence 106:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement that ought in fairness to be considered contemporaneously with it.

On its face, this provision limits the completeness idea to assuring the presentation of the entire relevant portion of a writing or recorded statement. Still, the rule applies quite broadly in certain respects. Unlike most other rules that affirmatively provide for the admission of evidence, the rule of completeness is not tied to a particular exclusionary rule. Therein lies both its potential power and its realized ambiguity.

On the one hand, the completeness rule might operate across admissibility rules, trumping any that would otherwise require the exclusion of potentially "completing" evidence. Alternatively, it might be subordinate to such exclusionary rules, having only some narrower

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§ 57, and the doctrine of waiver of objections, id. § 55. The relationship of curative admissibility to completeness is discussed infra Part III.B.

6. Given the presumptive admissibility of relevant evidence, most other inclusionary rules are simply exceptions to exclusionary rules that would otherwise apply. Usually, the status of a rule as an exception is obvious, especially under modern codifications. However, some rules require closer inspection. For example, Fed. R. Evid. 609 mandates the admissibility of certain evidence that a witness has been convicted of crime, but it is clear from the context that the rule operates as an exception to the otherwise applicable exclusion of character evidence. See Fed. R. Evid. 404, 608(b). Yet Rule 609 also operates as an exception to the hearsay prohibition as it would apply to a report of the conclusion of a separate trier of fact. Cf. Fed. R. Evid. 803(22).

It should also be noted that there is a much narrower completeness provision in the Federal Rules that is tied to a particular exclusionary rule. See Fed. R. Evid. 410(i) (providing for admissibility against defendant of statement made in plea negotiations when necessary to understand another admitted statement from same discussions).
procedural effect indicated by the "at that time" language. Modern case law and commentary are split on this question, reflecting substantial confusion about the rationale of the rule. In this Article I will endorse the view that the most important modern function of the completeness rule is to trump otherwise applicable exclusionary rules, though not every rule in every instance. I will also offer the general proposition that it should almost always trump one large and important class of exclusionary rules, those based upon the "best evidence" principle, that is, the principle that parties should present to the tribunal the epistemically best evidence available to them on a given litigated issue. The trumping effect arises naturally from the fact that the completeness rule is itself an instantiation of that principle.

Beyond these specific conclusions, this study of the completeness rule is valuable for the light that it sheds on the complex ways in which the Anglo-American system of adjudication responds to partiality of presentations. It demonstrates that we accept evidentiary partiality in order to gain the benefits of an adversarial procedure. When those benefits are compromised, the commitment to adversarial procedure is weakened. In particular, when accuracy of adjudication is at risk, the adversary system is often modified to ameliorate the problem, even at the cost of some loss in party autonomy in the conduct of trials.

The analysis proceeds in two stages. Part II of the Article examines completeness under the common law of evidence, by which I shall mean evidence law apart from the Federal Rules of Evidence and similar state codifications. This examination yields a more precise picture of the common-law doctrine than heretofore available and identifies three distinguishable functions that it performs. The discussion also establishes the importance of completeness in contexts not limited to "writings or recorded statements," the language of Federal Rule 106. With this background, the more theoretical Part III relates the completeness doctrine to the best evidence principle, using the resulting insights to distinguish completeness from the related doctrine of curative admissibility, sometimes suggested as the source of the power to trump otherwise applicable exclusionary rules. Most importantly, this examination allows us to identify a test for when the trumping of such exclusionary rules should occur. Part IV concludes with an indication of future work on the implications of this study for the interpretation and evaluation of the treatment of completeness under the Federal Rules.

7. This issue has been called "by far the most intriguing" problem to arise in connection with Rule 106. Emerging Problems Under the Federal Rules of Evidence (2d ed.) A.B.A. Sec. on Litig. 21 (West 1991).
8. See Nance, Best Evidence, supra note 3, at 230-47.
II. THE COMMON-LAW HERITAGE: IDENTIFYING FUNCTIONS OF THE
COMPLETENESS DOCTRINE

In order to understand the modern completeness doctrine, a re-examination of its common-law origins is indispensable. Indeed, this is a classic example of the importance of doctrinal history in the interpretation of codified rules. Unfortunately, though not surprisingly, that history reveals both complexity and confusion. Much of the difficulty arises from the brevity of judicial opinions on evidentiary questions generally, and completeness questions in particular. Cryptic opinions pose a serious challenge to interpretive efforts. And of course, even under the most careful scrutiny, the large number of opinions from courts at every level dating back over two hundred years cannot all be perfectly harmonized. What follows, therefore, is a necessarily brief summary of the mature common-law completeness rule, articulated with an unavoidable, yet historically sound, interpretive gloss. It is, however, much more than a mere restatement of the received wisdom. By exploring the rationale of the doctrine at greater depth than previously attempted, the discussion dispels several confusions that have beset the doctrine, confusions that have appeared in both judicial opinions and academic commentary.

A. Defining "Wholeness"

Wigmore’s synthesis of the common-law rule provides an excellent starting point, although it is not without flaws. What Wigmore called the doctrine of "Verbal Completeness" is triggered when a party (hereafter the "proponent") presents evidence of only part of a verbal utterance, written or oral, rather than the entire utterance. The basic idea can be traced at least as far back as a famous seventeenth century English trial in which the defendant argued against piecemeal use of passages from his allegedly seditious manuscript. Rather than simply leaving the adversely affected party (hereafter the "opponent") to complain of unfairness, the modern doctrine offers a more significant remedy, the exact contours of which will be addressed momentarily. In other words, the doctrine is a response to the advertent or inadvertent creation of false impressions made by taking language out of context, and it may be summarized in the principle that "the whole of a verbal utterance must be taken together."
The expansive force of the completeness principle is thus constrained by
the idea of a verbal utterance, since the affirmative license or demand
for the admission of evidence can extend no further than to the entirety of
such an event. This supposes, of course, the individuation of communica-
tions into identifiable events that may qualify as "wholes," though it does
not necessarily assume that such individuation is unique, that it can be
performed in only one way. The common-law doctrine is thoroughly
modern in that its point is to achieve an understanding of evidence based
on wholeness of meaning, even if there is no "value-free" criterion of
wholeness. Wigmore succinctly identified the resulting tension:

But what is the whole of the utterance? No doubt this principle of
entirety is flexible in its application. A simple thought requires
but a simple utterance; a complex thought, a complicated
utterance. When, therefore, we obey the canon that the whole of
the utterance must be considered, the scope of our survey may be
very variable, so far as concerns the mere number of words,
sentences, or paragraphs. The whole that is to be considered is
obviously not the whole of a phrase or a paragraph, any more
than it is the whole of the printer's line or page, but the whole of
thought — that is, such a quantity of utterance as the utterer has
indicated to be distinct and entire in itself, for the purpose of
representing a distinct thought. . . . Thus the possibilities are
infinite and the boundaries indefinite in this search for entirety of
utterance. It will be difficult for the law, in applying the principle,
to employ any fixed test. Yet the law cannot be expected to be
satisfied practically with the indefiniteness which in theory the
conception of entirety involves; and therefore the application of it
is full of difficulties. 14

Although the identification of verbal events may present difficult problems,
that is not to say that it cannot practically be performed. As is often the
case in handling such dilemmas, the key to an identification of whole
verbal events will be context: The practical "boundaries" of the whole will
be a function of both the purposes for which the original portion may
legitimately be used and the purposes served by invoking the completeness
doctrine.

verbal event rather than its exact words, presents a problem the treatment of which has now
largely merged with the lay opinion rules. See generally id. §§ 2097, 2098. A similar confluence
can be seen with respect to the issue of precision of secondary evidence of the contents of a
document or other recording and the rule preferring originals when trying to prove the
contents thereof. See generally id. §§ 2105-11. Of course, the risks of each type of incompleteness
partly account for the necessity of all those rules that constrain the means by which one
can prove out-of-court verbal events, including the lay opinion rule, the original recording
rule, and the hearsay rule, a fact that will prove to be of considerable importance.

14. Id. § 2094, at 604 (emphasis in original).
VERBAL COMPLETENESS

1. The Relevance Test

With respect to the former, a substantial amount of case law addresses the standard by which one is to measure wholeness. Wigmore offered the following synthesis of the norm animating these decisions: "No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable" under the principle of completeness.\footnote{15} While this way of expressing the matter seems to depend upon a prior determination of what constitutes the "remainder" of a verbal utterance, one may take it to be the refinement of a pre-analytic notion. Such a broader notion of the whole—extending to all that the person said or wrote at that time on the subject-matter of the suit—is sometimes encountered, especially in questions about the entirety of a criminal defendant's admission or confession.\footnote{16} Wigmore thought the narrower restriction necessary "so that the opponent shall not, under cloak of this conceded right, put in utterances which do not come within its principle and would be admissible in the guise of auxiliary evidence of the past conduct of the defendant."\footnote{15} Actually, Wigmore offers this as one of three restrictions on the use of the remainder, the other two being: "No utterance irrelevant to the issue is receivable," and "The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony."\footnote{15} The former might seem to be entailed by the restriction quoted in the text, but by reasserting the overarching requirement of relevance, it affirms that qualifications of admitted portions do not become admissible when they concern irrelevancies. See id. at 656-57. The latter additional restriction does not address the boundaries of the verbal event at all, but rather the nature of the use of remainder evidence. See United States v. McCorkle, 511 F.2d 482, 487 n.4 (7th Cir. 1974) (en banc) (endorsing the first two restrictions and distinguishing the third), cert. denied, 423 U.S. 826 (1975). I argue later that Wigmore was wrong about this last restriction. See infra note 56 and accompanying text.

16. Compare 1 Simon Greenleaf, Greenleaf on Evidence § 218 (rev. ed. 1899) (noting early cases admitting remainder of confessions, the defendant "not being confined to so much only as is explanatory of the part already proved against him, but being permitted to give evidence of all that was said upon that occasion, relative to the subject-matter in issue"), with Commonwealth v. Watson, 388 N.E.2d 680, 686-91 (Mass. 1979) (holding that after prosecution used part of defendant's out-of-court statement to show defendant's consciousness of guilt, the remainder was properly excluded as not relevant to the admitted portion), and People v. Ramos, 512 N.E.2d 304 (N.Y. 1987) (holding that after partial introduction of defendant's prior statements to impeach defendant's testimony, defendant's completeness motion was properly rejected in absence of showing of relevance to rehabilitation by affecting understanding of prior inconsistent statement). The broader view of wholeness seems not even to have gained much of a foothold in this country with respect to utterances other than those of a criminal defendant. Compare Clark v. Smith, 10 Conn. 1, 5 (1833) (applying broader standard to admissions of a civil defendant), with Commonwealth v. Keyes, 77 Mass. (11 Gray) 323 (1858) (applying narrower standard in rejecting completeness argument with respect to utterances of non-defendant in criminal case), and Rouse v. Whited, 25 N.Y. 170 (1862) (applying narrower standard in rejecting completeness argument with respect to utterances proved in civil cases). The same point is true under codifications of the completeness rule. A modern example is People v. Perry, 499 P.2d 129, 148 (Cal. 1972) (interpreting codification allowing admission of "the whole on the same subject" as "necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced").
otherwise... inadmissible." Conversely, a statement that is not part of what was said or written at the same time is not ordinarily embraced within the rule, even if it qualifies the admitted statement, so the pre-analytic notion continues to have bite. This collection of restrictions on the use of completing evidence will be called the "relevance test" for wholeness, even though it is obviously important to keep in mind that these restrictions are tighter than one simply requiring the remainder to be relevant to the material issues in the case.

The application of the relevance test can be controversial even in those courts, the vast majority, that unequivocally endorse the narrower restrictions advocated by Wigmore. The explanation for this lies in the variety of ways that the remainder can serve to explain or qualify the original part. Although neither primary nor secondary authorities make any conscious effort to distinguish among these modes of completion, one can readily illustrate the variety. In each of the following hypotheticals the whole of the statement is given, with the portion omitted by the proponent in italics:

Case 1: Evidence that a defendant, charged with a chainsaw slaying, said, "Yes, I sawed him then, but I ain't seen him later that day."

Case 2: Evidence that a defendant, charged with murder, said, "I may have killed him."

Case 3: Evidence that a defendant, charged with murder, said, "I killed him, as I would kill any invader from Mars."

Case 4: Evidence that a defendant, charged with murder, said, "I shot right at him, but I missed."

Case 5: Evidence that a defendant, charged with murder, said, "You're damn right, I killed him; in self-defense."

In Case 1, the omitted part qualifies the (grammatical) meaning of the utterance, in this particular case by indicating which of two possible words with the same or similar spelling or pronunciation, even if ungrammatical, the defendant intended in making the statement. In Case 2, the omission reduces the probability of the partial utterance being true insofar as the

17. 7 Wigmore, supra note 10, § 2113, at 656. One should note, however, that Wigmore acknowledged the use of a broader idea in some cases, and even conceded that no great harm comes therefrom. Id. § 2113, at 657-59.

18. See 7 Wigmore, supra note 10, § 2119 (noting general pattern as well as inconsistency in rulings). The most conspicuous exception routinely recognized at common law was when the part of the utterance introduced contained an explicit or implicit reference to another utterance. Id. §§ 2104, 2120. An occasional case can be found that for good reason extends the reach of wholeness to temporally separate utterances that, because of their circumstances, were understood by the conversants as part of the context of the statement first introduced. See, e.g., West v. State, 37 S.E.2d 799, 800-01 (Ga. 1946) (holding that inculpatory statements made to sheriff on second interview presupposed the exculpatory statements made during first interview). And codifications of the completeness rule sometimes confirm a broader extension to at least some separate but qualifying utterances. See, e.g., Cal. Evid. Code § 356 (West 1967), Iowa Code § 622.20 (1950), Tex. Code Crim. Proc. Ann. art. 38.24 (West 1964).
warrant for its truth is the credit given the utterance, though of course the partial utterance could still be true.¹⁹ All common-law courts would concede the application of the completeness doctrine in Cases 1 and 2.²⁰ And only the fluky case can be found rejecting completeness in cases like Case 3, in which the probability of the truth of the partial utterance is affected, but not necessarily according to any assertive intentions of the speaker.²¹

However, the omitted parts in Cases 4 and 5 qualify neither the meaning nor the probability of the truth of the partial utterance; rather, they qualify its significance in the case. More precisely, the remainder in Case 4 qualifies the factual inference to homicide that the trier of fact has been invited to draw, while the remainder in Case 5 invites an inference as to a distinct ultimate fact in the case, such as a justifying circumstance or the existence of malice.²² Here there is serious ambiguity due to the malleability of the “same subject” restriction articulated by Wigmore. For example, in Case 4 one can argue that the prosecution’s evidence addresses only the mens rea of murder, not the “distinct subject” of an actus reus of homicide; and in Case 5 one can argue that the prosecution’s evidence concerns only the homicide and not the “subject” of mens rea.²³

¹⁹. In an extreme case, like, “I did not kill him,” the omission (of the word “not”) makes the whole logically inconsistent with the partial utterance, though once again the partial utterance could still be true. Incredibly, such deceitful redaction has actually occurred and not only in the distant past. See, e.g., Reece v. State, 772 S.W.2d 198, 202-04 (Tex. Ct. App. 1989) (arising under state’s version of the Federal Rules).

²⁰. To be sure, the effect of the remainder on the probability of the truth of the partial utterance is not always recognized, but even then the principle of allowing the remainder if it does have such an effect is not questioned. See, e.g., Black v. Nelson, 424 P.2d 251, 252-54 (Or. 1967) (reversing judgment for defendant in personal injury case because, inter alia, trial court wrongly admitted remainder of written statement by defendant which included opinion on the ability of plaintiff to avoid the accident; the appellate court was of the erroneous view that the opinion “in no way tends to explain or qualify the discrepancy between the defendant’s testimony and the pretrial statement” as to the positions of the cars).

²¹. Compare Commonwealth v. Keyes, 77 Mass. (11 Gray) 323 (1858) (affirming trial court’s rejection of completeness argument with respect to remainder of utterance that might have called into question the credibility of an unavailable hearsay declarant; the court strangely opined that since the hearsay declarant was not a witness, his credibility was not in issue), with Tracy v. People, 97 Ill. 101, 105-07 (1880) (holding that trial court erred in excluding defendant’s cross-examination of witness about whether dying declarant used profanity, a fact that would be relevant to the credibility of someone about to meet his maker). (The remainder in Case 4 might also affect the probability of the truth of the proposition that defendant “aimed right at” the victim, assuming it is disputed that he killed the victim, for if he had so aimed, it is less likely that he would have missed.)

²². Certain assumptions are implicit in this analysis. For example, the remainder in Case 3 may similarly affect the significance of the original proffer, as distinct from affecting the probability of the original part’s being true, if the defendant’s plea is not guilty by reason of insanity. And the remainder in Case 4 may affect the significance of the original part if the defendant is also charged with attempted murder; if the charge were only attempted murder, then the remainder would be irrelevant, despite its casting doubt on the accuracy of defendant’s aim. The remainder in Case 4 might also affect the probability of the truth of the proposition that defendant “aimed right at” the victim, assuming it is disputed that he killed the victim, for if he had so aimed, it is less likely that he would have missed.

²³. The question of whether the identity of the subject matter is determined by the use
The court can undoubtedly use this flexibility to reach the result it considers just or otherwise desirable. Nonetheless, the majority of decisions employ a relevance test broad enough to cover Case 4 and, at least as to the utterances of criminal defendants, Case 5 as well.

For the pragmatist, however, all this will seem rather amorphous without an understanding of the other aspect of context which serves to mark off meaningful wholes, namely the purpose or purposes of employing the notion of completeness. How, in other words, does the holistic demand arise in practice? In order to answer this question, careful attention must be directed to the procedural contexts in which the common-law response is invoked.

which the proponent claims to make of the original part is addressed infra at notes 59-63 and accompanying text.

24. Often the result is simply to affirm the trial court's judgment. See, e.g., Commonwealth v. Watson, 398 N.E.2d 680, 686-91 (Mass. 1979) (holding that, after demonstrably false part of defendant's out-of-court statement was used to show defendant's consciousness of guilt, the remainder, which conceivably affected the various inferences to be drawn from the lie, was properly excluded as not relevant to whether defendant lied and therefore to whether he was conscious of his own guilt). One must be careful not to read from such cases the proposition that, so long as the remainder evidence affects neither the grammatical meaning of the proffered part nor the probability of its being true, there is necessarily a distinct subject matter, thus defeating a completeness motion even if the suggested inferences from the proffered part are affected by the remainder. Watson seems rather to be based on the judgment that the inferences to be drawn from the defendant's lie were not significantly affected by the exculpatory assertions coupled with it.

25. See, e.g., Rosenberg v. Wittenborn, 3 Cal. Rptr. 459 (Cal. Ct. App. 1960) (affirming admission of remainder in personal injury case after police officer testified for plaintiff that defendant had admitted running a red light; cross-examination was allowed as to defendant's further statements to the officer about failure of his brake); Rokus v. City of Bridgeport, 463 A.2d 252, 255-56 (Conn. 1983) (holding it error to reject remainder in a personal injury case after police officer testified for plaintiff that defendant's employee admitted not seeing plaintiff in time to avoid collision; trial court had precluded cross-examination as to employee's further explanations of collision); Brown v. State, 450 S.E.2d 821 (Ga. 1994) (holding trial court's error in not admitting further portions of defendant's suppression hearing testimony was not harmless, when the state had introduced portions suggesting that earlier extrajudicial statements by defendant were voluntarily made, and the offered further portions would suggest that they were coerced); Commonwealth v. Britland, 15 N.E.2d 657, 658-59 (Mass. 1938) (holding it error to exclude remainder of defendant's statement qualifying admissions of involvement in crime by denials of knowledge or intent).

26. See, e.g, State v. Menilla, 158 N.W. 645, 653 (Iowa 1916) (holding that codified rebuttal rule renders admissible the exculpatory portions of defendant's out-of-court statement that admitted the killing but justified it as in defense of her son); King v. State, 287 S.W.2d 642 (Tex. Crim. App. 1956) (holding that codified rebuttal rule renders admissible the exculpatory portions of defendant's testimony at prior trial admitting killing in self-defense). This expands the test almost to the pre-analytic notion already mentioned, unless one limits the use of remainders to those which relate to the same causes of action, offenses, or defenses as the original part. Cf Rouse v. Whited, 25 N.Y. 170 (1862) (allowing remainder of defendant's statement attributing principal debt to plaintiff, after plaintiff had introduced part of same statement attributing ownership of levied property to plaintiff).
2. Aggressive and Responsive Completeness

One must first set aside what may be called an aggressive use of the notion of completeness, in which the proponent of the original partial utterance attempts to invoke the completeness principle in order to introduce a remainder that is otherwise inadmissible on his behalf. If this were allowed, it would invite abuse, as proponents would offer relatively unimportant parts of a verbal utterance for the purpose of bootstrapping the admission of the remainder. Not surprisingly, the courts have been careful to avoid such stratagems. The doctrine is thus limited for the most part to a responsive role. So limited, there are two distinct common-law completeness rules, at least as delineated by Wigmore. Distinguishing these rules and identifying their underlying functions are essential to understanding the common law and, ultimately, modern codifications. The next two sections undertake these tasks.

B. The Rebuttal Rule

The first rule, "universally conceded" in the common law, allows the opponent to place in evidence, during either cross-examination or the next major phase of the trial, those parts of the verbal event needed to understand and evaluate the part already introduced. I will refer to this

27. See, e.g., State v. Savage, 290 A.2d 221, 223 (Conn. 1971) (holding that trial court properly precluded defendant's effort to introduce remainder of statement part of which was first elicited by defendant in cross-examining police officer); Kuhn v. Kjose, 248 N.W. 250, 251-52 (Iowa 1935) (holding that trial court properly refused admission of that part of defendant's out-of-court admission that indicated his insurance coverage); Commonwealth v. Henry, 640 N.E.2d 505, 505-07 (Mass. App. Ct. 1994) (holding no error in trial court's exclusion of that part of defendant's out-of-court statement which denied wrongdoing). To be sure, many of the cases have concerned the prosecution's attempt to introduce portions of a defendant's admission or confession which relate to other crimes the defendant may have committed, and those decisions are somewhat in conflict. Compare People v. Loomis, 70 N.E. 919, 919-21 (N.Y. 1904) (holding that parts of confession relating to other crimes was improperly admitted), with McRae v. People, 281 P.2d 153, 153-56 (Colo. 1955) (holding that parts of confession relating to prior incarceration was properly admitted). If the two parts of the statement are not conveniently separable, one must apply the usual balancing of probative value and prejudicial potential, and even when the result is that the remainder is admitted in order to help the trier of fact understand the admissible parts, limiting instructions are properly employed to minimize the risk of improper use of the former. See, e.g., People v. Hurry, 52 N.E.2d 173, 176 (Ill. 1944); Bell v. State, 198 A.2d 895, 897 (Md. 1964). Responsive or defensive uses of completeness are not properly subject to such limitations, occasional contrary statements notwithstanding. See infra Part III.B.

28. Of course, the opponent of an incomplete proffer can become the proponent of an incomplete remainder, thus generating a completeness right in the original proponent. See, e.g., Patterson v. State, 509 S.W.2d 857 (Tex. Crim. App. 1974) (holding that defendant's introduction of part of remainder of confession allows prosecution to introduce residue of remainder).

29. See 7 Wigmore, supra note 10, § 2095.

as the *rebuttal* rule. It is at once puzzling because it seems unnecessary: if the completing portion aids in assessing the probative value of admittedly relevant evidence, it is itself necessarily relevant and thus presumptively admissible. Thus, the limitation of the rule to qualifying portions of the same verbal event as that proffered by the proponent seems too strict. Why cannot the opponent present *any* evidence relevant to the material facts?

To be sure, the doctrine could have meant no more than to emphasize the relevance of the completing evidence. Indeed, in many cases this seems to be the only identifiable purpose of invoking the completeness principle. Thus, one might say that a distinct completeness function is that of demonstrating relevance. But of course such a function, though persuasively real, is not *doctrinally* distinct. The completeness principle is used here merely as part of an argument to establish admissibility under the rule of presumptive admissibility of relevant evidence. In a doctrinal sense, the latter rule does the work. Likewise, since the probative value of the completing evidence can be *de minimis* if not considered in connection with the part it modifies, the completeness argument can serve to emphasize that the remainder is not subject to exclusion as a waste of time. Again, the latter rule does the work. In other words, the common-law rule would have been unnecessary, as a distinct doctrine, were its only practical point that of emphasizing the relevance or probative value of the remainder.

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Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.


31. *See* McCormick, supra note 5, § 185, at 541-44 (articulating relevance as the existence of probative value with respect to a material proposition in the case).

32. *See, e.g.*, J. Trueitt Payne Co. v. Jackson, 203 So. 2d 443, 445 (Ala. 1967) (discussing use of cross-examination to elicit remainder of conversation surrounding transaction between agent of defendant and third party); State v. Hillesheim, 305 N.W.2d 710, 716-17 (Iowa 1981) (discussing rebuttal presentation of other portions of basis of expert opinion); Floyd v. Tuckabury, 129 Mass. 362, 363 (1880) (discussing rebuttal presentation of further terms of, and basis for, prior judgment of partition); Aaberg v. Minnesota Commercial Men's Ass'n, 173 N.W. 708, 711 (Minn. 1919) (discussing rebuttal presentation of further terms of insurance contract).

1. The Timing Function

However, the common-law doctrine has meant much more than this allows, and the problem remains to identify its doctrinally distinct function. One suggestion is that the rebuttal rule overcomes any otherwise applicable preference for limiting the scope of cross-examination to the subject matter of the direct examination. In this way, the doctrine serves what is essentially a "timing" function, changing the point in the trial at which evidence is received, for if the scope limitation is the only difficulty in admitting the evidence, then by hypothesis it would be admissible without the aid of the completeness principle if offered at a later stage of the proceedings. Some modern commentators have treated this overriding of scope limitations as the principal, if not only, independent significance of the doctrine. But Wigmore disagreed, explicitly distinguishing the completeness doctrine from rules governing the timing of evidence presentation.

What should be made of this disagreement? While overriding otherwise applicable rules is the right general idea, overriding evidence sequencing rules certainly does not fully explain the completeness doctrine. In the first place, once again completeness would serve virtually no distinct doctrinal function. In jurisdictions that do so limit the scope of cross, the completing portions of a verbal event are almost inevitably within the subject matter of direct in that they qualify the evidence already offered with regard to the relevant subject matter thereof. Thus, the only relationship of rebuttal completeness to scope is that satisfying the

34. See, e.g., 1 B.E. Witkin, California Evidence § 319 (3d ed. 1986); Note, The Scope of Cross-Examination, 24 Iowa L. Rev. 564, 572-73 (1939). Of course, not all jurisdictions so limit cross-examination, but the "subject matter of direct" test is the narrowest of restrictions commonly applied. See McCormick, supra note 5, § 21.

35. The prosecution cannot call the criminal defendant to the stand, so it is ordinarily limited to whatever testimony it can elicit during cross-examination of a defendant who chooses to testify. See McCormick, supra note 5, § 130. Thus, if a defendant testifies to a part of an utterance made by someone else or by himself at another time, the timing function of completeness may have the effect of allowing the prosecution to admit evidence that it could not otherwise elicit from the defendant at a later time. However, this phenomenon applies more broadly than to verbal utterances and is a consequence of judgments about waiver of the defendant's privilege not to testify and the extent thereof. Id. § 132. In principle, the prosecution could constitutionally call the defendant to the stand at a later time, provided the further examination were limited to the scope of the waiver. See Graham C. Lilly, An Introduction to the Law of Evidence § 4.11 (2d ed. 1987).

36. See, e.g., Ronald L. Carlson et al., Evidence In the Nineties 104 (3d ed. 1991). While these authors at least raise the question of the existence of non-timing functions, see id. at 105 (problem 6-12), they clearly indicate their belief that the rule of completeness is primarily a rule altering the usual scope rules governing successive stages of the examination of a witness. See also Edward J. Imwinkelried, Evidentiary Distinctions 14 (1993).

37. 7 Wigmore, supra note 10, § 2114 ("Other principles discriminated"); (5) at 661-62 ("That the stage of re-examination or cross-examination is the proper time for putting in explanatory utterances is one of the rules for the order of evidence, and does not involve the tenor or limits of the utterance." [cross-references omitted; emphasis in original]).
requirements for completeness entails satisfying even the most restrictive limitations on the scope of subsequent examinations. Completeness serves as part of an argument that presentation of the remainder satisfies such limitations, rather than that the remainder is admissible notwithstanding such limitations. No significant "override" is involved. 38

More importantly, other modalities of the rebuttal rule cannot be captured by reference to a timing function. This point can be shown indirectly in several ways. First, some jurisdictions do not limit cross-examination to the subject matter of direct yet still find need of a rebuttal rule. 39 Furthermore, many common-law decisions invoke the completeness principle for the opponent's presentation of the remainder at a stage of the proceedings following cross-examination of the witness sponsoring the original incomplete version, or in some other context where the scope limitation on cross does not apply. Finally, even when the remainder is presented on cross in a jurisdiction where cross-examination is subject to the usual scope limitation, the completeness doctrine does more than simply override unduly restrictive applications of the scope limitation. 40

38. See McCormick, supra note 5, § 21, at 53 (opining that completeness idea often invoked in applying scope limitation is "mere statement of the converse of the limiting rule" and is thus distinct from the general completeness doctrine). Once again, this is not to deny the rhetorical value of the completeness principle in this context: "The fact that this is substantially a mere statement of the converse of the limiting rule itself does not detract from its usefulness as an added tool for argument." Id.


40. While some such cases may entail no more than emphasizing the relevance of the remainder, see supra notes 32-33 and accompanying text, others cannot be so explained. See, e.g., Evans v. Multicon Constr. Corp., 574 N.E.2d 395, 402 (Mass. App. Ct. 1991) (applying rebuttal rule to responses to requests for admission); Albuquerque Nat'l Bank v. Clifford Indus., Inc., 571 P.2d 1181 (N.M. 1977) (applying rebuttal rule to answers to interrogatories); Clinch River Mineral Co. v. Harrison, 21 S.E. 660, 663 (Va. 1895) (holding that if part of defendant's answer to the complaint is used as evidence against it, exculpatory portions of the answer must be considered as well).

41. See, e.g., Rosenberg v. Wittenborn, 5 Cal. Rptr. 459 (Cal. Ct. App. 1960) (relying on codified completeness rule in rejecting proponent's objection to remainder on grounds of both exceeding scope of cross and violating hearsay rule). In State v. Manilla, 156 N.W. 655, 653 (Iowa 1916), the court relied on the completeness rule in holding that refusal to allow the exculpatory remainder of defendant's statement, as "not proper cross-examination," was error made harmless by the fact that defendant made no attempt to introduce the remainder in subsequent direct examination of the witness, the court explaining that the remainder would have been then admissible as "res gestae."
2. The Trumping Function

So one must look further for the full practical import of the rebuttal rule. It can be found by observing that, in some situations, an exclusionary rule can potentially bar the opponent from presenting the completing portion. The following pages will offer examples of how this can occur without the original proffer being inadmissible under the same exclusionary rule. What is important here is to observe that this occurrence generates a predicament. On the one hand, the evidence in its incomplete form is, by hypothesis, misleading. In some such cases, the court could exclude it on that basis, but then probative evidence might well be lost, a loss that is especially problematic if the completing portion is available for presentation. On the other hand, admitting the original proffer as well as the completing evidence requires one to face the seeming conflict between the principle of completeness and whatever principle or policy underlies the exclusionary rule in question. Here, at last, could be real doctrinal meat in the completeness principle: Resolution of such conflicts would be the main point of the common-law completeness rulings.

In fact, courts have routinely used the rebuttal rule to override at least some admissibility rules. The exclusionary rule most frequently encountered in this way is the hearsay prohibition. An illustrative,
modern decision from a common-law jurisdiction is *Rokus v. The City of Bridgeport.* In that personal injury case, the plaintiff offered and the trial court admitted part of the defendant’s out-of-court statement to the witness concerning the cause of the accident. This, of course, was allowable pursuant to the hearsay exception for an opponent’s admissions. However, when the defendant proposed to cross-examine the witness concerning the remainder of the statement, the trial court excluded such testimony as hearsay. The Supreme Court of Connecticut held this exclusion to be error under the doctrine of completeness. In so ruling, the high court agreed with the trial court that the remainder of the defendant’s statement was hearsay when offered by the defendant, but nevertheless held that:

When a portion of a party’s out-of-court admission is placed in evidence by an opponent, the party has a right to introduce other relevant portions of the conversation from which it was excerpted, irrespective of whether it is self-serving or hearsay.

Indeed, the court emphasized that “[t]he principle announced in [prior Connecticut decisions] . . . is an independent exception to the rule against hearsay.” Thus, the completeness principle has what may be called a “trumping” function, in that it trumps the operation of an otherwise applicable exclusionary rule.

To be sure, in some contexts the opponent may use the completing matter for a purpose that does not fall within the hearsay prohibition at all. When, for example, a party’s out-of-court statement is admitted, statements made by others in the same conversation or correspondence may be introduced by either side as necessary to understand the significance of the admitted statement, without running afoul of the statement. A similar rule obtained in the federal courts before the adoption of the Federal Rules of Evidence. See, e.g., United States v. McCorkle, 511 F.2d 477, 478-79 (7th Cir. 1974), *rev’d on rehearing*, 511 F.2d 482, 485-87 (en banc), *cert. denied*, 423 U.S. 826 (1975) (opining that prosecutor cannot introduce portions of defendant’s statement and then object on hearsay grounds to defendant’s presenting completing portions; remainder properly excluded, however, for failure to meet relevance tests for completeness).

45. *483 A.2d* 252 (Conn. 1983).
46. Id. at 255-56. The statements were made to, and reported in court by, a police officer who investigated the accident. Id.
47. Id. at 256.
48. Id. *Accord*, California Law Revision Commission Tentative Recommendation and Study Relating to Uniform Rules of Evidence, Article VIII, Hearsay Evidence 599 (Aug. 1962) (“To the extent that this section [upon which California’s codified rebuttal rule was based] makes hearsay admissible, we may regard the section as a special exception to the hearsay rule.”).
49. The appellate court, however, went on to hold that the trial court’s error in denying the cross-examination at issue was rendered harmless by the fact that the defendant subsequently testified not only to the material facts but also that he gave the same account thereof in the out-of-court statement from which plaintiff selectively quoted. *Rokus*, 440 N.E.2d at 256. *Cf. Commonwealth v. Britland*, 15 N.E.2d 657, 659 (Mass. 1938) (rejecting harmless error argument when defendant’s completeness questions had been ruled out on cross-examination, even though defendant subsequently had testified to remainder of statement to police).
VERBAL COMPLETENESS

hearsay rule. Similarly, if the proponent uses the opponent's out-of-court statement for some purpose other than proving its truth, then a suitably limited admission of the remainder equally circumvents any hearsay objection. In particular, when the original incomplete evidence is offered to impeach a witness with a prior inconsistent statement and the completeness counter attempts to rehabilitate the witness by showing that the prior statement, taken in context, is not inconsistent with the witness's original testimony, both parts of the prior statement may be used to assess the credibility of the witness, without direct regard to their truth or falsity. In such cases, the completeness argument serves simply to demonstrate relevance to the rehabilitation purpose.

50. See, e.g., United States v. Morello, 250 F.2d 631, 634 (2d Cir. 1957) (holding that letter asserting unlawful acts is admissible under completeness to show meaning of a reply letter written by defendants' unindicted coconspirator); State v. Hilleishiemi, 305 N.W.2d 710, 712-13 (Iowa 1981) (relying on completeness principle in holding that statements of other party to conversation "may be admitted without regard to their truth or falsity in order to show the context in which" the admission was made); Unity Tel. Co. v. Design Serv. Co., Inc., 179 A.2d 804, 807-08 (Md. 1962) (using completeness doctrine to affirm admission of correspondence); Friedman v. United Rys. Co., 238 S.W. 1074 (Mo. 1922) (holding that proponent was properly allowed to introduce whole conversation in order to understand plaintiff's admission).

51. See, e.g., People v. Weaver, 440 N.E.2d 112, 257, 259 (III. 1982) (holding that, since defendant's out-of-court statements, elicited by prosecution, were inconsistent as to content with prosecution's theory of the case, but in their brevity might suggest inference consistent with prosecution's theory, exclusion of remainder as hearsay, which might create misleading impression that nothing further was said, was error under completeness idea). But the completeness principle may also be used in cases in which the proponent's use of the out-of-court statement is arguably a hearsay use; invocation of completeness mutes the hearsay question as applied to the remainder. See, e.g., Frank v. State, 27 Ala. 37 (1855) (holding that, when part of defendant's out-of-court statement was admitted to show intent to conceal facts by stating falsehoods, exclusion of the remainder was reversible error).

52. At common law, neither prior inconsistent statements nor prior consistent statements can, without coming within some exception to the hearsay rule, be used as substantive evidence of the matters asserted thereby, but only as evidence of the witness's credibility. See McCormick, supra note 5, § 251, at 744. It follows that, "When a writing or recording is admissible for impeachment purposes only, completing matter is admissible only to rehabilitate the witness and not as substantive evidence, unless the completing matter is admissible for substantive purposes independent of its admissibility under this [completeness rule]." N.Y. Code Evid. § 106 (Proposed Draft 1991).

53. See, e.g., Hargress v. City of Montgomery, 479 So. 2d 1187, 1188-89 (Ala. 1985); Lowe v. State, 25 S.E. 656, 657 (Ga. 1896); People v. Hicks, 192 N.E.2d 891 (III. 1963); Price v. Commonwealth, 172 S.W.2d 576 (Ky. 1943); State v. Robertson, 328 S.W.2d 576, 581-82 (Mo. 1950); People v. Barker, 244 N.E.2d 323, 239-40 (N.Y. 1968). For pre-Rules federal decisions, see Coltrane v. United States, 418 F.2d 1151, 1140 (D.C. Cir. 1969); United States v. Lev, 276 F.2d 605, 608-13 (2d Cir.), cert. denied, 363 U.S. 812 (1960); Cefasso v. Penn. R.R. Co., 169 F.2d 451, 453 (3d Cir. 1948); United States v. Smith, 328 F.2d 848, 850 (6th Cir.), cert. denied, 379 U.S. 936 (1964); Affronti v. United States, 145 F.2d 3, 7-8 (8th Cir. 1944). In this context, a quasi-doctrinal function may remain, for the admissibility of the portion of the prior statement consistent with the declarant's testimony is sometimes described as an exception to the general rule that prior consistent statements are not admissible to rehabilitate the witness. See also 7 Wigmore, supra note 10, § 2114(4), at 661 (noting that in such cases "putting in of..."
This sort of analysis, if applicable in all completeness cases, would substantially reduce the need for a trumping function. Indeed, in many cases, even when the original incomplete evidence is offered as (admissible) hearsay, a completing portion uttered by the same person on the same occasion need not be used by the opponent for a hearsay purpose, since it can be used to attack the credibility of the declarant without endorsing the truth of the completing part. An example is provided by our hypothetical Case 3: Evidence that defendant said, "I killed him, as I would kill any invader from Mars." In such a case, the italicized remainder impeaches the testimony by undermining the declarant's credibility. Alternatively, the remainder evidence may impeach the credibility of the witness by casting doubt on the accuracy of the report of the hearsay declaration. Thus, the omission of the words "may have" from hypothetical Case 2 ("I may have killed him."), casts doubt on the witness's report without necessarily crediting the omitted qualification. However, in the usual case, the fact of omission does not seriously impeach the testimony unless the remainder is taken as a credible qualification, in which case the hearsay status of the remainder is manifest. Otherwise, its omission is actually a service to the tribunal, eliminating superfluous language, and does not adversely affect the credibility of the witness or the proponent.54

In any event, as the Rokus case illustrates, the completing evidence ordinarily is not limited in such cases to credibility inferences. The completeness response accepts arguendo the accuracy of the witness's report, as far as it goes, as in our hypothetical Case 4 and Case 5. 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." One might argue that this conditional hearsay use does not come within the hearsay prohibition, that the remainder is used merely to make the original part "understood."55 This appears to have been Wigmore's view, for example.56 Most subsequent commentary, however, has found this

the exculpatory parts is justifiable equally on two principles," apparently meaning verbal completeness and relevance to rehabilitation).

54. Part III.C.1, infra, illustrates how the trumping function is not limited to the hearsay rule. In most other contexts, there is not even an analogue of the nonhearsay use argument for admitting the remainder.

55. A standard definition of hearsay is "an assertion by an out-of-court declarant, offered to prove the truth of the assertion." Carlson et al., supra note 36, at 568. Cf. Fed. R. Evid. 801(c). One might try to say, for example, that such a definition does not include statements, or parts of statements, that a party is forced by an opponent to include. But there is no warrant in the usual language for such a construction. More importantly, all the hearsay dangers, concerning the memory, narrative ability, sincerity, and perception of the declarant, are as applicable to the remainder as to the incomplete portion originally offered, perhaps more so since the remainder will generally be self-serving. See generally Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948).

56. 7 Wigmore, supra note 10, § 2115, at 659-60. Curiously, the example used by
argument unconvincing, and even Wigmore expressed doubts about it. The present elaboration supports the latter view. To be sure, there is nothing improper or inconsistent in the opponent exercising the completeness option while yet arguing that the completed hearsay statement is inaccurate because, for example, it was given under duress or in ignorance of other facts or even because the statement was wrongly attributed to the opponent. This would not mean that the remainder is used for some purpose other than establishing the truth thereof, but only that it is used for such a purpose argued in the alternative: "Don't believe the offered statement; but if you do, believe only the complete version of it." This analysis yields an important conclusion with respect to the relevance test. Observe that the proponent's use of a party opponent's prior statements can be either substantive, insofar as the making of the
statement tends to prove its truth (other than for a credibility purpose), or nonsubstantive, insofar as it impeaches the opponent’s testimony at trial, if any. It can also be a hearsay or nonhearsay use, which is not the same distinction. The possibility of multiple permissible inferences from the proponent’s evidence raises the question of whether the use of the completing evidence should be limited to deflecting the inference explicitly argued by the proponent. In fact, an occasional judicial opinion seems to suggest that the use of the remainder is limited and admissible via completeness only if it qualifies or explains an inference argued by the proponent. For example, if the incomplete portion is used merely to impeach the opponent’s testimony, then the proffered remainder is admissible, under this view, only if it counters the impeachment effect; it is not enough that the putative remainder qualifies a legitimate substantive inference that the trier of fact might plausibly draw from the original part.

However, the better reasoned cases reject this limitation, since evidence admissible on either of two theories may be used by the trier of fact for either or both. Correction of the misleading impression may be

59. The point, although often missed, is easily illustrated. Opponent’s out-of-court admissions can be used to prove the truth thereof (thus hearsay), which in turn is used to attack his credibility (thus, in one sense, nonsubstantive): For example, the opponent may have made an out-of-court admission of lying under oath. Conversely, the opponent’s out-of-court statement can be used to establish that the statement was made, irrespective of its truth (thus nonhearsay), which may itself be part of what the proponent must prove or probative thereof, such as a libel or contractual agreement (thus substantive). Thus, the substantive/nonsubstantive distinction, as so understood, is not congruent to the hearsay/nonhearsay distinction.

60. In People v. Ramos, 500 N.Y.S.2d 667 (N.Y. App. Div. 1986), by a 3-2 decision, the appellate court affirmed the defendant’s conviction over a challenge to the trial court’s refusal to admit the putative remainder of the defendant’s statement. The majority emphasized that the original portion was used solely for impeachment and the offered remainder did not show that the prior statement was consistent with the defendant’s testimony, even though the remainder did tend to counteract a distinct substantive inference against defendant. Id. at 668-69. Significantly, the majority indicated its concern to preserve the jury’s verdict by noting that the most likely substantive inference from the statement involved uncontroverted matters, id. at 669, and by adding that any error in rejecting the completeness motion would have been harmless. Id. at 670. The dissent thought the exclusion was reversible error. Id. at 670-71. The decision was affirmed in a short memorandum opinion that unfortunately suggests the kind of narrow limitation on completeness criticized in the text. People v. Ramos, 512 N.E.2d 304 (N.Y. 1987) (holding completeness motion properly rejected in absence of showing of relevance to rehabilitation by affecting understanding of prior inconsistent statement).

61. See, e.g., Spani v. Whitney, 110 N.W.2d 103, 105-07 (Neb. 1961) (applying common-law rebuttal rule to civil plaintiff’s out-of-court written statements, specifically rejecting the defendant-proponent’s argument that the use of the plaintiff’s prior statement was solely for impeachment purposes); People v. Gallo, 186 N.E.2d 399, 400-01 (N.Y. 1962) (holding it error for trial court to deny admission of remainder of defendant’s out-of-court statement, noting substantive admissibility of the statement despite prosecution’s apparent impeachment use of the originally admitted part). The matter is different, of course, if the entire statement is substantively inadmissible on behalf of the proponent. See, e.g., State v. Smith, 81 So. 520 (La.
necessary even if the proponent does not specifically argue the theory as to which fairness demands the remainder. Understandably, research has uncovered no case in which the proponent requested a limitation on the use of his evidence to only one of several legitimate purposes. Only if such a restriction is requested by the proponent, allowed by the court, and made clear to the jury, should the completeness response be similarly limited. Thus, when the original incomplete statement may be used by the trier of fact for a hearsay purpose, completing statements made by the same person and satisfying the relevance standard may, but need not, be used _qua_ hearsay as well. The completeness doctrine assures the admissibility of the remainder for this purpose.

But _how_ it does so remains somewhat puzzling. One way to view the situation is that the proponent is thereby _compelled_ to include the entirety of the verbal event as the admission. The statement, as qualified by the remainder, is then available as substantive or nonsubstantive evidence, depending on how the original proffer may be used. If the original hearsay is admissible by virtue of the party opponent admissions exception, then _ipso facto_ any such use of the remainder should also qualify for the admissions exception since it is being offered by the proponent, in principle if not in practice. However, this conception is understandably difficult to accept, given the identity of the party demanding admission of the remainder. How can the opponent be seen to make use of the admissions exception to the hearsay rule in presenting her own out-of-

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1919) (holding it error to deny defendant’s rehabilitative completeness motion even though the whole of the statement was substantively inadmissible for the prosecution because of a failure to comply with statutory restrictions on confessions).

62. Limitations as among multiple purposes are commonly imposed at the request of the party opponent when one of the purposes is impermissible. See McCormick, supra note 5, § 59.

63. A further subtlety should be noted for jury cases: If the original part is inadmissible for one purpose but rightly admitted for another, without an appropriate limiting instruction, the remainder ought to be admissible to qualify the former use, since the jury will not know of the limitation. In other words, in a jury trial the remainder should be admissible to qualify any relevant use of the original part, unless the jury has been instructed that some particular use is prohibited. Unlike judges, one cannot rely on the premise that the jury will use evidence only for the purposes as to which it is technically admissible. Cf. id. § 60 (articulating appellate rule that the trial court in a bench trial is presumed to have relied only on admissible evidence in reaching its decision).

64. A distinct question arises concerning which party may use the various parts of the completed statement as evidence of the truth of the matter asserted. Since a party’s admissions are not admissible for this purpose on behalf of that party, arguably they are not affirmative evidence for that party even when properly introduced by an adverse party. In the context of party admissions, however, it has long been settled that the self-serving parts of the complete statement, once admitted, can be used substantively to support the declarant party’s case. See, e.g., Brown v. Brown, 4 F. Cas. 356 (C.C.D.R.I. 1846) (No. 1,994); Bristol v. Warner, 19 Conn. 7, 18-19 (1848); Perkins v. Lane, 82 Va. 59, 60-62 (1886). See generally 1 Greenleaf, supra note 16, § 201 (concerning admissions), § 218 (concerning confessions). For a modern case reaffirming the trier’s freedom to accept substantively the exculpatory portions of the admission, see People v. Dlugash, 363 N.E.2d 1155, 1162 (N.Y. 1977) (holding that jury may reject exculpatory portion if it is contradicted or rendered improbable by other evidence).
court statements. Thus, the completeness doctrine sets to rest doubts about admissibility that arise from this special form of evidence presentation. In this sense, the comment made in the Rokus case and elsewhere, that the remainder comes in by way of "an independent exception to the rule against hearsay," is somewhat misleading. Although the completeness doctrine provides independent authority for the substantive admission of hearsay, it's authority is inherently tied to, and derivative of, the existing hearsay exception.

Alternatively, if we do not view the completeness idea as, in principle, forcing the proponent to present the whole of a statement, then we must instead view the responsive presentation of the remainder in the usual adversarial way, and the trumping effect must be more explicit. The doctrinal force of completeness is then not simply a matter of removing doubts engendered by the more unusual procedural conception explained above. It must be premised ultimately on the claim that under certain circumstances the usual goals of the hearsay prohibition are muted or outweighed by the need for the responsive presentation of the remainder. Indeed, the risks of misleading inaccuracies usually associated with a party's presentation of her own out-of-court statements for the truth thereof, even when that party does not testify, are overwhelmed by the likelihood of distortion accompanying the proponent's selective presentation of portions of the opponent's statement. Moreover, that the proponent has already chosen to inject the statement into the trial of the issue assures the tribunal that the proponent has the wherewithal to challenge the opponent's version of the complete statement, an important check upon total fabrication of self-serving hearsay. One may reasonably

65. Occasionally, this confusion causes misleading statements in judicial opinions. See, e.g., Black v. Nelson, 424 P.2d 251, 253-54 (Or. 1967) (rejecting a completeness argument for failure to meet the relevance test, but adding, "It is, moreover, as we have characterized it, a mere opinion, and, while an admission against interest in the form of an opinion is competent evidence against the declarant, [citations omitted], this is not true of a self-serving declaration, such as the statement in question"). It is unclear whether the quoted argument is intended as saying that the evidence is not admissible if the standards for completeness are not met, or as an independent reason to reject the remainder even though falling within the reach of the completeness rule. One might try to avoid the confusion by thinking of the remainder as introduced by the court, albeit at the opponent's suggestion. See McCormick, supra note 5, § 8 (discussing court's authority to introduce evidence). However, it is doubtful that the remainder would thereby qualify for the party-opponent hearsay exception. See, e.g., id. § 262 (defining admissions as "words or acts of a party-opponent . . . offered as evidence against him").

66. See supra note 48 and accompanying text.

67. Later we will generalize this observation by illustrating how the completeness doctrine is applicable in connection with inclusionary authority other than the hearsay exception for admissions of a party opponent. See infra Part III.C.

68. See Roger Park, The Rationale of Personal Admissions, 21 Ind. L. Rev. 509, 514 (1988). One might argue that trumping the hearsay rule is unnecessary in view of the opponent's opportunity to testify directly to the issues, one of the factors that seems to warrant the asymmetry in the admissions exception in the first place. See id. at 516-17. This
conclude, therefore, that in most cases the ultimate purposes of the hearsay prohibition are not served by the exclusion of the remainder.

However the trumping function is conceived, it forms a crucial part of the common-law rebuttal rule. The test used to determine wholeness is critical, for the broader the standard, the more otherwise inadmissible evidence is rendered admissible. Relatively expansive versions or applications of the standard may result from intuitions that the system would otherwise be too restrictive in its admission of hearsay, especially hearsay from a party declarant. This and other implications of trumping may depend on how the rebuttal rule is conceived, as between the two alternatives described above. Further attention will be given to this issue after we fill out the common-law pattern by examining the second common-law completeness rule.

C. The Interruption Rule

In some circumstances the opponent of the original proffer may insist that the completing portion of the utterance be presented together with the original proffer without waiting for the opponent's turn to present the remainder on cross-examination or even later. I will call the rule permitting this contemporaneous completion the "interruption" rule. An examination of this second part of the completeness doctrine entails a reconsideration of the timing and trumping functions already identified. It also involves the identification of a third function, that of achieving discovery of evidence, especially tangible evidence, in the hands of the proponent. This identification yields insights into the historical relationship of this aspect of the doctrine to the rebuttal rule discussed above.

1. Timing and Trumping Functions Revisited

The interruption rule not only allows overriding some admissibility rules which would otherwise hinder the opponent's response, but also allows the opponent to modify the normal sequence of presenting evidence by interrupting the proponent's chosen proffer. This is done in the interest of presenting the trier of fact the more complete evidentiary package in a more understandable way. Contemporaneous completion opportunity, however, will often be inadequate, since a trier of fact ignorant of the true tenor of the hearsay is likely to discount the in-court, self-serving testimony in favor of the out-of-court, adverse admission. See supra note 49.

69. 7 Wigmore, supra note 10, §§ 2097-11.
avoids an inconvenient and potentially pernicious gap in time between the presentation of the incomplete part and the presentation of the remainder. Thus, the interruption rule operates essentially as an accelerated rebuttal.

As described, the interruption rule requires that the remainder "be presented" contemporaneously. This phrasing is deliberately ambiguous regarding which party is to do the presenting. The answer to this question is important, both in theory and in practice, though the variety of trial situations requires the flexibility to use both procedures.

As for practice, the opponent surely knows better which additional portions she thinks need to be introduced, but if the opponent presents the remainder then a significant disruption of the proponent's control over the presentation of his case will result. This consequence argues for allowing the proponent to do the contemporaneous presenting designated by the opponent and required by the court. Indeed, the common-law interruption rule typically takes the form of requiring the proponent to present the remainder, at least if the opponent validly insists on completeness.\textsuperscript{71}

As for theory, requiring the proponent to present the remainder has the advantage of obviating the trumping function, since the hearsay rule would not bar the proponent's presentation of the complete version of the opponent's admission. Explicitly forcing the proponent to introduce the remainder, on pain of losing the admission entirely, thus confirms a conception of the trumping function that allows the opponent to piggy-back on the inclusionary authority utilized by the proponent in the first instance. What is essentially inclusionary in function takes on a conditional exclusionary form.\textsuperscript{72}

\textsuperscript{71} Wigmore, supra note 10, \S 2095. Since, as already noted, Wigmore distinguished the completeness doctrine from timing issues, he ignored the possibility of contemporaneous completion by the opponent's presentation of the remainder. He would view this as merely a sequencing issue under the rules governing such, provided the opponent has the right to present the remainder at a later time under what we have called the rebuttal rule. Wigmore did not specifically address this issue, however, and appears to have assumed that any presentation by the opponent will be done on cross or later. Thus, for Wigmore the interruption rule is coextensive with the requirement that the proponent introduce the whole of the verbal event, whereas the rebuttal rule is coextensive with the option of the opponent to introduce the remainder, regardless of when that occurs. Id. My distinction between the rebuttal rule and the interruption rule does not, therefore, correspond precisely to Wigmore's distinction between "optional" and "mandatory" completeness. My reformulation both allows for the expanded range of options empirically encountered and facilitates comparison of the common law with the federal rule.

\textsuperscript{72} Wigmore observed that the exclusionary rule is conditional. 7 Wigmore, supra note 10, \S 2095(1), at 607 (referring to the proponent being "met by the objection that he can offer no part unless he offers the whole"). It is unclear, however, whether exclusion is necessarily the remedy in case the proponent refuses to introduce the whole. Not surprisingly, no case has been discovered in which the proponent, after introducing the incomplete statement and being met by a completeness objection, has tried to withdraw the original proffer, so it is difficult to say whether trial courts have been thought to have the authority to
Clearly, the interruption rule has practical significance quite apart from overriding otherwise applicable exclusionary rules. Being able to interrupt the proponent’s presentation and insist on contemporaneous completion is itself significant. Indeed, cases arise in which the completing evidence is otherwise admissible on behalf of the opponent, the completeness rule being invoked in aid of the opponent’s demand that the completing portion come in simultaneously with the original proffer.73 While the trial judge’s discretionary control over timing of evidence presentation should be adequate to achieve this result without the need of a distinct completeness doctrine in cases where the opponent will present the remainder, it would be a hard stretch to say that such authority could require contemporaneous presentation by the proponent. Even an opponent’s contemporaneous presentation is a sufficiently dramatic alteration of the ordinary process of proof, entailing a serious curtailment of the proponent’s ordinary control of his case, that it is not surprising for the effect in question to be sanctioned by a distinct doctrine.74 Practically speaking, one cannot say that the interruption rule is unnecessary as a distinct rule without the potential to override otherwise applicable exclusionary rules. Nevertheless, the functions of timing and trumping are sometimes conjoined in common-law cases, as well as cases arising under codifications pre-dating the Federal Rules of Evidence.75

The important limitation on the common-law interruption rule arises because of the difficulty of forcing a possibly hostile witness to recount portions of an event or transaction without the benefit of extensive cross-examination. There is also the possibility that a complete oral rendition of an out-of-court document or conversation might require several witnesses. These possibilities threaten to undermine the ability of the proponent to put on an organized, coherent case and present strategic opportunities for the opponent to exercise contemporaneous completion to precisely that end. Consequently, it is understandable that the interruption rule is less liberally invoked by common-law courts than the rebuttal rule. In particular, the former is generally applied only to incomplete proffers of writings or other tangible verbal records, the context of which keeps the interruption to manageable proportions.76

order the presentation of the whole or pursue some other nonexclusionary response to the situation.

73. Typical cases involve jural act documents such as deeds, wills, and contracts, offered either as dispositive of the legal issue or as evidence relating to disputed factual issues. See, e.g., In re Brown’s Estate, 15 P.2d 605, 610 (Idaho 1932) (holding that trial court properly required all of will to be admitted); In re Mann’s Estate, 189 N.W. 991, 996 (Mich. 1922) (same).

74. See generally 6 John H. Wigmore, Evidence in Trials at Common Law § 1882 (Chadbourn rev. 1976) (describing general practice that rejects the idea of an opponent interrupting the proponent’s direct examination of a witness).

75. See cases cited supra note 70.

76. See, e.g., the cases cited supra notes 70 and 73. See generally 7 Wigmore, supra note 10, §§ 2090-2100 (reporting that the interruption rule is not generally applied to incomplete
This correlation of the interruption rule with writings must be distinguished from the usual limitation of the rebuttal rule to verbal events, events which may be either oral or written. In the context of the rebuttal rule, the limitation concerns the nature of the event being evidenced, not the form of the evidence employed. The additional limitation on interruption, on the other hand, concerns the form of the evidence offered in court. Presentations that mix documents with testimony present the hard cases. For example, an incomplete testimonial account of the contents of a document not presented in court will ordinarily permit invocation of the rebuttal rule, not the interruption rule, even though the constriction of scope inherent in the reference to a document serves to limit the extent of the interruption more so than if the underlying verbal event were conversational.77 Certainly, in such cases the proponent should not be subject to a conditional exclusion that forces him to examine the witness so as to introduce the remainder. The proponent may introduce the completing portion on cross-examination or later, and in some cases contemporaneously, a presentation unencumbered by many exclusionary rules that might otherwise apply.78

Other factors enter into the decision whether to mandate the testimonial proffer); §§ 2102-04 (reporting that interruption rule is often applied to documentary evidence). See also Fed. R. Civ. P. 32(a)(4) ("If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts."); Fed. R. Crim. P. 15(e) ("If only part of a deposition is offered in evidence by a party, and adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts."). Of the many versions of the Federal Rules adopted by the states, this pattern is most clearly codified under Texas law. See Tex. R. Crim. Evid. 106 (codifying interruption rule for writings or recorded statements as evidence); Tex. R. Crim. Evid. 107 (codifying rebuttal rule for both written and oral evidence of statements); Tex. R. Civ. Evid. 106 (codifying interruption rule for writings and recorded statements as evidence); Tex. R. Civ. Evid. 106 advisory committee's note (indicating retention of rebuttal rule for both written and oral evidence of statements).

77. Understandably, Wigmore notes some significant judicial divergence from the conclusion stated above in the context of verbal act documents, such as contracts, wills, and deeds. See 7 Wigmore, supra note 10, §§ 2105-07. The divergence may be explained in part by the tendency in such rulings to conflate admissibility questions with sufficiency questions.

78. Although the so-called "best evidence" rule generally requires the use of the document to prove its contents, the posited example could arise in situations where the use of the document is excused. See McCormick, supra note 5, §§ 237-40. How a completeness rule could be needed to authorize rebuttal in such cases is explained infra, in Part III.C. Moreover, documents are often introduced only by being read by an authenticating witness, and even here the oral nature of the use may be considered adequate reason to deny interruption, leaving the opponent to subsequent rebuttal. In most cases, however, the better rule would be to allow interruption, provided the remainder passes the relevance test. Compare People v. Gallo, 186 N.E.2d 399, 403-04 (N.Y. 1962) (holding that trial court improperly denied defense counsel's request to read remainder contemporaneously, after stenographer read into record selected parts of defendant's pre-trial statement), with People v. Perry, 499 P.2d 129, 148-49 (Cal. 1972) (affirming a ruling limiting rebuttal under relevance standard, after trial court had denied interruption in favor of opportunity for rebuttal on cross-examination after part of a written statement had been used to impeach a witness).
proponent's presentation of the whole or to allow only responsive introduction by the opponent. If a document or other recording is cut into fragments and presented in such a redacted form, the proponent's presentation of the remainder in complementary redacted form would be very inconvenient for the trier of fact, who would have to try to piece the record back together. The proponent's responsive presentation of an integrated document, which would certainly be allowed if the completing portions satisfy the relevance standard for the rebuttal rule, would warrant exclusion of the proponent's redacted version simply on grounds of being confusing and unduly cumulative. To avoid the confusion and waste of time inherent in first admitting and then excluding the redacted version, admission of the proponent's offer of the redacted version may, in anticipation of the completing response, be conditioned on the simultaneous introduction of the remainder. And absent a dispute about the authenticity of the remainder, the court may insist on simultaneous introduction in an integrated form.\(^7\)

A fairly clear picture emerges from these observations. In most contexts, the interruption rule is rightly seen as subsidiary to the rebuttal rule. The significance of the completeness doctrine rests primarily on the trumping function. The interruption rule comes into play only in the relatively unusual cases when delayed completion is considered inadequate and simultaneous completion is considered practicable, primarily cases involving tangible records of statements. In such cases, the trumping function carries over to contemporaneous completion.\(^8\) Of course, the

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79. In a case of serious dispute over the authenticity of the putative remainder, the court obviously should not compel an integrated presentation by the proponent; to do so would risk confusion by suggesting to the trier of fact that the proponent does not challenge the remainder's authenticity. In such cases, the better practice is to relinquish the opponent to the usual responsive presentation, possibly assisted by the trumping function of the rebuttal rule. Only rarely do the reported cases shed any light on this issue, since the overwhelming majority of such cases involve remainders that are undeniably as genuine as the part introduced by the proponent. Cf. McBrayer v. Walker, 50 S.E. 95 (Ga. 1905) (holding that opponent can, without further authentication, introduce and rely on entries made on the back of a deed introduced by proponent, when the entries on the back purport to reveal that the deed on the front was given as security for a usurious loan).

80. Wigmore's presentation is organized temporally: He addresses interruption first because that is the first issue that will come up in the litigation process. Only if the proponent chooses, or cannot avoid, presenting evidence in a misleadingly incomplete form, and the opponent is unable or unwilling to invoke the interruption rule, does the question of delayed rebuttal arise as a strategic option. That Wigmore's sequencing of the discussion does not reflect any sense of the relative importance of the two rules in the modern common-law is confirmed by his report that the rebuttal rule is more clearly and predictably established. 7 Wigmore, supra note 10, § 2095, at 607 (noting that interruption rule is "the stricter effect of the principle, and indeed is not enforced invariably or for all classes of utterances"). Wigmore's view of the relationship between the two branches of the doctrine is summarized as follows:

It has been seen, in the foregoing sections, that there is much opportunity for difference of opinion whether the proponent in the first instance must put in the whole. But there is and could be no difference of opinion as the opponent's right, if a
trial court’s choice about whether to mandate contemporaneous completion, even in the case of tangible proffers, will rarely be reversible since the opponent retains the option to make a completing presentation under the rebuttal rule.81

2. The Discovery Function Disinterred

The foregoing analysis of the modern completeness doctrine does not fully reflect its historical development. In order to see why, one must consider the profound changes in procedural rules that have occurred since the doctrine first emerged.

In early English criminal trials there were severe limitations on the defense’s ability to present evidence at all.82 In such a context, it is not surprising that the completeness principle would be invoked in terms of controlling or modifying the evidence presented by the prosecution, rather than in terms of the defense presenting completing evidence.83 Even in the seventeenth century, as defendants began to call their own witnesses and cross-examine prosecution witnesses, there still was no glimmer of discovery rights.84 This remained true through the development of truly adversarial procedures in the eighteenth century.85 Similarly, although

part only has been put in, himself to put in the remainder. Indeed it is the very fact of this later opportunity and right which (as already seen) has frequent bearing upon the question whether it is worth while to require it from the proponent in the first instance.

Id. § 2113, at 653.

81. The discretion of the trial court in this regard is routinely emphasized. See, e.g., Sovereign Camp, W. O. W. v. Adams, 86 So. 737, 742-43 (Ala. 1920) (affirming trial court’s rejection of interruption in favor of rebuttal presentation of completing portions of insurance contract). See generally 7 Wigmore, supra note 10, at 618 (concerning discretion in regard to testimonial evidence), and § 2102, at 630 (concerning discretion in regard to documentary evidence). More specifically, a trial court’s judgment about conditional exclusion will be virtually immune from challenge on appeal. If the court denies the opponent’s motion for conditional exclusion, the opponent will still have a completing response and it will be very hard to show that any error was prejudicial. Conversely, if the court grants such a motion, the proponent will likely introduce the whole, in which case the proponent will have a hard time showing prejudice in view of the fact that the opponent would have had an opportunity to present the whole on rebuttal anyway. (Of course, the matter is entirely different if the proponent’s claim is that the remainder does not satisfy the relevance standard applicable to both rebuttal and interruption.)

82. In the sixteenth century, “The defendant was not allowed to call witnesses, conduct any real cross-examination, or develop an affirmative case.” Stephan Landsman, Readings on Adversarial Justice: The American Approach to Adjudication 13 (1988).

83. See, e.g., Algernon Sidney’s Trial, 9 How. St. Tr. 818 (KB. 1683), in which the defendant complained of selective reading from documents seized by the prosecution and claimed to be treasonous. Id. at 853-54. The Sidney case also illustrates an argument in the alternative, since Sidney argued that the documents were not authored by him and, in any event, were not treasonous if taken in their entirety. Id. at 878, 905.


85. See generally Stephan Landsman, The Rise of the Contentious Spirit: Adversary
there had long been greater opportunities for each side in a civil case to present evidence, there was no broadly effective system of discovery by which the opponent could obtain evidence in the proponent's possession to use in subsequent rebuttal. Again, in such procedural contexts, the conditional exclusionary form of the interruption rule would obviously retain considerable importance, especially as to incomplete documentary evidence, which cannot be cross-examined by the opponent to elicit the completing portions.

Thus, until at least the mid-nineteenth century, when civil discovery of documents began to expand considerably, and even later in criminal cases, an important function of the completeness rule was to effectuate discovery and presentation of documents introduced only in part by one's adversary. Once again, it was a conditional form of discovery, since the proponent could avoid it by not introducing even part of the document. The rule nonetheless served as an important check on the defects of a system lacking discovery and presentation rights as we know them.

On the other hand, the development of the exclusionary rules, along with the emergence of adversarial procedures in the eighteenth century, increasingly presented occasions for cross-examination of witnesses and admission of completing parts of documents that would run afoul of such rules were it not for trumping. Hence, during this period, the trumping function emerged alongside the discovery function as of central
importance in the completeness doctrine.\textsuperscript{91}

Of course, the situation is radically different today. All parties have the right to present evidence not excluded by some particular rule.\textsuperscript{92} Discovery, especially discovery of tangible evidence like documents, is the norm in both civil and criminal cases.\textsuperscript{93} To be sure, even under modern discovery regimes, occasions will arise in which the opponent has no access to the full text of a document and will, therefore, be unable to utilize delayed rebuttal of a misleadingly incomplete proffer.\textsuperscript{94} One still encounters an occasional case in which the completeness doctrine is invoked in aid of a requirement that the proponent not use part of a document when the whole is neither admitted nor made available to the opponent for possible rebuttal.\textsuperscript{95} Nevertheless, it is clear that the rationale behind the completeness rules has shifted substantially away from the discovery function toward a mix of the timing and trumping functions. As it did, invocation of the completeness doctrine shifted its emphasis from

\textsuperscript{91} The need for trumping was especially pronounced in regard to reports of out-of-court statements of a party opponent, for until the mid-nineteenth century parties were incompetent to testify under oath, thus dramatically limiting their ability to provide even the substance of the remainder by their own in-court assertions, much less by testifying to the remainder of the out-of-court statement. See also 2 John H. Wigmore, Evidence in Trials at Common Law § 577 (discussing the abolition of disqualification of civil parties), § 579 (discussing the abolition of disqualification of accused in criminal cases) (Chadbourn rev. 1979). See generally Joel N. Bodansky, The Abolition of the Party-Witness Disqualification: An Historical Survey, 70 Ky. L.J. 91 (1981-82).

\textsuperscript{92} Indeed, the right has constitutional dimensions in criminal cases, and perhaps in civil cases as well. See generally Edward J. Imwinkelried, The Case for Recognising a New Constitutional Entitlement: The Right to Present Favorable Evidence in Civil Cases, 1990 Utah L. Rev. 1 (contrasting constitutional right in criminal and civil cases).

\textsuperscript{93} See, e.g., Fed. R. Civ. P. 34; Fed. R. Crim. P. 16. Failure of the prosecution to divulge the remainder of a document, proffered in part at trial by the prosecution, should violate the prosecution's constitutional duty to disclose exculpatory evidence. See generally Charles H. Whitebread & Christopher Slobogin, Criminal Procedure §§ 24.02-06 (2d ed. 1986). Conversely, discovery of documents in the possession of a defendant does not violate the defendant's constitutional privilege against self-incrimination unless the document records the defendant's own statements. See, e.g., United States v. Nobles, 422 U.S. 225 (1975). Although discovery only means being able to inspect and make a copy of the document in question, the subsequent admission of a part of the document by its possessor is subject to responsive introduction of the copy of the remainder since the opponent's compliance with the original document rule is excused, provided the opponent gives notice to the proponent to produce the whole of the original at trial. See McCormick, supra note 5, § 239.


\textsuperscript{95} See, e.g., Arthur v. Commonwealth, 307 S.W.2d 182, 185 (Ky. 1957) (holding it error for prosecutor to make reference to written confession that prosecutor refuses to make available to defense); Ely v. State, 141 S.W.2d 626, 628-29 (Tex. Crim. App. 1940) (suggesting error for a party to make use of an alleged admission for impeachment purposes without making the whole of the statement available to the opponent for a possible completeness motion). Of course, restrictions long imposed on the use of prior statements of a witness for impeachment purposes entail making available to the opposing side the substance of the prior statement. See generally McCormick, supra note 5, § 37.
the interruption rule to the rebuttal rule.\textsuperscript{96}

\textbf{D. "Wholeness" Contextualized}

The foregoing elucidation of the common-law completeness doctrine emphasizes the relative doctrinal importance of the rebuttal and interruption rules. But it also shows that the subject can be analyzed from an orthogonal direction. Instead of focusing on the two branches of the doctrine, as did Wigmore, one can organize one's thought according to the three doctrinally distinct functions involved. In order of importance, they are: first, the overriding of otherwise applicable exclusionary rules (the trumping function); second, the overriding of otherwise applicable rules on the order of presentation of the completing evidence (the timing function); and third, the overriding of otherwise applicable limitations on a party's power to obtain evidence from an adversary (the discovery function). Each of the first two functions is present to some extent in each branch of the common-law rule, but neither is involved in every \textit{application} of the completeness doctrine. The third function inheres almost entirely in the exclusionary form of the interruption rule, and its significance has been eclipsed by the expansion of discovery rights.

One consequence of this isolation of function is the opportunity to examine the question of whether the concept of "wholeness" is function-dependent. In other words, the meaning of wholeness and the boundaries of the verbal utterance in question may depend upon which function is in play. These ramifications cannot be exhaustively explored here, but a few important examples should be noted.

First, observe that as between the two most important modern functions, trumping and timing, there is reason to expect a divergence in their respective tests for wholeness. When trumping is at stake, the courts should determine the whole with reference to the legitimate goals of the exclusionary rules. When only timing is implicated, the courts should shift the focus to the goals served by regulating the sequence of evidentiary presentations. As has already been shown, the added significance of the timing function \textit{constricts} the range of the completeness doctrine under the interruption rule. By limiting interruption to tangible proffers, the determination of wholeness is rendered less problematic in a context where that kind of simplicity is important. In a different way, the interruption rule may employ a more \textit{expanded} concept of wholeness when the trumping function is not in issue than when it is. If the efficacy of otherwise applicable exclusionary rules is not at stake, the concept of wholeness can be extended to embrace \textit{related} tangible things with little adverse effect. Application of the interruption rule may then involve a

\textsuperscript{96} Interestingly, Wigmore made no reference to the discovery function or its attenuation. However, he does rightly suggest that a consideration in deciding whether to invoke the exclusionary form of the completeness rule is the relative availability of the document to the parties. See 7 Wigmore, supra note 10, § 2095(3).
concept of wholeness more inclusive than even the pre-analytic concept of a single verbal utterance.97

But when trumping is in issue, the courts have gravitated toward some version of the relatively narrow, post-analytic relevance test discussed earlier.98 Such a limitation must be imposed, lest the admission of a single out-of-court statement by a declarant render admissible all out-of-court statements by that person about the subject matter of the suit or about some aspect of it, a result that would substantially modify the hearsay rule. If a declarant has made several distinct statements, prevailing practice allows the proponent to pick among those which are substantively admissible, even if the opponent cannot use the others, as in the case of the opponent's out-of-court assertions. The completeness doctrine modifies this practice only to the extent of insisting that those statements selected by the proponent are more accurately portrayed.

1. The Embedded Utterance Problem

These themes are nicely illustrated by the decision in Gencarella v. Fye.99 In this automobile accident case, the plaintiff examined a police officer with respect to his written investigation report, as a prelude to offering the report into evidence. The plaintiff attempted to isolate those parts of the report that were based on the officer's personal observations from those parts reporting the statements of witnesses. The defendant objected, asserting on the basis of the completeness principle that the entire report should come in if any part of it did, and the trial court agreed.100 The report was apparently introduced, and the defendant subsequently examined the officer, as well as the defendant himself, with regard to witness statements contained therein. The defendant thus successfully invoked at trial what has here been called the interruption rule, and ultimately recovered a favorable judgment.

On appeal, however, the First Circuit reversed the judgment, concluding that the completeness doctrine had been improperly applied. The familiar limitation on hearsay exceptions for police reports, which admits records of the officer’s personal observations but not of witness statements recorded in the report, meant that the plaintiff was pursuing a legitimate inquiry as foundation to admitting parts of the report. The doctrine of completeness did not override the otherwise applicable limitation because the reported statements were "severable" from the record of the officer’s personal observations and had "no bearing to

97. A common example is the application of the interruption rule to reply letters in a correspondence, when the proponent offers one letter thereof without offering the letter to which it replies. See 7 Wigmore, supra note 10, § 2104, at 634-35.
98. See supra notes 15-26 and accompanying text.
99. 171 F.2d 419 (1st Cir. 1948).
100. Id. at 421-22.
explain or qualify" the latter. 101

This result is interesting in that the putative remainder very likely did qualify inferences to be drawn from the admissible parts. 102 But unless we are to have a rule that police reports are either admissible in their entirety or not at all, it must sometimes be possible to separate admissible portions from inadmissible portions and admit only the former. The sensible solution the court reached was to rule the two aspects of the report "severable," which is to say that the wholeness test is not satisfied as to the otherwise inadmissible statements recorded in the report. Thus emerges a subsidiary wholeness principle to the effect that no "imbedded utterance" is embraced within the whole if no part of that embedded utterance (and, presumably, no misleading reference to it) is admitted by the proponent in the first instance. 103 Yet, were the trumping function not at issue here, there would be no need to invoke this limiting principle, and the entire report—including reported witness statements—could properly be considered the relevant whole and required to be presented under the interruption rule, at least if that would not seriously interrupt the proponent's sequencing of evidence. 104

2. The Source Limitation Issue

An even more important example of divergence in wholeness concepts concerns the issue of whether wholeness is measured not only with reference to the utterance in question, but also in reference to the source through which it is evidenced. The paradigm of trumping that appears repeatedly in the common-law cases is the offer of a remainder through the same witness or document utilized by the proponent in the first instance. Conversely, the paradigm in which trumping is not allowed is the attempt of the opponent to introduce a contradictory version of the utterance from a different evidentiary source. 105 But what if the

101. Id. at 422-23.
102. At least portions of the remainder consisted of reports of the defendant's statement to the investigating officer, statements that would have been admissible for the plaintiff had the plaintiff chosen to offer them. Significantly, this is the very part of the remainder that the defendant most wanted to introduce, and did. See id. at 422.
103. Compare this result with the Roba case, by which the trumping function was first illustrated, supra notes 45-49 and accompanying text. There, the proponent introduced part of the opponent's out-of-court statement by the testimony of the investigating officer; the same trumping would have occurred had the vehicle for presenting part of the statement been a written accident report that would be admissible, at the first level of hearsay as a business record or prior recollection recorded, and at the second level as an admission of a party opponent. See McCormick, supra note 5, § 324.5.
104. Imagine, for example, that the only witness statement contained in the report was admissible at the second level of hearsay under some exception available to both parties, such as the excited utterance or dying declaration exception. See McCormick, supra note 5, §§ 297, 283.
105. However, the conventional understanding in such a case is that the opponent can still introduce the contradictory account through the second source for the limited purposes of
opponent's distinct source provides a further portion of the utterance, thus reporting a version that is consistent with, but more inclusive than, the proponent's account? This looks like "completeness" in terms of the words of the utterance itself, but it involves a different evidentiary source. How then should the issue of trumping be decided?

A possible clue to the resolution of this issue comes from the wholeness concept applicable under the discovery function, out of which the modern completeness doctrine has evolved. For in terms of discovery, the completeness rule covered only the proponent's particular evidentiary source, or rather the particular version of the utterance derived from that source. The completeness doctrine in effect protected the right to cross-examine the proponent's chosen witness with regard to the remainder of the utterance; and it mandated that the whole of the proponent's chosen documentary evidence be revealed to the opponent and the court. If this inherent source restriction is applicable to the trumping function, that constitutes a significant limitation on the reach of trumping. On the other hand, it has just been demonstrated that the wholeness concept applicable to one function may not necessarily be right for another.106

The case law on this facet of the trumping function is surprisingly meager. The vast majority of trumping cases involve remainders elicited from the proponent's source, by cross-examining the proponent's witness or by introducing, or demanding the introduction of, the remainder of the document upon which the proponent has relied. This suggests at least a tacit convention that the trumping function is subject to a same-source limitation. On the other hand, no decision has been found explicitly imposing such a restriction on trumping. And in at least one reported appeal where the question of trumping from a distinct evidential source is seriously implicated, the decision confirms the applicability of the completeness doctrine.

In People v. Williams,107 the defendant made video-taped statements to police officers in investigative interviews. The officers testified at trial about the defendant's admissions and were subject to cross-examination using transcripts of the taped statements. The defendant subsequently attempted to introduce the tapes to be played for the jury, but they were

impeaching the proponent's account. See, e.g., United States v. Bourne, 743 F.2d 1026, 1032 (4th Cir. 1984) (rejecting a "best evidence" argument for excluding an oral report of defendant's confession in favor of a tape recording, but indicating that the tape could be used by the defense to impeach the prosecution's witness if the two accounts were at variance); State v. Worthy, 123 S.E. 2d 835, 841-42 (S.C. 1962) (articulating same distinction).

106. In particular, it is clear that a same-source limitation is not applicable to determinations solely concerned with the timing function. Frequently, these determinations concern whether one letter in a correspondence should be coupled with another going in the opposite direction and, therefore, certainly constituting a different evidentiary source. Admission of one is sometimes conditioned on admission of the other pursuant to the interruption rule. See 7 Wigmore, supra note 10, § 2104, at 634-35.

excluded by the trial court primarily on the grounds that playing the tapes would be cumulative and possibly confusing to the jurors, in view of an extensive direct and cross-examination of the officers. The defendant appealed his conviction, and the Supreme Court of Illinois reversed. The high court identified two sources of incompleteness: (1) possibly significant verbal parts of the out-of-court statements omitted in the officers' testimony, and (2) inflections and other speech characteristics lost by testimonial recounting of the confession. Exclusion of the tapes was held error under the rule of completeness, with the following clarifications on the source issue:

To comply with this “rule of completeness,” the trial court should have allowed all that the defendant said, which pertained to the events at issue, to be placed before the jury through cross-examination of the officers or through defendant’s own witnesses. In the instant case, defense counsel was not restricted in his cross-examination of Officers Moss and Strohm. In fact, utilizing a transcript of the tapes, he extensively cross-examined both officers. However, we do not believe that a defendant is limited in his right to oral cross-examination regarding a conversation. When one party offers oral testimony regarding a conversation, a tape recording of that conversation may have independent relevance. Demonstrative evidence may be clearer and more persuasive that oral testimony covering exactly the same points. Since the veracity of the statements was clearly in issue, the defendant’s demeanor and voice inflections, as recorded on the tapes, was relevant wholly independent of the actual words spoken.

To be sure, this is only one decision, and there are several avenues by which one might attempt to explain it away. Moreover, the choice to

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108. Id. at 616. The hearsay rule was apparently not considered by the trial court, presumably because it was thought that some portions of the tapes could be used to impeach the officer’s testimony without violating the hearsay rule, just as the transcripts had been used.

109. The court noted that on several occasions the officer “could not remember or was unsure of statements made by the defendant.” Id. at 617.

110. The reasonable extension of the rule of completeness to nonverbal aspects of verbal events explains why the hearsay rule would constitute no bar to the substantive use of the tapes apparently contemplated by the court’s opinion. At least some of the nonverbal aspects of the statements would otherwise be precluded by the application of the hearsay rule to assertive conduct. See McCormick, supra note 5, § 250, at 736-37.

111. Id. at 616-17 (emphasis supplied). The court’s reference to demonstrative evidence was no doubt an analogy; the tapes were not offered as demonstrative evidence in this case.

112. One might try to construe the decision as simply using the notion of completeness to support the high court’s reversal of the trial court’s “cumulative and confusing” judgment. To that extent, the extension of the trumping function would not really be at issue. Cf. supra notes 32-33 and accompanying text. However, in view of the rule that a trial court’s exclusion of evidence should be sustained on appeal on any proper ground that might have been used by the trial court, see McCormick, supra note 5, § 52, at 131, the appellate court should be seen as speaking to the potential hearsay objection as well. Similarly, one might try to characterize the tapes as concerned solely with inferences as to the credibility of the witnesses at trial, including the defendant; there certainly are references in the opinion to issues of
extend trumping to distinct evidential sources for the remainder is not without costs. It means that, once a party offers evidence of an out-of-court verbal utterance, the exclusionary rules may be severely undermined in their application to other versions of the utterance, versions that would not be admissible by the opponent if the proponent had not broached the subject. This is an important issue to which we must return after delving deeper into the rationale of the completeness doctrine and its distinct functions. The next Part will examine both the range of exclusionary rules affected by the trumping function and the limits that should properly be placed upon it.

III. Completeness and the Best Evidence Principle

This Part looks at the nature of completeness as a constituent principle in the body of evidence jurisprudence. It shows that completeness derives from the more fundamental principle that parties should present the epistemically best evidence available to them on litigated issues. The three procedural functions identified above are analyzed with reference to this "best evidence" principle. The investigation clarifies the problems that necessitate a completeness doctrine and yields valuable insights on the otherwise mysterious question of which exclusionary rules are appropriately subject to being trumped by the completeness principle.

A. Completeness as a Component of the Best Evidence Principle

In a previous article, I argued that within the law of evidence is a principle that serves to explain, and to some extent to justify, many of the existing rules. With deference to eighteenth and early nineteenth century judges and evidence scholars, I called this the "best evidence" principle and articulated it as the principle that a party should present the best evidence reasonably available on any given litigated issue. "Best evidence"
was defined in terms of epistemic value, that is, in terms of what a reasonable trier of fact, whether lay or expert, would find most helpful in the rational determination of the issue in question. I further argued that this principle is not absolute; it is subject to at least one pervasively important qualification based on the existence of an adversarial system of adjudication. This qualification is not easy to state with precision, but in rough terms it may be expressed as follows: A litigant is privileged not to present the best available evidence if the opponent will have a reasonable opportunity to present that evidence. Thus, a judicial application of the best evidence principle is identifiable as:

[An]y judicial use of a rule, decision, or argument that proceeds by identifying some set of potential evidentiary items, call it P, which is rationally of greater probative worth than that set which is or might be offered, call it S, and that either (i) enforces a preference for P because of its superior probativity, or (ii) recognizes such a preference but permits the use of S because of some countervailing consideration.

The most significant countervailing considerations internal to the theory are: (1) the practical infeasibility of the proponent presenting P without placing incommensurate burdens on the resources of the parties and the tribunal, and (2) the practical capacity of an opponent to present P in a not substantially less understandable or more costly way.

In demonstrating the significance of this principle, I analyzed a wide variety of evidentiary doctrines, ranging from discovery rules to witness sequestration rules, from "substantive" legal rules like statutes of frauds and statutes of limitation to what we think of more traditionally as the heart of evidence law, the rules of admissibility.

115. See Nance, Best Evidence, supra note 3, at 230-34, 240-42.
116. Id. at 234-39, 242-43, 263-70. In the indicated passages, I gave an even narrower articulation of the adversarial privilege, one that required presentation of the epistemically best, reasonably available evidence unless the party reasonably believes that another party will present the better evidence omitted by the former. In a later article, I worked with the broader privilege described in the present text. See Dale A. Nance, Missing Evidence [hereinafter Missing Evidence], 13 Cardozo L. Rev. 831, 859-60 (1991). Although I have stated the more conservative version here, nothing significant for present purposes turns upon the difference.
118. The indicated considerations are "internal" to the theory in that both are based, at least to some extent, on the goal of obtaining the best reasonably available evidence for use by the trier of fact. "External" countervailing considerations include limitations arising from extrinsic social policies like the preserving of confidential relationships under privilege rules. To the extent that adherence to an adversarial system is premised on litigant autonomy, rather than accuracy of adjudication, it constitutes an "external" countervailing consideration. Cf. id. at 241-42.
119. Id. at 270-94.
is the common-law completeness rule. This section elaborates on the claim that the completeness rule is a manifestation of the best evidence principle.

On its face, the preference for the whole of a verbal event or utterance is easily seen as generated by the best evidence principle. The whole of the event, insofar as necessary to understand the significance of some relevant part, is better evidence than the part alone. This is true regardless of the nature of the trier of fact, whether lay or professional, expert or otherwise, so the rule is not attributable to special concerns about misleading a lay jury. Nor is there any other obvious explanatory candidate available with respect to this preference. One might be tempted to say that simple fairness motivates the completeness idea, rather than the concern for accuracy that motivates the best evidence principle. But fairness is one of those conclusory terms that calls out for explanation. The unfairness involved in the selected presentation of only parts of an utterance is that it poses a threat to accuracy of the judgment. This concern with accuracy arises not only because accuracy is an end in itself, but also because accuracy is important in doing substantive justice. It is that aspect of justice that warrants taking and evaluating evidence at all. Remove the risk of inaccuracy, and there would be no plausible claim of unfairness in this context.

Thus, in understanding completeness as a consequence of the best evidence principle, the only difficulties that require attention lie in the countervailing considerations. In fact, the qualifications of the best evidence principle explain the more precise contours of the completeness rule. Out of deference to history, we start by examining the discovery function.

1. The Discovery Function

As already discussed, the conditional exclusionary form of the interruption rule offsets limitations on the opponent's ability to discover a document in the proponent's possession. The adversary privilege fails to outweigh the best evidence principle in this context for the simple reason that the opponent does not, without the assistance of the rule, have the opportunity to present the remainder, at least not through the same evidential source. On the other hand, if the proponent also does not have access to the remainder, conditional exclusion would simply result in the loss of valuable evidence. Thus, one would expect the completeness rule, like other best evidence rules, to display an excusable preference structure in which the proponent can excuse the presentation of the part on the ground that the whole is not available to the proponent or that the remainder is available to the opponent.

The cases are often difficult to penetrate in this regard because most

120. Id. at 284-85.
opinions provide little information about the relevant context of the trial court's decision. Nonetheless, some evidence suggests that, unless the proponent's proffer is so incomplete as to be obviously unhelpful in the case, such an excusing structure exists. Perhaps the most important piece of evidence is the tendency not to invoke exclusion in response to unavoidably incomplete testimonial accounts of verbal events. Consider, for example, the appeal in the case of People v. Adamson. Defendant alleged error in the admission of testimony recounting only part of a conversation in which he participated. The Supreme Court of California affirmed the conviction, noting the well settled rule "that a witness may testify to a part of a conversation if that is all that he heard and it appears intelligible." What is significant about this result is that the witness who was the source of the account was subject to cross-examination concerning the statement. Had the witness heard the remainder and yet refused to reveal it on cross-examination, the court should, and under conventional doctrine would, have stricken the direct testimony on motion. Thus, the unavailability of the missing information from this witness insulated the testimony from exclusion. Moreover, the common-law pattern generally encountered in the testimonial proof of extrajudicial statements of a party does not even require the witness, on pain of exclusion, to state in the first instance all

121. 165 P.2d 3 (Cal. 1946) (prosecution for murder and burglary).
122. Id. at 6-7. The court rejected the defendant's argument that the incompleteness was such as to render the evidence irrelevant. Id. To the same effect, see also Lyon v. State, 79 S.E. 29, 33 (Ga. 1913); Mayo v. Deaver, 1 Iowa 216, 222-23 (1855). Confessions are sometimes subject to statutes requiring the whole thereof. Cases interpreting such statutes typically allow the use of unavoidably incomplete reports of the confession, although they may also require the witness to be able to state the "substance" of the whole confession. See, e.g., State v. Jugger, 47 So. 2d 46, 54 (La. 1950) (allowing witness to testify to substance of defendant's admissions even though he could not remember all that was said). An exception should also be noted in the understandable reluctance of some courts to allow unavoidably incomplete testimonial accounts of lost or destroyed documents having in themselves legal effect, such as deeds, contracts, and wills. See 7 Wigmore, supra note 10, §§ 2105, 2106.
123. See McCormick, supra note 5, § 19. See also Nance, Best Evidence, supra note 3, at 282-84 (analyzing the requirement that a witness submit to cross-examination, and the exclusionary rule that is activated by a refusal to so submit, as a best evidence rule).
124. Of course, there is the remaining potential for collusion between the proponent or some other person and the witness to manufacture or feign a loss of hearing or memory as to the remainder, but the Adamson court was obviously not impressed by this possibility in the context of the case. One line of authority excludes confessions when the defendant's statement was interrupted after the admission of the act but before an explanation could be given. Compare William v. State, 39 Ala. 532 (1865) (holding defendant slave's partial confession to master improperly admitted when master prevented defendant from completing the confession), with United States v. Wenzel, 311 F.2d 164, 168 (4th Cir. 1962) (affirming admission of defendant's confession to officer even though it was interrupted by arrival at jail, where defendant showed no inclination to qualify statements already made). In such cases, exclusion may be based upon the presumptive unreliability of the statement, but may also represent a confusion between admissibility and sufficiency. In the former cited case, for example, the court in reversing the conviction makes reference to the presumption of innocence and the possibility that the defendant might have gone on to provide a justification for the killing, such as self-defense. William, 39 Ala. at 535.
that was perceived; because of the availability of this information to the opponent by way of cross-examination, elicitation of the remainder is generally left to the opponent. 125

In the context of incomplete tangible proffers, the a priori improbability of the proponent having access to only part of an important document, coupled with the difficulty of detecting false claims of unavailability, should lead the courts to adopt a rather skeptical attitude toward the proponent’s claim that the remainder is unavailable. Still, in some contexts the unavailability of the remainder is uncontroversial, and the appropriateness of the exclusionary response then turns on whether the incomplete proffer is so incomplete as to be simply a distracting waste of time, or perhaps on the likelihood of tampering. 126 As for the argument that the tangible remainder is available to the opponent, the cases do not invariably accept this excuse either. But at least the reason for this tendency is not difficult to discern within the framework provided here. Certainly, both case law and commentary confirm the proposition that availability of the remainder to the opponent is a relevant factor in deciding whether to invoke the exclusionary response. 127 Yet even when

125. See 7 Wigmore, supra note 10, § 2099, at 659-61, and § 2100, at 661-62 (noting some judicial ambivalence in cases of criminal confessions). Stricter applications in the context of confessions given under custodial interrogation are understandable as prophylactic measures, since the government generally has adequate control to assure the availability of an admissible account of the whole of the confession.

126. See, e.g., Harrison v. Henderson, 12 Ga. 19, 22 (1852) (affirming admission of a letter written by a defendant and acknowledging debt, despite the mutilation of a postscript). One can observe this pattern particularly well in the context of the recurrent modern problem of partially inaudible tape recordings. Compare Monroe v. United States, 234 F.2d 49, 54-55 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956), wherein the court stated:

Partial inaudibility is no more valid reason for excluding conversations than the failure of a personal witness to overhear all of a conversation should exclude his testimony as to the portions he did hear. Unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy the recording is admissible ....

with Hunter v. Hunter, 83 A.2d 401 (Pa. Super. Ct. 1951) (holding it error to admit, in divorce proceeding, incomplete tape recordings of conversations between husband and wife surreptitiously made by son at husband’s request; admission also held to violate privilege for confidential communications). Numerous federal cases are cited in 1 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Evidence ¶ 106[01], at 11-12 (1991) (concluding that “federal courts have generally admitted inaudible or incomplete tape recordings if it seemed clear that inaudibility was not created deliberately by the proponent”). Cf. State v. Dills, 416 F.2d 651, 655-56 (Or. 1966) (affirming admission of partly inaudible tape in conjunction with testimonial account of remainder of defendant’s statement, the court noting that no tampering claim had been made).

127. See, e.g., Cannister Co. v. United States, 70 F. Supp. 904, 909 (Cl. Ct.), cert. denied, 352 U.S. 830 (1947):

Whether or not a part only may be introduced depends to some extent on the facts. It is improper, we think, to receive in evidence only a part of a document unless the remainder of it is available or is made available to the other party. ... The original of the bill of sale, a copy of which was introduced, was in plaintiff’s possession. If plaintiff thought the omitted portion material to the issue, it was available to it and
the opponent's possession of the remainder is readily verifiable, the timing function may provide an independent reason to reject the proponent's excuse for partial presentation.

2. The Trumping Function

An examination of the trumping function is even more revealing. Assume, for simplicity, that the discovery function is not also at issue; that is, assume that both parties have reasonable access to the evidence of the remainder. Here the adversarial privilege fails, not because the remainder is unavailable to the opponent, but because an exclusionary rule bars the opponent from presenting the remainder evidence to the trier of fact. As illustrated in the previous Part, the most common problem of this sort occurs when the proponent has used substantively damaging parts of the opponent's out-of-court admission; without the aid of the completeness doctrine, the opponent cannot fully utilize the completing out-of-court statements in response without running afoul of the hearsay rule. The law has responded by honoring the opponent's demand that if the statement is to be used for the hearsay purpose, it must be used as a whole. This illustrates the affinity of the completeness rule to the very rule it is trumping, since the general point of both rules is to prescribe that if a declarant's knowledge is to be brought to bear on the case, it should ordinarily be done in the more reliable form. In the hearsay context, this means in the form of in-court testimony; in the completeness context, it means in the form of a complete utterance.

It is important to recognize that the failure of the adversarial privilege in such a context renders the proponent's duty to present the whole absolute, provided of course the parties have reasonable access to the remainder and no countervailing considerations of extrinsic social policy could have been introduced by it.

See also 7 Wigmore, supra note 10, § 2095(3) (noting the mandatory requirement of entirety of parts may be dispensed with when whole of document is produced in court for possible use by the opponent).

128. Once again, if neither party has such access, we have only a problem of the excusability of the preference for the whole in the face of an inability to obtain the whole. By hypothesis, trumping is not at issue.

preempt such a result.\textsuperscript{130} Thus, the best evidence principle leads to the conclusion that invocation of the trumping function should be viewed as a \textit{forced presentation by the proponent}, thereby resolving the ambiguity we encountered in the common-law doctrine.\textsuperscript{131} Under this interpretation, the completeness doctrine allows the opponent to piggy-back on the inclusionary authority used by the proponent. That does not mean, however, that the actual physical introduction of the remainder must be performed by the proponent. Reasons of convenience and clarity dictate that it is often better to allow the opponent to introduce those portions needed for the sake of completeness, whether contemporaneously or later, especially in cases where the proponent does not concede that the remainder was uttered as the opponent claims. Indeed, a negotiated and mediated adversary process may properly determine the whole of the verbal event and precisely how it is to be presented to the trier of fact.\textsuperscript{132}

One may even say, with a civility that is not entirely counterfactual, that the opponent \textit{assists} the proponent to perform his duty to the tribunal.\textsuperscript{133} So the trumping function, seen as a consequence of the best evidence principle, is entirely compatible with both mandated presentation under the interruption rule and optional presentation of the remainder by the opponent under either the interruption or rebuttal rule.

To be sure, one might object that an \textit{exclusionary} response, the traditional form of the common-law interruption rule, is an odd way to ensure that the whole of the utterance comes in. There is truth in this complaint.\textsuperscript{134} It reflects a paradox that is ubiquitous in the law of

\begin{itemize}
  \item \textsuperscript{130} See supra note 118 and accompanying text.
  \item \textsuperscript{131} See supra notes 64-68 and accompanying text.
  \item \textsuperscript{132} See, e.g., United States v. Castro, 813 F.2d 571, 574-77 (2d Cir.), \textit{cert. denied}, 484 U.S. 844 (1987) (affirming trial court's compromise acceptance of defendant's completeness motion so as to allow substance of remainder of defendant's statement into evidence without jeopardizing confrontation rights of co-defendant).
  \item \textsuperscript{133} One commentator, drawing on language found in many case reports, accurately stated the functional relationship in the context of confessions, where the law is particularly well developed:
    
    When a confession is admissible, the whole of what the accused said upon the subject at the time of making confession is admissible and should be taken together, and if the prosecution fails to prove the whole statement, the accused is entitled to put in evidence all that was said to and by him at the time which bears upon the subject of controversy, including any exculpatory or self-serving declarations contained therewith.
    
    29 Am. Jur. 2d Evidence § 535, at 586 (1967), formerly 20 Am Jur. Evidence § 488, at 425, quoted in United States v. Wenzel, 311 F.2d 164, 168 (4th Cir. 1962). This language has been cited as an example of the ambiguity of the rules in confession cases in that it does not "distinguish between the prosecutor's having to introduce the whole confession and the accused right to call for the rest." 1 Weinstein & Berger, supra note 126, ¶ 106[01], at 8-9. The discussion in the text shows why this ambiguity actually serves to relate the two kinds of rules.
  \item \textsuperscript{134} One might respond that the simple explanation of the common-law division between rebuttal and interruption lies in the answer to the question of whether the incomplete proffer is so misleading as to be excludable \textit{without regard} to a completing response. This, however,
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evidence. Evidence law is thick with exclusionary rules more intended to encourage presentation of additional evidence than to eliminate from consideration the evidence excluded. Exclusionary rules may thus have what I have elsewhere described as an "expansionary" purpose. On the other hand, some exclusionary rules serve not only to encourage the presentation of other evidence, but also to eliminate the evidence excluded for that purpose. The most conspicuous rule of this sort is the hearsay rule; presentation of the declarant for testimony in court does not ordinarily render her out-of-court statements substantively admissible. Such rules are "substitutionary" in that their object is to replace the offered evidence with the preferred evidence.

The completeness doctrine, in both its inclusionary and exclusionary forms, is of the expansionary kind. That is just what is meant by the conditional nature of the exclusion enforced under the common-law interruption rule. For if the remainder is introduced, the original is no longer subject to exclusion for its incompleteness. Generally speaking, exclusion is no worse an option in this context than it is elsewhere in the law of evidence. In any event, the sense of paradox does not arise in

suffers from two serious problems: (1) It does not explain the tendency not to employ exclusion in the context of testimonial incompleteness, even though such incompleteness can be as extreme as any tangible incompleteness; and (2) It does not explain the tendency to employ exclusion in the context of tangible incompleteness even though the incompleteness does not create a seriously misleading impression. See supra notes 76-78 and accompanying text. That is, this explanation of the exclusionary response is both overinclusive and underinclusive relative to the empirical patterns.

135. See Nance, Best Evidence, supra note 3, at 281-85 (discussing, inter alia, the exclusion of testimony when the witness refuses to submit to cross-examination; the exclusion of incomplete verbal utterances under the completeness rule; and the exclusion of proffered evidence in the absence of other evidence with respect to which the former is inaccurately said to be "conditionally relevant").

136. The Federal Rules make some noteworthy exceptions, representing a laudable shift toward a more expansionary version of the hearsay rule. See Fed. R. Evid. 801(d)(1).

137. The original document rule—the paradigmatic "best evidence" rule—may be thought to be the clearest example of this phenomenon. See, e.g., Model Code of Evidence Rule 602 (1943) ("As tending to prove the content of a writing, no evidence other than the writing itself is admissible unless" failure to introduce original is excused.). There is authority, however, for the proposition that this rule excludes secondary evidence of contents only by way of encouraging the use of the original; if the original is used, the rule is satisfied, whether or not secondary evidence is also used. See 4 John H. Wigmore, Evidence in Trials at Common Law § 1190 (Chadbourn rev. 1972) (opining that a copy may be used in addition to an original, although it may be excluded as superfluous). The Federal Rule is surprisingly precise on this point, as it does not explicitly exclude secondary evidence, but rather mandates the use of the original—a mandate implicitly backed by an exclusionary rule. Compare Fed. R. Evid. 1002 (requiring original) with Fed. R. Evid. 1004 (allowing use of other evidence of contents under fairly broadly stated conditions of unavailability of original). See Nance, Best Evidence, supra note 3, at 273-74.

138. To be sure, there are reasons not to employ exclusion of relevant evidence as the means of encouraging the presentation of other evidence. This is a difficult matter taken up more generally elsewhere. See Nance, Missing Evidence, supra note 116, at 835-38, 845-46, 866, 872-81. Suffice it to say that the principal factor counting against exclusion is the availability of
connection with optional completion by the opponent or with completion chosen by the proponent in contemplation of the opponent’s otherwise inevitable and embarrassing rebuttal.\(^\text{139}\)

3. The Timing Function

Finally, consider briefly the timing function. Assume that both sides have reasonable access to the remainder and that no otherwise applicable exclusionary rule bars the opponent from a response in rebuttal. In such cases, there remains the problem of timing. Though this problem is a relatively minor one when compared to problems of access to and admissibility of the remainder, it is nonetheless worth addressing. When introduction of the remainder is moved to a point earlier in the trial than would otherwise occur, the subsequent presentation is rendered redundant. Thus, invoking the timing function effects the substitution of one form of presentation—one more nearly contemporaneous—for another. The purpose, one entirely compatible with the best evidence principle, is to provide the information in a manner most readily usable by the trier of fact. Not only do we worry that the misimpression cannot be corrected by delayed response, but also we see no good reason to impose the additional burden on the trier of fact necessary to make the connection.\(^\text{140}\) Once again, the limitations on contemporaneous

the remainder for presentation by the opponent, against which must be balanced the need for contemporaneous completion and the failure—where it occurs—to recognize the trumping function when that is necessary to allow the opponent’s response.

\(^\text{139}\) Nevertheless, as with all remedial invocations of the best evidence principle, one should give careful attention to the range of possible responses. For example, when the opponent cannot offer completing evidence without regard to the completeness doctrine, one might argue that a missing evidence instruction, such as the following, is appropriate:

If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.

\(^\text{3}\) Edward J. Devitt et al., Federal Jury Practice and Instructions § 72.16 (4th ed. 1987). This, however, would be an unusual application of the quoted instruction, which is more typically employed when the missing evidence would be admissible on behalf of the adverse party, if only it were available to that party. If one interprets the language “not reasonably available to the adverse party” as covering situations where the evidence is inadmissible by the adverse party, that would be setting up inferences outside the completeness context favoring a party in precisely those situations where the law has chosen not to allow that party to present certain evidence. It would be a bizarre and intolerable situation, forcing each party to present any admissible evidence that is not admissible by an adverse party, just to avoid the adverse inference. One could limit the use of an adverse inference to the subset of these cases that involves incomplete proffers by the proponent, but even then the vagaries of an adverse inference from unknown information are much worse than the uncertainties associated with the evaluation of actual evidence of the remainder. Thus, the adverse inference is a plausible response to incompleteness only in cases where the content of a remainder known once to have been available has been lost by the proponent’s negligent or intentional spoliation.

\(^\text{140}\) There is also an occasional resource savings should the earlier presentation of the
completion arise from concerns that this form of response may actually confuse matters by making the proponent's presentation disjointed.  

In sum, an examination of the three functions of the common-law completeness doctrine reveals straightforward connections to the best evidence principle. In a moment, we will see what can be inferred from this in terms of the reach of the important trumping function. Before doing so, however, we pause to consider the relationship between the trumping function and the doctrine of curative admissibility. This examination will deepen our understanding of the role of the best evidence principle in this context.

**B. Completeness and Curative Admissibility**

It has been argued that the trumping effect is, or can be, simply a consequence of the application of the notion of "curative admissibility." Curative admissibility refers to the idea that one party's presentation of inadmissible evidence, which for some reason is admitted, may be met by the introduction of other inadmissible evidence insofar as necessary to remove any induced prejudice. As applied in the present context, the argument is that admission of incomplete portions of a verbal event gives license for the opponent's introduction of the otherwise inadmissible remainder.

The difficulty with this assimilation of the two doctrines is that the premise of each is, or is usually thought to be, different. Curative admissibility applies only when the original evidence is properly inadmissible upon objection, whereas the original proffer to which a completeness response is made is typically considered admissible, even though incomplete. To bridge the gap, the suggested explanation of the remainder so undermine the strength of the proponent's case as to make it appropriate to direct a verdict without the necessity of responsive evidence.

141. One might argue that the reluctance to intrude upon the proponent's presentation is a consequence of the concern for litigant autonomy, independent of any concern about accuracy of the judgment. Although superficially attractive, this explanation is implausible except in the rule-consequentialist sense of wanting to maintain litigant autonomy even at the cost of accuracy in a particular case for the sake of maintaining accuracy in the long run of cases. In any event, here the point matters not, since the best evidence principle obviously does not assume that all legitimate competing demands must somehow be traceable to the best evidence principle itself.

142. The commentator who has pressed this connection most consistently is Professor Michael Graham. See, e.g., Michael H. Graham, Evidence: Text, Rules, Illustrations and Problems 595 (2d ed. 1988); Cleary & Graham's Handbook of Illinois Evidence, § 106.2, at 38 (4th ed. 1984). The fourth edition of McCormick's hornbook, the editors of which now include Professor Graham, has picked up on this idea. See Charles T. McCormick, McCormick on Evidence § 56 (4th ed. 1992). To be precise, Professor Graham does not deny the trumping function of the completeness doctrine; rather, he asserts, without elaboration, that even if such a function is not part of the completeness doctrine, as some federal courts have opined, essentially the same effect can be achieved by invoking curative admissibility.

143. See McCormick, supra note 142, § 57.

144. See 1 David W. Louisell & Christopher B. Mueller, Federal Evidence § 50, at 369.
trumping effect presupposes that the original proffer must be so misleading on account of its incompleteness as to be excludable were the opponent to object. Although there will be cases where the original incomplete proffer would be properly excludable upon objection, there will also be cases where the trial court reasonably concludes that admitting the incomplete proffer, without regard to a possible completeness motion by the opponent, would be less detrimental to accurate fact finding than excluding the incomplete proffer. Most conspicuously, the significance of the remainder, or even the fact of its utterance, may be seriously disputed, and the trial court may entertain sufficient doubts on that score as to preclude a finding that the proponent’s proffer is too misleading to be admitted.

Even if the court is confident of both the occurrence and the significance of the remainder, it might not conclude that the original part is inadmissibly incomplete. Ordinarily, judges and commentators tend to think about exclusions of evidence as misleading without regard to the availability of other evidence. If, however, one extends the rubric of “misleading” to include situations in which other important, context-providing evidence is known or even believed likely to be available, then such an incomplete proffer should be held excessively misleading relative to the complete version, even though the same evidence would not be so misleading as to be excludable if the remainder were unavailable.

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145. There is considerable disagreement in judicial opinions and academic commentary over the question of whether the opponent must object, or must not object, to the proponent’s proffer in order to be able to take advantage of the opportunity to present curative evidence. See generally 1 John H. Wigmore, Evidence in Trials at Common Law § 15, at 731 (Tillers rev. 1983). In sharp contrast, completeness cases do not even address the issue of an objection to the admissibility of the original part as a precondition of the response, which suggests that typically no one has thought the original proffer inadmissible, except in the special, conditional way associated with the interruption rule. See, e.g., People v. Gambos, 84 Cal. Rptr. 908, 909-12 (Cal. Ct. App. 1970) (rejecting curative admission, emphasizing opponent’s waiver by failure to object to proponent’s evidence; separately rejecting opponent’s completeness argument because of failure to show relevance to understanding proponent’s proffer).

146. For example, Fed. R. Evid. 403 provides in pertinent part: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . misleading the jury . . . .” (emphasis supplied). Under such a rule an incomplete proffer may have relevance that is not “substantially outweighed” by its misleading character. See, e.g., United States v. Soulard, 730 F.2d 1292, 1301 (9th Cir. 1984) (holding that the admission of certain evidence was within court’s discretion under Fed. R. Evid. 403, and rejecting defendant’s argument that the evidence should have been excluded under Rule 106, stating, “First, the record shows that Soulard failed to object timely to the evidence as being ‘incomplete.’ Second, even if Soulard had objected timely, rule 106 would not have required exclusion of the exhibits—it would merely have allowed Soulard to compel the Government to introduce evidence as to the other subfranchises on a showing that the new evidence “ought in fairness . . . be considered contemporaneously . . . .”).

147. The drafters of Rule 403 stated, “The availability of other means of proof may also be an appropriate factor to consider in determining whether to exclude evidence under that
Though probably still perceived as unconventional, this is not an unreasonable extension. Indeed, that is the upshot of a best evidence analysis of many long-established exclusionary rules.\textsuperscript{149}

However, there is yet another difficulty for the assimilation of the trumping function under curative admissibility: It presupposes that the jurisdiction in question recognizes the latter doctrine. In reality, some jurisdictions are reluctant to employ curative admission, while no such reluctance is evidenced with regard to completeness.\textsuperscript{149} As a practical matter, therefore, if courts reject the trumping function as an inherent part of the completeness rule, curative admissibility might fail as a substitute. On the other hand, situations in which the completeness principle applies may be among those in which a general reluctance to allow curative admissibility would be overcome. When the proponent has incompletely evidenced a verbal event, granting a motion to strike may leave significant prejudice to the opponent, and the curative admission of the remainder will remain subject to relevance restrictions that serve to keep the curative admission from getting out of hand. The remainder thus tends to satisfy the generally prevailing restrictions on curative admission.\textsuperscript{150}

Whether one views the trumping function as an integral part of the completeness rule, or as a special application of curative admissibility, one must recognize its distinctive character. Ordinarily, in cases where curative admissibility is explicitly applied, the preferred situation would have been that neither party's evidence be presented.\textsuperscript{151} The responsive evidence

rule. See Fed. R. Evid. 403 advisory committee's note. See, e.g., United States v. Crosby, 713 F.2d 1066, 1071-72 (5th Cir.), cert. denied, 464 U.S. 1001 (1983) (excluding prior consistent statements of defendant under Rule 403 partly on grounds of incompleteness thereof). It is hard to see how a jury could be affected in its inferences from the evidence by the availability or unavailability of evidence that is not presented, unless the jury is aware of the relevant circumstances. The point, of course, is that though their evaluation of the two situations might and should be the same if they are not so informed, all things considered it ought not to be the same. The traditional response to problems of available evidence not presented, when they are not covered by some best-evidence exclusionary rule, is to allow the opponent to request a "missing evidence" jury instruction, which entails bringing the availability of the missing evidence to the jury's attention. See Nance, Missing Evidence, supra note 116, at 856-57, 866. For reasons already noted, this makes no sense in cases where the reason for unavailability to the opponent is an exclusionary rule. See supra note 139.

148. See supra note 134 and accompanying text.


150. See 1 Wigmore, supra note 145, § 15, at 740 (describing the so-called "Massachusetts rule" that curative admissibility is allowed only to the extent necessary to cure prejudice). Note that the usual though not invariable context of an incomplete proffer, especially an incomplete testimonial proffer, makes it unlikely that the opponent will have a meaningful opportunity to object prior to its introduction. This tends to undermine the usual argument against curative admissibility, namely that the opponent is adequately protected by the right to object and should therefore be viewed as waiving the objection if it is not made. Id. at 746 (articulating this explanation of cases rejecting curative admissibility entirely).

151. Rare exceptions may occur when the parties have stipulated to the admission of the
"cures" the situation only in that it balances or negates the prejudice otherwise resulting from that to which it responds, or at least so it is hoped. Curative admission does not remove the feature that made the original evidence inadmissible. Thus, curative admissibility reflects the law's judgment that the preferred rank ordering of evidentiary presentations, from best to worst, is: (1) that neither proponent's nor opponent's evidence be presented, (2) that both be presented, or (3) that only proponent's be presented. The law settles on the "second-best" solution because the theoretically optimal solution has become impossible to achieve, practically speaking. Thus, for example, the introduction of the responsive evidence under curative admissibility does not ordinarily waive the opponent's right to challenge the original admission on appeal.

In contrast, no case has been found in which the opponent successfully challenged on appeal, as prejudicially misleading, the admission of only a part of a verbal event when the opponent was able to put in the remainder. And this is as it should be, since the introduc-
tion of the completing portion eliminates, by hypothesis, the misleading character of the original proffer, although some residual confusion may remain due to the timing of the completeness response. Given the assumed (not insubstantial) relevance of the complete utterance, the admission of both parts is to be preferred to the admission of neither. Here, the law's general preference order is: (1) that both be presented, (2) that only proponent's be presented, or (3) that neither be presented. To be sure, the second- and third-ranked solutions may be reversed in priority if the incomplete proffer is especially misleading, as the assimilation argument supposes, but each remains subordinate to the first.

This means that the status of the two parts in a curative situation is different from that of the two parts in a completing situation. The former may not have the status of substantive evidence, in the sense of supporting a request for particular jury instructions, opposing a motion for directed verdict, or supporting a verdict in a post-trial motion. This is obvious in a case where admitted irrelevant evidence is met by curative irrelevant evidence: By definition, neither can support a verdict on the appropriate merits or a jury instruction relevant thereto, except possibly a jury instruction admonishing the jury to ignore irrelevancies or limiting the jury's use of the curative evidence to negating the significance of the proponent's original irrelevancy. Arguably, prejudicial or incompetent evidence used to counter prejudicial or incompetent evidence should be limited in the same way.

Indeed, some commentators have argued that version of the Federal Rules).

156. It may, of course, turn out that the completed utterance is of de minimis probative value, the remainder offsetting whatever significance the original part appeared to have. But that can be known only after the remainder is considered, at which point exclusion of the whole will usually not save court time or otherwise serve any useful purpose, unless the evidence contains otherwise prejudicial elements.

157. In the interruption rule context the law may settle on exclusion of the original proffer, which seems to adopt solution (3), but that will be more as an incentive to move the proponent from (2) to (1) than as an expression of a preference for (3) over (2). See supra Part III.A.

158. It is important to distinguish between two fundamentally different aspects of the curative admissibility doctrine that are often confused. On the one hand, there is a doctrine which the opponent invokes at trial claiming that the proponent's introduction of what the trial court recognizes as inadmissible evidence warrants the opponent's introduction of responsive inadmissible evidence. This branch of the doctrine, which is the one most seriously questioned, is raised on appeal by the proponent if the responsive introduction is allowed, or by the opponent if it is disallowed. On the other hand, there is a purely appellate doctrine that arises from the appellate court's recognition that the trial court failed to exclude the proponent's evidence when it should have done so. Here the argument is that, given the opponent's responsive introduction, the error in admitting the proponent's evidence is harmless. In the former category of cases, the opponent usually has not made an appropriate objection; in the latter, an appropriate objection has been overruled. In the former, the trial court should not consider the evidence substantive in the sense described; in the latter, the trial court's erroneous application of the exclusionary rules usually means that the evidence was considered substantive by that court.

159. In many ways this is analogous to the limited admissibility of prior inconsistent
curative evidence should be allowed only for the purpose of deflecting immaterial inferences.160

Completion evidence is different. Since it eliminates the defect of the incomplete proffer, both parts can and should be considered substantive in the sense described here. When taken together as the principle demands, both are relevant evidence not subject to exclusion.161 While the remainder becomes admissible only by virtue of the proponent’s presentation of the incomplete part, the net effect of the whole ought not to be limited in a way that it would not have been if offered by the proponent in the first instance. Thus, the use of the remainder is not rightly limited to nullifying the effect of the incomplete part. The net probative effect of the whole utterance may favor the opponent.162

Of course, a single proffer may contain both kinds of defects, incompleteness as well as some (other) reason for inadmissibility. Numerous cases of this type can be found in which the completeness

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160. See 1 Wigmore, supra note 145, § 15, at 750.
161. The New York Court of Appeals expressed the point, not without ambiguity, in a classic completeness opinion approving the fully substantive use of the remainder:

The rule appears to be firmly settled, both as to a conversation or writing, that the introduction of a part renders admissible so much of the remainder as tends to explain or qualify what has been received, and that is to be deemed a qualification which rebuts and destroys the inference to be derived from or the use to be made of the portion put in evidence. . . . Here the declarations of the letter were not admissible in behalf of the plaintiff at all, because she was the personal representative of the deceased [declarant]. The defendant could waive that difficulty by putting such declarations, or a part of them, in evidence, on its behalf, but when it did so, must also make equally evidence that which tended to explain or qualify the portion which was used.

Grattan v. Metropolitan Life Ins. Co., 92 N.Y. 274, 282-86 (1883) (holding that self-serving parts of a letter written by an insured could be used by the jury to infer that the insured had not lied in his application for insurance, even though other undisputed facts strongly implied that he had).

162. Wigmore’s claim, discussed supra note 56 and accompanying text, that the completing evidence is limited in use, may have been intended to mean more than that it avoids the hearsay rule; he may have meant that the completing evidence is not substantive in the sense discussed here, even if it does trump the hearsay rule. This is not, however, the way his argument reads, and the cases he cites are better explained in other ways detailed above.

There are occasional statements by other commentators to a similar effect. See, e.g., Graham, supra note 142, at 596 (completing statements “may be admitted substantively only if otherwise admissible”). Note, however, that Professor Graham makes this statement in the context of his explanation that the trumping effect can be achieved by the use of curative admissibility, which theory may well be subject to the nonsubstantive use limitation.
rationale is used to support the responsive introduction of evidence. In such cases, however, though the completing evidence cures the first defect—the incompleteness—it does not cure the second defect—the inadmissibility, although it may negate the prejudice that arises from the latter. Consequently, admission of the remainder must be limited in character—not supporting a verdict or jury instructions—in the same way as other curative admissions. In other cases, it is difficult to know whether the principle of curative admissibility is at work and whether, therefore, a limitation on the use of the remainder is in order, yet the doctrine of completeness is clearly employed.

Curative admissibility, then, is not an adequate explanation of the trumping function at work in the common law of completeness, nor is it a fully adequate substitute for that function. The two doctrines are related, in that each may be seen as an example of a "constructive waiver" of the proponent's otherwise valid objection. The waiver is "constructive" because, although it is not intended by the proponent, the circumstances entitle the court to treat the situation as if it were. But they are not co-extensive, since the nature of the proponent's action and its consequences for the scope of the waiver are different in the two contexts. Nevertheless, in those jurisdictions, if any, where the courts wrongly insist that trumping is not part of the completeness rule, curative admission may be the best available

163. See, e.g., R.C. Bottling Co. v. Sorrells, 275 So. 2d 131, 133-34 (Ala. 1974) (applying completeness to otherwise inadmissible hearsay statement offered by proponent); State v. Lovely, 517 P.2d 81, 81-82 (Ariz. 1973) (en banc) (applying completeness to otherwise inadmissible portions of complaining witness's hearsay statement); State v. Hinkle, 229 N.W.2d 744, 749 (Iowa 1975) (using completeness and curative admissibility as alternative reasons to affirm the introduction of the remainder); Stewart v. Sioux City & New Orleans Barge Lines, Inc., 431 S.W.2d 205, 211-12 (Mo. 1968) (applying completeness to hospital records containing otherwise inadmissible hearsay offered by proponent). In other cases, the court uses the completeness idea, but not by name. See, e.g., Seaboard Coast Line R.R. v. Magnuson, 288 So. 2d 302 (Fla. Dist. Ct. App. 1974) (allowing opponent to clarify contents of inadmissible hearsay through other testimony of same witness).


165. See, e.g., Grobelny v. W.T. Gowan, Inc., 151 F.2d 810, 812-13 (2d Cir. 1945), in which the trial court allowed the plaintiff to introduce the remainder of a medical report part of which was introduced by the defendant on cross-examination of the plaintiff's expert. Since the whole of the report would have been inadmissible hearsay if offered by the plaintiff for the truth of statements contained therein (which included statements made by plaintiff not for purposes of treatment), its partial presentation was presumably allowed in the first instance by way of indicating the basis and limits of the expert's opinion. If so, then the remainder is similarly limited in use. See supra notes 56-52 and accompanying text. On the other hand, no limitation seems to have been placed on the introduction of the part. Thus, it is possible that the part was available as evidence of the truth of the statements contained therein. If so, the remainder may also have been used substantively in this sense. In the latter case, whether the remainder was used curatively depends on whether an objection was made, and required to be made, in response to the plaintiff's original unlimited proffer. See supra note 145.
protection against truth-defeating unfairness in the presentation of misleadingly incomplete evidence.\textsuperscript{166} This approach does not reproduce the "forced presentation" interpretation of completeness adumbrated above, and this could make a difference in some situations. Still, there may be no substantial loss in approaching the trumping function in this manner, provided the distinctive character of completeness as a curative doctrine is kept firmly in view.

\textbf{C. Exclusionary Rules and the Reach of the Trumping Function}

We come now to the most important implications of the analysis. In this section, we take up the difficult question of the reach of the trumping function, that is, the delineation of those situations in which trumping is proper. We proceed by generalizing from the examples of trumping that have been used in the foregoing analysis, thereby obtaining a first-order approximation of the class of cases in which trumping is appropriate. Then, we refine the analysis by considering objections to the overinclusiveness and underinclusiveness of the proposed class.

\textbf{1. Asymmetry and the Trumping Function}

Up to this point in the Article, abuse of the party-admission exception to the hearsay rule has been the sole example of the problem that gives rise to the trumping function. It is certainly the most commonly encountered example, but it is not the only one. For example, if the statement of a criminal defendant, part of which is used by the prosecution, is contained in the testimony of the defendant at a prior trial for the same offense, the problem becomes more complex. The prosecution can use the defendant's prior testimony either under the party-opponent admission exception or, if the defendant elects not to testify at the later trial, under the prior testimony exception. But the defense can use neither exception. The prior testimony exception does not allow the defendant to present the remainder, for that exception depends upon the declarant being unavailable to the proponent of the hearsay.\textsuperscript{167} And while the defendant is unavailable to the prosecution, he will not be considered unavailable to the defense.\textsuperscript{168}

\begin{footnotesize}
\begin{enumerate}
\item[166.] In jurisdictions not governed by Fed. R. Evid. 106, or state rules patterned on that rule, it is very hard to find decisions that clearly reject the trumping function. And the rare indications against trumping have been short-lived. For example, in Indiana, despite a long-established trumping function, see Metzer v. State, 39 Ind. 590, 590-91 (1872), the law was confused in the 1980s by a decision in which a split court affirmed the trial court's authority to exclude remainders because they were otherwise inadmissible under the hearsay rule. See Duff v. State, 508 N.E.2d 17, 19, 21-22 (Ind. 1987). However, this rule was soon reversed, and the traditional trumping function was restored, in McElroy v. State, 553 N.E.2d 835, 839 (Ind. 1990) (holding that trial court erred in denying admission of remainder of defendant's statement).
\item[167.] See, e.g., Fed. R. Evid. 804(b)(1); see also McCormick, supra note 142, § 302, at 308.
\item[168.] See, e.g., Fed. R. Evid. 804(a)(1) (defining unavailability to include situations in which
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doctrine of completeness modified only the party-opponent admissions exception, distortion of a defendant's statements could perhaps be effected by the prosecution's offering the partial statement only under the prior testimony exception. More generally, the prior testimony of a party or nonparty witness can be admissible on behalf of a proponent but not on behalf of his opponent, owing to differential application of the "unavailability" requirement.\textsuperscript{169}

Moreover, completeness can be important in this way well beyond the confines of the hearsay rule. Several such problems can arise in the context of the original document rule, which requires, unless excused, the use of the original to prove the terms of a document.\textsuperscript{170} Suppose, for example, that the original of a document is in the possession of a third person. Our proponent calls the adverse party as a witness and secures an admission from the opponent of only the portions of the writing's contents favorable to the proponent. In such a case, use of the original by the proponent is excused since its contents are acknowledged by the adverse party.\textsuperscript{171} But if, on cross-examination, the opponent is asked what further terms the writing contains, terms favorable to the opponent, the exception does not apply. Without the completeness doctrine, the opponent's further testimony would be admissible only if by chance some other exception to the original document rule applies or the opponent manages to subpoena the original mid-trial.\textsuperscript{172} If the proponent is willing to rely on the declarant "is exempted by ruling of the court on ground of privilege from testifYYing concerning the subject matter of the declarant's statement"); see also McCormick, supra note 142, § 353, at 132.

\textsuperscript{169} For example, the federal rule specifying hearsay exceptions conditioned on the unavailability of the declarant, after listing the various ways in which the declarant can be considered unavailable, qualifies the list as follows: "A declarant is not available as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." Fed. R. Evid. 804(a). Such qualifications obviously can, indeed almost inevitably will, apply differentially to opposing parties. At common law, the completeness doctrine has been employed to trump the otherwise applicable hearsay exclusion when a proponent seeks to use such qualifications to block the opponent's introduction of the remainder of the declarant's utterance. See, e.g., King v. State, 287 S.W.2d 642 (Tex. Crim. App. 1956) (involving prior testimony exception as applied to testimony of defendant at previous trial).

\textsuperscript{170} See, e.g., Fed. R. Evid. 1002 (requiring original when writing, recording, or photograph used to prove contents thereof). See generally McCormick, supra note 142, § 230. In at least one context, the drafters of the Federal Rules specifically anticipated a completeness issue in the administration of the original document rule. If there is no genuine issue of authenticity of the original from which a duplicate is made, the duplicate is to be treated as equivalent to the original unless "in the circumstances it would be unfair to admit the duplicate in lieu of the original." Fed. R. Evid. 1003. One circumstance identified as involving such unfairness is "when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party." Fed. R. Evid. 1003 advisory committee's note (citing United States v. Alexander, 326 F.2d 736 (4th Cir. 1964)).

\textsuperscript{171} See, e.g., Fed. R. Evid. 1007; see also McCormick, supra note 142, § 242.

\textsuperscript{172} For example, Fed. R. Evid. 1004(2) provides that secondary evidence, like the
opponent's characterization of the documentary contents, he should at least be required to introduce the opponent's complete statement on the matter.

Again, suppose the proponent offers the testimony of a nonparty witness to prove the contents of the document. This time, the proponent invokes an exception to the original document rule that applies when the original is in the possession of an opponent who has been given reasonable notice to produce the original at trial. The opponent denies possession of the original, but the trial court finds by a preponderance of the evidence that the opponent has the original. Thus, the proponent is allowed to introduce secondary evidence, such as testimony of the document's contents. However, the opponent claims that the secondary evidence is incomplete in omitting crucial passages of the document and proposes to add the remainder through further testimony. The proponent, however, now objects on the ground that the circumstances do not entitle the opponent to use the exception to the original document rule upon which the proponent relied, or any other exception recognized as part of the jurisprudence of the original document rule. The trial judge may have to agree, completeness aside, for by hypothesis the original is in the possession of the opponent.

Alternatively, suppose the proponent's claim, accepted by the trial court, is that the opponent destroyed the original in bad faith. The opponent admits the destruction but vehemently denies bad faith, saying the destruction was done pursuant to a regular business practice.

remainder of the proponent's secondary evidence, is admissible if "[n]o original can be obtained by any available judicial process or procedure." This exception could be invoked if the opponent obtains a stay in order to subpoena the original and demonstrates that the efforts to obtain the original, though reasonable, were ineffective. The exception might even be stretched to say that, because of time limitations at trial, the subpoena process is not reasonably available to the opponent.

173. See, e.g., Fed. R. Evid. 1004(3) (stating that original is not required if, "At the time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing"); see also McCormick, supra note 142, § 230.

174. See, e.g., Fed. R. Evid. 104(a), 1008; see also McCormick, supra note 142, § 53.

175. One might respond by noting that the opponent can always introduce the original. This is true, provided the trial court was correct in its judgment that the opponent has possession of the original. Given the standard of proof on the issue, that judgment could be wrong in a significant number of cases. It is one thing to use the preponderance of evidence standard to determine whether to excuse a party from presenting the original; it is another to use that same standard and determination as controlling the opponent's ability to present the remainder of secondary evidence introduced only in part by the proponent. There is also the possibility that the original was in possession of the opponent at a time when the proponent served notice of an intention to use secondary evidence but, with or without the fault of the opponent, it is not in opponent's possession at the time of trial. See supra note 173.

176. See Fed. R. Evid. 1004(1) (prescribing admission of other evidence of contents if "all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith"); see also McCormick, supra note 142, § 237.
necessitated by the economics of information storage. In such a case, the opponent almost surely has no access to the original with which to counter the proponent's incomplete secondary evidence. One may say that such is the price the opponent must pay for her bad faith. But even putting aside residual doubts about the purpose of the admitted destruction, doubts which may be substantial, it is a dubious response to a litigant's bad faith to give a deliberately incomplete account of the document to the trier of fact, whose duty is to reach its best judgment of the truth on the merits. Is it not better to punish a procedurally miscreant party in some way other than skewing the evidence available to the trier of fact and thereby knowingly interfering with the trier's efforts to perform its task? 177

The problem can be even more subtle than the previous examples would suggest. Consider, for example, the hearsay exception for statements against interest. 178 Assuming the declarant is unavailable to both parties, this exception appears to be equally available to each side. However, there is a body of case law addressing when a statement not itself against interest is admissible in connection with a statement that is, usually because the former is closely connected with the latter. 179 Now, what if the related statement not against the declarant's interest is against the interest of the proponent? One can expect the proponent not to raise the question of the bootstrap. Yet the incomplete statement thereby introduced may well call for a completing response by the opponent. Without the trumping function, this response is arguably precluded by the fact that the remainder is neither against the declarant's interest nor presented by the opponent together with against interest declarations. 180

These examples show that the need for a trumping function is not tied exclusively to the admissions exception to the hearsay rule, nor indeed to the whole set of hearsay exceptions. Rather, the trumping function is important in any context where the exclusionary rules are asymmetric, that

177. See generally Nance, Missing Evidence, supra note 116, at 872-81 (arguing for caution in the use of punitive evidentiary sanctions).

178. See Fed. R. Evid. 804(b)(3) (prescribing admissibility of some such statements if declarant unavailable); see also McCormick, supra note 142, § 316.

179. See, e.g., United States v. Garris, 616 F.2d 626, 629-31 (2d Cir.), cert. denied, 447 U.S. 926 (1980). See generally 5 John H. Wigmore, Evidence in Trials at Common Law § 1465 (Chadbourn rev. 1974). See also Model Code of Evidence Rule 509(2) (1942), which states: Subject to Rule 505 [governing criminal confessions], evidence of so much of a hearsay declaration is admissible as consists of a declaration against interest and such additional parts thereof, including matter incorporated by reference, as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy.

A recent decision by the Supreme Court may have eliminated this possibility, at least in the federal courts. See Williamson v. United States, 114 S.Ct. 2431 (1994).

is, where the rules make certain evidence admissible if offered by one party, but inadmissible if offered by an opponent. The completeness doctrine is a "meta-rule" about admissibility, a rule about the use of other admissibility rules. More precisely, it is a rule to prevent the abuse of asymmetric exclusionary rules and asymmetric exceptions to exclusionary rules. This insight suggests a test for determining when trumping is appropriate, assuming the remainder satisfies the applicable relevance test:

**PRELIMINARY TEST:** Under the principle of completeness, evidence of the remainder should be admissible on demand of the opponent over an otherwise valid objection by the proponent to the same extent and for the same purposes as the combined evidence of the whole of the verbal event (original part plus remainder) would be admissible on behalf of the proponent.

This counterfactual criterion attempts to respond directly to the defect in the adversarial presentation of evidence by correcting for the advantage that a proponent could otherwise gain by a partial introduction of the verbal event. As befits a meta-rule, it does not specify the purposes for which the remainder is admissible, but leaves that to be determined according to the counterfactual consideration of the admissibility of the remainder by the proponent. The test responds to our sense of the unfairness involved when a proponent introduces only a part of an utterance, when the opponent has no ability to respond with the remainder. The following subsection, however, will press this intuition.

As is true more generally, the sense of fairness cloaks other values that may, when made explicit, require us to qualify the Preliminary Test.

181. See Nance, Best Evidence, supra note 3, at 266-67. This kind of asymmetry is a species of a broader genus that Professor Jonakait calls "biased" evidence rules. See Randolph N. Jonakait, Biased Evidence Rules: A Framework for Judicial Analysis and Reform, 1992 Utah L. Rev. 67 (defining biased evidence rules as "those that permit one party to use a kind or class of evidence while prohibiting the other from using it").

182. In some cases, rules provide for admissibility of evidence without indicating the purpose for which admission is allowed. For example, if a witness uses a writing to refresh her memory, the writing may be admissible by a cross-examining party. See, e.g., Fed. R. Evid. 612. Rule 612 sets up an asymmetry because it does not allow the calling party to introduce the writing. See McCormick, supra note 142, § 9, at 33. Moreover, the rule does not specify for what purpose the writing is admissible; it does not specify what otherwise applicable exclusionary rules are being overridden. Under our Preliminary Test, an incomplete introduction of the writing by the cross-examining party could be met with a completing introduction of the remainder by the calling party. The purposes of both introductions must be worked out as part of the jurisprudence of Rule 612. See 3 Weinstein & Berger, supra note 126, ¶ 612[05], at 50-51 (opining that Rule 612 does not create exception to hearsay rule, use of the document under that Rule being limited to testing the credibility of the witness).

183. This idea is briefly suggested in a recently published treatise:

[I]f the initial statement fits an exception and the related statement would fit if the proponent offered it originally, the fact that the same exception would not be available to adverse parties should matter much less (or not at all) since the original proponent should not be able to misuse an exception in a misleading way.

2. Beyond Formal Asymmetry

a. The overinclusiveness of asymmetry

The test developed in the previous subsection is called "preliminary" because we must still consider whether it is overinclusive or underinclusive in its extension of the trumping function and its consequent admission of evidence. Consider first the question of overinclusiveness: Should all asymmetric exclusionary rules be subject to trumping? We have already considered the hearsay rule and the original document rule in some of their many variations. Must we consider every other variation and every other rule separately, or can we make some useful generalizations?

i. Best evidence and other accuracy rules. — To begin with, trumping is surely appropriate when the asymmetric rule to be trumped is designed to facilitate accurate adjudication by assuring the presentation of the best reasonably available evidence on an issue. These are just those asymmetric rules based on the best evidence principle. This fact allows one to make sense of the otherwise cryptic remark made by Dean McCormick in describing the trumping function under the common-law rebuttal rule:

This right is subject to the qualification that where the remainder is incompetent, not merely as to form as in the case of secondary evidence or hearsay, but because of its prejudicial character then the trial judge should exclude it if he finds the danger of prejudice outweighs the explanatory value.

In its ambiguous reference to "form," this passage suggests, but does not clearly articulate, the connection between the hearsay and original document rules. That connection is their mutual dependence on the best evidence principle. The trumping function is clearly appropriate in contexts where that principle is not being well served by a rule based upon it.

The relative infrequency with which the trumping function arises in the original document rule context, in the modern era of liberal discovery, results from the fact that the rule and its exceptions generally allow the opponent to present the remainder of the secondary evidence if either the original is also presented or it is unavailable to the opponent. As illustrated by the unusual character of the examples presented in the previous section, under such an excusing structure, trumping is rarely required. Substantial liberalization of the admissibility of hearsay, bringing that rule into greater harmony with the best evidence principle, would generate a similar excusing structure. Whether this would greatly

184. See supra notes 115-20 and accompanying text.
185. McCormick, supra note 5, § 56, at 146. This language appeared in all editions up to the current, fourth edition, where it is unfortunately dropped by the reviser in favor of the curative admissibility approach. See McCormick, supra note 142, § 56.
186. See supra note 137 and accompanying text.
187. See supra note 137 and accompanying text.
188. See, e.g., Model Code of Evidence Rule 503 (1942) (prescribing admission of hearsay
reduce the incidence of circumstances calling for the exercise of a trumping function depends on how the liberalization would affect the asymmetry of the admissibility of prior statements of parties. At present, of course, the contours of the hearsay rule do not conform perfectly to the demands of the best evidence principle. Indeed, since the nineteenth century, many have believed that the hearsay rule is motivated by a different truth-seeking rationale, that the probative value of hearsay is likely to be excessively credited by the trier of fact, especially a lay jury. Although this theory is probably insufficient to support a general exclusionary rule for hearsay, its acceptance nonetheless almost certainly warrants trumping in contexts of asymmetry. Suspicions of juror credulity cannot rationally be strong enough to make acceptable the misleadingly incomplete admission of evidence under a hearsay exception generally thought to obviate those suspicions. In the overwhelming majority of cases, the omission will undermine the reliability thought to justify the exception. The same point applies as to other exclusionary rules similarly grounded, thus indicating a somewhat broader conclusion:

if declarant testifies or is shown to be unavailable); Seigel, supra note 129, at 930-32 (recommending admission of hearsay "if it is the best evidence available to the offering party from a particular declarant source, or if the best evidence has been or will be presented to the trier of fact").

189. See Seigel, supra note 129, at 938 (justifying party-opponent admissions exception under a best evidence approach to the hearsay rule). Although Professor Seigel does not address the issue, a theory of hearsay exclusion that rests on enforcing a preference for live testimony by the declarant may render the exclusion of a nontestifying criminal defendant's proffer of his own out-of-court declarations unconstitutional as a violation of the Fifth Amendment privilege not to be compelled to testify, unless the declaration in question was generated just to avoid having to testify. That result would end much, but not all, of the asymmetry that necessitates the trumping function in criminal cases. Cf. Brown v. State, 450 S.E.2d 821, 823 (Ga. 1994) (recognizing that trial court's denial of defendant's motion to admit remainder of defendant's pretrial statement, on the ground that defendant was available to testify, could violate defendant's privilege); People v McLucas, 204 N.E.2d 846, 847-48 (N.Y. 1965) (holding that trial court's limitation on use of exculpatory remainder of defendant's statement because it "does not take the place of sworn testimony from the witness chair" violates defendant's privilege).

190. See Nance, Understanding Responses to Hearsay, supra note 129, at 460-64 (distinguishing "taint" theories from "inducement" theories, the former excluding hearsay because of the truth-defeating effects of the hearsay itself, and the latter excluding hearsay as a means of inducing its proponent to present the "better evidence" testimony of the declarant). Not to be confused with such taint theories is one that prescribes the exclusion of hearsay when necessary in order to conserve the cognitive resources of the trier of fact for the evaluation of more important evidence. See Craig R. Callen, Hearsay and Informal Reasoning, 47 Vand. L. Rev. 43 (1994). The latter theory can be articulated in a manner consistent with the epistemic best evidence principle.

191. See Seigel, supra note 129, at 905-16 (rejecting what he calls the "misinformation" theory of excluding hearsay).

192. An example would be the so-called Dead Man's Acts, which commonly prohibit a party adverse to the interests of an estate from testifying to statements made by the deceased. See, e.g., Reeves v. Lyon, 277 N.W. 749, 754 (Iowa 1938) (invoking completeness doctrine to hold that estate's use of part of conversation allows adverse party to use remainder).
Trumping should generally apply in cases of asymmetry in any exclusionary rule that regulates the admission of evidence primarily in order to facilitate accuracy of adjudication.\textsuperscript{193}

\textit{ii. Privilege rules.} Questions of privilege are only somewhat more troublesome, provided the privilege is held by the proponent. Of course, the concept of privilege competes with truth finding in its attempt to protect confidentiality or secrecy at the cost of adjudicative accuracy.\textsuperscript{194} And it might seem that this would be the strongest argument for overriding the best evidence principle. However, in many cases, probably most, the very presentation of the original part will effect a waiver of the privilege under conventional privilege rules.\textsuperscript{195} Indeed, it has been argued that preventing a proponent from utilizing misleading incompleteness is precisely the proper focus of the waiver rules.\textsuperscript{196} But if no waiver is found, the court will need to make a further determination as to whether the interests of justice require the negation of the privilege to the extent necessary to correct the incompleteness of the proponent’s proffer. A possible, though unusual, example is when the original incomplete

\textsuperscript{193} Important asymmetric rules, to which trumping readily applies, are those ordinarily symmetrical objections that are held not to apply to a party opponent’s admissions. For example, the proponent offers part of a statement of an opponent that does not of itself indicate “personal” or first-hand knowledge of the facts stated. The usual personal knowledge requirement is dropped in such cases. See McCormick, supra note 142, \S 255, at 144-47. However, if the opponent offers a remainder similarly devoid of evidence of personal knowledge, this exception would not apply without the help of the completeness doctrine.

\textsuperscript{194} See McCormick, supra note 142, \S 72. To be sure, some privileges may actually contribute to the flow of relevant information to tribunals. See Ronald J. Allen et al., A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine, 19 J. Legal Stud. 359, 361-62 (1990):

\begin{quote}
In brief, our argument is that the attorney-client privilege and the work product doctrine offer two perspectives on a larger goal, which is to increase the amount of information about disputes available to courts and to work against the disincentives to the production of that information which would otherwise exist.
\end{quote}

\textsuperscript{195} See generally McCormick, supra note 142, \S 83, at 305-06 (concerning marital privilege), \S 93, at 344 (concerning attorney-client privilege), \S 103, at 386-87 (concerning physician-patient privilege). A fair restatement of the law is that:

A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.


\textsuperscript{196} See Richard L. Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605, 1607 (1986) (arguing that in analyzing attorney-client privilege waiver issues, "the focus should be on unfairness flowing from the act on which the waiver is premised. Thus focused, the principal concern is selective use of privileged materials to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight."). Some decisions have narrowed the scope of waivers to countering only such misleadingly incomplete disclosures. See, e.g., In re von Bulow, 828 F.2d 94 (2d Cir. 1987).
statement does not itself contain any portion of a privileged communication, but the necessary remainder does.197 If the privilege is neither waived nor trumped, the court should make a final determination as to whether the original proffer should be admitted, or allowed to remain in evidence.198 Essentially the same analysis applies in the context of "quasi-privilege" doctrines that exclude evidence in order to promote or protect certain kinds of conduct by actual or potential litigants.199

iii. Prejudice rules. — Finally, objections to the basis on prejudice to the proponent are the most problematic because there is as yet no fully adequate theory of what prejudice is or why courts exclude evidence on account of it.200 Putting aside the simple risk of inaccurate evaluations of evidence discussed above, prejudice can be characterized as a "tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."201 This, in turn, can be understood as

197. The question would be whether the proponent has "consented" to disclosure even though he has not disclosed any part of the privileged matter. See Uniform Rules of Evidence 510 (quoted supra note 194). This presupposes that the privilege can extend to a part of the whole conversation in a way that the privileged part satisfies the relevance test for completeness with respect to the unprivileged part. See John K. Baldwin, Note, Does the Attorney-Client Privilege Extend to a Confidential Part of a Non-Confidential Communication?, 32 S. Cal. L. Rev. 212, 216-17 (1959) (noting the connection between completeness and waiver but doubting that the privileged part will often satisfy the relevance test by qualifying the unprivileged part).

198. See, e.g., United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986) ("Rule 106 was not intended to override every privilege and other exclusionary rule of evidence in the legal armamentarium, so there must be cases where if an excerpt is misleading the only cure is to exclude it rather than to put in other excerpts."). See also Graham, supra note 57, § 106.1, at 55 n.15 ("If the otherwise inadmissible evidence necessary in fairness to explain, modify, qualify, or otherwise shed light upon the evidence being offered is absolutely barred for constitutional or as [sic] other reasons, it is open to the trial judge to exclude the originally proffered evidence under Rule 403.").

199. See McCormick, supra note 142, § 72.1 (distinguishing true privileges from rules excluding evidence of subsequent remedial repairs, offers of compromise, and so forth). For a codification of the notions of waiver and trumping, see Fed. R. Evid. 403 (allowing admission or remainder of statements made in plea bargaining). Cf. Lindsey v. Wabash Ry. Co., 233 N.W. 450 (Neb. 1930) (admitting remainder of events even though it included information about subsequent repairs).

200. As a preliminary matter, one might object that exclusions for prejudice are not asymmetrical; any party may object to improper prejudice toward any party. But while the rules excluding evidence for prejudice, e.g., Fed. R. Evid. 403, do not explicitly limit standing to raise the objection, a trial judge probably is obligated to accept a party's waiver of the risk of prejudice to that party. Add to that the a priori unlikelihood that an objection will be invoked by someone other than the adversely affected party, and one readily concludes that prejudice rules are essentially asymmetrical.


We may break [the danger of unfair prejudice] into two types. First, some evidence may bias the juror[s], effectively distorting the burden of persuasion that they apply; for example, proof that an accused is a native of a nation with which we are on unfriendly terms might encourage some jurors to convict him even though they are not persuaded beyond a reasonable doubt about his guilt. Second, some evidence might be overvalued by the jury; for example, in some cases jurors might be inclined
the regrettable consequence of the admission of evidence before a trier of fact, willing to render a decision contrary to its own rational judgment of the facts under the applicable burden of persuasion. This sort of explanation may depend on a concept of juror irrationality or obstinacy causing less accurate results when certain evidence is presented than when it is not, even if that evidence is epistemically the best available.

Alternatively, prejudice can be seen as improper litigant conduct in appealing to the baser side of the trier of fact, whether or not one predicts that the appeal will be successful in the particular case. In either event, a balancing of competing considerations is clearly necessary in order to decide whether the remainder should be admitted, although the nature of that balancing will depend on the theory of prejudice adopted. Without attempting to develop such a theory here, one can simply conclude that when proponents raise the issue of prejudice associated with the remainder, essentially the same procedure must be employed as in the case of privilege claims in which no waiver is found; trumping is not automatic.

b. The underinclusiveness of asymmetry

Consider now the issue of underinclusiveness. Does the asymmetry test admit too little? In other words, does the Preliminary Test exclude from trumping cases that ought to included? Here the issue focuses on those situations in which the remainder, hypothetically considered, would be inadmissible if offered by the proponent. Obviously, such cases present an

to give some evidence with an appearance of scientific complexity far more weight than it merits.


203. See Nance, Best Evidence, supra note 3, at 291-92. The viability of controlling potential prejudice by the use of limiting or cautionary instructions may also depend on which theory of prejudice one endorses, being easier to justify under the latter theory. See id. at 292-93.

204. Compare In re Mann's Estate, 189 N.W. 991, 996 (Mich. 1922) (affirming trial court’s requirement that all of will be introduced, notwithstanding the potential prejudice arising from the jury’s exposure to the relative wealth of the contestants), with Derrick v. Rock, 236 S.W.2d 726, 728-29 (Ark. 1951) (holding that putative remainder was erroneously admitted because it was irrelevant to the part introduced and contained prejudicial information about insurance), and Jeddeloh v. Hockenhull, 18 N.W.2d 582, 585-89 (Minn. 1945) (same).

Unlike privilege claims, however, if the remainder is admitted over a claim of prejudice, and the prejudicial aspect of the remainder is distinguishable from its completing uses, limiting or cautionary instructions are appropriate. Cf. United States v. Apuzzo, 245 F.2d 416, 420 n.4, 421-22 (2d Cir. 1957) (holding no error in trial court’s admission of remainder containing potentially prejudicial reference to defendant’s prior arrest for similar offense, when trial judge instructed jury not to infer defendant’s guilt from the fact of a prior arrest; affirmance based on waiver by invited response as well as verbal completeness).
obstacle to trumping under a theory that rests on the idea of mandatory presentation by the proponent. How can the proponent be compelled to introduce that which he has no right to introduce? Two general contexts should be distinguished. In each, the question is whether to allow trumping or to leave the opponent to other remedies that may be available. As discussed in the previous section, these remedies include: (1) disallowing the proponent’s evidence on the ground that it is substantially misleading relative to its probative value and (2) invoking curative admissibility to introduce the remainder for the limited purpose of negating the proponent’s evidence. This leads us into especially difficult problems of choosing the optimal institutional response, but we may console ourselves in the resulting ambivalence with the recognition that these situations are very unusual as compared to the completeness problems already discussed.

1. Complementary asymmetric rules. — First, in addition to an asymmetric rule blocking the opponent’s response, the proponent’s introduction of the remainder could be subject to an objection asymmetrically available only to the opponent, for example a privilege or quasi-privilege held by the opponent. Of course, the opponent can waive the latter in choosing to introduce the remainder, thus leaving in place only the asymmetric objection favoring the proponent. Indeed, the opponent is not raising the secondary objection favoring her as to the remainder, so the proponent in fact could have introduced the remainder, and a functional asymmetry is presented. Moreover, the opponent ought not to be in a worse position, and the proponent ought not to be in a better position, than if

205. Recall the reluctance of common-law courts to accept completeness as an argument to allow the proponent to admit additional portions of an utterance that are otherwise inadmissible. See supra note 27 and accompanying text.

206. Certain cases we may set aside. If the remainder is unavailable, then forced presentation obviously would make no sense. It might seem that forced presentation also makes no sense when the remainder is available only to the opponent, but since the proponent probably could have obtained the remainder by discovery and the opponent ultimately makes the remainder available to the tribunal, there is no reason to deny that it can, in principle or in practice, be made available to the proponent for presentation.

207. One might suggest that such situations call for exclusion of the proponent’s incomplete evidence, even though the discovery function is not in play, because of the potential invasion of the opponent’s privilege that admission represents. But there is generally no reason to prohibit the introduction of evidence simply because it will put pressure on the opponent to waive his right to keep out other evidence. See, e.g., Marcus v. United States, 86 F.2d 854, 858 (D.C. Cir. 1936) (holding defendant’s confession, redacted to omit references to other crimes, admissible for the prosecution despite the alleged incompleteness); United States v. Grunewald, 164 F. Supp. 644 (S.D.N.Y. 1958) (holding redacted testimony of defendant from former trial admissible for prosecution, even though remainder would include cross-examination concerning the defendant’s exercise of Fifth Amendment rights which had been held unconstitutional in previous appeal, so long as redaction would not garble the sense of the former testimony). Of course, without recourse to the completeness doctrine, the trial court certainly has the discretion to exclude a proffer of minimal probative value if the primary purpose of the proffer is to create a misleading impression that can only be eliminated by the opponent’s waiving the privilege in question. See Fed. R. Evid. 403.
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no such additional objection, intended solely for the protection of the opponent, were available. So these cases should qualify for trumping, and the Preliminary Test is underinclusive in this regard, unless it presupposes the opponent’s waiver of such additional asymmetric objections. This problem can be rectified by changing the counterfactual to allow trumping if the evidence of the whole utterance would be admissible by the opponent over the same objection by the opponent.

ii(a). Judicial economy rules. — Second, there could be an objection to the remainder equally available to each of the opposing parties as against the other. This problem might also be superimposed on a distinct asymmetric rule favoring the proponent. The symmetric objection would not be trumped even under the expanded test just articulated. But should it be? In two subcategories the answer clearly is in the negative. The first is the symmetrically available objection that the probative value of the remainder, though extant, is so minimal in comparison to the time and effort necessary to introduce and evaluate it that it should be excluded in the interests of judicial economy. Such objections obviously should not be subject to a completeness override. The contractionary dimension of the best evidence principle they instantiate is not rendered inoperative by the introduction of part of an utterance. On the other hand, the unusual probative value of a completing remainder may help to establish that its consideration by the tribunal is not in fact a waste of time under the rule that the proponent has invoked.

ii(b). Third party privileges. — The second subcategory that should be immunized from trumping involves a valid objection to the remainder that renders it inadmissible on behalf of either party as a consequence of the need to avoid prejudice to a third party or violation of a privilege held by a third person. Here the interests of third persons argue against trumping; such persons are not responsible for the misleading proffer, though they may seek to take advantage of the opponent’s incapacity to respond. If the third person does not consent to the introduction of

208. See, e.g., Fed. R. Evid. 403 (allowing exclusion of relevant evidence if probative value substantially outweighed by the danger of waste of time). The resulting exclusion of relevant evidence is not necessarily in conflict with the goal of truth finding. In some cases, exclusion may actually enhance the accuracy of adjudication by shepherding the unavoidably limited resources of the trier of fact.

209. See supra note 33 and accompanying text. As compared to a claim of prejudice to the proponent, the courts have a distinct and more significant interest in monitoring the issue of judicial economy, and the objection cannot therefore be viewed as fully waivable by the proponent or as essentially asymmetrical. Cf. supra note 200.

210. In addition to the usual rules of privilege, some rules protecting witnesses from the admission of impeaching evidence may be put in this category. See, e.g., Fed. R. Evid. 412 (stating federal “rape shield” rule); State v. Miskell, 451 A.2d 383 (N.H. 1982) (interpreting rape shield statute as creating a privilege for complainant). This example also illustrates how the proponent may have standing to raise the objection on behalf of the third person; otherwise, there would be nothing to trump under the Preliminary Test as worded.

211. Of course, if the remainder can be edited so as to achieve the explanatory function
the remainder, the court faces the decision whether to admit the incomplete utterance without the remainder, to admit the remainder for a limited use as between the proponent and opponent, or to exclude the whole of the utterance. The second option, moreover, seems plausible only in cases of potential prejudice to a third party, not those involving the privilege of a third person, since limited use would still entail disclosure of the privileged material. However, the completeness doctrine is implicated if the proponent, though not technically the holder of the privilege, is effectively in control of its exercise. In such a case, an effective asymmetry may exist because in practice the proponent can choose whether to admit the complete verbal event. This contingency also requires recognition in a revised test for trumping.

ii(c). Symmetric accuracy rules. — A third large subcategory of symmetric exclusionary rules poses perhaps the most difficult trumping issues. Suppose evidence of the remainder is blocked by a symmetrical exclusionary rule that is intended to improve accuracy by inducing the presentation of better evidence than that offered, or by eliminating evidence that might be accorded excessive weight, or both. For without jeopardizing the legitimate interests of the third person, then the potential conflict between completeness and the protection of the third party's interest can be avoided. See, e.g., State v. Turecek, 456 N.W.2d 219, 225-26 (Iowa 1990) (affirming admission of taped statement by defendant in child abuse case, when defendant was allowed to testify to related conversation with victim in order to clarify meaning of defendant's apology to victim; remainder of conversation relating to prior abuse of victim by another excluded in accordance with Iowa's rape shield rule).

212. Under the Federal Rules, the decision is at the interface of Rule 403 (discretionary exclusion) with Rule 105 (limited admissibility). See Fed. R. Evid. 105 advisory committee's note (advising that limited admissibility may be rejected in cases of undue prejudice). See, e.g., United States v. Bigelow, 914 F.2d 966, 971-72 (7th Cir.), cert. denied, 111 S. Ct. 1077 (1990) (holding that trial court did not abuse discretion in refusing to admit marginally exculpatory remainder of defendant's statement that would strongly inculpate co-defendant in violation of latter's confrontation rights); United States v. Ford, 771 F.2d 60, 62-64 (2d Cir. 1985) (holding that trial court did not abuse discretion in excluding defendant's proffer of both complete and redacted version of co-conspirator's post-arrest statement offered as a declaration against penal interest; confrontation rights of co-defendant implicated). Also available as a means to avoid prejudice to a co-defendant third party is the option to sever trials. Compare People v. LaBelle, 22 N.E.2d 727 (N.Y. 1946) (holding that trial court erred in not granting motion to sever trials of joint defendants and then allowing prosecution to use redacted statement of one defendant that omitted exculpatory parts), with United States v. Alvarado, 882 F.2d 645, 650-51, 655-56 (2d Cir.), cert. denied, 493 U.S. 1071 (1989) (finding no error in not granting motion to sever trials of joint defendants and then allowing prosecution to use redacted statement of defendant that omitted parts implicating co-defendant but included substance of defendant's exculpatory assertions).

213. If introduction of the original part violated the same third-party privilege, then a mixed problem of curative admissibility and completeness results. The proponent cannot choose to raise the privilege bar without requiring the exclusion of both parts; even if the proponent cannot formally waive a third party's privilege, and even if the proponent is not in effective control of the third party's decision about waiver, the introduction of part of the privileged matter may be treated under an estoppel theory as a waiver of the proponent's right to invoke the privilege. See supra notes 194-96 and accompanying text.

214. These are expansionary and substitutionary best evidence rules, such as the hearsay
example, suppose again that a partial confession is introduced by the testimony of a police officer who heard the defendant's oral statement. This time, the defendant offers as rebuttal the testimony of a witness who says he was told by someone that the defendant also made an exculpatory explanation on the same occasion. Without regard to trumping, this would be excludable "double" hearsay when offered by either party, though the reason for its exclusion when offered by the prosecution is only the second level of hearsay that does not come within the exception for a party admission.215

It is hard to state a general conclusion about whether to allow trumping in such situations. Once again, to reconcile trumping with a forced presentation theory of completeness, one must rely on the not wholly satisfying fact that the opponent would not in fact exercise her right to object to the remainder if it were offered by the proponent. One can make the further, admittedly abstract argument to support trumping generally. Any symmetric exclusionary rule can, in principle, be divided into two asymmetric exclusionary rules, one favoring the proponent and one favoring the opponent. The former is exactly the kind of rule paradigmatically subject to trumping, whereas the latter is waivable by the opponent under the same reasoning applied above to cases involving the existence of a secondary privilege rule favoring the opponent. Why then should it matter that the exclusionary reasons applicable to both parties arise under distinct rules rather than the same rule? Moreover, the purpose of symmetrical exclusionary rules is almost invariably to facilitate accuracy of judgment without unwarranted expense in time or other resources,216 and once again, that is when trumping has its strongest appeal.

But not in every case. Consider the partial confession case hypothesized above. Certainly, there are occasions in which the opponent's responsive testimony is the best available evidence with respect to the content of the remainder; in the stated hypothetical, for example, the prosecution's witness may not have heard the entirety of the confession, and the "someone" who told the defense witness about the remainder.

215. See, e.g., Fed. R. Evid. 805 (excluding hearsay within hearsay unless exceptions apply at each level). (Technically, in the federal scheme admissions of a party opponent are nonhearsay, so the prosecution faces only a single level hearsay problem; but the resulting issue is the same as under the conventional, double hearsay scheme of the common law.) Moreover, the analysis assumes that residual exceptions to the hearsay rule do not apply. See Fed. R. Evid. 803(24), 804(b)(5). The requirement of advance notice of the use of evidence under these rules would militate against their use for completeness purposes in situations where the proponent's introduction of incomplete reports of utterances cannot be anticipated.

216. The only discernable exceptions are rules protecting third persons, rules that apply to both proponent and opponent but which cannot ordinarily be invoked by either of them. This matter is addressed supra notes 210-12 and accompanying text.
might be a since-deceased officer who heard the remainder. This possibility seems to demand an expansion of the test to allow trumping of symmetric rules. The risk of misleading incompleteness dwarfs any hearsay concerns. On the other hand, a different case is presented if the second officer is still available to testify. Then, either the second officer would testify favorably to defendant, in which case the defendant would have called the officer, and there would be no double hearsay problem; or the second officer would deny the qualifying remainder or provide it in a form less favorable to defendant than that offered by the defense witness in the hypothetical, leading the defendant to offer the double hearsay. In the latter case, arguably the defendant's proffer should be rejected: The second officer's testimony is presumptively better evidence of the remainder, as the hearsay rule implies. To this extent, the hearsay rule can be honored without precluding evidence of the remainder, indeed, application of the rule stands to improve the reliability of the evidence of the remainder. But the opposite conclusion should obtain if the second officer's declaration was made under conditions reducing the probative dangers of hearsay, especially if the testimonial report of the remainder is made by an apparently neutral or pro-prosecution witness.

One may conclude that the court should exclude the remainder under a symmetric rule to the extent that the objection raised by the proponent is due to a defect in the opponent's evidence that we can reasonably expect the opponent to be able to cure and the curing of which will likely improve the quality of the evidence of the remainder of the utterance. The limited case law available tends to confirm such a view.

217. Once again, the fact that the proponent can and has presented evidence of part of the utterance inherently reduces the risk of total fabrication by the opponent, since proponent's witness will very likely have knowledge of the circumstances surrounding the alleged remainder. C.f. supra note 68 and accompanying text. The importance of such background information affecting the reliability of hearsay is emphasized by Professor Swift, supra note 129.

218. Of course, one can argue that the assumption of the availability of the second officer renders the prosecution's objection unnecessary, since the second officer may be called by the prosecution if it considers the hearsay account of his report unacceptable. However, this argument is one that applies quite generally to all hearsay from an available but nontestifying declarant. The same reasons for excluding hearsay from such a declarant, whatever they are and however convincing they may be, apply here. (The best evidence principle is the most coherent reason to exclude such hearsay, if exclusion is justifiable at all.) And in this context, deference to those reasons does not present an inescapable conflict with the completeness principle.

219. This ungainly qualification would be unnecessary if the hearsay rule were reformed in the direction of greater conformity to the best evidence principle, as that would certainly allow the opponent to present the hearsay of the second officer's statement as long as the second officer also testifies, see supra note 188, and perhaps even if not, given the officer's identification with the prosecution. See Selig, supra note 129, at 936 (best evidence hearsay rule should admit hearsay statements of a person strongly identified with an opposing party).

220. See, e.g., State v. Ryder, 348 A.2d 1, 3-5 (Me. 1975) (holding remainder evidence rightly excluded as improper in form on account of witness's use of unnecessary opinion; remainder could have been introduced by properly phrased questions). Note that in Ryder the
In this respect, the brief formula suggested by Dean McCormick\(^{221}\) is just backwards: Objections like hearsay and secondary evidence should be applied to the remainder evidence precisely when they are objections only "to form," if by that one means curable objections to the manner of evidencing the remainder as opposed to objections that, if sustained, would preclude the opponent's evidencing the remainder at all. Conversely, an incurable admissibility defect should not stand in the way of eliminating the greater defect of incompleteness, unless of course the former is the unlikely circumstance that introduction of the remainder evidence would cause an inordinate consumption of time or money relative to the significance of the issue in question.

To be sure, the problem with this scheme is that the substitution of the curable defect standard for rules symmetrically excluding the remainder amounts to a significant modification of the hearsay rule and other symmetrical rules in accordance with the best evidence principle. Some may consider this too radical in liberalizing admissibility. But when limited to evidencing a verbal event that has already been broached by the proponent, it is hard to see how this is undesirable.\(^{222}\)

3. The Problem of a Source Limitation Revisited

Notice, however, that the confession hypothetical just discussed is ambiguous as to the testimonial source of the remainder: The witness who is to report the hearsay version of the remainder might or might not be the witness through whom the prosecution offered the original part. As discussed at the end of Part II, nearly all reported trumping cases involve a remainder evidenced by the proponent's chosen source, whether a witness defect of the opponent's response was avoidable by the opponent. Also, the court endorsed earlier decisions, from Maine and from other states, allowing trumping in the more typical contexts. Id. at 4 (citing, inter alia, Storer v. Goren, 18 Me. 174, 176-77 (1841)).

221. See supra note 185 and accompanying text.

222. Among the most pervasive symmetric exclusionary rules are the authentication and identification requirements for tangible evidence. See generally McCormick, supra note 142, § 212, at 7-9 (discussing identification of real evidence), § 218 (discussing authentication of documents). Since authentication of a portion of a document will usually entail authentication of the whole of the same document, the opponent's completeness motion will rarely be impeded by authentication concerns, and the same point applies to identification. Moreover, to the extent that these requirements are interpreted flexibly, in accordance with the best evidence principle, they should only rarely present an occasion for exclusion on account of an incurable defect in the foundation for the remainder. See Dale A. Nance, Conditional Relevance Reinterpreted, 70 B.U. L. Rev. 447, 484-88, 492-97 (1990) (rejecting the "conditional relevance" explanation of authentication and identification requirements and arguing for an excusable preference structure). However, a less flexible interpretation has not been uncommon, and the occasional case in which a problem arises does seem to allow for trumping. See, e.g., McBrayer v. Walker, 50 S.E. 95 (Ga. 1905) (holding that opponent is not required to offer evidence authenticating entries on back of deed introduced by proponent, even though proponent relied only on information on the front).
or document.\textsuperscript{222} If this pattern suggests a rule, then the opponent may introduce a remainder pursuant to the completeness rule, over an otherwise valid objection, only to the extent that the remainder can be elicited from the proponent's witness, or from the complete version of the document only part of which the proponent has introduced. On the other hand, if there is no same-source limitation, as apparently was held in the Williams case, then the opponent is free to use other sources to complete the utterance and still take advantage of the trumping function.\textsuperscript{224} In the earlier discussion, this issue was left unresolved. Can we now give a more definitive answer?

If the "forced presentation" theory of completeness is taken as the starting point, a same-source limitation might seem proper. One way to express the adversarial privilege is that a litigant should generally be free to choose evidential sources, though he need not and should not be free to distort what a given source has to offer the tribunal. After all, the witness's oath, with which we started our discussion, requires only that witnesses tell the whole truth as they know it. That requirement permits a witness to give an incomplete account, as long as the information needed to make it complete is not known by the witness. As to other sources, it is at least plausible that the usual exclusionary rules should apply.

However, one must not confuse the witness's duty with the litigant's duty. Even though a given witness cannot be expected or even encouraged to tell more than he or she knows, the proponent is in a different situation when he has knowledge that the witness's account is incomplete. Thus, while it may be true that the proponent is free to choose his evidential sources, and it may also be true that he should not be free to distort what a given source has to offer the tribunal, it may further be true that the proponent should not be free to use a complete account of what one witness knows (or is willing to reveal) in order to distort the evidence of a verbal utterance by omitting information available from a different source that cannot be introduced by his opponent. So we must look further in order to resolve this issue.

Consider what a same-source limitation means for the typical case in which the opponent's remainder is blocked by the asymmetric party-opponent exception to the hearsay rule. Under such a regime, the opponent can cross-examine the proponent's witness concerning the remainder; if the witness acknowledges the remainder it can be used substantively just as if the proponent had presented the remainder on direct. If, however, the witness denies the utterance of a remainder, that ends the completeness motion as such. Independent evidence of the remainder can still be used, but only for impeachment purposes, or more precisely, only if otherwise admissible. And if the witness denies knowledge of the remainder, but acknowledges the possibility of its utterance (say

\textsuperscript{222} See supra notes 105-07 and accompanying text.
\textsuperscript{224} See supra notes 107-12 and accompanying text.
because the witness did not hear all that the opponent may have said on the occasion), then even impeachment of the witness is barred, at least in theory, since evidence of the remainder is in no way inconsistent with the witness’s truthfulness. Nevertheless, the incompleteness of the witness’s knowledge will at least appear on cross-examination and serve to alert the trier of fact to the dangers of relying on the proponent’s version of the utterance.  

Now this scheme presents some fairly serious difficulties, given what has already been argued. For example, it would mean that a video-taped remainder, like that involved in the Williams case, would not be substantively admissible, even though the tape is undeniably superior evidence of the defendant’s confession than the officer’s testimonial account introduced by the prosecution. Yet paradoxically, if the videotape were no longer available to be introduced, and the proponent’s witness were aware of its contents, the opponent could admit substantively the witness’s account of the remainder derived entirely from the unavailable tape. This follows from the claim of the previous section that an incurable symmetric objection to the remainder is subject to trumping combined with the fact that in this case the trumping would come from the same source. But how can it be that an available video-tape is substantively inadmissible, while secondary evidence of the contents of an unavailable video-tape is substantively admissible? This kind of inconsistency can be avoided only by retreating to a scheme in which symmetric exclusionary rules are not subject to trumping at all, even if the defect that they address is incurable.

A more fundamental, if more abstract problem is that a same-source limitation has the effect of turning completeness into a kind of “voucher” rule, whereby the proponent vouches for the particular evidentiary source. To be sure, this is not the same as the traditional notion that a proponent is estopped from controverting the testimony of his own witness, a restriction which has been rightly rejected in modern evidence law.

225. A similar regime would apply to documentary proof. If the proponent introduces part of a documentary record of the opponent’s admission, the opponent can cross-examine the sponsoring witness with regard to other parts, or otherwise introduce the remainder that will have been subject to discovery. If the document relied on by the proponent reveals a qualifying part, it may be introduced and used substantively just as if the proponent had presented the remainder together with the original proffer. If, however, no qualifying remainder appears from the document from which the proponent has drawn his proffer, then the opponent will be unable to use the completeness motion to introduce independent testimonial or documentary evidence of a claimed remainder. Such evidence will be limited to impeachment uses.

226. One may be accustomed to this perversity in the form of the routine ruling that the testimony is not excludable in favor of the tape by virtue of a “best evidence” objection. See Nance, Best Evidence, supra note 3, at 227-29. However, the issue here is not whether to exclude the testimony, but whether to admit the tape as well.

227. See generally 3A John H. Wigmore, Evidence in Trials at Common Law §§ 896-99 (Chadbourn rev. 1970). The application of this rejection of voucher to evidence presented by
Nonetheless, a same-source limitation seems to rely on the idea that the proponent must at least vouch for the admissibility of the remainder, precisely because he has introduced a part of what that source has to offer the tribunal. This source-based voucher draws on the same discredited moral intuition as the traditional voucher rule. Moreover, if the theoretical account of completeness offered here is correct, it arises from the demand for the best available evidence, applied within an adversarial structure of rules that incorporates that idea as a heavily weighted, but not exclusive principle. Neither a same-source restriction nor its implicit voucher concept speaks to such a theory of completeness.

On the other hand, different problems must be addressed if trumping is not confined to what can be elicited from the proponent’s source. The most important issue arises from the fact that, when the remainder is evidenced from an independent source, there is a much greater chance that the proponent will plausibly dispute the utterance of the putative remainder or claim that any such remainder was different from that asserted by the opponent. Of course, the fact that one side disputes events evidenced by the other is ordinarily no cause for alarm; but in the context of a completeness motion, the question is whether forced presentation is theoretically appropriate. It is hard to infer that the proponent should have presented evidence of a remainder that the proponent believes was not uttered.

This suggests that before allowing trumping, especially from a distinct evidential source, the trial court should make a preliminary finding that the remainder was uttered as claimed. More precisely, upon the proponent’s challenge to either the occurrence or the content of the remainder utterance, the court should make a conditional finding that if the way of completeness is mentioned supra note 58.

228. When trumping involves a remainder elicited from the same source, the proponent is hard pressed to maintain that the remainder was not uttered as the opponent claims. In the case of testimonial evidence, the proponent must argue that his witness is telling the truth about part of the utterance but a falsehood as to the remainder. The possibility is somewhat more realistic in the case of documentary evidence, since the proponent can claim, for example, that only part of a document is a forgery. Interestingly, in the only such cases encountered in this research, trumping of the otherwise applicable authentication requirement was endorsed. See McBrayer v. Walker, 50 S.E.2d 95 (Ga. 1905); see also Dagleish v. Dodd, 172 Eng. Rep. 955 (KB. 1832) (admitting for defendant writing by plaintiff’s insolvent on back of defendant’s letter already admitted for plaintiff). However, these cases also rely, more or less explicitly, on a distinct and understandable exception to the requirement of authentication, one that does not depend upon the completeness rule as such, namely that “a person’s possession of documents purporting to be made by himself and, particularly, of documents used and acted on by him in the ordinary conduct of his business, is sufficient evidence of their genuineness to justify their reception.” 7 Wigmore, supra note 10, § 2160, at 777 (emphasis omitted). Even in the Williams case, where the court applied the completeness rule to mandate the admission of evidence of the remainder from a distinct source, that source was a video-taped version of the defendant’s confession created and possessed exclusively by the police and prosecution. Obviously, the proponent was in no position to contest the utterance of the remainder.
original part was uttered as the proponent claims, then the remainder was uttered as the opponent claims.\(^{229}\) If this conditional fact is established, one may reasonably infer that the proponent should have revealed the evidence of the remainder to the trier of fact. If not, the opponent is subject to the same regime that would apply if there were a same-source trumping limitation. This, moreover, is not simply a matter of conditional relevance, but rather a matter of determining the applicability of the supra-relevance exclusionary rule, usually the hearsay rule, the trumping of which is at issue.\(^{228}\) Consequently, under conventional practice, the required preliminary finding should be made by a preponderance of the evidence, just as would a factual issue conditioning the application of an exception to such a rule.\(^{231}\)

The difference between these two completeness regimes lies in the degree to which they allow expression of the reformatory power of the best evidence principle in terms of liberalizing the admissibility of evidence. This power is given greater sway if a same-source limitation is not imposed. Granted that one should not find in the completeness doctrine authority

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\(^{229}\) A conditional form reflects the fact that the opponent may well deny the asserted occurrence of the utterance as a whole or the asserted identity of its speaker or author. See supra notes 55-58 and accompanying text. While it might be theoretically more precise to pose the question of whether the proponent was aware of the utterance of the remainder, that awareness will depend on the evidence, and the evidence might only come to the proponent’s attention at trial. Thus, the preliminary question is more practically posed in terms of what the evidence shows than in terms of what the proponent knew or believed before trial.

\(^{230}\) Among other implications, this means that the trial court is not bound by exclusionary rules, other than privileges, in making its preliminary determination. See Mueller & Kirkpatrick, supra note 183, § 1.12, at 51-53. Note that to the extent an authentication or identification requirement is the objection to the remainder at issue, the opponent can gain admission by either (a) producing sufficient admissible evidence to support a finding that the remainder is what the opponent claims it to be (i.e., the ordinary route in which trumping is not employed, see id. § 9.2), or (b) producing sufficient evidence that the trial judge finds conditionally that the remainder is what the opponent conditionally claims it to be (i.e., the route in which trumping is employed).

\(^{231}\) See id. § 1.12, at 50-51. Of course, there are several other candidates for a requirement, including: (1) a finding that the proponent concedes the utterance as claimed; (2) a finding beyond a reasonable doubt that the remainder was uttered as claimed; (3) a finding that the evidence would support a finding that the remainder was uttered as claimed; or (4) a finding that there is some significant evidence that the remainder was uttered as claimed (i.e., that it is not beyond reasonable doubt that it was not uttered as claimed). In each case, the finding would be conditional, in the sense described in text. Standard (1) is obviously too demanding on the opponent, since it would allow the proponent to block any trumping. Arguably, standard (4) is insufficiently demanding under a forced presentation theory of completeness, since it would mean the proponent is obligated to present any significant evidence of a remainder utterance not otherwise admissible for the opponent, which by definition will be true under a completeness motion that survives the relevance test and raises the issue of trumping. Standard (3) is plausible, since the trier of fact is likely to ignore a remainder that does not satisfy such a test, but it is nonetheless too weak a requirement in that it places a theoretical moral burden on the proponent to present evidence he disbelieves just because he might have believed it. And standard (2), also plausible, makes the opposite mistake.
to reform the whole of admissibility law, two factors favor the more expansive view of trumping. First, the vast majority of the troublesome cases, involving symmetric exclusionary rules premised on improving accuracy, will concern the hearsay rule, and there is reason to believe that hearsay is not as great a danger to accuracy as once thought.\textsuperscript{252} Second, a same-source limitation pushes one to limit trumping too narrowly to cases of formal asymmetry, while the concerns that are introduced by the trumping of symmetric rules are dramatically reduced by requiring a preliminary finding in any case where the utterance of the remainder is disputed.\textsuperscript{253} On balance, the Williams case is correct in its apparent conclusion that the better choice is not to impose a same-source limitation on trumping, at least when the utterance of the remainder as claimed by the opponent is conditionally probable.\textsuperscript{254}

4. A Revised Test for Trumping

We thus obtain the following revised version of the test for determining when trumping should occur, assuming once again that the proffered remainder passes the relevance test for wholeness.

\textbf{REVISED TEST:} Under the principle of completeness, evidence of the remainder should be admissible on demand of the opponent, for the same purposes as to which the original proffer is admissible, over an otherwise valid objection by the proponent if the court finds by a preponderance of the evidence that the remainder was uttered as the opponent claims, assuming for this purpose that the original part was uttered as the proponent claims, unless:

(a) the objection to the remainder is based on a defect that is reasonably curable by the opponent, the curing of which will

\textsuperscript{232} See, e.g., Peter Meine et al., Juror Decision Making and the Evaluation of Hearsay Evidence, 76 Minn. L. Rev. 683 (1992) (reporting results of empirical study to the effect that jurors do not overvalue hearsay evidence). Note also that, according to the analysis of the previous subsection, the problem will only arise when the hearsay objection represents an incurable defect, since a curable defect objection can be asserted despite the completeness argument. Theories of hearsay that emphasize the conservation of the trier's cognitive resources do not lead to a different result, since remainder evidence that is extraordinarily weak need not be admitted under the analysis of the previous subsections. See supra notes 207-08 and accompanying text.

\textsuperscript{233} For example, in the double hearsay confession hypothetical of the previous subsection, if the trial court's finding is not in favor of the opponent's (perhaps conditional) claim that the remainder was uttered, then trumping is not allowed, but the evidence of the remainder may nonetheless be admissible for nonhearsay purposes such as impeachment, which do not require such a finding.

\textsuperscript{234} A complete analysis of this issue would require consideration of the problem of "nonverbal completeness," that is, the possibility of a trumping function with a wholeness criterion that is not even limited to verbal events, but rather demands complete evidence of the often underlying nonverbal events. Unfortunately, that examination must be postponed until another occasion, so the conclusions reached here with regard to a source limitation must be considered subject to revision.
improve the quality of the evidence of the remainder, or (b) the public interest in accuracy served by admitting the whole of the utterance in question is clearly outweighed either by the proponent's interest in excluding the remainder under a rule of prejudice or an (unwaived) rule of privilege or quasi-privilege or by the public's interest in reasonably efficient trials, or (c) admission would violate a right held by a third person, not lawfully waived by the proponent, under rules of privilege or prejudice.

Of course, if the remainder falls into one of the three exceptional categories of the Revised Test, it remains open to the trial court, in an appropriate case, to exclude the original part as excessively misleading or even to invoke the doctrine of curative admissibility to admit the remainder for the limited purpose of offsetting the probative effect of the original part. The former response, excluding the incomplete proffer, ought not be available with regard to remainders falling into the first exception since by hypothesis the opponent has the ability to redress the incompleteness. And the latter response, invoking curative admission, will almost certainly be precluded when the reason for the inadmissibility of the remainder is an unwaived privilege rule. However, if the privilege is one protecting the proponent, the likelihood that the proponent's rights under such a rule would not be waived is exceedingly small.

Note that we started with a Preliminary Test based on asymmetry, but we have concluded with a Revised Test that is not explicitly dependent on that concept. This is a consequence of the shift from formal to functional asymmetry and of the emphasis on accurate adjudication as the principal goal underlying our sense of unfairness in the situations that call for trumping. Nevertheless, the vast majority of trumping cases have occurred in the context of formal asymmetry, where the demands of fairness and accuracy are most clearly complementary.

IV. CONCLUSION

The adversarial common law has always contained norms that serve to assure the presentation of the best reasonably available evidence on a litigated issue. That is not to say that the courts have invariably achieved such a goal, but only that serious pressure is applied to move things in that direction. One such norm has been the doctrine of completeness, a general inclusionary doctrine judicially crafted to forestall several mechanisms of truth-defeating unfairness. In its early development, before the advent of modern discovery rules, the most significant of these was the differential availability of the evidence to the parties. Under modern procedure, most significant is the existence of exclusionary rules that are

235. See supra Part III.B.
236. See supra note 155 and accompanying text.
237. See supra notes 194-95 and accompanying text.
formally or functionally asymmetric when applied to a given item of evidence. Of secondary importance is the ability to control the timing of the presentation of the remainder in order to facilitate its understanding by the trier of fact.

Recent decades have seen an unfortunate tendency to deemphasize this important common-law doctrine. The most conspicuous evidence of this tendency is the seemingly narrow version of the doctrine that emerged out of the federal codification, quoted in the Introduction to this Article:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement that ought in fairness to be considered contemporaneously with it.239

Aside from the lack of significant guidance inherent in the vague "fairness" standard, this version suggests that the doctrine of completeness applies only to "writings or recorded statements," thus apparently leaving untouched the enormous category of incomplete testimonial recountings of conversations, statements, or documentary contents. Stated in a form that is easily recognized as the modern counterpart of what has here been called the interruption rule, it also risks a narrow interpretation as concerned only with the timing function. Unfortunately, these narrowing connotations are endorsed by a substantial body of poorly reasoned judicial dicta as well as supporting academic commentary.240 It is not surprising,

238. Fed. R. Evid. 106. Earlier evidence is the fact that the common-law doctrine does not appear at all in the American Law Institute's Model Code, except in connection with the more narrowly applicable doctrine of waiver of privilege. See Model Code of Evidence Rule 231 (1942).

239. See, e.g., United States v. Harvey, 959 F.2d 1371 (7th Cir. 1992) (holding that trial court did not err in excluding certain exculpatory hearsay statements made by defendant, where they were not within Rule 106 because they were neither relevant to qualify any statements elicited on direct examination of the witness nor part of a writing); United States v. Terry, 702 F.2d 299, 314 (2d Cir.), cert. denied, 461 U.S. 951 (1983) (stating in dictum that "Rule 106 does not render admissible evidence that is otherwise admissible," but holding remainder of oral statements in question admissible under state of mind exception to hearsay rule); United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982) (holding that trial court erred in admitting portions of document containing hearsay upon prosecution's request after defendant had introduced portions relevant to testimony of witness and upon which witness relied to refresh memory, where portions offered by prosecution irrelevant to witness's testimony; dictum that Rule 106 governs only order of proof); United States v. Burreson, 643 F.2d 1344 (9th Cir.), cert. denied, 454 U.S. 830 (1981) (holding that the trial court did not abuse discretion in denying admission of irrelevant, hearsay remainder). For similar academic commentary, see Graham, supra note 57, § 106.1; Stephen A. Saltzburg & Michael M. Martin, Federal Rules of Evidence Manual 87 (5th ed. 1990); 1 Weinstein & Berger, supra note 126, ¶ 106[01], at 13, and ¶ 106[02] (noting common-law antecedents but then simply asserting that Rule 106 "merely regulates a detail of the order of proof"). To be sure, there are competing opinions more in line with the common-law understanding. See, e.g., United States v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986) (holding that completeness trumps hearsay objection to evidence of remainder of defendant's out-of-court declaration); Louisell & Mueller, supra note 144, § 49.
therefore, that the doctrine receives little or no attention in many modern textbooks on evidence law, a fact which no doubt contributes to a lack of understanding and appreciation of the doctrine in the practicing bar.240

The present study has begun the process of redressing this unfortunate state of affairs. In later work, I will address the question of whether the Federal Rules of Evidence are compatible with the understanding of the completeness doctrine developed here. I will also consider what amendatory language would more readily achieve the laudable functions that evolved at common law. If the indicated narrowing constructions are in fact placed on the Rules, such amendment may be necessary in order to avoid injustice.