Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence

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INTRODUCTION

Perhaps the Federal Rules of Evidence are harder to interpret than other statutes. The difficulty may be that evidence law gives wide discretion to trial courts,[1] with the result that the Rules of Evidence are more a draft of general principles than a code like other statutes.[2] Perhaps they are harder to interpret because evidence codification exposed many conceptual difficulties that common law adjudication obscured.[3] Perhaps interpretation is difficult simply because the Federal Rules of Evidence are not well drafted.[4] Or, perhaps the problem is that the Supreme Court has tried to interpret these Rules as it would any legislation[5] despite the fact that the Federal Rules of Evidence are not a typical statute.[6]

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1. *See* Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 289 (1993) ("It is imperative that any body of Evidence law accord the trial judge a significant measure of discretion in applying the Rules. No matter how hard they try, the drafters of any evidence code can never anticipate all the variations of the record that a trial judge will encounter."); David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 956-57 (1990) ("[R]ulemakers have recognized the unique position of the trial judge, who observes the context in which particular evidentiary issues arise and who is therefore in the best position to weigh the potential benefits and harms accompanying the admission of particular evidence."); *see also* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 457 (1989) ("[T]he Federal Rules of Evidence are intended to provide some guidance to trial courts and litigants, but cannot be consulted for the definitive answers to many questions."); *cf.* Victor J. Gold, *Do the Federal Rules of Evidence Matter?*, 25 LOY. L.A. L. REV. 909, 919 (1992) ("[Courts have] recoguiz[ed] discretion where it does not exist or expand[ed] discretion beyond the scope granted . . . .").

2. *See* Gold, *supra* note 1, at 921 ("[T]he Rules . . . often appear closer to a draft of general principles than a finished set of rules."); Mengler, *supra* note 1, at 427 (noting the drafters of the Federal Rules of Evidence "chose the form of a general code").

3. *See* Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 314 (1990) ("Codification . . . has exposed a host of conceptual defects and systematic incoherencies that had been concealed by the common law method of adjudication.").

4. *See id.* at 294 n.7 ("[T]he Federal Rules [of Evidence] are poorly drafted—probably because of the haste with which they were put together rather than any lack of skill on the part of the drafters."); *see also* Gold, *supra* note 1, at 920.

> The Rules are frequently confusing, utilizing undefined terms where meaning is not clear from context. Further, rather than providing a clear rule regulating admissibility, the Rules repeatedly make reference to discretion and the weighing of probative value against prejudicial impact. As with the terms themselves, the manner in which they might be balanced is left undefined. This virtually invites the judiciary to assume an undisciplined, ad hoc approach to applying the Rules.

Id.

5. *See* Andrew E. Taslitz, Daubert's *Guide to the Federal Rules of Evidence: A Not-So-Plain-Meaning Jurisprudence*, 32 HARV. J. ON LEGIS. 3, 4 (1995) ("[T]he Supreme Court treats the Rules like any other statute . . . .").

6. *See* Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1307 (1992).

> [T]he Federal Rules of Evidence have very little in common with a typical statute. Most fundamentally, the Federal Rules of Evidence originated in, and were designed by, the judicial branch and not the legislative branch. In addition, the role of Congress in the process that generated the Federal Rules of Evidence was largely passive. Congress' primary function was to enact into law the will and intent of the Supreme Court and its Advisory Committee. Moreover, the judicial branch designed the Federal Rules of Evidence to operate as guidance for the exercise of discretion within the federal judiciary, and consequently, the Rules' intended function is very much unlike that of most statutes.

Id.; *cf.* Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1741 (1995).

Whatever the cause, the Supreme Court's decisions interpreting the Federal Rules of Evidence certainly have not been satisfying. Earlier cases indicated that "the plain language of the Rules . . . controls outcomes without regard to policy, history, practical operation of the law of evidence, or new conditions."[7] If consistently applied, this

> standard will affect so many evidentiary practices that the entire evidentiary landscape will change. Inevitably, . . . the plain-meaning standard will produce worse evidence law by freezing evidence into a literalistic mold, by eliminating its dynamism, and by mandating results without any attempt to satisfy the policy goals of evidence law.[8]

Recent evidence cases, however, cast doubt on the primacy of this textualist approach[9] or show its limitations, primarily because the approach cannot decide many evidentiary disputes.[10] As we shall see, the Court has truly applied the plain-meaning standard in only one of its recent evidence decisions. In the rest, while it sometimes has paid lip service to plain meaning, the Court actually used other methodologies to decide the evidentiary disputes.[11]

> The bottom line is that any approach to interpreting the Federal Rules of Evidence will have to confront the problem that while they are rules of procedure, they are also statutes passed by Congress and signed by the President. The rules of evidence are indeed statutes, but they are special statutes.

Id.

7. Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 745 (1990).

8. *Id.* at 786.

9. "Textualism endorses constrained judicial decision based on an interpretation of the language and structure of the text and basically rejects reference to extra-textual evidence such as legislative history." George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259, 259 n.3 (1995).

10. Similarly, Taylor notes:

> To the extent that . . . the meaning of a text is in fact tested and potentially transformed during the process of application, this transformation poses a significant challenge to the textualist [approach]. If applying statutory language in new cases extends and changes the statute's meaning, then the meaning is not provided conclusively by the statutory language, and a court's role cannot be restricted to mere explication of previously ascertained meaning.

Id. at 260.

11. *See* Taslitz, *supra* note 5, at 5 ("The Court selectively gives primacy—but not sole control—to a plain-meaning approach, sometimes believing it wise to give lip service to such an approach even when it is obvious that the claim of plain meaning is nonsense."); *see also* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 866 (1992) ("Despite the Court's rhetoric and its affinity for plain meaning, it has not adopted a monolithic approach . . . ."); Imwinkelried, *supra* note 1, at 270-71 ("[The] Court has embraced a . . . moderate textualist [approach to the Rules where] legislative history . . . is only a secondary interpretive aid of far less importance and entitled to much less weight than the apparent plain meaning of the statutory text." (footnotes omitted)).

The recent cases, however, also undercut other rationales for the Court's previous outcomes. For example, these earlier evidence decisions consistently found for the prosecution. They also consistently upheld the admission of more evidence, a policy the Court may have favored.

> If the Supreme Court's reasoning is not taken seriously there are other plausible explanations for the Court's Federal Rules of Evidence decisions. For example, one could cynically conclude that the controlling force of the major plain-meaning decisions is simply that in each case the Government won and a criminal defendant lost. More neutrally, one might note that each recent Supreme Court interpretation of the Federal Rules of Evidence allows the wider admission of evidence, a policy that the Court may favor. In spite of the Court's explanations for its outcomes, plain meaning might not control the results; instead the standard may have been selected to justify outcomes that were reached for other reasons.

Jonakait, *supra* note 7, at 762 n.80; *cf.* Taslitz, *supra* note 5, at 16 (explaining that the plain-meaning approach to the Federal Rules of Evidence may be used when it aids the prosecution and resisted when it does not aid the prosecution). The recent evidence cases, as we shall see, however, have consistently favored neither the prosecution nor the wider admission of evidence.

The plain-meaning standard itself would not consistently support the prosecution or uniformly result in the wider admission of evidence. *See* Jonakait, *supra* note 7, at 762, 782 (arguing that the plain-meaning approach should lead to strict enforcement of notice provision of residual hearsay exceptions requiring exclusion of evidence and will not consistently favor one party).

These developments raise fundamental questions for future interpretations of the Federal Rules of Evidence. When does plain meaning control? When can it be disregarded? How should the Rules be interpreted when plain meaning does not give an answer? Indced, an examination of the recent cases raises the question: Is there truly a methodology being used to decide evidentiary disputes, or are there just ad hoc determinations?

Such questions would be important in any statutory area,[12] but they have special importance to evidence law. The Supreme Court will speak directly to only a fraction of the evidence decisions a trial court must make. This is so not only because the Rules grant much discretion to the trial court, but also because the trial court's rulings often depend upon the distinctive facts of each case. Each evidence decision tends to have unique qualities, and appellate courts generally review them under an abuse of discretion standard.[13] Trial courts, then, seldom confront evidentiary disputes where appellate law gives a definitive answer. The result may be that we do not have an evidence law, but only the evidence law of individual trial judges. The Supreme Court's job in such a regime, it would seem, is to do more than sensibly decide the evidence disputes it chooses to hear. It should also indicate to trial courts the methodologies and general interpretive prineiples they should use for the many singular evidence issues they will confront. For there to be an evidence law, judges must use the same tools to decide the disputes.

The Supreme Court's recent evidence decisions do not serve evidence law well. Few of the cases it has chosen to hear have been of much intrinsic importance to trials generally. In deciding these cases, the Court has not used one methodology, but several, and has not indicated which methodology should be generalized to other evidentiary disputes. Important issues have consistently gone unaddressed in these recent opinions.[14] Although it often nods at a textualist approach, the Court does not treat the Federal Rules of Evidence as a text. Instead, the Court interprets them too often as if the Rules were only a collection of isolated provisions, as if they were only a compilation of segregated texts.

With this approach, a Supreme Court evidence decision teaches little beyond the actual dispute resolved. Trial courts cannot find general principles to apply to the many new evidence conflicts they must routinely resolve.

In this Article, I will first examine the recent evidence cases to see how the Court has given meaningful methodological guidance on handling other evidentiary disputes. I will then explore some evidentiary issues raised, but not resolved, by the opinions to see how the Court can better serve evidence law in the future. I contend that if a code of evidence is to have meaning, its interpretation must be text centered. A text-centered approach requires that the Federal Rules of Evidence be treated as one text when possible, not as a collection of separate texts, and thus a court must examine how the interpretation of one provision interconnects with other provisions. This exploration begins with a recent case

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12. *Cf.* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 120 (1982) ("We are dealing with the slow adaptation of our whole legal-political system to a major change: the preponderance of statutory law."); James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 1 (1994) ("Over the past decade the debate over the appropriate method for interpreting legislative commands has intensified . . . .").

13. One court applying an abuse of discretion standard to an evidentiary ruling stated that those appealing evidence issues "are like rich men who wish to enter the Kingdom; their prospects compare with those of camels who wish to pass through the eye of a needle." United States v. Glecier, 923 F.2d 496, 503 (7th Cir.), *cert. denied*, 502 U.S. 810 (1991).

14. *Cf.* Scallen, *supra* note 6, at 1770 ("The Court appeared to be hiding behind the 'plain meaning' of the Rule instead of addressing the serious substantive problems with the application of the Rule . . . .").

that was a straightforward application of the plain-meaning doctrine, *United States v. Salerno*.[15]

I. *UNITED STATES V. SALERNO*

The U.S. Attorney, investigating a bid-rigging scheme in the Manhattan concrete construction industry, called before the grand jury two principals of a concrete construction corporation.[16] While others had identified the pair as part of the conspiracy, the principals, testifying before the grand jury under a grant of immunity, denied knowledge of the bid-rigging.

At trial, the defendants sought to call these two grand jury witnesses to present their exculpatory information. The prosecutor, however, refused to give them immunity for their trial testimony, and neither would testify, claiming a privilege against self-incrimination. The trial court then denied a defense motion to admit the grand jury testimony as former testimony, concluding that the "similar motive" requirement of that hearsay exception had not been satisfied.[17]

On appeal, the Second Circuit concluded that it did not have to decide whether the grand jury testimony was admissible as former testimony. Regardless of whether the hearsay met the requisites of Federal Rule of Evidence 804(b)(1), it was admissible, the appellate court held, because the witnesses were available to the proseeution through a grant of immunity. The court noted that a party cannot introduce evidence under Rule 804, which requires the unavailability of the declarant, if that party has caused the declarant to be unavailable.

> In such a case, the witness is not "unavailable" to the proponent, who is thereby prevented from invoking rnle 804(a). That same principle of adversarial fairness should prevent the *opponent* of a hearsay declaration from invoking the protections of rule 804(b)(1) when the declarant, although unavailablc to the *proponent*, is available to the *opponent* of the declaration.[18]

Furthermore, the similar motive requirement did not have to be satisfied because its purposes were fulfilled.

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15. 505 U.S. 317 (1992).

16. Although the issues that made it to the Supreme Court concerned the bid-rigging scheme, the scope of the prosecution's case was in reality much broader.

> *United States v. Salerno* aimed to fell all of New York City's Cosa Nostra leaders with a single stroke. The indictment charged the bosses of New York City's Cosa Nostra crime families and several of their subordinates with constituting and operating a "commission" that served as a board of directors and supreme court for the mob. . . . In a real sense, the case was about whether it is a crime, meriting life imprisonment, to be a Cosa Nostra boss.

JAMES B. JACOBS, BUSTING THE MOB: UNITED STATES V. COSA NOSTRA 79 (1994). Among the predicate acts alleged under the RICO indictment was the bid-rigging scheme.

17. If the declarant is unavailable, Federal Rule of Evidence 804(b)(1) excepts from the hearsay rule

> [t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

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

The District Court opinion was unpublished. The Court of Appeals stated, "[The District Judge] reasoned that the government's motive to examine a grand jury witness is 'far different from the motive of a prosecutor in conducting the trial': thus, she held, the grand jury minutes were inadmissible under rule 804(b)(1)." United States v. Salerno, 937 F.2d 797, 804 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992).

18. *Salerno*, 937 F.2d at 805 (emphasis in original).

> The "similar motive" requirement of rule 804(b)(1) protects the party to whom the witness is "unavailable" in order to accord that party some degree of adversarial fairness, thereby assuring that the earlier treatment of the witness is the rough equivalent of what the party against whom the statement is offered would do at trial if the witness were available to be examined by that party. When the declarant is unavailable to the party against whom the testimony is being offered, the "similar motive" requirement not only ensures that the right of cross-examination is preserved, but also ensures that the party against whom the testimony is offered has been afforded a fair chance to seek the truth, and is not blindsided at trial by the hearsay testimony.
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> . . . But since these witnesses were available to the government at trial through a grant of immunity, the government's motive in examining the witnesses at the grand jury was irrelevant. When the reason for the requirement evaporates, so does the requirement.[19]

The Supreme Court, however, in an opinion by Justice Thomas, did not examine whether fairness to the defendants required admission of the hearsay or whether the policies of the similar motive requirement, the former testimony exception,[20] or the hearsay rule generally would have been satisfied by admitting the grand jury testimony. Instead, the Court applied the plain-meaning doctrine, and only had to analyze the literal language.

> When Congress enacted the prohibition against admission of hearsay in Rule 802, it placed 24 exceptions in Rule 803 and 5 additional exceptions in Rule 804. Congress thus presumably made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted.[21]

Consequently, every element required by the words of the former testimony exception must be satisfied for evidence to be admitted under Rule 804(b)(1). This language includes the similar motive restriction, and the grand jury testimony was not admissible simply because the prosecution could have made the declarants available with an immunity grant. The defendants were only entitled to introduce the grand jury testimony if the government had a similar motive to develop that testimony at the prior proceeding as it would have had at trial. "Nothing in the language of Rule 804(b)(1) suggests that a court may admit former testimony absent satisfaction of each of the Rule's elements. . . . The respondents, as a result, had no right to introduce DeMatteis and Bruno's former testimony under Rule 804(b)(1) without showing a 'similar motive.'"[22]

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19. *Id.* at 806 (citations omitted). The court also indicated that it believed the admission of the grand jury testimony would further the policies of Brady v. Maryland, 373 U.S. 83 (1963):

> It is indeed troubling to us that after identifying Bruno and DeMatteis as exculpatory witnesses under *Brady*, the government then sought to make it impossible for the defendants to obtain the exculpating testimony. . . . To say that the government satisfied its obligation under *Brady* by informing the defendants of the existence of favorable evidence, while simultaneously ensuring that the defendants could neither obtain nor use the evidence, would be nothing more than a semantic somersault. However, we rest our decision on our interpretation and application of Fed.R.Evid. 804(b)(1), and not *Brady v. Maryland*, keeping in mind the time-honored rule that we should not reach constitutional issues unless absolutely necessary.

Salerno, 937 F.2d at 807 (citation omitted).

20. *See* Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 466 (1986) ("[F]ormer testimony is admitted because the jury can evaluate it nearly as well as in-court testimony." (footnote omitted)).

21. *Salerno*, 505 U.S. at 322.

22. *Id.* at 321. While Justice Stevens dissented, he did not disagree with this point. Instead, he concluded that the grand jury testimony should have been admitted because the prosecution did have a similar motive. *Id.* at 326 (Stevens, J., dissenting).

Salerno reached its result by a straightforward application of the plain-meaning doctrine. The text was clear, and it controlled. The Court enforced the words even though evidence was excluded, possibly increasing the likelihood of an inaccurate verdict.[23]

The remainder of recent Supreme Court cases soon undermined *Salerno*'s reaffirmation of absolute literalism, however, because plain meaning does not control any of them. *Salerno* was deficient in other ways for those trying to understand how to interpret the Federal Rules of Evidence. The issue actually at stake—the admission of grand jury testimony by an accused—is not of broad interest. It is an unusual occurrence, and lower courts hardly ever needed guidance on it.[24]

More broadly, however, the case is about former testimony, and former testimony issues do arise frequently. It teaches that a similar motive cannot be taken for granted, but that lesson seems at odds, as we shall see,[25] with other Supreme Court cases concerning former testimony. Since *Salerno* did not address this tension, lower courts can only guess at its significance.

Salerno also concerns the hearsay exceptions generally. *Salerno* teaches that the requirements of those exceptions must be scrupulously honored. The importance of this lesson, however, is obscure. Its true importance depends upon the interpretation of the residual exceptions.[26] If the grand jury testimony in *Salerno* was admissible under a residual exception, then the rigid enforcement of the former testimony boundaries means little, and this is true for all the hearsay exceptions. The significance of what seems to be *Salerno*'s clear lesson about the importance of the requirements in the hearsay exceptions

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23. In this instance, the normal reasons for banning hearsay did not exist. Courts exclude hearsay because they believe juries cannot properly evaluate it. *See* Jonakait, *supra* note 20, at 434.

> The rule against hearsay is inextricably linked with the belief that cross-examination can demonstrate the debilities of an assertion. When an assertion is hearsay, it is not subject to contemporaneous cross-examination in front of the trier of fact. Hearsay is barred because the trier is unable to properly evaluate the hearsay assertions.

Id.

No one suggested in *Salerno*, however, that even if the prosecution had not had the similar motive at the grand jury, the trial jurors could not have properly evaluated the grand jury testimony if they had heard it. Surely the jury could have understood the government's stated reasons for not challenging the testimony in the grand jury. *See, e.g.*, United States v. DiNapoli, 8 F.3d 909, 911 (2d Cir. 1993) (en banc):

> The prosecutor, obviously skeptical of the denials, pressed DeMatteis with a few questions in the nature of cross-examination. However, in order not to reveal the identity of then undisclosed cooperating witnesses or the existence of then undisclosed wiretapped conversations that refuted DeMatteis's denials, the prosecutor refrained from confronting him with the substance of such evidence.

Id.

The information that would have been used to challenge the grand jury witnesses could have been presented at trial. Even so, the jury never had the chance to assess this information because the grand jury testimony was excluded from the trial. The jury convicted without hearing all the relevant, nonprejudicial exculpatory information.

24. Perhaps *Salerno* had intrinsic significance because it concerned important organized crime figures which may have colored the results. *See* JACOBS, *supra* note 16, at 22.

> The appellate courts are loathe to reverse a conviction resulting from many months of trial against a defendant whom [sic] "everybody knows" is a major organized-crime figure. Even when they are obviously troubled by such things as megatrials and status crimes, the appellate judges have upheld organized-crime convictions, while expressing their "doubts" and "concerns."
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> Civil libertarians have rarely chosen organized-crime cases to challenge government over-reaching and abuse of authority. . . . Perhaps there is an implicit assumption that the rules are different in organized-crime cases. Perhaps it is generally accepted that Cosa Nostra bosses and members assume the risk of (and have no justifiable complaint about) whatever law enforcement tactics the legislative and executive branches come up with.

Id.

25. *See infra* part VI.

26. FED. R. EVID. 803(24), 804(b)(5); *see infra* part VII.

can only be determined after we know *how* to interpret the residual exceptions, and on this issue the Supreme Court has remained silent.

In the Supreme Court's next evidence decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[27] the Court tackled an important topic—scientific evidence—but its resolution raises, without answering, important questions about evidence interpretation.

II. *DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.*

Daubert concluded that the *Frye* test, which limited the admissibility of novel scientific evidence to that which is generally accepted in its field, did not survive the adoption of the Federal Rules of Evidence,[28] a conclusion flowing from the text of the Rules.[29] Rule 702[30] speaks to scientific evidence, and it does not state that such evidence is admissible only if generally accepted. The *Daubert* Court noted, in its opinion by Justice Blackmun, that "[n]othing in the text of this Rule [702] establishes 'general acceptance' as an absolute prerequisite to admissibility."[31] Since that Rule's text does not contain a "general acceptance" requirement, it does not exist.

It would seem that *Daubert* killed *Frye* with a pure textual analysis, but the Court did not stop there. It also referred to the common law, the "'liberal thrust' of the Federal Rules, and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'"[32] The Court ultimately concluded:

> Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in fedcral trials.[33]

The Court, then, did not seem to be relying just on the text of the Rules. The policies embodied generally in the Rules—that is, their "liberal thrust"—and the policies embedded specifically in Rule 702, those relaxing "traditional barriers" to expert testimony, seem influential. Since, by the Court's analysis, text and policies coincide, it was easy to conclude that *Frye* should not continue to be applied. However, this approach implies that at least some of the time when policies and text do not correspond, the text should not control. If otherwise, the Court's discussion could have begun and ended with the textual analysis.

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27. 113 S. Ct. 2786 (1993).

28. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. 1923):

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id.

29. *See* Jonakait, *supra* note 7, at 765 (noting that the plain-meaning standard "means the end of the *Frye* or 'general acceptance' test" (footnote omitted)).

30. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

31. *Daubert*, 113 S. Ct. at 2794.

32. *Id.* (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).

33. *Id.*

While this portion of the *Daubert* opinion casts doubt on the absolute authority of plain meaning, the rest of it clearly shows the limitations of that standard. The Court, after dispatching *Frye*, discussed what limitations Rule 702 did place on the admissibility of scientific evidence.[34] The Court concluded that, to be admitted, the trial judge must find scientific evidence "reliable":

> The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. . . . [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.*, "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.[35]

A trial court must consequently undertake a "flexible" inquiry into whether the proffer consists of truly "scientific knowledge. . . . Many factors will bear on the inquiry," but the trial court should consider whether the theory or technique "can be (and has been) tested [and] whether [it] has been subjected to peer review and publication."[36] The trial court should also consider "the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation" as well as the acceptance of the theory or technique in the scientific community.[37]

While *Daubert* started this analysis with reference to the text's use of "scientific" and "knowledge," the plain meaning of the Rules hardly compels the resulting standard. No court-ordered framework would be compelled, since "scientific knowledge" is not a term with a determinate meaning.[38] While perhaps it is correct to say that the enunciated framework is not inconsistent with "scientific knowledge," the flexible guidelines are not inevitably compelled by the phrase. Many of us could not define "scientific knowledge," and we certainly would not produce a uniform definition. The meaning of "scientific knowledge" can hardly be considered "plain." *Daubert* is an illustration of the obvious point that the plain-meaning standard has to fail when a Rule does not have a plain meaning.[39] The question then arises of how to interpret the many Rules whose text is *not* clear.[40]

Daubert, however, gives no explicit guidance. The Justices enunciated no precepts on how to interpret a Rule when it is muddy. If there are methodological lessons to be learned, they must be mined from *Daubert*. The Court formulated its flexible framework

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34. Chief Justice Rehnquist, joined by Justice Stevens, while agreeing that *Frye* was not part of the Federal Rules of Evidence, dissented from the Court's discussion of the limitations imposed on scientific evidence by the Rules. "I think the Court would be far better advised in this case to decide only the questions presented, and to leave the further development of this important area of the law to future cases." *Id.* at 2800 (Rehnquist, C.J., concurring and dissenting).

35. *Id.* at 2795 (majority opinion) (quoting FED. R. EVID. 702) (first omission in original) (footnote omitted).

36. *Id.* at 2796-97.

37. *Id.* at 2797.

38. *Cf.* Nehf, *supra* note 12, at 24-25.

> Textualists are accused of creating a false dichotomy that nontextual sources, such as legislative history and public policy considerations, cannot be relied upon because they can be manipulated by result-oriented judges, while the meaning of the words in statutory text is determinate. In fact, critics argue, the meaning of a text depends on whom you ask, when you ask and the level of generality at which you ask.

Id. (citations omitted).

39. Jonakait, *supra* note 7, at 761 n.78 ("Beech Aircraft Corp. v. Rainey . . . illustrates the obvious point that if a Rule does not a have a plain meaning, the plain-meaning standard cannot be applied.").

40. *See* Gold, *supra* note 1, at 920 ("The Rules are frequently confusing, utilizing undefined terms where meaning is not clear from context."); *see also* Taslitz, *supra* note 5, at 34 ("Gaps and ambiguities have forced the Court to look beyond the Rules' language in much of its evidentiary jurisprudence . . . .").

by using a strikingly broad array of interpretive tools, not only those that might be found routinely in legal decisions such as dictionaries, lower court opinions, legal treatises, and law review articles, but also propositions asserted about science in amici briefs, books, and articles concerning the philosophy and sociology of science.[41] This analysis suggests that, at least when the text of a Rule is imprecise, almost any source that sheds light on the possible meaning can be used.

Daubert, however, may simply be an ad hoc determination not based on any generalizable principles. The question of the admissibility of scientific opinions somehow seems different from other kinds of evidentiary decisions. As Chief Justice Rehnquist phrased it, *Daubert* has an "unusual subject matter,"[42] and perhaps an unusual subject matter produces a singular method of interpretation.

Considering its treatment of Rule 104, viewing *Daubert* as an ad hoc decision is a real possibility. *Daubert* asks who, either judge or jury, should determine that a proffered opinion is "scientific." The Court answered that the trial court must do so under Rule 104(a), which means that the proponent has to establish that the proffered evidence is "scientific" by a preponderance of the evidence.[43] *Daubert* reached this conclusion without examination or citation.[44] For anyone trying to find methodologies to resolve other evidentiary disputes, this assertion without analysis presents a problem because the admissibility of scientific evidence is not indisputably a Rule 104(a) question.

Huddleston v. United States[45] held that when the relevance of one piece of evidence is conditioned or dependent on the finding of another fact, Rule 104(b) controls. Under this provision, the trial court does not determine by a preponderance whether the foundational fact exists. Instead, the trial court merely decides whether the jury *could* find that it exists. If the jury could find that the fact exists, the trial court admits the disputed evidence. The Supreme Court in *Huddleston* reasoned that the jury must be assumed to have acted logically, and if the jury in its deliberations concludes that the preliminary fact was established, it will treat the disputed evidence as relevant and weigh it. If the jury finds that the preliminary fact was not proven, it will act logically and disregard the disputed evidence.[46] Consequently, when confronted with other crime evidence that is relevant only if the accused actually committed the other crime, a trial court does not decide by a preponderance of proof whether the accused committed the crime. Instead, it decides whether the evidence on that issue would allow the jury to conclude that the

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41. Chief Justice Rehnquist, in contending that the Court should go no further at this point than ruling that the *Frye* standard was not part of the Federal Rules of Evidence, commented:

> The various briefs filed in this case are markedly different from typical briefs, in that large parts of them do not deal with decided cases or statutory language—the sort of material we customarily interpret. Instead, they deal with definitions of scientific knowledge, scientific method, scientific validity, and peer review—in short, matters far afield from the expertise of judges. This is not to say that such materials are not useful or even necessary in deciding how Rule 703 should be applied; but it is to say that the unusual subject matter should cause us to proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.

Daubert, 113 S. Ct. at 2799 (Rehnquist, C.J., concurring and dissenting) (discussing Rule 702 in conjunction with Rule 703).

42. *Id.*

43. *Id.* at 2796 (majority opinion).

44. The Court merely said, "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* In a footnote, the Court quoted Rule 104(a) and clarified that a preponderance of proof was the appropriate standard. *Id.* n.10.

45. 485 U.S. 681 (1988).

46. *Id.* at 690.

accused committed the other crime. If the answer to that is "yes," the evidence is admitted without the judge determining the likelihood of the accused committing the other crime.[47]

Daubert did not explore why the *Huddleston* analysis does not apply to scientific evidence. *Daubert* maintains that a trial judge must ensure that scientific evidence "is not only relevant, but reliable."[48] Are relevance and reliability really two separate categories? Or is relevancy logically dependent on reliability? At least when it comes to lay witnesses, the answer is that reliability is a question of conditional relevancy. The eyewitness report that the blue car ran the red light is relevant only if the eyewitness reliably reports what she pereeived. The judge, however, does not determine by a preponderance whether the witness is reliably reporting. Instead, the jury makes that decision in its deliberations, and we trust that if they find the witness unreliable they will disregard the evidence. Scientific evidence might be the same. It is relevant only if the science is reliable. If unreliable, the jury ought to disregard it. If this contention is correct, reliability is a logical component of relevancy. Scientific reliability, then, is not a Rule 104(a) question which the judge determines by a preponderance of proof, but a conditional relevancy question falling within Rule 104(b), which authorizes the admission of scientific evidence as long as reasonable jurors could find the science to be reliable.[49] Indeed, treating scientific evidence as a conditional relevancy question would lead to the wider admission of scientific opinions consistent with the "liberal thrust" of the Rules and the lowering of traditional barriers to expert opinions, policies upon which the Court seemingly relied in striking down *Frye*. Whatever the correct resolution of the Rule 104 issue for scientific evidence, the Court's failure to discuss the tensions with *Huddleston*, the only case exploring classifications under that Rule, leaves adrift others who are trying to resolve Rule 104 questions. *Daubert* fails to advance understanding of Rule 104 and suggests that the Court was not interpreting Rule 104 with neutral, generally applicable principles, but from an ad hoc, predetermined perspective.

Daubert also fails at its most basic function of guiding trial courts in treating scientific evidence. While clearly striking down *Frye*, *Daubert*'s flexible framework is so varicd in possible meaning that it hardly gives meaningful guidance on how to gauge the admissibility of scientific evidence.[50] Instead of giving a methodology that trial courts can apply consistently in resolving questions about scientific evidence, the Court's flexible framework has only triggered an outpouring of comments as to what the framework means or ought to mean,[51] a sign of *Daubert*'s inadequacy at its most fundamental level.

For those interested in future evidentiary interpretations, *Daubert* fails (1) by not making clear whether it is jettisoning a plain-meaning standard, (2) by not making clear

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47. *Id.*

48. *Daubert*, 113 S. Ct. at 2795.

49. Jonakait, *supra* note 7, at 767 ("The admission of scientific evidence is a question of conditional relevancy. Testimony based on the scientific test aids the jury if it is relevant; it is relevant only if the test is reliable."); *cf.* Scallen, *supra* note 6, at 1792:

> Justice Blackmun did not even try to explain his decision to have the judge determine that the evidence is scientifically valid before the jury can hear it. By simply asserting that it was a Rule 104(a) decision, he avoided discussing the conflict between his opinion and the unanimous opinion of the Court in *Huddleston*.

Id. (footnote omitted).

50. *See* David L. Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 HASTINGS L.J. 555, 555 (1995) ("*Daubert* provided precious little advice on how to successfully resolve the tangled relations between law and science.").

51. *See id.* n.3 ("The lack of advice to be found in *Daubert* perhaps is best illustrated by the surplus of commentary seeking to interpret and advance the *Daubert* lesson . . . .").

how a Rule should be interpreted when its meaning is not clear, (3) by merely asserting an answer to an issue that should have been contested, the Rule 104 question, and (4) by formulating a flexible framework that does not truly guide lower courts.

The Court's next case, *Williamson v. United States*,[52] again confronted an evidence provision with an indeterminate text. This time the Court did suggest a methodology for interpreting the provision, but that methodology turns out to have only limited use.

III. *WILLIAMSON V. UNITED STATES*

Reginald Harris confessed a drug offense to the police. He also inculpated the accused, Williamson. This entire declaration was admitted at Williamson's trial under Rule 804(b)(3) over the objection that the part that damned the accused was not a statement against the witness' interest.[53]

The Court, in an opinion by Justice O'Connor, started its analysis of Williamson's contention with the Rule's words, but quickly determined that text did not yield a clear answer to the problem. The key term, "statement,"[54] could be read broadly or narrowly. It could mean that the entire confession, including "both the self-inculpatory and the non-self-inculpatory parts . . . would be admissible so long as in the aggregate the confession sufficiently inculpates him." Or "statement" could be read narrowly to mean "'a single declaration or remark,' [which] would make Rule 804(b)(3) cover only those declarations or remarks within the confession that are individually self-inculpatory."[55]

All the Justices agreed that the text was not plain,[56] but disagreed on how to interpret it. Justice Kennedy, joined in his concurring opinion by Chief Justice Rehnquist and Justice Thomas, concluded that "three sources demonstrate that Rule 804(b)(3) allows the admission of some collateral statements: the Advisory Committee Note, the common law of the hearsay exception for statements against interest, and the general presumption that Congress does not enact statutes that have almost no effect."[57]

The majority, however, suggested that the Justices who disagreed in the concurrence looked for meaning in the wrong places.[58] While the text was unclear, the key to the

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52. 114 S. Ct. 2431 (1994).

53. Rule 804(b)(3) permits the introduction of hearsay if the declarant is unavailable and the hearsay is a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID. 804(b)(3).

Harris refused to testify, thus making himself "unavailable" under the Rule, and the court held him in contempt. *Williamson*, 114 S. Ct. at 2434.

54. "[W]e must first determine what the Rule means by 'statement,' which Federal Rule of Evidence 801(a)(1) defines as 'an oral or written assertion.'" *Id.*

55. *Id.* at 2434-35 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2229 (1961)).

56. "The text of the Rule does not tell us whether the collateral statements are admissible . . . ." *Id.* at 2441 (Kennedy, J., concurring in the judgment).

57. *Id.* at 2442.

58. The Court maintained that its narrow reading would not eviscerate the penal interest exception. *Id.* at 2436 (majority opinion). It also concluded that the Advisory Committee Note was ambiguous:

> Justice Kennedy suggests that the Advisory Committee Notes to Rule 804(b)(3) should be read as endorsing the position we reject—that an entire narrative, including non-self-inculpatory parts . . . may be admissible if it is in the aggregate self-inculpatory. . . . [The Notes'] language, however, is not particularly clear, and some of it—especially the Advisory Committee's endorsement of the position taken by Dean McCormick's treatise—points the other way . . . .

correct interpretation was still in the text, for it expressed a controlling principle. "Without deciding exactly how much weight to give the Notes in this particular situation, . . . we conclude that the policy expressed in the statutory text points clearly enough in one direction that it outweighs whatever force the Notes may have."[59] And that text-derived principle requires a restricted reading:

> Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.[60]

Consequently, the Court concluded that Rule 804(b)(3) limits admissibility only to statements that, in the light of their surrounding circumstances, are individually self-inculpatory.[61] More important, however, for future interpreters, the Court seemed to be indicating a methodology to be applied to other evidence disputes.

Williamson suggests a text-centered approach that first examines the words used to express a Rule. If those words do not definitively resolve the dispute, the interpreter does not then jump to aids outside the text. Instead, the words of the Rule must be examined further to see if they express a policy that resolves the dispute.[62] If so, that text-expressed principle controls, not potential answers given by nontextual sources, such as the Advisory Committee Notes,[63] the common law,[64] or other precepts, such as general presumptions about statutory interpretation.

At first glance, this methodology seems at odds with *Daubert*'s methods. The Court did not confine its *Daubert* analysis to the text or policies, but instead considered just about anything it could get its hands on. If these two cases are to be reconciled, the distinguishing factor seems to be that *Williamson* found a policy actually discernible in the text of Rule 804(b)(3). The policies referred to in *Daubert*—the Rules' liberal thrust, and Rule 702's relaxation of traditional barriers to expert testimony—are not discernible from the text alone. They can only be derived by contrasting the Rules of Evidence with previous evidence law. If this distinction is correct, then *Williamson* suggests that a

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Id. at 2435-36.

59. *Id.* at 2436; *cf.* Becker & Orenstein, *supra* note 11, at 911 ("We note that occasionally the current Advisory Committee notes deviate from the plain meaning.").

60. *Williamson*, 114 S. Ct. at 2435.

61. *Id.* at 2437. The Court did not reach a conclusion as to how the particular hearsay at issue should have been treated. Justices O'Connor and Scalia concluded that the matter should be remanded to the Court of Appeals for the "fact-intensive inquiry" into "whether each of the statements in Harris' confession was truly self-inculpatory." *Id.* Justice Ginsburg, concurring and joined by Justices Blackmun, Stevens, and Souter, concluded that none of the hearsay fell, "even in part, within the exception described in Rule 804(b)(3), for Harris' arguably inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy." *Id.* at 2439 (Ginsburg, J., concurring).

62. *Cf.* Scallen, *supra* note 6, at 1798 ("Justice O'Connor[] . . . purported to find the solution in the text of Rule 804(b)(3), but ultimately justified her conclusion through arguments without a textual basis.").

63. *Cf. Williamson*, 114 S. Ct. at 2442 (Kennedy, J., concurring in the judgment) ("When as here the text of a Rule of Evidence does not answer a question that must be answered in order to apply the Rule, and when the Advisory Committee Note does answer the question, our practice indicates that we should pay attention to the Advisory Committee Note.").

64. *Cf. id.* ("Absent contrary indications, we can presume that Congress intended the principles and terms used in the Federal Rules of Evidence to be applied as they were at common law.").

policy discernible from the text alone is privileged over other policy considerations. A text-derived policy squelches the search for other sources of meaning while other types of policies do not.

Williamson fails to tell us, however, how we know when we have stumbled upon a policy or principle discernible from the text itself. The *Williamson* Court seems to have focused on Rule 804(b)(3)'s language, which allows the admissibility of statements against interest only when "a reasonable person in the declarant's position would not have made the statement unless believing it to be true."[65] This phrase apparently led the Court to conclude that the text-based principle or policy animating the hearsay exception is "the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true."[66]

This textual clause is apparently seen as doing double duty. It not only helps define the boundaries of the provision; it also indicates the rationale for the exception's existence. The very text of Rule 804(b)(3) requires the statements against interest to be of the kind that would only be made if true. Of course, if the statement is likely to be true, then there is a good reason to except it from the hearsay prohibition. The textual restriction simultaneously indicates which hearsay is admissible and why it is more trustworthy than hearsay generally. Perhaps we can say this text does limn a principle or policy that justifies the provision, and in a text-centered jurisprudence, perhaps this textually derived policy should control interpretation when the text does not give a clear answer to the dispute.[67]

Even if this is a sensible and justifiable method for interpreting the Rules of Evidence, this method will not have much use. While Rule 804(b)(3)'s text may indicate the policy upon which the provision rests, few other Rules have words simultaneously giving both the boundaries for the provision and the rationale for its existence. For example, the hearsay exception which immediately precedes statements against interest permits dying declarations to be admitted "[i]n a prosecution for homicide or in a civil action or proceeding[. This exception admits] statement[s] by a declarant while that declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death."[68] The various clauses in this provision do set the boundaries for the exception, but they do not indicate why the exception exists. The policy or principle animating dying declarations is not discernible in its text. The language itself does not indicate why such hearsay is likely to be trustworthy. If we seek to interpret dying declarations by the method derived from *Williamson*, we get nowhere because we do not find a text-expressed policy and cannot give it privileged status. If we think that the policies animating dying declarations are important, we have to look outside the text to find them.[69]

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65. FED. R. EVID. 804(b)(3).

66. *Williamson*, 114 S. Ct. at 2435.

67. *Cf.* Scallen, *supra* note 6, at 1795 ("[*Williamson*] was, to be candid, a complete mess.").

68. FED. R. EVID. 804(b)(2).

69. Indeed, we have to look beyond the Advisory Committee Note to find them. The only rationale given by that note for the exception states: "While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in Rex v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789)." FED. R. EVID. 804(b)(2) advisory committee's note.

The original justification concluded that persons knowing that soon they will enter eternity and, thus, be judged, are unlikely to tell a lie. This justification has been transmuted into the more general proposition based on gut psychology that

Indeed, a quick march through the Rules reveals that few, if any, contain text expressing a policy, as it might be said the words of Rule 804(b)(3) do. Rule 404(a), for example, does not tell us why character evidence is generally prohibited; Rule 606(a) does not tell us why jurors cannot be witnesses; and Rule 1002 does not tell us why a writing's original is required. Sensible policies might support these and other Rules, but if we wish to know them, we have to probe outside the text. If *Williamson*'s methodology truly requires that a text-derived policy controls when the text itself does not, it is not very significant because it cannot affect many evidentiary disputes.

Williamson, however, might be seen to stand for a broader principle: The interpretation of the Rules must be text centered. That precept, however, was not followed in the Court's two most recent evidence decisions, both of which reach decisions in opposition to the plain meaning of the Rules.

IV. *TOME V. UNITED STATES*

Matthew Wayne Tome's daughter stated that he had abused her. Tome, however, claimed that the charges were concocted during a summer vacation spent with the mother so that the girl would not be returned to his custody. At issue were the girl's statements made after the initial allegations that further indicated that the father had abused her. The trial court admitted them under Rule 801(d)(1)(B), which states that prior consistent statements of testifying witnesses are not hearsay if they are "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."[70]

Tome v. United States[71] held, in an opinion by Justice Kennedy, that the statements should not have been admitted. Prior consistent statements can be admitted only if they were made before the time of the claimed fabrication, and the statements at issue came after that point. Even though this conclusion may be good evidence law, the Court's analysis throws into doubt the status of the plain-meaning doctrine for interpreting the Federal Rules of Evidence. The language of the Rule was not unclear. It yielded an answer, but not the answer given by the Court.

The most basic starting point for any evidentiary dispute is Rule 402: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."[72]

Taken literally, as the plain-meaning doctrine requires, relevant evidence can be excluded only if the Constitution, a statute, or another rule specifically authorizes exclusion. Under Rule 402, courts are not permitted to devise their own restrictions or requirements that exclude relevant evidence. In other words, the text of the Federal Rules of Evidence prohibits courts from acting like common-law courts to create categorical

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most people who face death are unlikely to lie. Of course, that rationale does not explain why the hearsay exception is limited in subject matter to causes of death or why such statements, if they are likely to be true, can only be introduced into some types of cases. In any event, if there is a policy or principle that truly drives the exception, it cannot be derived from the text.

70. The Rule also requires that "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement . . . ." FED. R. EVID. 801(d)(1).

71. 115 S. Ct. 696 (1995).

72. FED. R. EVID. 402; *see* Imwinkelried, *supra* note 1, at 272 (stating that Rule 402 is the structural key to the Federal Rules of Evidence).

rules of exclusion. Under the plain-meaning doctrine, relevant evidence must be admitted unless a specific provision authorizes its exclusion.[73] Of course, relevant evidence can be excluded under Rule 403,[74] but Rule 403 exclusions come as the result of a weighing process that is done on a case-by-case basis and does not lead to categorieal rules of exclusion.

A class of relevant evidence, as the Supreme Court recognized in *United States v. Abel*,[75] can be excluded only if a specific Rule sanctions its blanket exclusion. The Supreme Court has resolved other evidentiary disputes this way. Thus, *Abel* recognized that evidence of witness bias is relevant. No Rule categorically excludes bias evidence, and therefore, such evidence is admissible unless its unfair prejudice in a particular dispute points to its inadmissibility.[76] Similarly, *Huddleston v. United States*[77] indicated that courts cannot impose categorical restrictions not found in the text. In rejecting the contention that special restrictions should be imposed before other crime evidence could be admitted, *Huddleston* stated: "The text [of 404(b)] contains no intimation . . . that any preliminary showing is necessary before such [other crime] evidence may be introduced for a proper purpose."[78]

The text of Rule 801(d)(1)(B) does not state that a prior consistent statement is only admissible if it is a precedent declaration; that is, one occurring before the time of the claimed fabrication. Since the Rules do not contain this categorical exclusion, the plain-meaning doctrine—as well as other decisions—indicates that a court cannot impose such an absolute temporal requirement as long as statements occurring before the time of claimed fabrication could be relevant for the defined purpose of rebutting the contention of recent fabrication.

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73. *See id.* at 282 ("Properly construed, Rule 402 abolishes the uncodified exclusionary rules of evidence."); *see also* Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 883 (1988) ("[T]he judiciary has lost its common-law power to formulate exclusionary rules of evidence.").

74. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

75. 469 U.S. 45 (1984).

76. *See* Imwinkelried, *supra* note 1, at 284.

> It is true that the Chief Justice [writing the Court's opinion in *Abel*] referred in passing to earlier common-law decisions permitting bias impeachment. However, those references were makeweights; the premise of the decision is Rule 402. In *Abel*, there was no need to resort to any common-law precedent; even if there had not been a single prior common-law precedent permitting bias impeachment, the Chief Justice's Rule 402 analysis would still be valid. Once the logical relevance of a witness' impeachment is acknowledged, Rule 402 alone suffices to rationalize the outcome in *Abel*. By the terms of Rule 402, logically "relevant evidence is admissible, except" in specified instances; the proffered bias evidence was indisputably relevant, and none of the specified exceptions came into play in *Abel*.

Id. (footnotes omitted); *cf.* Taslitz, *supra* note 5, at 9:

> The Rules do not expressly state, however, that bias evidence is a permissible form of impeachment. Moreover, several Rules expressly regulate other impeachment techniques . . . . Standard rules of statutory construction suggest that where a statnte includes certain items, the legislature intended to exclude similar items not expressly mentioned. The Rules' language thus suggest that evidence of bias is not admissible.

Id. (footnote omitted); *see also* Daubert v. Merrell Dow Pharmaceutieals, Inc., 113 S. Ct. 2786, 2794 (1993):

> In *United States v. Abel*, we considered the pertinence of baekground common law in interpreting the Rules of Evidence. We noted that the Rules occupy the field, but . . . explained that the common law nevertheless could serve as an aid to their applieation. . . . We found the common-law precept at issue in the *Abel* case entirely consistent with Rule 402's general requirement of admissibility, and considered it unlikely that the drafters had intended to change the rule.

Id. (citations omitted).

77. 485 U.S. 681 (1988).

78. *Id.* at 687-88.

The *Tome* Court did concede that such postmotive statements could have the necessary probative power. "There may arise instances when out-of-court statements that postdate the alleged fabrication have some probative force in rebutting a charge of fabrication or improper influence or motive . . . ."[79] While the Court thought that such statements would only be weakly probative because their relevance would depend upon an "indirect inferential chain,"[80] the definition of relevancy is broad. It makes no distinction between direct and indireet inferences. Evidence, under Rule 401, "having any tendency" to affeet logically a material issue is relevant.[81] Consequently, for purposes of Rule 801(d)(1)(B), evidence is relevant if it has any tendency to rebut the claim of recent fabrication.

When *Tome* concluded that only premotive statements could be admitted under Rule 801(d)(1)(B), it was acting in opposition to the text of the Rules read as a whole.[82] The Court jettisoned plain meaning by examining sources outside the text, which indicated that the drafters intended to enact the temporal requirement even though they did not explicitly put it into the Rule.

The premotive requirement, began the Court, was the prevailing common-law rule for over a century. It was this traditional "common law of evidence[] which was the background against which the Rules were drafted."[83] Furthermore, thc drafters had little reason for limiting Rule 801(d)(1)(B) as they did if they had wished to permit the admissibility of postmotive statements:

> [I]f the drafters of Rule 801(d)(1)(B) intended to countenance rebuttal along that indirect inferential chain, the purpose of confining the types of impeachment that open the door to rebuttal by introducing consistent statements becomes unclear. If consistent statements are admissible without reference to the time frame we find imbedded in the Rule, there appcars no sound reason not to admit consistent statemcnts to rebut other forms of impeachment as well. Whatever objections can be leveled against limiting the Rule to this designated form of impeachment and confining the rebuttal to those statements made before the fabrication or improper influencc or motive arose, it is clear to us that the drafters of Rule 801(d)(I)(B) were relying upon the common-law temporal requirement.[84]

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79. *Tome*, 115 S. Ct. at 701.

80. "Evidence that a witness made consistent statements after the alleged motive to fabricate arose may suggest in some degree that the in-court testimony is truthful, and thus suggest in some degree that that testimony did not result from some improper influence . . . ." *Id.* at 701-02. The dissent concluded, however, that antecedent statements could directly rebut claimed recent fabrication:

> A postmotive statement *is* relevant to rebut . . . when the speaker made the prior statement while affected by a far more powerful motive to tell the truth. A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances *also* make clear to the speaker that only the truth will save his child's life. Or, suppose the postmotive statement was made spontaneously, or when the speaker's motive to lie was much weaker than it was at trial.

Id. at 708 (Breyer, J., dissenting) (emphasis in original).

81. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

82. *Cf. Tome*, 115 S. Ct. at 708 (Breyer, J., dissenting):

> In sum, because the Rule addresses a hearsay problem and one can find a reason, unrelated to the premotive rule, for why it does so, I would read the Rule's plain words to mean exactly what they say: if a trial court properly admits a statement that is "consistent with declarant's testimony" for the purpose of "rebut[ting] an express or implied charge . . . of recent fabrication or improper influence or motive," then that statement is "not hearsay," and the jury may also consider it for the truth of what it says.

Id. (quoting FED. R. EVID. 801(d)(1)(A), (B)) (omission in original).

83. *Id.* at 701 (majority opinion).

84. *Id.* at 702. The Court added: "Our analysis is strengthened by the observation that the somewhat peculiar language of the Rule bears close similarity to the language used in many of the common law cases that describe the premotive requirement." *Id.*

Even if this reasoning is correct, it raises problems for those trying to determine the appropriate methodology for future evidence disputes. Although there was some attempt to rely on the words of Rule 801(d)(1)(B),[85] *Tome* contradicted the text. Of course, *Daubert* and *Williamson* did not reach their results through a textual analysis either, but in those cases the text did not yield an answer. The Court had to go beyond the words to resolve the disputes. That was not true in *Tome*; the Court never suggested that the text was ambiguous or unclear. Nor was *Tome* like *Green v. Bock Laundry Machine Co.*,[86] where enforcing the language of a Rule would have produced an irrational disparity between the parties that would probably have been unconstitutional.[87] The literal reading of the prior consistent statements provision would not produce an imbalance between the parties. The Rule would apply equally to each, and the enforcement of its text could hardly be considered unconstitutional.

Instead, *Tome* forsook plain meaning. The Court decided that if the prior consistent statement provision did not contain the temporal restriction, "there appear[ed to be] no sound reason not to admit consistent statements to rebut other forms of impeachment as well."[88] Even though enforcing the text of Rule 801(d)(1)(B) would not be unconstitutional or upset the balances of the adversary system, the actual words did not control, since logical drafters would have included a broader provision if they had not wanted the premotive requirement. If this authorizes deviation from plain meaning, however, a chasm has opened up in the doctrine, for having the advantage of hindsight, courts can often think of logical things drafters left undone. The unusual circumstances of *Bock Laundry* made it clear that the Court had only temporarily shelved a textual analysis.[89] *Tome*'s logic, on the other hand, could lead to plain meaning's widespread abandonment.[90]

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85. *See id.*

> The language of the Rule, in its concentration on rebutting the charges of recent fabrication, improper influence and motive to the exclusion of other forms of impeachment, as well as in its use of wording which follows the language of the common-law cases, suggests that it was intended to carry over the common-law pre-motive rule.

Id.

86. 490 U.S. 504 (1989).

87. *Bock Laundry* interpreted Rule 609(a)(1), which then stated that evidence of a felony conviction "shall be admitted" to impeach the testimony of a witness "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." *Id.* at 510-11. On its face, this language meant that felony convictions could always be used to impeach a plaintiff, but would permit the exclusion of such impeaching evidence against a civil defendant. The Court concluded that because of this strange, senseless imbalance between civil plaintiffs and defendants, the literal Rule was probably unconstitutional and the plain-meaning doctrine should not be applied.

> No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant. . . . [C]ivil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause. . . . It is unfathomable why a civil plaintiff—but not a civil defendant—should be subjected to this risk. Thus, we agree with the Seventh Circuit that as far as civil trials are concerned, Rule 609(a)(1) "can't mean what it says."

Id. at 1985 (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987)).

88. *Tome*, 115 S. Ct. at 702.

89. *See* Jonakait, *supra* note 7, at 759 ("[T]he *[Bock]* Court gave no indication that it was doing anything more than temporarily abandoning the standard. Instead, all the Justices indicated that the unique circumstances of this specific Rule required plain meaning to be momentarily set aside to avoid an irrational result that probably would have been unconstitutional." (footnotes omitted)); *cf.* Taylor, *supra* note 9, at 275 ("The judgment that the interpretation of a statute leads to seemingly nonsensical results is not an idle one. In numerous cases the Supreme Court has rejected apparently plain statutory language where application of this meaning would lead to absurd results." (footnote omitted)).

90. *Tome* referred to *Bock Laundry* only once: "'A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.'" *Tome*, 115 S. Ct. at 704 (quoting *Bock Laundry*, 490 U.S. at 521).

On the other hand, perhaps the methodological implications of *Tome* are really not so broad. Perhaps the text is superseded only when a particular nontextual reading seems to explain better the words actually chosen to express the Rule *and* the nontextual reading coincides with the common law. Apparently part of the reason *Tome* concluded that Rule 801(d)(1)(B) contained the temporal requirement is that the common law had the same qualification.[91] Reliance on the common law as a springboard to leap over a Rule's actual text, however, conflicts with *Bourjaily v. United States*,[92] where the Court's plain-meaning interpretation of evidence law began.[93]

The question in *Bourjaily* was whether a claimed co-conspirator statement—admissible only if a conspiracy existed and the defendant was a member of it—could be used to establish those essential preliminary facts. When the Federal Rules of Evidence were adopted, the law clearly required that a co-conspirator statement could not be used in this bootstrapping fashion.[94] Since the Advisory Committee specifically indicated that the drafters were not expanding the admissibility of co-conspirator statements, but merely adopting the "accepted practice,"[95] the anti-bootstrapping precept apparently was the background against which the co-conspirator provision, Rule 801(d)(2)(E), was written.

Rule 104(a), however, states that inadmissible evidence can be used to determine such factual questions. Taken literally, Rule 104(a) kills the anti-bootstrapping provision.[96] And kill it, according to *Bourjaily*, it did.

> It would be extraordinary to require legislative history to *confirm* the plain meaning of Rule 104. The Rule on its face allows the trial judge to consider any evidence

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91. *See id.* at 700.

> The prevailing common-law rule for more than a century before adoption of the Federal Rules of Evidence was that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards . . . .
>
> . . . The question is whether Rule 801(d)(1)(B) embodies the temporal requirement. We hold that it does.

Id.; *cf.* Becker & Orenstein, *supra* note 11, at 868:

> The relationship between the Rules and the vast body of common law that they codify and incorporate is complex. Unquestionably, the Rules coexist with unstated common law assumptions that were never formally incorporated into the corpus of the Rules . . . .
>
> Many of the so-called plain meaning debates pose questions of how to resolve discrepancies between the plain text of the Federal Rules and the generally shared interpretation of the Rules deriving from preexisting common law traditions. Under the new theory of plain meaning, the language of the Federal Rules controls, even in light of a strong and persuasive common law tradition to the contrary.

Id. (footnote omitted); *cf.* Jonakait, *supra* note 7, at 783:

> Because we know the goals, or history, or policy, or practical operation of a provision, we view the Rules through a fog that may prevent us from seeing the true features of evidence law as defined by plain meaning. It may be difficult to jettison our existing knowledge of evidence law and just mechanically inspect the plain language.

Id.

92. 483 U.S. 171 (1987).

93. *See* Jonakait, *supra* note 7, at 749 ("The Supreme Court first applied the plain-meaning standard to the Federal Rules of Evidence in *Bourjaily v. United States*." (footnote omitted)).

94. *See id.* at 750 (noting "a longstanding prohibition against such bootstrapping").

95. *See* FED. R. EVID. 801(d)(2)(E) advisory committee's note.

> The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. . . . [T]he agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established.

Id. (quoting FED. R. EVID. 801(d)(2)(E)).

96. "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by rules of evidence except those with respect to privileges." FED. R. EVID. 104(a).

> whatsoever, bound only by the rules of privilege. We think that the Rule is sufficiently clear that to the extent that it is inconsistent with [the common law], the Rule prevails.[97]

Bourjaily commands following the text over a contradictory concept in common law. *Tome* departed from the text to follow the common law. Perhaps there are ways to reconcile the two cases, but since *Tome* did not address the earlier case or the methodological implications of its approach,[98] such proposed reconciliations are only speculation. The Court's most recent evidence decision, *United States v. Mezzanatto*,[99] rendered a fortnight after *Tome*, can only fuel speculation as to how the Rules should be interpreted in the future.

V. *UNITED STATES V. MEZZANATTO*

Gary Mezzanatto, implicated in an illegal drug scheme, sought to explore a plea bargaining arrangement. The prosecution, however, said it would discuss the possibility only if the accused first agreed that anything he said in the talks could be used to impeach him if he testified at trial. After conferring with counsel, Mezzanatto assented to the prosecutor's terms.

A deal was not reached, and the case proceeded to trial. Mezzanatto testified and the prosecutor cross-examined him about the inconsistent statements he made during the failed plea discussions. The Ninth Circuit concluded that this impeachment violated Federal Rule of Evidence 410, which forbids the introduction against the defendant of statements made in unsuccessful plea bargaining.[100] That court, relying on the Rule's explicit text, noted that although the Rule contains two exceptions, it did not have one for waivers. Therefore, Congress intended to preclude the admissibility of plea bargaining statements, even if made upon waiver.

The Supreme Court, in an opinion by Justice Thomas, reversed. The text did *not* control. Instead, a background presumption against which the entire Federal Rules of Evidence was drafted determined the outcome. The Court stated that "[t]he Ninth Circuit's analysis is directly contrary to the approach we have taken in the context of a

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97. *Bourjaily*, 483 U.S. at 178-79 (emphasis in original).

98. The status of the Advisory Committee Notes fragmented the Justices in *Tome*. Justice Kennedy's opinion, in a portion that did not command a majority, treated the notes as a special authority. He referred to the notes as a "respected source of scholarly commentary" that reveals the "purpose" and "inten[t]" of the drafters. *Tome*, 115 S. Ct. at 702-03 (concurring in the judgment). The dissent referred to the Advisory Committee Notes without indicating whether they had special authority. Justice Scalia, concurring, wrote to stress that the Advisory Committee Notes should not be treated as a special authority on legislative intent.

> [T]he Notes are assuredly persuasive scholarly commentaries—ordinarily *the* most persuasive—concerning the meaning of the Rules. But they bear no special authoritativeness as the work of the draftsmen. . . . It is the words of the Rules that have been authoritatively adopted—by this Court, or by Congress if it makes a statutory change.

Id. at 706 (Scalia, J., concurring) (emphasis in original).

99. 115 S. Ct. 797 (1995).

100. Federal Rule of Evidence 410 states:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who . . . was a participant in the plea discussions:
>
> . . . .
>
> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

FED. R. EVID. 410.

broad array of constitutional and statutory provisions. Rather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption."[101] Because Rule 410 was enacted with this "background presumption[,] . . . we will not interpret Congress' silence as an implicit rejection of waivability. [The accused] bears the responsibility of identifying some affirmative basis for concluding that the plea-statement Rules depart from the presumption of waivability."[102] Not convinced of that affirmative basis,[103] the Court held that the waiver was enforceable. Consequently, the accused's statements made during the plea discussions were properly used for impeachment.

Even though the text on its face clearly prohibited the use of the accused's statements, the Court determined that the background presumption meant that the plain meaning should be disregarded. Even the dissent, in an opinion by Justice Souter joined by Justice Stevens, eschewed a plain-meaning approach.

> Believers in plain meaning might be excused for thinking that the text answers the question. But history may have something to say about what is plain, and here history is not silent. If the Rules are assumed to create only a personal right of a defendant, the right arguably finds itself in the company of other personal rights, including constitutional ones, that have been accepted time out of mind as being freely waivable.[104]

While other evidentiary prohibitions could be waived,[105] the dissent continued, Rule 410 was not waivable because "Congress rejected the general rule of waivability when it passed the Rules in issue here. . . . [W]e are bound to respect the intent that the Advisory Committee Notes to the congressionally enacted Rules reveal."[106] According to the dissent, this examination reveals that Rule 410 is "meant to serve the interest of the federal judicial system . . . by creating the conditions understood by Congress to be effective in promoting reasonable plea agreements[, and] Congress must have understood that the judicial system's interest in candid plea discussions would be threatened by recognizing waivers under Rule 410."[107]

Mezzanatto teaches an important lesson for interpretations of the Federal Rules of Evidence. While the text gave a clear rule, none of the Justices looked to that plain

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101. *Mezzanatto*, 115 S. Ct. at 801.

102. *Id.* at 803.

103. The accused argued that Rule 410 established a guarantee of fair procedure that cannot be waived. While some evidentiary rights might be so fundamental to accurate factfinding that they cannot be waived, the Court concluded that Rule 410 was not such a right because "[t]he admission of plea statements for impeachment purposes *enhances* the truth-seeking function of trials and will result in more accurate verdicts." *Id.* at 803 (emphasis in original). Mezzanatto also contended "that waiver is fundamentally inconsistent with the Rules' goal of encouraging voluntary settlement." *Id.* at 804. The Court replied, "[A]lthough the availability of waiver may discourage some defendants from negotiating, it is also true that prosecutors may be unwilling to proceed without it." *Id.* Finally, the accused maintained that since prosecutors have more power than defendants in the plea process, waivers might be abused. The Court replied that

> the appropriate response to the respondent's predictions of abuse is to permit case-by-case inquiries into whether waiver agreements are the product of fraud or coercion. We hold that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.

Id. at 806.

104. *Id.* at 807 (Souter, J., dissenting).

105. *See id.*

> The possibility that the Rules in question here do create such a personal right must, indeed, be taken seriously if for no other reason than that the Rules of Evidence contain other bars to admissibility equally uncompromising on their face but nonetheless waivable beyond any question.

Id. (citing FED. R. EVID. 802 (hearsay); FED. R. EVID. 1002 (best evidence)).

106. *Id.*

107. *Id.* at 808.

meaning. Whatever the merits of the plain-meaning doctrine, *Mezzanatto* was correct to conclude that, even if the language does not authorize them, waivers can still be valid. Waivers and stipulations are routine and valuable in litigation. Their blanket prohibition would change trials tremendously, and it is almost inconceivable that the drafters of the evidence code would have meant to ban waivers completely without at least some discussion of such a major change. Only a reflexive acolyte of plain meaning could conclude that because the text does not mention them, waivers cannot be enforced under the Federal Rules of Evidence.

Such a conclusion, however, has importance for future interpreters beyond the issue of waivers. *Mezzanatto* convincingly demonstrates, if it had not been clear before, that the Federal Rules of Evidence cannot simply be treated as a self-contained code in which the text alone embraces the answer to all evidence questions.[108] Sometimes we must look beyond the words of the Rules to understand evidentiary doctrine. We must do so when the Rules are not definitive or are ambiguous—in cases like *Daubert*[109] and *Williamson*[110]—but sometimes even when the text is clear, as *Mezzanatto* illustrates and *Tome*[111] indicates.

Recognition of these limitations of the text, however, does not mean that the text does not have special status in evidence interpretation. Why codify evidence law if the words chosen to express codification are not considered significant? Evidentiary interpretations must somehow be text centered if the Federal Rules of Evidence—as written rules—are to have meaning.[112] Even in these most recent cases casting doubt on the absoluteness of the text, the words chosen to express a Rule can matter, as indicated in *Salerno*.[113]

Questions now erupt. When is the text authoritative, and when is it not? Some answers are clear. Courts cannot apply the plain-meaning doctrine when it leads to an apparently unconstitutional result. Plain meaning cannot be applied when the text itself is not definitive. But the inquiry cannot stop there, for the text was not applied in *Tome* and *Mezzanatto*, yet there the text did yield clear resolutions that were not unconstitutional.

Even if we know when we can or must go beyond the text, methodological questions arise. How do we interpret when plain meaning does not control? Is there a hierarchy of authorities? If a policy is expressed in the text, is that determinative? What if no such policy is found? What is the role of legislative history and the common law? What are the

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108. *Cf.* Imwinkelried, *supra* note 1, at 281 ("It would . . . be a mistake to overstate the extent to which the Federal Rules operate as a self-contained evidence code. . . . [T]he courts may certainly turn to common-law precedents to help them resolve ambiguities in the text of the individual rules."). *But see* Imwinkelried, *supra* note 73, at 881 ("[T]he Federal rules operate much like a self-contained, civil-law code, abolishing common-law rules that Congress failed to codify." (footnote omitted)).

109. *See supra* text accompanying notes 28-44.

110. *See supra* text accompanying notes 53-69.

111. *See supra* text accompanying notes 70-91.

112. *Cf.* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1302 (1995) ("John Hart Ely once suggested that a 'neutral and durable principle may be a thing of beauty and joy forever,' but if it lacks basis in the text or structure of the Constitution, then we have no business proclaiming it as a norm of constitutional law." (quoting John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973) (footnote omitted)).

113. *See supra* text accompanying notes 16-26.

general policies of the Federal Rules of Evidence? When does the background of preexisting law push to the forefront and crowd out the text?[114]

By parsing recent cases, one may hazard answers to such questions, but these guesses in turn raise a broader question. Do the cases really reveal a methodology that trial courts can apply to other evidence questions? The Court, of course, cannot discuss all the ramifications of its opinions,[115] but the Court's recent opinions fail to provide sufficient guidance. No lower court can really be sure how to approach an evidence question not already addressed by the Supreme Court.

The Court's opinions have failed because they have been incomplete.[116] When the Court gives reasons for its results, it implies that it is committed to those reasons in resolving future disputes.[117] However, when the methodology of a given case conflicts with the results and methodologies of other cases, we do not know where, if anywhere, the commitment lies until the Court confronts such tensions. The Court has not dealt with such inconsistencies. How should *Tome* and *Bourjaily* be reconciled?[118] Are *Huddleston* and *Daubert* compatible?[119] Why plain meaning in *Salerno*, but not in *Tome*?

The Court, too often, has not confronted the conflicts its opinions have created. It is almost as if the Court is treating the Federal Rules of Evidence not as one text, but a compilation of separate texts, each of which can be interpreted in isolation. Such isolationism, however, does not explain how to approach evidence problems not addressed by the Court. Until the possible conflicts are addressed, interpretation of the Federal Rules of Evidence cannot advance as a whole.

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114. For example, the law at the time of the Rule's adoption did not allow the introduction of statements against the prosecution as agency admissions, but the text authorizes the admission of such evidence. FED. R. EVID. 801(d)(2). Does plain meaning control? *See* Jonakait, *supra* note 7, at 782 n.153 ("The Court's seriousness about interpreting the Federal Rules of Evidence by the plain-meaning standard may become evident if it decides that an accused can introduce statements against the prosecution as agency admissions.").

115. Consider Judge Richard Posner's statement that "[t]he glory of the Anglo-American system of adjudication is that general principles are tested in the crucible of concrete controversies. A court cannot be assumed to address and resolve in the case in which it first lays down a rule every controversy within the semantic reach of the rule." Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989).

116. Compare Scallen, *supra* note 6, at 1757-59, which concludes that good evidence opinions should stress completeness and candor.

> Completeness, which involves addressing all of the possible interpretations of a rule, is necessary because the most persuasive "construction" will have multiple "legs" on which to stand. . . .
>
> . . . The need for candidness is related to the requirement of completeness. When there are competing and conflicting sources of interpretation, does the Court explain why it chooses one over the other ?
>
> . . . .
>
> . . . By adhering to the qualities of completeness and candor, a court shows that it is not discovering the true or correct interpretation, but that it is constructing the best interpretation possible in a particular context. As it does, the court builds upon its *ethos*; it increases the persuasiveness of its position and teaches us how we might approach similar problems.

Id. (footnotes omitted); *see also* Nehf, *supra* note 12, at 30:

> Judges should recognize the truth about how interpretation occurs and write opinions that candidly acknowledge the sources and arguments that are driving their decisions. They should set forth the thought processes influencing the outcome more honestly, rather than justify the decision with make-shift arguments based on their view of the plain meaniug of the text, selective use of canons of construction or legislative histories. As a result, precedent would become a more meaningful predictor of outcome in later cases because the true reasons supporting the decision would have been articulated.

Id.

117. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 644 (1995).

> Implicit in the process is the notion that one who offers a reason for a result (or a rule) is, at least at that time, committed to the reason as well as to the less general result. And equally implicit is the corollary that to be committed to a reason is to be committed to the results encompassed by that reason.

Id.

118. *See supra* text accompanying notes 92-99.

119. *See supra* text accompanying notes 48-49.

In the remainder of this Article, I would like to explore some of the other, perhaps less obvious, tensions created by recent evidence decisions, namely the apparent conflict between *Mezzanatto* and *Salerno* as illustrated by the situation of the intimidated witness, and between *Salerno* and other decisions concerning former testimony. These discussions will lead to a consideration of the residual hearsay exceptions, an issue avoided in several of the recent cases, but an essential key to understanding how the Rules of Evidence should be explicated. Only after the Court tells us how to interpret the residuals will we know whether to read the Rules as one text or as a collection of isolated provisions.

VI. THE INTIMIDATED WITNESS, *MEZZANATTO*, AND *SALERNO*

An intimidated witness' hearsay, even though not falling within a hearsay exception, has increasingly been admitted against criminal defendants.[120] Courts have concluded that the accused waives his Sixth Amendment confrontation rights when he intimidates a witness to prevent that witness from testifying at trial.[121] Having reached this interpretation, courts almost offhandedly conclude that any hearsay objection has also been lost.[122]

The Federal Rules of Evidence, however, do not state that otherwise inadmissible hearsay is admissible if the accused intimidates the declarant. The Rules do not state that a waiver of confrontation rights constitutes a hearsay waiver. The Rules state that hearsay is inadmissible unless it falls within a hearsay exception.[123] A plain-meaning interpretation of the Rules would not admit the out-of-court statements of an intimidated or murdered witness unless that declaration fell within a hearsay exception.

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120. *See* Paul T. Markland, Comment, *The Admission of Hearsay Evidence Where Defendant Misconduct Causes the Unavailability of a Prosecution Witness*, 43 AM. U. L. REV. 995 (1994). I have found no civil cases dealing with intimidated witnesses.

121. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982) ("[I]f a witness' silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot assert his confrontation clause rights in order to prevent prior grand jury testimony of that witness from being admitted against him." (citations omitted)), *cert. denied*, 467 U.S. 1204 (1984). The doctrine has expanded beyond grand jury testimony. United States v. Thai, 29 F.3d 785, 814 (2d Cir.) ("Although we first articulated this rule in the context of admission of prior grand jury testimony, we have held that its rationale is not limited to such testimony." (citation omitted)), *cert. denied*, 115 S. Ct. 456 (1994); *see also* State v. Gettings, 769 P.2d 25 (Kan. 1989) (holding that murdered witness' statements to police investigator were admissible).

> The confrontation right is waived only if the government shows . . . that (1) the defendant caused the witness' unavailability (2) for the purpose of preventing that witness from testifying at trial. Thus hearsay evidence would not be admissible simply because the witness was missing. Moreover, even if the government proved . . . that the defendant had caused the witness' absence, the hearsay evidence would still not be admissible until the government proved the second part of the test, i. e., that the defendant-caused absence was for the purpose of preventing the witness from testifying.

United States v. Thevis, 665 F.2d 616, 633 n.17 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982).

Courts, however, have not agreed on the burden the government must satisfy in proving that the defendant procured the witness' absence. *Compare* United States v. Balano, 618 F.2d 954 (6th Cir. 1982) (preponderance of evidence), *cert. denied*, 461 U.S. 945 (1983) *and Mastrangelo*, 693 F.2d 269 (preponderance of evidence) *with Thevis*, 665 F.2d 616 (clear and convincing evidence).

122. *Gettings*, 769 P.2d at 29 ("[A] waiver of the right to confrontation based on the procurement of the absence of the witness also constitutes a waiver of any hearsay objections to prior statements of the absent witness."); *see Balano*, 618 F.2d at 626 ("A valid waiver of the constitutional right is *a fortiori* a valid waiver under the rules of evidence."); Markland, *supra* note 120, at 1012 ("Because courts have held that a proven waiver of confrontation rights is *a fortiori* a waiver of the right to raise hearsay objections regarding the unavailable witness' statements, courts have also dispensed with the reliability requirements that they demand of hearsay statement absent a confrontation waiver." (footnotes omitted)).

123. *See* FED. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules . . . .").

Such literalism, however, does not promote the basic goal of the Federal Rules of Evidence—namely, justly ascertaining the truth.[124] A malefactor should not benefit from his misdeeds, and courts should remove incentives for witness intimidation.[125] The text may be plain, but can we not depart from it to admit the otherwise inadmissible hearsay of a witness intimidated by the accused?

While the Supreme Court has not addressed this issue,[126] *Mezzanatto* seems to indicate that courts can admit this hearsay. Since the accused can waive the protections of Rule 410, the accused can waive the protections of the hearsay rule, and indeed, all the Justices in *Mezzanatto* agreed that the hearsay prohibition could be waived.[127]

The waiver sanctioned in *Mezzanatto*, however, is not the same as a waiver imposed in the witness intimidation cases. *Mezzanatto* permitted the enforcement of an agreement between consenting parties that certain evidence would be admissible at trial for impeachment. "We hold that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable."[128] In the Court's view, it was confronting the equivalent of an evidentiary stipulation, an essential and well-established part of litigation: "[E]videntiary stipulations are a valuable and integral part of everyday trial practice."[129]

A waiver by intimidation, however, is not a voluntary agreement between the parties entered into as a part of litigation.[130] Instead, a "waiver" is imposed on an accused for behavior outside the formal trial process. A waiver by intimidation is a legal fiction. As the Sixth Circuit said,

> [T]he "waiver" concept is not applicable, strictly speaking, to [witness intimidation], and its use is somewhat confusing. It is a legal fiction to say that a person who interferes

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124. *See* FED. R. EVID. 102 ("These rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined.").

125. *See Balano*, 618 F.2d at 629 ("We agree that, under the common law principle that one should not profit by his own wrong, coercion can constitute voluntary waiver of the right of confrontation."); United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) ("The Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery."); Markland, *supra* note 120, at 1014 (stating that courts should not "strengthen incentives for criminal defendants to quickly secure the unavailability of an opposing witness before the witness improves the inherent reliability of his or her declarations").

126. *Williamson* may have contained the issue, but was decided on other grounds. Williamson v. United States, 114 S. Ct. 2431 (1994); *see supra* part III. The declarant there was unavailable because he refused to testify. He told an investigating officer that he was afraid of Williamson. As the Court stated: "When called to testify at Williamson's trial, Harris refused, even though the prosecution gave him use immunity and the court ordered him to testify and eventually held him in contempt." *Id.* at 2434. The issue of witness intimidation was raised in the lower courts.

> While the case was pending on appeal, the government secured a remand to the district court to address its claim that Mr. Williamson had waived his confrontation rights by procuring Harris's silence at trial. Following an evidentiary hearing, the district court concluded that Mr. Williamson had not waived his confrontation rights. It also found, ironically, that Harris was not a credible witness.

Petitioner's Brief at 6 n.1, *Williamson* (No. 93-5256) (citation omitted).

127. *Mezzanatto*, 115 S. Ct. at 805 n.5; *id.* at 807 (Souter, J., dissenting).

128. *Id.* at 806 (majority opinion); *cf. id.* at 802 ("[A]lthough hearsay is inadmissible except under certain specific exceptions, we have held that *agreements* to waive hearsay objections are enforceable." (emphasis added)).

129. *Id.* at 802.

130. The Court found that Mezzanatto's pretrial agreement was similar to a permissible litigation stipulation. It rejected his contention that the agreement was

> unlike a typical stipulation, which is entered into while the case is in progress, and is more like an extrajudicial agreement made outside the context of litigation. While it may be true that extrajudicial contracts made prior to litigation trigger closer judicial scrutiny than stipulations made within the context of litigation, there is nothing extrajudicial about the waiver agreement at issue here. The agreement was made in the course of a plea discussion aimed at resolving the specific criminal case that was "in progress" against respondent.

Id. at 802-03 n.3 (citations omitted).

> with a witness thereby knowingly, intelligently and deliberately relinquishes his right to exclude hearsay. He simply does a wrongful act that has legal consequences that he may or may not foresee. The connection between the defendant's conduct and its legal consequence under the confrontation clause is supplied by the law and not by a purposeful decision by the defendant to forego a known constitutional right.[131]

The intimidation waiver is not an evidentiary stipulation, and *Mezzanatto* does not clearly control. The background presumption that rights can ordinarily be waived by voluntary agreement does not apply to waiver by intimidation. The Rules were not drafted in a setting where it was well established that witness intimidation waived hearsay objections. The first case that found a waiver of confrontation rights from the intimidation of a witness was apparently the 1976 case of *United States v. Carlson.*[132] That case, however, did not consider whether the accused's behavior concomitantly waived a hearsay objection. *Carlson* concluded that the hearsay was properly admissible under a residual exception of the Federal Rules of Evidence. The first case finding a hearsay waiver from witness intimidation seems to be the 1979 case of *United States v. Balano,*[133] where without citation or reference to any provision in the Rules' text, the Tenth Circuit concluded that "[a] valid waiver of the [confrontation] right is *a fortiori* a valid waiver of an objection under the rules of evidence."[134]

While the doctrine that witness intimidation waives hearsay objections was not well established at the inception of the Federal Rules of Evidence, the Supreme Court had held earlier that the accused, even absent a voluntary agreement with the prosecution, could waive confrontation rights through his conduct.[135] For example, *Illinois v. Allen* held that the accused's disruptive behavior could justify his removal from the courtroom,[136] and *Taylor v. United States* held that a trial could be completed in absentia when the accused absconded in the midst of trial.[137] *Taylor* and *Allen,* however, differ from the intimidation waiver cases. First, the trial records made it clear that Taylor and Allen knew the possible consequences of their behavior. Allen was explicitly warned that his behavior could cause his removal from the courtroom.[138] Taylor had attended the beginning of his trial and

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131. Steele v. Taylor, 684 F.2d 1193, 1201 n.8 (6th Cir. 1982), *cert. denied,* 460 U.S. 1053 (1983); *see also* MICHAEL H. GRAHAM, WITNESS INTIMIDATION 174 (1985) ("When witness intimidation arising from the acts of the defendant or the defendant's agents is sufficiently established, these courts have declared that the defendant has waived his or her hearsay objection and confrontation right. This waiver doctrine, however, is based upon certain questionable assumptions.").

132. 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977). "Whether the accused waives his right of confrontation under these circumstances is an issue which apparently has not been directly considered by a federal court or, so far as we have been able to ascertain, by any state court." *Id.* at 1358.

133. 618 F.2d 624 (10th Cir. 1979), *cert. denied,* 449 U.S. 840 (1980).

134. *Id.* at 626; *see also* United States v. Thevis, 665 F.2d 616, 627 (5th Cir. 1982) ("The issue of admissibility of a witness' hearsay statements in the face of a defendant-caused absence of that witness from trial is a question of first impression in this circuit . . . .") (discussing *Balano*), *cert. denied,* 459 U.S. 825 (1983).

135. Illinois v. Allen, 397 U.S. 337 (1990); Taylor v. United States, 414 U.S. 17 (1973).

136. *Allen,* 397 U.S. 337.

137. *Taylor,* 414 U.S. 17; *see also* United States v. Diaz, 223 U.S. 442 (1912) (holding that the accused waived the right to be present by voluntarily absenting himself from trial).

138. According to the Court, after Allen's disruptive behavior, "[t]he trial judge thereupon stated to the petitioner, 'One more outbreak of that sort and I'll remove you from the courtroom.'" *Allen,* 397 U.S. at 340. The Supreme Court concluded:

> [W]e explicitly hold today that a defendant can lose his right to be present at trial if, *after he has been warned by the judge that he will be removed if he continues his disruptive behavior,* he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Id. at 343 (emphasis added) (citation omitted).

knew of his right to be present.[139] Because these in-court proceedings had made clear the potential consequences of the defendants' conduct, their subsequent actions in light of that knowledge were akin to voluntary waivers. With the witness intimidator, who has not been warned by the trial court, we do not know, but can only assume, that he is aware that as a consequence of his action the hearsay of the intimidated witness can be admitted at trial. More realistically, however, the intimidator has acted upon the opposite belief. He must presume that his actions, if successful, will prevent damaging evidence from being used against him. If courts act upon the assumption that the intimidator knows the consequences of his actions, courts are reaffirming the legal-fiction status of waiver by intimidation.

Furthermore, the conduct of Taylor and Allen only waived a portion of the rights guaranteed by the Confrontation Clause—the right to be present at trial. The Court's opinions do not indicate that the defendants concomitantly gave up all hearsay objections. The Court did not imply that because Taylor fled and Allen disrupted, the government could have introduced whatever hearsay it wished under the theory that the defendants' confrontation waivers also waived all hearsay objections. Presumably, if defense attorneys had entered timely objections to otherwise inadmissible hearsay, the trial court should have sustained the objections.[140] A defendant by his behavior cannot prevent his trial from continuing, but this fact does not allow the government to use legally untrustworthy evidence to convict him. While the government is entitled to complete the trial, it is *not* entitled to get an unreliable conviction.

The Supreme Court case closest to a waiver by intimidation is the 19th-century case of *Reynolds v. United States*,[141] in which the Court found a waiver by conduct of confrontation rights that normally protect against hearsay. Reynolds was tried in the territory of Utah for bigamy. The government sought to call Amelia Jane Schofield to prove that she had married the defendant while he was also married to another woman. When Schofield did not appear, allegedly because the defendant had made her unavailable, the government introduced her testimony from a former trial for the same offense under another indictment. The Court, affirming the conviction, conceded that the Constitution gives the accused the right to confront witnesses against him, but relying on the "maxim that no one shall be permitted to take advantage of his own wrong,"[142] concluded that "if a witness is absent by [the accused's] own wrongful procurement, [the accused] cannot complain if competent evidence is admitted to supply the place of that which he has kept away."[143]

While *Reynolds* seems to stand for the proposition that misconduct waives a confrontation objection to hearsay, the Court did not hold that misconduct waives all hearsay objections. The Court did not indicate that otherwise inadmissible hearsay

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139. As the Court stated:

> It is wholly incredible to suggest that petitioner, who was at liberty on bail, had attended the opening session of his trial, and had a duty to be present at the trial, entertained any doubts about his right to be present at every stage of his trial. It seems equally incredible to us, as it did to the Court of Appeals, "that a defendant who flees from a courtroom in the midst of trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial would continue in his absence."

Taylor, 414 U.S. at 20 (quoting United States v. Taylor, 478 F.2d 689, 691 (1st Cir. 1973) (citation omitted)).

140. Allen had refused court-appointed counsel and tried to represent himself, but the trial court appointed a standby counsel to advise him. *Allen*, 397 U.S. at 339.

141. 98 U.S. 145 (1878).

142. *Id.* at 159.

143. *Id.* at 158.

became admissible because the defendant had procured the declarant's absence. Instead, the Court held that because of such procurement, evidence falling within a hearsay exception that required unavailability of the declarant became admissible.[144] The Court stressed that the disputed hearsay was "former testimony" as defined by evidence law:

> It was testimony given on a former trial of the same person for the same offence, but under another indictment. It was substantially testimony given at another time in the same cause. The accused was present at the time the testimony was given, and had full opportunity of eross-examination. This brings the case clearly within the well-cstablished rules.[145]

Former testimony, then as now, was admissible only if the declarant was unavailable. *Reynolds* seems to have held only that the accused could not object to the declarant's unavailability when he was responsible for her absence. It was not holding that all of the declarant's hearsay, including otherwise inadmissible declarations, became admissible due to the defendant's conduct. If otherwise, the Court had no need to determine whether the disputed evidence qualified as former testimony, which the Court was at pains to do.

Indeed, a different reading of *Reynolds* produces a collision with *Salerno*. The court of appeals in *Salerno* concluded that the grand jury testimony should be admitted because the declarants, while unavailable to the defendants, were available to the government. The government, but not the defendants, could secure the testimony by giving the declarants immunity as the government had done in the grand jury. Under these circumstances, the Second Circuit concluded that the "principle of adversarial fairness should prevent the *opponent* of a hearsay declaration from invoking the protections of rule 804(b)(1) when the declarant, although unavailable to the *proponent*, is available to the *opponent* of the declaration."[146] It takes only a slight rephrasing of the panel's opinion to conclude that it was, in essence, holding that because the government failed to make the declarant available, the government had waived its right to object to the hearsay. Viewed this way, the government's conduct in *Salerno* was almost the same as the "misconduct" in *Reynolds*. The *Reynolds* record revealed that

> an officer who knew the witness personally went to the house of the aecused to serve the subpoena . . . ; that he was told by the accused she was not at home; that he then said, "Will you tell me where she is?" that the reply was "No; that will be for you to find out;" that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself; and the accused replied, "Oh, no; she won't, till the subpoena is served upon her," . . . .[147]

The process server returned later

> and there found a person known as the first wife of the accused. She told him that the witness was not there, and had not been for three weeks. He went again the next morning, and not finding her, or being able to ascertain where she was by inquiring in the neighborhood, made return of that fact to the court.[148]

The rccord did not show that the accused had intimidated the declarant or that she would not have testified if properly served.

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144. *See id.* at 158-61.

145. *Id.* at 160-61. Compare the Court's statement stressing that the hearsay was "competent evidence" with its conclusion: "If, therefore, when absent by his procurement, *their evidence is supplied in some lawful way*, he is in no condition to assert that his constitutional rights have been violated." *Id.* at 158 (emphasis added).

146. United States v. Salerno, 937 F.2d 797, 805 (2d Cir. 1991) (emphasis in original), *rev'd*, 505 U.S. 317 (1992).

147. *Reynolds*, 98 U.S. at 159-60.

148. *Id.* at 160.

The accused, however, refused to cooperate in making her available. The Court concluded that "enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away."[149] In *Reynolds*, the accused made it difficult for his opponent to produce the declarant, and thereby waived his confrontation rights. If this conduct also waived hearsay objections, then the government in *Salerno* may also have waived hearsay objections, for the prosecutor seems to have been as instrumental in keeping the declarants away as Reynolds had been in shielding Amelia Jane Schofield.

Perhaps there is a meaningful distinction between whatever the Court assumed Reynolds had done and the *Salerno* prosecutors' refusal to grant trial immunity, but *Salerno* did not attempt to find that distinction or explore the issue. *Salerno* flatly held that for hearsay to be admitted it must fall within an exception. A party's unilateral conduct, apparently, could not make the hearsay admissible, and the Second Circuit had been wrong to consider it. The grand jury testimony could be admitted only if it had the characteristics placing it within one of the Rules' hearsay exceptions. Of course, if the unilateral actions of the government cannot make otherwise inadmissible hearsay admissible, then unilateral actions by other parties should not be able to change the status of inadmissible hearsay either.

Salerno, thus, indicates that there cannot be a hearsay waiver by intimidation. Indeed, the introduction of otherwise inadmissible hearsay from an intimidated witness, in effect, creates a new hearsay exception by court decree. Courts cannot do this; they cannot ignore the requirements of the existing exceptions. According to *Salerno*, courts must assume that the drafters carefully selected the boundaries of the exceptions. If the drafters wanted to admit hearsay from intimidated witnesses, they would have created an exception for this situation. Since they did not, even if that absence was an oversight, courts are not allowed, according to the logic of *Salerno*, to substitute their wisdom just because the drafters had insufficient foresight.

In any event, courts should not conclude too quickly that there has been an oversight in the drafting. The hearsay rules do in fact address witness intimidation. The last sentence of the "unavailability" definition states: "A declarant is not unavailable 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."[150] A party, thus, cannot intimidate a witness into being unavailable and then try to admit out-of-court statements of that witness under one of the exceptions requiring unavailability. Aware of the problem of witness intimidation, the drafters acted, but they did not create an exception from the hearsay rule for statements of intimidated witnesses. The absence of such an exception hardly seems like an oversight, but whether it was or not, *Salerno* indicates that hearsay is not admissible simply because the declarant has been intimidated. To be admitted, the hearsay must fall within one of the Rule's exceptions.

The apparent tension between *Mezzanatto* and *Salerno*, with *Mezzanatto* permitting waivers and *Salerno* indicating that the parties' conduct is not to be examined when determining whether hearsay is admissible, is resolvable if *Mezzanatto* is treated as sanctioning stipulation-like waivers coming out of voluntary agreements, and not

149. *Id.*
150. FED. R. EVID. 804(a).

"waivers" by a party's unilateral out-of-court conduct.[151] This resolution, while preventing a conflict between the two cases, is disturbing because witness intimidators would benefit from their conduct. Surely we ought to question Rules or methods of interpreting those Rules that permit parties to coerce witnesses into not testifying.

Part of the problem here is a methodological one. *Salerno* is based on a principle that is absolute. Even if *Salerno* does not state that the text must always be followed, it does command that one must follow the literal language of the hearsay exceptions. In allowing the Rule 410 waiver, *Mezzanatto* indicates that sometimes departures from the text are allowed, but the Court does not give us a general principle for when this departure is permissible other than for waivers by voluntary agreement. At most, *Mezzanatto* suggests only that on some sort of ad hoc basis can we depart from the absoluteness of *Salerno*. This is hardly useful for lower courts trying to determine when to ignore the language of the Rules. Perhaps if the Court confronted the situation of hearsay from an intimidated witness, it would find a way to authorize its admissibility. But, placed alongside the principles the Court found so persuasive in *Salerno*, it would appear to be just another ad hoc determination. While ad hoc determinations may eventually lead to a useful common law, they do not lead to a real set of Rules.[152]

VII. FORMER TESTIMONY, *SALERNO*, AND THE CONFRONTATION CLAUSE

Salerno suggests another tension between evidence doctrine and the Confrontation Clause, with evidence law again admitting less hearsay. The *Salerno* Court remanded the case for consideration of whether the "similar motive" requirement of the former testimony exception had been satisfied. The Court did not explicitly attempt to define what might constitute the requisite similar motive, but the remand itself indicates that something more is needed for a "similar motive" than the fact that the objecting party had the opportunity to cross-examine and actually asked questions on the same subject matter in an earlier proceeding of the case. If such opportunity and cross-examination were sufficient, the Court had no reason to remand since the prosecution had the occasion to cross-examine at the grand jury and asked questions about the bid-rigging.

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151. The *Salerno* defendants maintained that a party can forfeit a privilege by opening the door to certain subjects and contended that in this case "the United States is attempting to use the hearsay rule like a privilege." *Salerno*, 505 U.S. at 323. The Court responded, "Even assuming that we should treat the hearsay rule like the rules governing testimonial privileges, we would not conclude that a forfeiture occurred here. Parties may forfeit a privilege by exposing privileged evidence, but do not forfeit one merely by taking a position that the evidence might contradict." *Id.* The Court did not discuss whether other actions could be considered a forfeiture. *Mezzanatto* stated, however, that Rule 410, in effect, creates a privilege, "and, like other evidentiary privileges, this one may be waived or varied at the defendant's request." *Mezzanatto*, 115 S. Ct. at 803-04.

152. *Cf.* Schauer, *supra* note 117, at 650-51.

> The argument for the nonexistence of commitment to reasons in legal practice likely stems from a common law tradition of particularity. Law is not about generality, the tradition holds, but about particular situations and decisions in cases that the infinite variety of human experience ensures will never repeat themselves. . . . Moreover, abstract reasoning is necessarily deficient, and rules are incomplete until applied, so any abstract conclusion must be considered genuinely tentative and defeasible until actual cases provide the privileged knowledge that only the concrete can give us.
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> . . . .
>
> . . . But if giving reasons is centrally explained by a reason's generality and the reason giver's commitment to that generality, then giving a reason is like setting forth a rule.

Id.

Former testimony, however, satisfies the Confrontation Clause if the accused simply had the opportunity to examine the witness about the same subject matter at an earlier proceeding.[153] If an accused had the same chance to examine the witness as the *Salerno* prosecution did, the hearsay could have been constitutionally admitted against the accused. *Salerno*, thus, suggests that the standards for admitting former testimony under the Federal Rules of Evidence and the Confrontation Clause differ, with the Constitution being the more liberal.[154] Of course, evidentiary requirements can be stricter than constitutional ones, but *Salerno* did not indicate why that should be the case here. That reason is not apparent, especially since the hearsay rules and the Confrontation Clause

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153. *See* California v. Green, 399 U.S. 149, 165-66 (1970).

> Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned. . . . [R]espondent had every opportunity to cross-examine Porter [at the preliminary hearing] as to his statement . . . .
>
> . . . [T]he right of cross-examination then afforded [at the preliminary hearing] provides substantial compliance with the purposes behind the confrontation requirement . . . .

Id.; *accord* Ohio v. Roberts, 448 U.S. 56 (1980).

154. On remand, the court of appeals applied evidentiary standards for former testimony different than the constitutional standard. The Second Circuit, sitting en banc, held that the grand jury testimony was not admissible because the government's motive to develop the testimony at the grand jury was not "similar" to its motive to develop such testimony at the trial. The court concluded that "[t]he proper approach . . . in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of similar intensity to prove (or disprove) the same side of a substantially similar issue." United States v. DiNapoli, 8 F.3d 909, 914-15 (2d Cir. 1992) (en banc). Since the prosecution only needs to meet a probable cause burden at a grand jury proceeding, the prosecutor will not necessarily have the same motive to develop the testimony at the grand jury as at trial. If probable cause is established from other sources, the prosecutor has little motivation to challenge the grand jury witness who presents exculpatory information. The Second Circuit concluded that this was true in the *DiNapoli* grand jury, and therefore the similar motive requirement of the former testimony exception had not been met. The hearsay was not admissible.

Interestingly, criminal defendants have made the same argument when claiming that the admission of testimony from preliminary hearings at trials violates the Sixth Amendment's Confrontation Clause. In essence, the defendant argues that because he does not have the same motive to challenge witnesses at a preliminary hearing determining probable cause as he would at trial, testimony from that preliminary hearing constitutionally should not be admitted at trial. Indeed, defendants have contended that there are affirmative reasons why they should not seriously challenge the evidence at the preliminary hearing. True testing of witnesses there may not merely waste time, it may actually be harmful to the defendant by revealing trial strategies early and giving witnesses and the prosecution otherwise unavailable opportunities to prepare for trial. As Justice Brennan stated:

> Cross-examination at the hearing pales beside that which takes place at trial. . . . First, . . . the objective of the hearing is to establish the presence or absence of probable cause, not guilt or innocence proved beyond a reasonable doubt; thus, if evidence suffices to establish probable cause, defense counsel has little reason at the preliminary hearing to show that it does not conclusively establish guilt. . . . Second, neither defense nor prosecution is eager before trial to disclose its case by extensive examination at the preliminary hearing; thorough questioning of a prosecution witness by defense counsel may easily amount to a grant of gratis discovery to the State. Third, the schedules of neither court nor counsel can easily accommodate lengthy preliminary hearings. Fourth, . . . the defense and prosecution have generally had inadequate time before the hearing to prepare for extensive examination. Finally, though counsel were to engage in extensive questioning, a part of its force would never reach the trial factfinder, who would know the examination only second hand.

Green, 399 U.S. at 197 (Brennan, J., dissenting).

The Supreme Court, in the confrontation context, has rejected these arguments. The admission of preliminary hearing testimony does not violate the Sixth Amendment when the defendant had the opportunity to challenge the witness and to undertake some questioning at the hearing even if the motive was not "similar" to the cross-examination motive at trial. Michael Graham concludes, after discussing why a defendant might not have similar motives for cross-examining at a preliminary hearing, that

> [i]n spite of the foregoing, determining the adequacy of an opportunity to conduct meaningful cross-examination primarily focuses not on the practical realities facing defense counsel but upon the scope and nature of the opportunity for cross-examination permitted by the court. Accordingly, a decision by counsel not to cross-examine a witness at the preliminary hearing, or to do so only to a limited extent, no matter how much practical sense the decision makes, does not appear to affect the adequacy of opportunity.

GRAHAM, *supra* note 131, at 133.

generally serve the same purposes.[155] The drafters of the Federal Rules of Evidence indicated that the constitutional and evidentiary standards regarding the "similar motive" requirement were the same.[156] While avoiding constitutional questions may be wise,[157] here it presents a problem for future interpretations of the Rules. Lower courts might have thought that evidence law should track Confrontation Clause doctrine, but if the two do not converge for former testimony, then it is doubtful that courts would look to constitutional principles at all. Whether the Court really intended this outcome on the methodological issue, we can only guess, because the Court never discussed the tension between confrontation and evidence law which it created in *Salerno*.

VIII. THE RESIDUAL HEARSAY EXCEPTIONS

The most important evidentiary issue the Court has avoided, however, is the proper interpretation of the residual hearsay exceptions.[158] Three interrelated concepts crucially shape American trials—the jury trial as the norm, the faith in the power of cross-examination, and the limitation on the use of hearsay.[159] Not surprisingly, then, the hearsay rule is at the core of our evidence law, and the residual hearsay exceptions are a key to the hearsay structure of the Federal Rules of Evidence.

This structure seems to follow the traditional hearsay pattern generally prohibiting hearsay and admitting it only when it falls within the limited class of statements excepted from the hearsay prohibition.[160] In addition, however, the Rules contain two residual exceptions. These provisions potentially allow trial courts broad discretion to ignore the boundaries of the specific exceptions and to admit otherwise inadmissible hearsay. Consequently, "[t]he future of hearsay is inextricably linked with the way that courts interpret the residual exceptions."[161] Until the Supreme Court indicates how these

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155. *See* Tennessee v. Street, 471 U.S. 409, 415 (1985) ("[T]he Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials.'" (quoting Dutton v. Evans, 400 U.S. 74, 89 (1974))); *see also* FED. R. EVID. 102 (noting evidence law exists to serve "the end that the truth may be ascertained and proceedings justly determined"); *cf.* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 577 (1988) ("[T]he chief missions of the confrontation clause and evidence law coincide. Consequently, if evidence rules are thought to serve their own goals, they will also be thought to further confrontation's goals . . . .").

156. *See* FED. R. EVID. 804(b)(1) advisory committee's note.

> The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. Testimony given at a preliminary hearing was held in *California v. Green* to satisfy confrontation requirements in this respect.

Id. (citations omitted).

157. Justice O'Connor noted in *Williamson v. United States* that she did not need to address confrontation concerns. "In light of this disposition, we need not address Williamson's claim that the statements were also made inadmissible by the Confrontation Clause . . . ." *Williamson*, 114 S. Ct. at 2437. *But see* Scallen, *supra* note 6, at 1806 ("The facts of *Williamson* present the paradigmatic case for Confrontation Clause concerns.").

158. FED. R. EVID. 803(24) & 804(b)(5).

159. *See* JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364 (James H. Chadbourn ed., rev. ed. 1974) (noting the hearsay rule is "that most characteristic rule of the Anglo-American law of evidence—a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's method of procedure"); *see also* FED. R. EVID. art. VIII advisory committee's introductory note ("Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination. . . . The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental.").

160. *See* Jonakait, *supra* note 20, at 433-37 (discussing how the Federal Rules of Evidence embody the traditional hearsay framework).

161. RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 504 (2d ed. 1982).

provisions should be interpreted, we truly will not understand the structure of the hearsay rule embodied in the Federal Rules of Evidence. Since the hearsay rule is so important, without that understanding we will not truly know the structure of the Federal Rules of Evidence.

The Court has not addressed these residual exceptions,[162] but of the Court's recent cases, *Salerno* seems to speak to them. *Salerno* concluded that since Congress made careful choices in deciding what hearsay was admissible and reflected those choices in the words selected to express the hearsay exceptions, those words must be followed. That approach, however, tends to be meaningless if hearsay which does not meet the textual requirements of the former testimony or other specific hearsay exceptions is easily admitted under a residual exception. If the grand jury testimony in *Salerno* was admissible under a residual exception, analysis of the former testimony exception was a waste of time. *Salerno* has little real significance unless these residual exceptions are read in such a way as to prohibit the widespread introduction of hearsay not meeting the requirements of a specific hearsay exception.

Even so, courts have utilized a residual exception to admit prior testimony that fell afoul of the lines drawn in Rule 804(b)(1). For example, in *United States v. Deeb*,[163] testimony given at a trial where the defendant was not a party was offered in the defendant's criminal trial. The defendant did not even have the opportunity to develop the prior testimony, much less have a similar motive to do so. Rule 804(b)(1) clearly excludes such hearsay; however the *Deeb* court admitted it under a residual exception. Similarly, in *United States v. Clarke*,[164] the court ruled that testimony from a suppression hearing where the defendant was not a party was inadmissible as former testimony because of the lack of opportunity to develop the testimony, but admitted the evidence.[165]

Not just the former testimony exception has been treated this way. Many courts see the residual exceptions as a way to slip past pesky restrictions spelled out in specific

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162. The issue *potentially* has been in several of the recent cases. For example, in *Salerno*, the defendants suggested that the Supreme Court consider whether the hearsay was admissible under a residual exception. *See* Respondent's Brief at 18 n.26, *Salerno* (No. 91-872) ("This Court can affirm the court of appeals' sensible result on a ground not relied on by that court, including that the testimony is admissible under Rule 804(b)(5)." (citation omitted)). The government stated, "Respondents attempted to introduce the grand jury testimony . . . not only under Rule 804(b)(1), but also under Rule 804(b)(5). The trial court specifically found that the testimony lacked the 'circumstantial guarantees of trustworthiness' required by Rule 804(b)(5) . . . , a finding that was not disturbed by the court of appeals." Petitioner's Brief at 43, *Salerno* (No. 91-872) (citation omitted).

The issue also surfaced in *Tome v. United States*. "The Government offered the testimony of the social worker under both Rules 801(d)(1)(B) and 803(24), but the record does not indicate whether the court ruled on the latter ground." 115 S. Ct. 696, 700 (1995). The Court also stated:

> When a party seeks to introduce out-of-court statements that contain strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available, there is no need to distort the requirements of Rule 801(d)(1)(B). If its requirements are met, Rule 803(24) exists for that eventuality. We intimate no view, however, concerning the admissibility of A.T.'s out-of-court statements under that section, or any other evidentiary principle.

Id. at 705.

163. 13 F.3d 1532 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1093 (1995).

164. 2 F.3d 81 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1194 (1994).

165. See King v. Armstrong World Industries, Inc., 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991), where a deposition taken in an action unrelated to the pending case (in which the defendant was not a party) was admitted against the defendant under Rule 804(b)(5) without mention of the former testimony exception. In light of *Salerno's* conclusion that the grand jury testimony had to meet the requirements of the former testimony exception, perhaps of most interest is that grand jury testimony has frequently been admitted under a residual exception against a criminal defendant. *See also* United States v. Panzardi-Lespier, 918 F.2d 313, 316-17 (1st Cir. 1990); United States v. Curro, 847 F.2d 325, 327 (6th Cir.), *cert. denied*, 488 U.S. 843 (1988); United States v. Guinan, 836 F.2d 350 (7th Cir.), *cert. denied*, 487 U.S. 1218 (1988); United States v. Murphy, 696 F.2d 282 (4th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983).

exceptions.[166] Indeed, some courts seem to view the residual exceptions as a way to admit any hearsay that the court believes should be admitted. As one commentator laments,

> It may be a slight exaggeration to suggest that federal judges routinely use the residual exception to admit almost any relevant out-of-court statement that passes muster under Rule 403. It is . . . beyond debate that the residual exceptions are used with increasing frequency, and in ways Congress never intended.[167]

Salerno's demand for deference to congressional care in drafting specific exceptions often seems absent in interpretations of the residual exeeptions.

If decisions widely admitting hearsay under residual exceptions are right, when specific exceptions indicate that the evidence is not admissible then, in a fundamental sense, the hearsay framework is hopelessly at odds with itself. On the one hand, courts interpreting the specific exceptions—as *Salerno* commands—must make sure that every requirement is satisfied precisely as written. On the other hand, when interpreting the residual exceptions, hearsay can be admitted in a way to make line-drawing elsewhere superfluous.[168]

It was certainly not the intention of Congress to make the limitations of specific exceptions dispensable by enacting Rules 803(24) and 804(b)(5). The drafters did not intend to give broad discretion to trial judges to admit hearsay falling outside the other exceptions. They thought they were enacting provisions with a sharply limited reach. Congress expected the residual exceptions to "be used very rarely, and only in exceptional circumstances."[169]

Although the methodology for interpreting the Federal Rules of Evidence may be garbled, it seems certain that legislative history, no matter how clear, is not the starting

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166. *See, e.g.*, United States v. Simmons, 773 F.2d 1455, 1458 (4th Cir. 1985) (noting that government records were not admissible under Rule 803(6), but were admissible under Rule 803(24)).

167. Jeffrey Cole, *Residual Exceptions to the Hearsay Rule*, LITIGATION, Fall 1989, at 26, 27 (citations omitted). "The catch-alls currently generate 15-30 published opinions yearly." Myma S. Raeder, *Confronting the Catch-Alls*, CRIM. JUST., Summer 1991, at 31, 31. Myma Raeder indicates that in about 70% of these cases the prosecutor had offered the hearsay, and 77% of the time when they offered it, the prosecutors were successful in getting the hearsay admitted. *Id.*

168. Compare Tome v. United States, 115 S. Ct. 696 (1995), in which the Court, ruling in favor of the categorical premotive requirement for prior consistent statements, said,

> The statement-by-statement balancing approach advocated by the Government and adopted by the Tenth Circuit creates the precise dangers the Advisory Committee noted and sought to avoid: It involves considerable judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted.

Id. at 704-05. The Court was referring to the Advisory Committee's comments that it was rejecting a hearsay structure that abandoned

> the system of class exceptions in favor of individual treatment in the setting of the particular case . . . as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases.

FED. R. EVID. art. VIII advisory committee's introductory note. Of course, as courts interpret the residual exceptions more broadly, they will exacerbate the problems in the hearsay structure the drafters were trying to avoid.

169. S. Rep. No. 1277, 93d Cong., 2d Sess. 20, *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066. See Jonakait, *supra* note 20, at 437-40, for a summary of this history which concludes:

> This legislative history illustrates the intended scope of the residual exceptions. They were adopted to allow for growth and flexibility in the hearsay rule, but only within the spirit of the traditional approach. Congress never intended that a trial judge admit hearsay under a residual exception whenever he believed it necessary and reliable or true. Only hearsay comparable to the hearsay permitted under a specific exception was to be admitted.

Id. at 440.

point for analysis.[170] Instead, the words selected to express that intent should, at least normally, control. Except for the notice provision, however, the text of the residual exceptions is hardly crystalline.[171] Courts, examining this language, have found diverse ways to interpret the residual exceptions.[172]

We confront the methodology question again. When the words should govern, but do not contain a definitive answer, how should the Rule be interpreted? *Williamson* suggested that any policy or principle expressed in the text should then control, but that approach fails here. The text of the residual exceptions do not express a policy or principle in the way Rule 804(b)(3) does.

Perhaps we should follow *Daubert*, which suggests that when the words of a Rule are not definitive, every conceivable source of meaning can be consulted with no source superior to another. This method, however, gets us farther away from the text. Before this method is used, another more text-based interpretation may be possible. Since these are Rules that we are interpreting, the most text-centered approach ought to be favored. The residual exceptions illustrate this possibility.

This method requires acknowledgment that the Rules of Evidence are one text instead of a collection of segregated texts. When a Rule has more than one possible meaning, these alternatives are not just measured against the Advisory Committee Notes, additional scholarly commentary, or other extratextual sources. Instead, each possible meaning is first examined for its interconnections with other evidentiary provisions. The alternative that best harmonizes with the text of other provisions is the one that is selected. This meaning treats the entire text as authoritative. Thus, an interpretation of a residual exception which places it at odds with the plain-meaning limitations found elsewhere in the hearsay framework should be discarded in favor of a competing interpretation that furthers the plain meaning of the specific exceptions. Here, *Salerno* comes into play.

Salerno concluded that all the requirements of the former testimony exception must be met for hearsay to be admitted under Rule 804(b)(1). Congress carefully drew the exceptions' boundaries, and courts must honor them. Assume that *Salerno*'s grand jury testimony did not satisfy the "similar motive" requirement. Can that hearsay be admitted under a residual exception? Are we respecting Congress' line-drawing by honoring the

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170. Nor in the case of the residual exceptions can the interpretation be controlled by some sort of common law background presumption, such as that for prior consistent statements or waivers, because the residual exceptions are truly creations of the Federal Rules of Evidence.

171. Though Rule 804(b)(5) requires unavailability of the declarant, while Rule 803(24) does not, the two rules otherwise have the same requirements:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b)(5) & 803(24).

172. *See* Jonakait, *supra* note 20, at 440-41 ("Although the legislative intent is clear, the language of the residual exceptions is not. . . . [The] wording is not precise enough to give much guidance whether to admit the hearsay under a residual exception. Instead, it has been viewed as a grant of broad discretionary power to trial judges.").

similar motive requirement when considering Rule 804(b)(1), but ignoring it when the same evidence is proffered under Rule 804(b)(5)?[173]

If the residual exceptions' words contain the answer to this problem, it is in the requirement that hearsay can be admitted only if it is a "statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness."[174] The meaning of that "not specifically covered" requirement, however, is not plain. Courts have found greatly differing meanings.

In *United States v. Clarke*,[175] testimony from a prior proceeding in which the defendant was not a party was offered against the defendant. The Fourth Circuit stated that this hearsay "was clearly inadmissible under Fed.R.Evid. 804(b)(1)." When this testimony was offered under Rule 804(b)(5), the defendant argued that it must be barred because of the "not specifically covered" restriction. The former testimony exception, the argument went, covered the situation and indicated that prior testimony can be admitted only if the opponent of the hearsay had an opportunity to develop that testimony at the prior proceeding.[176]

Clarke rejected this view, maintaining that it would make the residual a "nullity."

> The plain meaning, and the purpose, of 804(b)(5) do not permit such a narrow reading. We believe that "specifically covered" means exactly what it says: if a statement does not meet all of the requirements for admissibility under one of the prior exceptions, then it is not "specifically covered." This reading is consistent with the purposes of 804(b)(5). That rule rejects formal categories in favor of a functional inquiry into trustworthiness, thus permitting the admission of statements that fail the strict requirements of the prior exceptions, but are nonetheless shown to be reliable.[177]

Clarke was not expressing a novel view. "Today the catchalls routinely permit 'near misses' to be introduced against criminal defendants."[178]

While the Fourth Circuit concluded that a narrow reading of the "specifically covered" requirement would make the Rule a nullity, its approach negates the restriction. If specifically covered hearsay is only that which meets all the elements of an exception, then specifically covered hearsay is always admissible without the residual exceptions. The requirement would only prohibit the residual exception from admitting hearsay already admissible under another provision. Big deal. With this "plain meaning," the restriction does not restrict. The requirement only has meaning if it restricts the admissibility of hearsay not already admissible under another provision. *Clarke*, in trying to avoid what it saw as a nullity, produced one.

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173. This is a "near miss" situation. In the lingo occasionally used to discuss the residual exceptions, a "'near miss' just falls short of a recognized hearsay exception, and may encompass a category of hearsay which was rejected from inclusion as an exception." Myma S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. L. REV. 925, 936-37 (1992).

174. FED. R. EVID. 803(24).

175. 2 F.3d 81 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1194 (1994).

176. "Appellant asks us to construe 'not specifically covered' narrowly, limiting 804(b)(5) to cases in no way touched by one of the four prior exceptions. According to appellant, admitting testimony that was a 'near miss' under 804(b)(1) would undermine the protections of the evidentiary rules . . . ." *Id.* at 83.

177. *Id.* at 83 (citation omitted). The Fourth Circuit continued: "If we were to adopt appellant's reading of the rule, we would deprive the jury of probative evidence relevant to the jury's truth-seeking role." *Id.* This is a curious statement. Any time evidence is excluded by the hearsay rule and not because of its irrelevance, we "deprive the jury of probative evidence relevant to the jury's truth-seeking role." *Id.*

178. Raeder, *supra* note 173, at 936; *see, e.g.*, United States v. Deeb, 13 F.3d 1532, 1536-37 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1093 (1995) (rejecting "the 'near-miss argument,' which maintains that a hearsay statement that is close to, but that does not fit precisely into, a recognized hearsay exception is not admissible under Rule 804(b)(5)").

Clarke found its "plain meaning" by considering the "not specifically covercd" requirement in isolation. This provision, however, is not segregated. It is part of the residual exceptions, which are part of a broader rule, Rule 804, and that Rule is part of a broadcr framework, the hcarsay structure of Article VIII.[179] *Clarke* did not consider how its plain-meaning reading fit in with a plain-meaning reading of that broader rule or framework, or more particularly, what should be done if its plain-meaning rcading conflicted with plain-meaning readings of othcr provisions.

United States v. Dent,[180] however, reveals another approach to this problem. Over defense objections, the trial court had admitted the grand jury testimony of an unavailable witness under Rule 804(b)(5). On appeal, the Seventh Circuit held that the "equivalent circumstantial guarantees of trustworthiness" requirement of that Rule had not been satisfied.[181] A concurrence by Judge Eastcrbrook, however, joined by Chief Judge Bauer, went further and considered the effect *United States v. Salerno* had on the residual exceptions and "whether Rule 804(b)(5) applies to grand jury testimony in the first place."[182]

Easterbrook noted that the Seventh Circuit in *United States v. Boulahanis*[183] had held grand jury testimony admissible under a residual provision, but that it had done so without considering the "not spccifically covered" requiremcnt. *Boulahanis* had assumed that the inadmissibility of grand jury testimony under Rule 804(b)(1) was so clear that the former testimony exception could not even be considered to apply to such hearsay. As a result, "Boulahanis treats Rule 804(b)(5) as if it began: 'A statement not spccifically admissible under any of the foregoing exceptions. . .'. Evidence that flunks an exprcss condition of a rule can come in anyway."[184]

Salerno, according to Easterbrook, had proved *Boulahanis*' assumption wrong: "Rule 804(b)(1) indeed 'applies.' Prior testimony of every description is 'specifically covcred by' Rule 804(b)(1)."[185] As a result,

> Rule 804(b)(5) reads more naturally if we understand the introductory clause to mean that evidence of a kind specifically addressed ("covered") by one of the four other subsections must satisfy the conditions laid down for its admission, and that other kinds of evidence not covered (because the drafters could not be exhaustive) are admissible if the evidence is approximately as reliable as evidence that would be admissible under the specific subsections.[186]

Salerno taught that the text of a rule must be followed rigorously. "Consistcnt application of the textualist approach implies taking the introduction to Rule 804(b)(5) equally

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179. *Cf.* Tribe, *supra* note 112, at 1233:

> It seems axiomatic that, to be worthy of the label, any "interpretation" of a constitutional term or provision must at least seriously address the *entire* text out of which a particular fragment has been selected for interpretation, and must at least take seriously the *architecture* of the institutions that the text defines.

Id. (emphases in original).

180. 984 F.2d 1453 (7th Cir.), *cert. denied*, 114 S. Ct. 169 (1993).

181. "The district judge carefully considered the admissibility of the grand jury testimony, but on balance we do not believe it satisfied the trustworthiness requirements and therefore hold its admission to be error." *Id.* at 1463.

182. *Id.* at 1465 (Easterbrook, J., concurring). *Salerno*'s effect was apparently not briefed. "At oral argument, the application of the Supreme Court's recent decision in United States v. Salerno was raised." *Dent*, 984 F.2d at 1463 (majority opinion) (citation omitted).

183. 677 F.2d 586, 588-89 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982).

184. *Dent*, 984 F.2d at 1465 (Easterbrook, J., concurring).

185. *Id.*

186. *Id.* at 1465-66.

seriously."[187] Since all prior testimony is covered by Rule 804(b)(1), grand jury testimony cannot be admitted under Rule 804(b)(5),[188] a result which the concurrence concluded was consistent with *Salerno*[189] and with the Sixth Amendment's Confrontation Clause.[190]

If we see the Federal Rules of Evidence not as a collection of isolated provisions and phrases but as one text, Easterbrook's approach is correct. Given the choice between competing meanings of an evidentiary rule, courts should choose the one that does not conflict with the meaning of other provisions. If the Rules are truly one text, then they should not be at war with themselves. When a Rule has more than one possible meaning, courts must examine its effect on other parts of the Rules and enforce the interpretation that best harmonizes with the text as a whole.

This methodology also indicates how the other key phrase in the residual exceptions—the requirement that hearsay, to be admitted, have "equivalent circumstantial guarantees of trustworthiness" to the specific exceptions—ought to be interpreted. This language has not been clear enough to prevent differing interpretations. The dominant approach considers evidence corroborating the proffered hearsay to determine whether the out-of-court statements have the requisite circumstantial guarantees of trustworthiness.[191] Those who see the Rules as one text should be concerned that corroboration as an equivalent circumstantial guarantee of trustworthiness produces a conflict within the residuals themselves as well as with other Rules.

The residual exception not only requires the equivalent circumstantial guarantees, it also mandates that the proffered hearsay be more probative than other reasonably

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187. *Id.* at 1466. The amount of the trial court's discretion depends on the text of a particular rule, according to Easterbrook:

> Some rules take the form: "Evidence is always admissible if conditions A and B hold; if these conditions do not hold, then it is admissible if the court believes that the benefits of using the evidence exceed any shortcomings." Consider how Rule 609 treats prior convictions offered to impeach a defendant: a conviction may be used automatically if it involves dishonesty or false statement, and otherwise the judge balances probative and prejudicial effects. This is how the court of appeals treated Rule 804(b)(1) in *Salerno*. . . . The court of appeals dispensed with the "similar motive" portion of the rule on equitable grounds and held the testimony admissible. The Supreme Court reversed, concluding that the Rule must be applied as written.

Id. (citation omitted).

188. *Id.* at 1464 n.1 (majority opinion). The court's opinion in *Dent* concluded:

> In Judge Easterbrook's concurrence the door appears to be tightly shut, as I read it, against ever using the grand jury testimony of an unavailable witness in a criminal prosecution. Perhaps it should be, but because this case does not require that determination I prefer not to go that far at this time. If this panel were to adopt the rule I see propounded in the concurrence, it would first require en banc consideration by this Court.

Id.

189. *Id.* at 1466 (Easterbrook, J., concurring) ("I doubt that the Solicitor General took *Salerno* to the Supreme Court in order to change the citation of authority from Rule 804(b)(1) to Rule 804(b)(5) while leaving the result untouched, or that the Court thought that its opinion would do nothing beyond correcting a typographical error.").

190. *Id.* at 1466-67.

> It would be ironic, though, if the upshot of *Salerno* were that *only* the prosecutor may employ grand jury testimony in criminal cases. Any asymmetry should run the other way: the confrontation clause of the sixth amendment protects defendants, not prosecutors, from out-of-court statements . . . .
>
> Trial by affidavit was the bugbear that led to the confrontation clause; trial by grand jury testimony is not far removed. . . . That the testimony has indicia of trustworthiness cannot be controlling; many affidavits *appear* to be trustworthy. . . . Confrontation is valuable in large measure because it may establish that what seems to be accurate is misleading or deceitful or rests on inadequate foundation. Conditions on the use of Rule 804(b)(1) ensure that the defendant retains the right of confrontation in circumstances that lie at the core of the constitutional guarantee. Temptation to get 'round this limitation by moving to Rule 804(b)(5) and slighting its introductory language should be resisted.

Id. (emphasis in original).

191. Raeder, *supra* note 167, at 36 (stating "most circuits" permit consideration of corroboration and "[m]ost lower courts have relied heavily on independent corroboration in determining whether hearsay satisfies . . . the catch-alls").

obtainable evidence. The more hearsay is corroborated, however, the smaller the chance that it is more probative than other evidence. "Relying upon corroboration to establish trustworthiness leads to the anomalous result that the more trustworthiness is demonstrated, the less likely it is that the hearsay should be admitted[,] . . . an interpretation that inevitably results in internal conflict."[192]

Furthermore, since corroborated hearsay is hardly rare, reliance on corroboration under the residuals moves toward the routine admission of otherwise inadmissible hearsay. The more an approach sanctions the admission of hearsay that would be excluded by the requirements of specific exceptions, the greater the conflict with the other exceptions.[193]

These conflicts might have to be endured if the residuals' text clearly mandated such reliance on corroboration, but they do not. Instead, the corroboration approach actually conflicts with the language. In assessing the amount and quality of confirming evidence at trial, a court is really determining whether proffered hearsay is as reliable as hearsay admitted under a specific exception.[194] The words of the Rule, however, do not authorize this.

> [U]sing corroboration . . . ignores the plain language of that provision. The catchalls do not authorize the admission of hearsay if it is as reliable as that admitted under a specific exception. If this were permitted, Rule 804(b)(5) would have instead provided '[s]tatements not covered by any of the foregoing exceptions but just as trustworthy. . . .'
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> . . . .
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> The residual exceptions, however, do not authorize the admission of hearsay if it is as trustworthy as that admitted under a specific hearsay exception. Instead, they require *circumstantial guarantees* of trustworthiness equivalent to those of a specific exception. Direct reliability is not the test; rather, *circumstances* that assure reliability must be measured.[195]

The residuals' text requires an examination of the circumstances that insure the trustworthiness of hearsay admitted under the specific exceptions. This examination determines whether hearsay not covered by the exceptions has "equivalent cireumstantial guarantees of trustworthiness." The guarantees of trustworthiness for the specific exceptions, however, are not corroborating pieces of evidence, but circumstances existing at the time of the hearsay's utterance that reduce some of the hearsay dangers.[196]

Consequently, the text indicates that "circumstantial guarantees of trustworthiness" means "circumstances must exist at the time the residual hearsay was uttered [that] reduce or eliminate the possibility that the out-of-court assertion was the product of ambiguity or narrative difficulties, insincerity, faulty memory, or flawed perceptions."[197] Furthermore, these "circumstances" must be "equivalent" to those of the specific exceptions. Therefore, in determining whether proffered hearsay is admissible under a residual exception,

> the court must isolate the circumstances existing when the hearsay was made[,] . . . the court must decide whether those circumstances reduce some or all of the hearsay

192. Jonakait, *supra* note 20, at 460.

193. *See id.* at 459 ("Congress intended that the residual exceptions would authorize the admission of hearsay only in truly exceptional circumstances[, but corroborated hearsay] is just not that rare.").

194. *See, e.g.*, United States v. Clarke, 2 F.3d 81, 83 (4th Cir. 1993) (concluding that the residuals authorize "a functional inquiry into trustworthiness"), *cert. denied*, 114 S. Ct. 1194 (1994).

195. Jonakait, *supra* note 20, at 466-67 (emphasis in original).

196. *See id.* at 467-74 (discussing this point at length).

197. *Id.* at 474.

> dangers[,] . . . the court must determine that these circumstances do not exist for all hearsay or for a broad range of inadmissible hearsay[, and] . . . the court must decide whether the reduction in the dangers is comparable to that for a specific exception.[198]

Given these competing interpretations of the residuals, a truly text-centered interpretive method would examine the interconnections between each alternative and other textual provisions to see which possibility best fits with the entire text. Unlike the corroboration approach, the requirement that judges look at the circumstances reducing the hearsay dangers at the time the declaration was uttered does not conflict with the plain meaning of the specific exceptions or the "more probative" requirement of the residual exceptions.[199] The text treated as a whole commands rejection of the corroboration approach in favor of the alternative.

The alternative approach is also desirable because it is consistent with the Confrontation Clause. While the Court in recent evidence cases has avoided exploring the interrelationships between the Rules and the Confrontation Clause, there are special reasons why an interpreter of the residuals ought to consider what effects an evidentiary approach at odds with the Sixth Amendment will have. *Idaho v. Wright*[200] is important for this evidentiary analysis.

Wright held that corroborating information could not be used in determining whether hearsay has the "particularized guarantees of trustworthiness" sometimes demanded by the Sixth Amendment's Confrontation Clause. The disputed declarations were made by a two-and-a-half-year-old girl to an examining pediatrician indicating that the defendants had sexually abused her. The trial court admitted this hearsay under Idaho's residual exception, the state counterpart to the federal provision.[201]

Wright's analysis started by reaffirming the requirement of *Ohio v. Roberts*[202] that hearsay from an absent declarant must have appropriate "indicia of reliability" to be admitted consistently with the Confrontation Clause, but that such indicia are established if the hearsay falls within "a firmly rooted hearsay exception."[203] If the hearsay, however, does not land within such a provision, the Confrontation Clause requires "a showing of particularized guarantees of trustworthiness."[204]

After determining that Idaho's residual exception was not a firmly rooted hearsay exception,[205] the Court confronted the definition of "partieularized guarantees of

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198. *Id.* at 478-79.

199. *See id.* at 479.

> These standards defer to the drafters' decisions that some circumstances do not lessen the dangers sufficient to justify the admission of hearsay. . . . Since the residual exceptions will be limited to that small area where no determination about circumstantial guarantees of trustworthiness already exists, the residual exceptions will be confined to rare and exeeptional cases. The proposed standards eliminate the inevitable conflict between tlie more probative and trustworthiness elements of the catchalls produced by the corroboration approach.

Id.

200. 497 U.S. 805 (1990).

201. IDAHO R. EVID. 803(24).

202. 448 U.S. 56 (1980).

203. *Id.* at 66.

204. *Id.*

205. *See Wright*, 497 U.S. at 817.

> Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements. The residual hearsay exception, by contrast, accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial. Hearsay statements admitted under the residual exception, almost by definition, therefore do not share the same tradition of reliability

trustworthiness."[206] *Wright* noted that our trial system depends on cross-examination to show the possible inaccuracy of a declaration. Hearsay, however, can be admitted "if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility."[207] The Court, citing a federal residual hearsay case for the proposition, then recognized that the guarantees of trustworthiness for firmly rooted hearsay exceptions come not from corroboration, but from circumstances that existed when the statement was made.[208] The Court concluded that

> the "particularized guarantees of trustworthiness" required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief....
>
> ....
>
> ... [T]he use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence to be admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.[209]

This conclusion seems to send a message for the residual hearsay exceptions. While the phrases "particularized guarantees of trustworthiness" and "circumstantial guarantees of trustworthiness" are not identical, they could mean the same thing, and, in fact, *Wright* treated them synonymously by citing a residual hearsay case to support the conclusion that corroboration was not a particularized guarantee of trustworthiness.[210] Furthermore, since both confrontation and the evidence rules have as their prime purpose the advancement of the accuracy of the truth-determination process of our trials, it makes sense that the similarly worded confrontation and residual requirements would have the same meaning.[211] All this suggests that the residual exceptions should be interpreted consistently with *Wright*. If so, corroboration cannot be considered when determining admissibility under Rules 803(24) and 804(b)(5).

A text-centered interpretation of the Federal Rules of Evidence should also come to that conclusion. The interpreter of the residuals should realize that allowing corroboration to gauge admissibility under the Rules while having it banned under the Sixth

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of statements under a firmly rooted hearsay exception.

Id. (citations omitted).

206. The state contended that the determination should "be based on a consideration of the totality of circumstances including not only the circumstances surrounding the making of the statement, but also other evidence at trial that corroborates the truth of the statement." *Id.* at 819.

207. *Id.* at 820.

208. *Id.* ("'The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include that may be added by using hindsight.'" (quoting Huff v. White Motor Corp., 609 F.2d 286, 292 (7th Cir. 1979))).

209. *Id.* at 820-23. The Court in reaching this conclusion stated:

> "Our precedents have recognized that statements admitted under a "firmly rooted" hearsay exception are so trustworthy that adversarial testing would add little to their reliability. Because evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability.

Id. at 820-21 (citations omitted) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1990)).

210. *Cf.* Jonakait, *supra* note 155, at 573 ("'Particularized guarantees of trustworthiness' . . . bears striking resemblance to [the] residual hearsay exceptions which permit the admission of hearsay . . . if the hearsay has 'circumstantial guarantees of trustworthiness. . . .' *Robert*'s language seems designed to guarantee that if hearsay is properly admitted under a residual exception, it will not violate the confrontation clause.").

211. *See supra* note 155 and accompanying text.

Amendment, in effect, ereates different evidence rules depending upon the nature of the case and the identity of the offering party. In civil cases and when the defendant offered hearsay in criminal cases, the court could use corroboration under the residuals, but not when the prosecutor offered it.[212] If one looks beyond the residuals to the entire text of the Federal Rules of Evidence, however, an interpreter sees—except when explicitly stated otherwise—that the Rules create one set of evidence laws. They mandate equal application in all actions[213] and for all parties.[214] Nothing in the words of the residual exceptions authorize a departure from this basic principle. The residuals' text, instead, indicates that it applies in the same manner, no matter who offers the hearsay and no matter what type the action is.[215] Here, a text-centered analysis of the Rules, which considers which of competing interpretations best harmonizes with the text as a whole, ought to take into consideration the alternatives' interplay with the Confrontation Clause. Because the corroboration approach to the residuals conflicts with the Sixth Amendment, divisions and distinctions will occur in the use of the residuals not in the text of those provisions. The alternative approach—the same one required for a confrontation analysis—does not produce these conflicts. It maintains the text as one entity.

CONCLUSION

While the Supreme Court's analysis of the Federal Rules of Evidence should indicate the methods by which lower courts can decide the many evidence disputes they confront, the Court's recent evidence cases only present a confusing picture. Sometimes the text is absolute, sometimes it is not, and the Court has done little to define when the words of the Rules will not control future issues. Many times the language will not be decisive by itself because it holds more than one possible meaning, but the Court has done little to indicate how to find the authoritative meaning in such a morass. If the Rules are to be meaningful rules, their interpretation must be text centered. This requires refraining from treating each provision, phrase, or requirement as a separate text, isolated from the rest of the text. It demands acknowledgment of the Rules as one text. Courts, when confronted with alternative interpretations of a Rule, must examine the alternatives' interrelationships with other portions of the evidence code and then select the meaning that best harmonizes with the entire text.

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212. *See, e.g.*, United States v. Accetturo, 966 F.2d 631, 634 (11th Cir. 1992) (stating circumstantial guarantees of trustworthiness for hearsay admitted under Rule 804(b)(5) against accused must come from the circumstances surrounding the statement), *cert. denied*, 113 S. Ct. 1053 (1993). Other courts, however, have held that when the Confrontation Clause is satisfied because the declarant testifies, the prosecutor can rely on corroboration to have hearsay admitted under the residual exceptions. *See, e.g.*, United States v. Grooms, 978 F.2d 425 (8th Cir. 1992).

213. "These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code." FED. R. EVID. 1101(b).

214. *See* Edward J. Imwinkelried, *Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution*, 71 MINN. L. REV. 269, 313 (1986) ("In most cases, whatever the identity of the proponent of the evidence, the foundational requirements for admitting the evidence and the possible objections to admission remain the same.").

215. *See* FED. R. EVID. art. VIII advisory committee's introductory note (indicating that hearsay rules should not require substantially different rules for civil and criminal cases).