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Intellectual Coherence in an Evidence Code

Paul F. Rothstein

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I. INTRODUCTION

The Federal Rules of Evidence (Federal Rules or Rules) were created in large part to promote uniformity and predictability in federal trials by providing a relatively instructive guide for judges and lawyers concerning the admissibility of evidence. As with any codification, success in this respect requires, among other things, that there be a considerable degree of intellectual coherence among the code's various provisions. The Federal Rules fall short of intellectual coherence in a number of areas. They contain contradictory and inconsistent mandates that do not make theoretical sense and therefore accord the trial judge almost unlimited discretion in these areas. He or she may arbitrarily make a ruling based on either side of the contradiction. Rulings are thus unlikely to be uniform or predictable on these matters.[1]

Although the Federal Rules lack intellectual coherence in a number of respects, this Essay focuses on only two examples:[2] (1) Federal Rule of Evidence 404(b), which governs the admissibility of

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1. This is not to say that the Federal Rules did not make great strides forward in many areas, and are not on the whole quite successful and a considerable advance over the previous system. But other improvements are possible.

2. I have commented on certain "intellectual incoherencies" in both Rule 404(b) and Rule 901 on earlier occasions.

During my tenure as chairperson of the Criminal Procedure and Evidence Committee of the American Bar Association's Criminal Justice Section, the committee examined Rule 404(b) and made some excellent suggestions in connection with that rule that would have helped with the problem noted here. Professor David Leonard chaired the working group that produced these suggestions. *See* ABA Comm. on Rules of Criminal Procedure and Evidence, *Federal Rules of Evidence: A Fresh Review and Evaluation*, 120 F.R.D. 299, 322-35 (1987).

prior crimes, wrongs, and acts to help establish a current alleged one;[3] and (2) Federal Rule of Evidence 901, which involves authentication and identification of documents and other items in order to establish the genuineness of their connection to the litigated matter.[4]

II. RULE 404(b): OTHER CRIMES, WRONGS, AND ACTS

It is inescapable that the first sentence of Rule 404(b),[5] the prohibitory sentence, is inconsistent with the second sentence, the permissive sentence,[6] at least as those sentences are currently interpreted. The first sentence commands, in effect, "Thou shalt not use other crimes, wrongs, or acts to prove character in order to prove an act in conformity with that character." The second sentence, however, says, in effect, "Yes, but you *may* use those other crimes, wrongs, or acts in order to prove such facts as knowledge, intent, motive, identity, plan, or absence of mistake or accident." The standard interpretation of these two sentences is that evidence is excluded by the first sentence if it is offered on a "propensity" theory—that is, that the defendant's prior acts demonstrate a tendency to behave the same way in the future. But, under the second sentence, the evidence may be admissible if the relevance of the evidence does not depend on a propensity inference. This dichotomy does not hold up under closer examination. The first and second sentences cannot be construed consistently in light of their interpretation in case law. Both describe evidence offered on a propensity theory.

Two cases epitomize how the second, permissive sentence is applied. The old English "Brides of the Bath"[7] case is certainly one of the primordial cases defining this category. In this case, the defendant was accused of drowning several of his wives in the bathtub,[8] a number of whom were wealthy and left the defendant their money.

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

4. FED. R. EVID. 901.

5. The first sentence of Rule 404(b) reads as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." FED. R. EVID. 404(b).

6. The second sentence of Rule 404(b) reads as follows:

> It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Id.

7. Rex v. Smith, 114 L.T.R. 239 (Crim. App. 1915).

8. *Id.* at 262.

"Oh, what a terrible accident" the defendant probably said when the authorities were investigating the latest drowning. The authorities were prepared to believe the man's lamentations until they learned about the other dead wives. At trial the judge allowed evidence of the other deaths to help prove the current charges.[9] The court admitted the evidence pursuant to something akin to what is now the second sentence of Rule 404(b), using catch words like plan, intent, knowledge, and absence of mistake or accident.[10]

The second case is *Jones v. State*,[11] also known as the "Body Rub" case. In that case a woman was charged with theft after she made sexual advances to a man by rubbing her body against his in order to distract him while she stole his wallet.[12] At trial the prosecution called several witnesses who testified that the defendant had previously done the same thing to them in the same manner.[13] The evidence was admitted to help prove the charge stemming from the latest incident.[14] As in Brides of the Bath, the court admitted the evidence pursuant to many of the same catch words that are now incorporated into the second sentence of Rule 404(b).[15]

Plainly, the evidence in both cases was admitted on a propensity theory. In the first case the defendant had a propensity to drown his wealthy wives in the bathtub, perhaps in order to inherit their fortunes. In the second case the defendant had a propensity to rub bodies and make sexual overtures in order to steal the wallets of her victims. Each defendant, therefore, was more likely to be guilty on the present occasion. It is inescapable that a propensity theory was used in the Brides of the Bath and Body Rub cases, but this is inconsistent with the first sentence of Rule 404(b) which appears to prohibit such a theory.[16]

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9. *Id.* at 264.

10. *Id.* (holding evidence was admissible to prove "design").

11. 376 S.W.2d 842 (Tex. Crim. App. 1964).

12. *Id.* at 842-43.

13. *Id.* at 843.

14. *Id.*

15. *Id.* (including "identity, intent, motive, malice or common plan or scheme").

16. This confusion, I believe, is responsible for the huge amount of litigation in the area of Rule 404(b). Many of the conflicting decisions are detailed in PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE: RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, Rule 404(b) (2d ed. 1994) and PAUL F. ROTHSTEIN, EVIDENCE: CASES, MATERIALS AND PROBLEMS § 4.02 (1986). The situation is summarized in PAUL F. ROTHSTEIN, EVIDENCE IN A NUTSHELL: STATE AND FEDERAL RULES, ch. 8 (2d ed. 1981). *See also* United States v. Himelwright, 42 F.3d 777, 781-87 (3d Cir. 1994) (implicitly recognizing problem); United States v. Sampson, 980 F.2d 883, 886 (3d Cir. 1992) (recognizing that character evidence is often offered for improper purposes under guise of Rule 404(b));

Several notions have been advanced to reconcile the apparent inconsistency between these two sentences. A number of writers,[17] following in the footsteps of recent English cases[18] and Wigmore,[19] suggest that the doctrine of chances affords a solution. They believe the doctrine provides a way to infer guilt from the multiplicity of offenses in cases like Brides of the Bath and Body Rub without relying on the propensity reasoning that the first sentence prohibits. In other words the doctrine provides a function for the second sentence that is truly different from that of the first.

The doctrine of chances asks a question that supposedly reconciles the dilemma. It asks, "What are the chances that an innocent person would be charged falsely so many times?" If the answer is "rarely," as it would be in Brides of the Bath and Body Rub,[20] it is safe to infer that the person is not innocent. It would be too coincidental that an innocent defendant would be charged falsely so many times. It is, therefore, possible to arrive at the inference of probable guilt without using the prohibited propensity chain of reasoning—or so it is argued.

The essence of this probable guilt argument is that there is a disparity between the chances, or probability, that an *innocent* person would be charged so many times and the chances, or probability, that a *guilty* person would be charged so many times. If there is such a

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United States v. Beasley, 809 F.2d 1273, 1278 (7th Cir. 1987) (allowing judge to admit all evidence of prior similar crimes produces "gravest risk of offending the central prohibition of Rule 404(b)"). For recent cases searching for a rationale to admit evidence under Rule 404(b), see United States v. Sutton, 41 F.3d 1257, 1259 (8th Cir. 1994), *petition for cert. filed*, (Mar. 6, 1995) (No. 94-8309); United States v. Bastanipour, 41 F.3d 1178, 1183 (7th Cir. 1994); United States v. Tutiven, 40 F.3d 1, 4-6 (1st Cir. 1994), *cert. denied*, 131 L. Ed. 2d 243 (1995); United States v. Birch, 39 F.3d 1089, 1093-94 (10th Cir. 1994); United States v. Madden, 38 F.3d 747, 751-53 (4th Cir. 1994); United States v. Jemal, 26 F.3d 1267, 1269 (3d Cir. 1994); United States v. Jenkins, 7 F.3d 803, 807 (8th Cir. 1993); United States v. Miranda, 986 F.2d 1283, 1285 (9th Cir.), *cert. denied*, 113 S. Ct. 2393 (1993); United States v. Templeman, 965 F.2d 617, 619 (8th Cir.), *cert. denied*, 113 S. Ct. 482 (1992). I wish to thank student Julie Brusslan for helping me wade through the mass of Rule 404(b) cases. A number of these cases seem to produce results or make statements that are exactly the opposite of others.

17. *See, e.g.*, Edward J. Imwinkelried, *The Evolution of the Use of the Doctrine of Chances as Theory of Admissibility for Similar Fact Evidence*, 22 ANGLO-AM. L. REV. 73 (1993).

18. *See, e.g.*, R. v. P., 3 All E.R. 337 (H.L. 1991).

19. *See* 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 302 (James H. Chadbourn revisor, 1979); Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances*, CRIM. JUST., Fall 1992, at 16, 19.

20. The question posed by the doctrine implies that the answer would almost *always* be "rarely."

disparity, however, it is only because a guilty person would have the *propensity* to repeat the crime. If it were not for the propensity to repeat, the chances, or the probability, that an innocent person and a guilty person would be charged repeatedly would be identical. Hence, the argument hinges on propensity and runs afoul of the first sentence of Rule 404(b). The effort to reconcile the permission in the Rule with the prohibition in the Rule has failed.

Furthermore, the doctrine of chances does not answer any of the hard questions raised by Rule 404(b). For example, how many other crimes are needed and how similar must they be, including their modus operandi, to the present crime? The number and similarity of the crimes greatly affect the degree of the disparity between the probability that an innocent person, in comparison to a guilty one, would be charged repeatedly. If the previous act is very different from the present act, it is quite possible that an *innocent* person, as well as a guilty person, might have been charged with both.

The doctrine of chances leaves open the question of how unlikely it has to be that an innocent person would have been charged. Where do we draw the line? When do crimes become numerous and similar enough to the present crime that they cross over from inadmissibility to admissibility? This is the central problem in the "other crimes, wrongs, and acts" area that the doctrine of chances does not address. The doctrine says that the evidence is admissible if it is unlikely that an innocent person would be falsely charged so many times, but how unlikely does it have to be?

In the movie *Casablanca*,[21] the police, having heard a crime had been committed, respond with the classic expression, "Round up the usual suspects." As in real life, a person who has been charged before commonly is charged again any time a vaguely similar crime is reported. Thus, contrary to the doctrine of chances, it is not so unlikely that an innocent person would be repeatedly charged falsely.

Furthermore, by admitting evidence on the theory that it is unlikely that an innocent person would have been charged before, the doctrine of chances encourages the police, judges, and juries to make the assumption that the person must be guilty if he or she has been charged previously. By asking the question, "How likely is it that an innocent person would be charged so many times," the doctrine suggests that if the police charged someone, he or she is probably guilty. The doctrine sends a harmful message to the police, judges, and juries.

21. CASABLANCA (Metro-Goldwyn-Mayer 1942).

Contrary to the constitutional presumption of innocence, it invites judge and jury to conclude that if a person has been charged, that person is most probably guilty. In other words, police, judges, and juries are licensed to do exactly what Rule 404(b) was designed to prevent—assume guilt from previous charges. This is the foundation of the doctrine. For these reasons, the doctrine of chances does not provide a satisfactory way to reconcile the apparent internal inconsistency in Rule 404(b).

This Essay proposes a more promising way to produce intellectual coherence between the two sentences of Rule 404(b). My tentative suggestion, admittedly somewhat incomplete, is the following.

There are many different kinds of propensity. There are propensities that are amorphous, diffuse, and tinged with moral approbation or disapprobation, which we call character. For example, a person who has cheated on an income tax return might have a non-law-abiding character. However, this has only the weakest tendency to suggest that that person, as compared with a totally law-abiding person, might assault someone. Yet, it carries the burden of possible moral prejudice against the non-law-abiding person. The propensity is general and laden with moral value—exactly what a lay person means by "character." A lawless person, a violent person, a dishonest person, and a thieving person are all descriptions of the propensity we call character.

Another type of propensity is specific propensity. This is the propensity to do a certain thing in a certain way repeatedly. It may even be called a plan, pattern, or scheme. The word "plan" here would be used in the sense that these acts all proceed according to the same blueprint, not necessarily that they have been planned together at the same time.

Examples of specific propensities would be the propensity to rub bodies to steal wallets or the propensity to drown wealthy spouses in the bathtub in order to inherit. This is not the propensity we would call character. No one would say that a person has the character to drown wealthy spouses in the bathtub in order to inherit or that a person has the character to rub bodies and make sexual overtures in order to steal wallets. These propensities are too specific in that they are addressed to the manner or means of carrying out the offense. One would likely feel comfortable, however, saying that a person has the "specific propensity" to do these things. While the general propensity called character has a moral tinge to it, other general propensities do not, and the more specific propensity may or may not. In the

examples mentioned above, the specific propensity does have a moral tinge.[22]

On the even *more* specific end of the propensity spectrum lies "habit." Habit is earmarked by relative—not necessarily complete—invariability and involuntariness. It is not necessarily morally tinged, as is character. Habit is comprised of conduct *very* specifically like the conduct in issue, and is marked by numerous instances of the conduct that occur *virtually* whenever the same stimuli are presented.

Viewed in this way, the first sentence of 404(b) bans propensity, but only when it is the general and morally tinged propensity known as character. In other words, character, the word used and banned in the first sentence of the Rule, is not synonymous with "propensity." Instead, character is just one type of propensity—the amorphous, general, morally-tinged kind—that presents the specter of the several dangers the character rule worries about: that the propensity is too amorphous and general to lead to a solid inference of specific behavior; that the jury may not realize this; and that they might be induced to make prejudicial moral judgments of the person or relax the rigor of their scrutiny of the facts based on their willingness to punish for general or past "badness."

The second sentence, the permissive sentence of Rule 404(b), licenses another kind of propensity. This is not character, which is excluded, but the more specific kind of propensity that may not be attended by the same dangers in the same degree. Finally, there is habit, governed by Rule 406, which licenses an even more specific and compelling kind of propensity—one that rises to such a level that we can call it habit.[23]

III. AUTHENTICATION AND IDENTIFICATION

The second intellectual incoherence in the Federal Rules of Evidence involves authentication and identification under Rule 901. The

22. Thus, the *specific* propensity evidence mentioned in the examples lacks one of the negative aspects of character evidence, namely, the—perhaps disguised—probative weakness of character evidence due to its generality. Yet the specific propensity has the other negative aspect of character evidence—the moral tinge. But it is not *character* evidence, subject to Rule 404(b); it is only subject to Rule 403, under which its prejudicial nature can be individually appraised in comparison to its probative value.

23. Yet another type of propensity might be a documented clinical psychological illness, predilection, or personality trait as testified to by a properly qualified expert. The law is unclear regarding this point.

Rules perpetuate an error fostered by Wigmore,[24] an error that appears in the structure of the Rules, in the advisory committee notes to Rule 901[25] and Rule 104,[26] and in the cases.[27] The error is the dogma—accepted now as "the law"—that the authentication and identification requirement is just an aspect of relevancy. In other words certain tangible evidence, such as a knife or document, is not relevant unless a special quantum of evidence—known as "authentication" or "identification"—connecting the items with the litigated matter is introduced as a foundational matter.

Under the traditional Wigmore doctrine, a knife, for example, would have to be shown to be the knife used in the crime that is the subject of the trial.[28] Similarly, the signature "Paul Rothstein" on a document would have to be shown to be genuine, if *who* signed the document was important to the case. It is not enough, under the Wigmore doctrine of authentication, that the signature purports to be my signature. There needs to be an *additional* quantum of evidence that the signature is genuine before the document is admissible, and this additional quantum requirement is said to be a requirement of relevancy. The additional quantum would be, for example, testimony that someone recognizes the handwriting, that someone witnessed the signing, or that the signature has distinctive characteristics such as the little smiley faces that I may customarily put in the dots over the *i*. The accepted belief, thanks to Wigmore and others, is that this kind of authentication or identification is a necessity inherent in the notion of relevance. It is this belief that is fundamentally wrong and causes serious problems.

Take the signature, for example. Certainly, it is slightly more probable that it is Paul Rothstein's signature if it says "Paul Rothstein" than if it says "John Jones." Relevance, defined in Rule 401, only requires the slightest increase in probability for evidence to be relevant.[29]

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24. 7 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2129 (James H. Chadbourn revisor, 1978).

25. FED. R. EVID. 901 advisory committee's note.

26. FED. R. EVID. 104 advisory committee's note.

27. *See, e.g.*, United States v. Espinoza, 641 F.2d 153, 169-70 (4th Cir.), *cert. denied*, 454 U.S. 841 (1981).

28. All references to the knife case herein assume a prosecution for stabbing with a knife.

29. " '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.

Whether or not the knife found in the defendant's possession and offered into evidence was the same one used in the crime, the offered knife is still relevant under Rule 401 as long as there is *any possibility* that it was the knife used in the crime. Any such possibility produces at least a tiny advance in proving guilt. Consequently, the knife is relevant under Rule 401. In fact, even if there is no possibility the knife was the same knife used in the crime, the offered knife is still relevant in that it shows some degree of interest in knives or some knowledge of knives on the part of the defendant. This in turn advances the possibility of guilt in some slight degree, as compared with a situation where this evidence of interest or knowledge is absent.

The system may want to exclude the document signed by Paul Rothstein or the knife found in the defendant's possession on a ground other than relevance if the document or knife is not more connected to the litigated event than the minimal connection posited here. The system might want to keep these items out, not on the grounds of relevancy, but because of considerations like those codified in Federal Rule 403:[30] The jury may exaggerate the probative force of a document or knife that is so minimally connected to the case. The possibility of prejudicing the defendant or misleading the jury may outweigh the item's slim degree of relevancy.[31] But it is important to realize on what basis the computation must be made and what the judge is supposed to consider. It is a Rule 403 computation.[32]

Although it is difficult to document the causes of the confusion in the cases, decisions in this area are largely devoid of a consistent and coherent rationale.[33] This deficiency seems, at least in part, attributable to the error in thinking that I have outlined.

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30. "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.

31. There may be other ways to get in the legitimate force of the evidence without this undesirable baggage. For example, telling the jury that a knife was found in the defendant's possession. Rule 403, however, might exclude the knife itself on a number of bases.

32. *See supra* note 30.

33. For examples of cases illustrating this inconsistency, see United States v. Neal, 36 F.3d 1190, 1210 (1st Cir. 1994); United States v. Johnson, 28 F.3d 1487, 1498 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 768 (1995); MDU Resources Group v. W.R. Grace & Co., 14 F.3d 1274, 1281-82 & n.12 (8th Cir.), *cert. denied*, 115 S. Ct. 89 (1994); United States v. Espinoza, 641 F.2d 153, 170-71 (4th Cir.), *cert. denied*, 454 U.S. 841 (1981); United States v. Brown, 603 F.2d 1022, 1027-29 (1st Cir. 1979); United States v. Wilson, 532 F.2d 641, 644-45 (8th Cir.), *cert. denied*, 429 U.S. 846 (1976).

Perhaps Wigmore can be forgiven for indulging in this error because his definition of relevancy required more than the slight increase in probability required by the Federal Rules. Wigmore's definition of "legal relevance" included consideration of factors like those in Rule 403.[34] Under the Federal Rule of Evidence, however, there is little excuse for this error.

This error in thinking has led to an incongruence between Rule 901(a) and 901(b), both of which govern the quantum of proof needed as a foundation for the authentication and identification of evidence. Rule 901(a) states a general principle that there is sufficient authentication or identification of an item if there is enough evidence to support the conclusion of some reasonable person that the item was authentic or identified.[35] Rule 901(b) supposedly illustrates applications of the general rule of 901(a). However, subsection (b) actually incorporates previous case law articulating more rigid requirements,[36] and seems to require more than subsection (a). In its many examples of how to authenticate or identify various items, and in its advisory committee notes and the cases cited therein, Rule 901(b) plainly suggests that more is required than the minimum that might satisfy a reasonable person.[37]

Surely, in the signature example, even without any proof that the signature is Paul Rothstein's, some reasonable person might feel there is enough to form a conclusion that this is Paul Rothstein's signature under Rule 901(a). The quantum of proof in 901(b), however, is something more than merely the signature. For example, someone

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34. 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 28, at 969 (Peter Tillers revisor, 1983). Wigmore writes:

> The judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning, has constantly seen fit to exclude matter that does not rise to a clearly sufficient degree of value. In other words, legal relevancy denotes, first of all, something more than a minimum of probative value. Each single piece of evidence must have a plus value.

Id.

35. Rule 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED. R. EVID. 901(a); *see also Neal*, 36 F.3d at 1210 (finding that there was reasonable probability that evidence was what it was purported to be); *MDU Resources Group*, 14 F.3d at 1281-82 (recognizing principle via Rule 104 without mentioning Rule 901); *cf. Johnson*, 28 F.3d at 1498 (finding that adequate foundation was established).

36. *See* FED. R. EVID. 901(b) advisory committee's note.

37. Rule 901(b) states:

who knows Paul Rothstein's signature has to be able to identify it,[38] the jury must compare an authenticated sample,[39] there must be distinctive characteristics to the signature[40] or distinctive characteristics reflected in the document,[41] or it must be validated by a handwriting expert.[42] A similar situation exists with the knife example.[43]

Thus, subsection (a) and subsection (b) send contradictory messages. Subsection (a) requires a low quantum of proof such as would satisfy a reasonable person in the conduct of normal affairs. In

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(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

FED. R. EVID. 901(b).

38. FED. R. EVID. 901(b)(1), (2).

39. FED. R. EVID. 901(b)(3).

40. FED. R. EVID. 901(b)(4).

41. *Id.*

42. FED. R. EVID. 901(b)(3).

43. Rules 901(a) and (b) refer to "identification," which is generally taken to refer to the foundation needed for tangible items other than writings. "Authentication" is the term used in the case of writings.

contrast, subsection (b) requires a higher quantum of proof than that of a reasonable person. Judges subject to these two contradictory mandates may do anything that they want. And they do.[44]

These contradicting mandates can make a difference. Consider, for example, a case in which an item or an unsigned document is found in a dresser drawer of a party's bedroom. Seemingly, under the standard of subsection (a)—the reasonable person standard—one might be justified in concluding that this item or document belonged to or was written by the party. The inference is not airtight but should be enough to admit the evidence and allow it to be debated before the jury. *Some* reasonable person could conclude that the item or document probably belongs to or was written by the party. Subsection (b), however, suggests that something more is required for admissibility than what an ordinary reasonable person would require. The mere fact that an item was in the party's dresser drawer might not be enough to authenticate or identify it[45] under the implication of subsection (b). Thus, a judge may decide either way. The conflict that exists in the authentication cases reflects judges' confusion about exactly what standard they are supposed to apply, and the confusion is not entirely their fault.[46]

IV. CONCLUSION

Incoherence concerning the admissibility of prior conduct and incoherence surrounding authentication and identification represent only two of a number of similar problems in the Federal Rules of Evidence, a generally admirable but far from perfect evidence code. Rather than being worked out by the courts, these incoherencies, which largely go unrecognized, have produced some pernicious results in the cases and have magnified the amount of litigation in several areas.

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44. *See supra* note 33.

45. Remember, by "authenticate" or "identify," the law means only that the evidence must meet a threshold that makes it admissible before the jurors, who then may or may not find the item to be authentic or identified with the matter in controversy in accord with their function as weighers of evidence.

46. *See supra* note 33. One solution to the dilemma would be to consider subsection (a) as applying only to unanticipated cases not specifically envisioned by subsection (b). The dresser drawer example might then be within (a) and not (b). But then there is a real theoretical problem of another kind: Why should some cases be governed by a higher standard than others just because they have been foreseen?