EVIDENCE — RELEVANCE AND PREJUDICE — NINTH CIRCUIT REMOVES BAR ON ADMISSION OF A DEFENDANT'S READING MATERIAL TO SHOW INTENT TO SOLICIT A MINOR. — *United States v. Curtin*, 489 F.3d 935 (9th Cir. 2007) (en banc).

Adjudicating the admissibility of evidence is a daily part of a trial judge's work, but some prominent commentators have cautioned against assuming that judges have a special ability to carry out that duty.[1] Still, trust in trial courts' discretion is a theme that runs heavily through the law of evidence.[2] Recently, in *United States v. Curtin*,[3] the Ninth Circuit held that a district court that admitted the defendant's pornographic reading material against him committed reversible error in failing to weigh all of the evidence for prejudice and probative value.[4] The court extended the law's theme of deference, however, by emphasizing that there is no statutory or constitutional bar to the use of reading material evidence. By approving the use of a defendant's reading material against him in a sex crime prosecution, but failing to provide so much as a warning to the district courts against the risks of admitting such evidence, the court showed too much trust in the discretion of trial judges and in the protections afforded by the rules of evidence.

While "patrolling the Internet" in 2004, a Las Vegas detective masquerading as a fourteen-year-old girl named "Christy" engaged in an online chat with Kevin Curtin, a forty-two-year-old man from California.[5] After chatting for four hours, viewing a picture sent by the detective,[6] and describing various sexual acts that he wanted to perform with Christy, Curtin made plans with her to meet at a bowling alley in Las Vegas a few days later.[7] On the appointed date, Curtin appeared as agreed at the bowling alley, where he was detained by Las Vegas

---

[1] *See, e.g.*, Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 202 (2006); Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 479 (1986); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1330–31 (2005).

[2] *See, e.g.*, FED. R. EVID. 403 (entrusting judges with the task of weighing the probative value of evidence against its potential prejudice); Old Chief v. United States, 519 U.S. 172, 174 n.1 (1997) (applying abuse of discretion standard of review to Rule 403 decisions).

[3] 489 F.3d 935 (9th Cir. 2007) (en banc).

[4] *Id.* at 958–59. On this decisive issue, the court's ruling was unanimous. *Id.* at 965 (McKeown, J., concurring).

[5] *Id.* at 937 (majority opinion).

[6] The picture was of an adult female police officer, taken when she was fourteen. The officer later served as a decoy for Christy in person. *Id.*

[7] *Id.* at 937–38. The court quoted the chat transcript in extensive detail. *See id.* at 946–47. The substance of the conversation can be characterized as an older man seeking to teach an inexperienced girl how to have sex.

police.[8] In a voluntary statement, Curtin said that he had indeed arranged to meet Christy, but that he expected his chat partner to be a thirty- or forty-year-old woman (pretending to be a girl) who would engage in "daddy/daughter" role play with him.[9] Police arrested Curtin and seized his personal digital assistant (PDA), which contained "over 140 stories about adults having sex with children."[10]

Curtin was charged in the U.S. District Court for the District of Nevada with crimes related to interstate travel with intent to solicit a minor.[11] At trial, Curtin reiterated his fantasy role-play defense.[12] To show that Curtin's intent was less benign, the government sought to introduce some of the stories seized from his PDA.[13] Curtin objected that introducing such "inadmissible character or propensity evidence," which also showed greater potential for prejudice than probative value, would violate Federal Rules of Evidence 404 and 403.[14] The trial judge, however, admitted five of the stories as evidence of Curtin's intent, although he did not read the stories "in their entirety" before admitting them.[15] Curtin was convicted on all charges.[16]

A divided panel of the Ninth Circuit reversed and remanded with respect to the district court's evidentiary rulings.[17] The panel held that, according to circuit precedent in *Guam v. Shymanovitz*,[18] the stories could not be admitted as a relevant prior act under Rule 404(b).[19]

---

[8] *Id.* at 938.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 937. Curtin was indicted for violations of 18 U.S.C. §§ 2422(b) and 2423(b) (2000 & Supp. IV 2004).

[12] *Curtin*, 489 F.3d at 939.

[13] *Id.* at 939–40.

[14] *Id.* at 941–42. Rule 404(a) provides that evidence of a person's character is generally inadmissible "for the purpose of proving action in conformity therewith." Rule 404(b) addresses evidence of a defendant's prior acts more specifically, providing that such evidence is inadmissible to show character but may be admissible for a variety of other reasons, including to show intent. Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

[15] *Id.* at 942.

[16] *Id.* at 937. On conviction, Curtin was subject to a minimum sentence of five years in prison. *See* 18 U.S.C. § 2422(b).

[17] United States v. Curtin, 443 F.3d 1084, 1094, 1096 (9th Cir. 2006). Judge Wallace wrote for the panel, joined by Judge Rymer.

[18] 157 F.3d 1154 (9th Cir. 1998). *Shymanovitz* involved a middle school guidance counselor charged with sexual and physical abuse of boys under his care. To show intent, the prosecution was allowed to introduce extensive testimony about the defendant's sexually explicit homosexual literature, much of which involved only adults. *See id.* at 1155. The Ninth Circuit reversed the conviction. *Id.* The Ninth Circuit had also addressed reading material evidence in *United States v. Giese*, 597 F.2d 1170 (9th Cir. 1979), in which it allowed into evidence a book entitled *Movement Toward Revolution* over the defendant's objection, but only in response to the defendant's introduction of other books to show his "non-revolutionary political views." *Id.* at 1189–93.

[19] *Curtin*, 443 F.3d at 1091–94.

The court found that because possession of lawful reading material "is simply not the type of conduct contemplated by Rule 404(b)"[20] and because a "wide gulf" separated possession of stories describing conduct from the conduct itself, *Shymanovitz* barred admission of the stories.[21] In dissent, Judge Trott argued that *Shymanovitz* could be distinguished because in that case, the defendant's reading material was not relevant to disprove his defense.[22] Here, by contrast, the defendant's subjective intent was directly at issue.

On rehearing en banc, the court reversed Curtin's conviction on different grounds. Judge Trott now wrote for the court, and reversed "because of a serious flaw in the manner in which the trial court reviewed Curtin's stories pursuant to Federal Rule of Evidence 403."[23] The court found that because the trial judge failed to read the entirety of the stories he admitted into evidence, he could not have adequately judged whether the unfair prejudice they caused to Curtin outweighed their probative value.[24] One of the stories, the court held, described conduct so far removed from the charges levied against Curtin that it was "both irrelevant and dangerously prejudicial,"[25] so admitting it into evidence was not harmless error.[26]

Most of the court's lengthy opinion, however, was devoted to the separate issue of whether the stories were admissible under Rule 404 in the first place. The court rejected Curtin's argument that the stories were inadmissible under Rule 404(a)'s general prohibition on character evidence, explaining that they were properly admitted under Rule 404(b)'s exception for evidence of intent.[27] The court pointed out that it was the defendant, not the government, who had emphasized the question of intent,[28] and that "circumstances surrounding an alleged crime become *more* relevant when the defendant makes his intent a disputed issue."[29] Judge Trott went on to make clear that, because Congress intended Rule 404(b) to be inclusive, the stories were close enough to Curtin's conduct to be relevant.[30] Finally, the court addressed its precedent in *Shymanovitz* and rejected that court's con-

---

[20] *Id.* at 1091 (quoting *Shymanovitz*, 157 F.3d at 1159) (internal quotation mark omitted).
[21] *Id.* at 1094 (quoting *Shymanovitz*, 157 F.3d at 1159).
[22] *See id.* at 1103–04 (Trott, J., dissenting).
[23] *Curtin*, 489 F.3d at 937.
[24] *See id.* at 956–59.
[25] *Id.* at 957. Specifically, the trial judge failed to exclude a passage involving bestiality. *Id.*
[26] *Id.* at 958.
[27] *See id.* at 944, 950–52.
[28] *See id.* at 940–41.
[29] *Id.* at 952.
[30] *See id.* at 944, 948.

clusion that the First Amendment categorically precludes use of lawful reading material as "other act" evidence.[31]

Judge Kleinfeld concurred, agreeing that the trial judge violated Rule 403.[32] Going further, however, he argued that reading material "generally ought to be excluded," with exceptions only for materials that are clearly more probative than prejudicial, such as how-to manuals on committing crime.[33] He based his opinion both on First Amendment concerns[34] and, in Curtin's case, on the distinction between fantasy about criminal activity and intent to commit a crime.[35] Judge McKeown concurred and agreed with the majority's Rule 403 rationale for reversing Curtin's conviction, but chastised the majority for reaching unnecessarily the issue of the stories' admissibility in general.[36] Judge Wardlaw concurred only in the result, agreeing with the majority that some of the stories were admissible to show intent, but rejecting the three-judge panel's conclusion that *Shymanovitz* held lawful reading material categorically inadmissible.[37]

In *Curtin*, the en banc court opened wide the door to the admission of reading material evidence. In most cases, such evidence is of dubious value to judges and juries deciding knotty issues of intent, and in the worst cases, it may amount to character evidence that says nothing about the defendant's guilt or innocence while giving the factfinder a great deal to dislike about the defendant as a person. The Ninth Circuit gave too much discretion and too little guidance to district courts tasked with weighing the unfair prejudice and probative value of reading material. The most Judge Trott offered was a simple referral to Rule 403 and the unhelpful statement that the court was "confident" in trial judges' ability to do precisely what the trial judges in *Curtin* and *Shymanovitz* failed to do.[38] District courts exercising discretion on these difficult questions require more.

---

[31] *See id.* at 953–56. In support, the court cited *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), which stated that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent," *id.* at 489, as well as a set of Supreme Court cases relating to First Amendment privileges for news organizations.

[32] *Curtin*, 489 F.3d at 962–64 (Kleinfeld, J., concurring). Judge Kleinfeld was joined by Judges Pregerson, Kozinski, Thomas, and Berzon.

[33] *Id.* at 961.

[34] *See id.* at 959 ("Our freedom to read and think requires a high wall restricting official scrutiny.").

[35] *See id.* at 961 ("The link between fantasy and intent is too tenuous for fantasy to be probative.").

[36] *See id.* at 965 (McKeown, J., concurring) ("The bulk of the majority's discourse is dicta."). Judges Pregerson, Kozinski, Thomas, and Berzon joined Judge McKeown's opinion.

[37] *See id.* at 965–66 (Wardlaw, J., concurring). Judge Wardlaw also agreed with Judge Kleinfeld's First Amendment concerns. *Id.* at 966.

[38] *See id.* at 956 (majority opinion).

A confluence of dangerous factors complicated the trial judge's admissibility decision in Curtin's case. First, the possession of lawful reading material is often of doubtful probative value, especially compared to the value of what a defendant actually did or said.[39] In this case, Curtin's possession of lawful reading material carried even less probative value because of ambiguities in the kinds of inferences that could properly be drawn from the stories.

It may be that, as an empirical matter, possession of a pornographic story is generally probative of the intent to perform the acts described therein. In this case, however, the court failed to recognize that, far from proving Curtin's criminal intent, the fact that he possessed stories about men having sex with girls was entirely consistent with his defense.[40] The majority seems to have misunderstood this defense when it reasoned that "possession of stories in [Curtin's] PDA consisting of role playing daddy/daughter incest with female adults"[41] would have weighed in Curtin's favor. The stories could not have described adult role play; the stories *were* the role play. For one of Curtin's stories to acknowledge that it was describing fictional events would defeat his purpose in reading it. Thus, while there are certainly examples of reading material relevant to prove intent or for another one of Rule 404(b)'s permitted uses,[42] they do not include reading material that is as likely to be an expression of a defendant's lawful and unacted-upon fantasy as a manifestation of his intent to break the law.[43]

---

[39] Judge Kleinfeld noted this distinction in explaining that First Amendment cases like *Mitchell* and *Haupt v. United States*, 330 U.S. 631 (1947), were inapposite because they involved some action beyond mere possession of reading material by the defendant. *See Curtin*, 489 F.3d at 962–63 (Kleinfeld, J., concurring).

[40] The ultimate validity of Curtin's unconventional defense was, as Judge Kleinfeld noted, a question for the jury. *See Curtin*, 489 F.3d at 964–65 (Kleinfeld, J., concurring).

[41] *Id.* at 951 (majority opinion). The majority came closer to the mark regarding what sort of evidence would have been exculpatory under this defense when, in a footnote, it suggested hypothetical "testimony of a woman with whom he had played daddy/daughter." *See id.* at 951 n.6. The feasibility of obtaining such testimony, however, is questionable when the online world's veil of anonymity can be nearly impossible to pierce.

[42] *See, e.g.*, Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997) (describing murder for hire committed following the advice of a guide for hit men). It is interesting to note that Judge Trott, in his dissent from the panel's decision, elliptically referred to the stories Curtin possessed as "manuals on what to do to children." United States v. Curtin, 443 F.3d 1084, 1095 (9th Cir. 2006) (Trott, J., dissenting).

[43] *See Curtin*, 489 F.3d at 961 (Kleinfeld, J., concurring). More generally, there is reason to doubt that Rule 404(b) will succeed in allowing the introduction of relevant evidence while excluding impermissible propensity evidence. *See* Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct To Prove Mens Rea*, 51 OHIO ST. L.J. 575, 585 (1990) ("In [some] cases, however, it is more difficult to determine whether the prosecutor has developed a legitimate noncharacter theory of relevance — or whether the prosecutor is merely endeavoring to cloak an illicit character theory."). In this case, Judge Trott cited portions of the record to show that the government clearly laid out which of Rule 404(b)'s exceptions it was applying. Yet on "Day Two," the prosecutor mentioned five different theories justifying the introduction of the sto-

Another troubling aspect of Curtin's case, and a further reason why the court should have counseled caution, was that Curtin was charged with a sex crime. Even if one acknowledges the low probative value of the reading material evidence, one might argue that evidence of Curtin's reading material also presented a low risk of prejudice because it simply did not say much about his intent to commit the crime. This argument fails to consider the emotionally laden context in which cases like Curtin's are decided. Sex offenses, and in particular sex offenses against children, are among the most abhorrent crimes on the books. Sex offenders have been the subjects of extensive statutory registration and community notification regimes,[44] and have received much attention in popular culture.[45] The ubiquity of the Internet and the resulting exposure of millions of minors to sexual predators online have heightened the sense of danger in the public,[46] in Congress,[47] and in the courts where accused predators are tried.[48] Recognizing the effects that such emotions can have on the rules designed to ensure a fair trial, the Indiana Supreme Court wrote, "[T]here remains what might be labeled the 'rationale behind the rationale,' the desire to make easier the prosecution of child molesters, who prey on tragically vulnerable victims in secluded settings."[49] This context in which judges and

---

ries ("modus operandi," "intent," "knowledge," "preparation," and "motive"), using them interchangeably and without further explanation, while on "Day Three," the argument was more targeted toward intent alone. *See Curtin*, 443 F.3d at 1117–21 (Trott, J., dissenting).

[44] *See, e.g.*, N.J. STAT. ANN. § 2C:7 (West 2005) (the original "Megan's Law"). All fifty states have since adopted similar laws. Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355, 378 (2005). Successful prosecutions for the federal crimes with which Curtin was charged have also risen dramatically in the past several years. In 1995, one defendant was convicted under 18 U.S.C. § 2422 (no acquittals) and fifteen under § 2423 (one acquittal); in 2005, those numbers were 87 (two acquittals) and 113 (no acquittals). *See* Bureau of Justice Statistics, Federal Justice Statistics Resource Center, Outcomes for Defendants in Cases Closed, http://fjsrc.urban.org/analysis/t_sec/stat.cfm?stat=3 (last visited Nov. 10, 2007) (select year; then select appropriate title and section of the U.S. Code).

[45] For a good literary exploration of the popular fascination with and fear of sex predators, see TOM PERROTTA, LITTLE CHILDREN (2004).

[46] *See, e.g.*, Abby Goodnough, *Town Is Shaken After Prosecutor's Arrest in a Child-Sex Sting*, N.Y. TIMES, Sept. 29, 2007, at A1 (describing arrest of federal prosecutor in Florida under §§ 2422 and 2423 and reactions of coworkers and neighbors).

[47] *See, e.g.*, Jim Puzzanghera, *Bill To Track Sex Predators on Web Offered*, L.A. TIMES, Jan. 31, 2007, at C3.

[48] *See, e.g.*, *Curtin*, 443 F.3d at 1095 (Trott, J., dissenting) ("Now, the Internet is upon us, and it allows cunning sexual vultures repeatedly to enter the bedrooms of immature children where, by seductive and calculating means, unwary children are enticed to leave the security of their homes and to venture into unspeakable dangers.").

[49] Lannan v. State, 600 N.E.2d 1334, 1337 (Ind. 1992). That decision invalidated Indiana's judicially created "depraved sexual instinct" exception to the general ban on character evidence, which allowed evidence of "prior sexual conduct" in prosecutions for "incest, sodomy, criminal deviate conduct or child molesting." *Id.* at 1335. A concurrence argued that "the necessity to protect children from the devastating harm of molestation justifies the invocation of [the 'depraved sexual instinct' exception]," and that a lower threshold was permissible in part because of the

juries make their decisions heightens the risk of unfair prejudice to the accused.

In light of these questions about the probity and prejudice of this sort of "other acts" evidence, a court nevertheless convinced that the admission of such evidence is appropriate might invoke the protections against undue prejudice contained in Rule 403. If the evidence truly presents greater potential for unfair prejudice than probative value, the trial judge will properly exclude it under that rule.[50] The rule is vague, however, and trial judges may consciously or unconsciously admit improper evidence simply by explaining away the prejudice it might cause and emphasizing its probative value.[51] The trial courts in *Curtin* and *Shymanovitz* demonstrated the potential for such abuse of Rule 403's grant of discretion. Defendants can take little comfort, moreover, in the possibility of having such a decision overturned on appeal, as the standard of review is highly deferential.[52]

Sufficient protection against the dangers of applying Rule 403 casually in cases like these may have to come from legislative reform. At the extreme, Congress or the Advisory Committee on Evidence Rules could impose a blanket ban on reading material evidence.[53] Such a ban would mirror prohibitions on other kinds of evidence, many of which are based in part on the sense that trial judges' discretion is inadequate to fairly adjudicate admissibility in those cases. For example, the drafters of the Rules have endorsed the general exclusion of hearsay evidence, despite suggestions that admission of hearsay might be better left to a trial court's discretion.[54] Even Judge Kleinfeld, however, seemed to question the wisdom of a blanket prohibition of reading material evidence, which would exclude even highly probative evidence such as manuals for hit men.[55] Another option, which has received some support among commentators, would be to heighten the

---

"heinous nature of the crime." *Id.* at 1341 (Givan, J., concurring in result). Such exceptions continue in many other states. *See* Reagan Wm. Simpson & Warren S. Huang, *Procedural Rules Governing the Admissibility of Evidence*, 54 OKLA. L. REV. 513, 531 n.68 (2001).

50 *See Curtin*, 489 F.3d at 956.

51 *See* Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437, 2474–75 (2000).

52 *See id.* at 2443–45. Judge Trott's exhortation to trust in Rule 403 also rings somewhat hollow when not only the trial judge's review, but the first round of appellate review as well, failed to reveal the reference to bestiality that eventually led a unanimous en banc panel to reverse Curtin's conviction.

53 Whether *Shymanovitz* did something similar was, until *Curtin*, in dispute. *See Curtin*, 489 F.3d at 965–66 (Wardlaw, J., concurring).

54 *See* Tome v. United States, 513 U.S. 150, 164 (1995) ("[Academics have] suggested moving away from the categorical exclusion of hearsay and toward a case-by-case balancing of the probative value of particular statements against their likely prejudicial effect. . . . 'The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion . . . .'" (quoting FED. R. EVID. art. VIII advisory committee's note)).

55 *Curtin*, 489 F.3d at 961 (Kleinfeld, J., concurring).

standard for admitting reading material beyond Rule 403's requirements.[56] This strategy has already been employed judicially: one line of cases from the state courts requires parties seeking to introduce hypnotically induced testimony to meet a higher substantive and procedural burden.[57]

Indeed, the court in *Curtin* also had the power to erect stronger protections against unfair prejudice in these cases. Even if the court was right that, in this case, the probative value of most of the stories outweighed their potential for unfair prejudice, it could have recognized that reliance on Rules 403 and 404 as safeguards is especially dangerous when dealing with reading material evidence relating to sex crimes, and that the introduction of such evidence therefore merits special care. A simple recitation by the Ninth Circuit of the inferences required for reading material to be probative, and of the particular risks of using such inferences in prosecution for a sex crime, would have gone a long way. A clear warning to district courts exercising discretion on these issues,[58] perhaps along with some guidance to prosecutors seeking to counter defenses like Curtin's,[59] would have gone even further. It is possible to put child predators behind bars without opening the door to abuses of Rule 403 discretion, but the court failed to point the way.

---

[56] *See* Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1544–58 (2005). As Professor Orenstein notes, such proposals are not politically popular. *Id.* at 1543–44. In fact, recent reforms of the rules of evidence have eased requirements for introducing evidence in sexual assault and child molestation cases. *See, e.g.*, FED. R. EVID. 413–415.

[57] *See, e.g.*, State v. Hurd, 432 A.2d 86 (N.J. 1981), *overruled by* State v. Moore, 902 A.2d 1212 (N.J. 2006). *Hurd*, the first case of its kind, required parties seeking to admit testimony gleaned from hypnosis to show admissibility by clear and convincing evidence. It was overturned not because of this requirement, but because of the *Moore* court's lack of confidence in the scientific validity of hypnosis generally. *See* 902 A.2d at 1227–28. See also *Rock v. Arkansas*, 483 U.S. 44, 58 n.16 (1987), for a list of states with similar heightened requirements with respect to hypnotic evidence.

[58] *Cf., e.g.*, United States v. Jernigan, 341 F.3d 1273, 1284–85 (11th Cir. 2003) (warning of the special dangers of prejudice inherent in evidence of gang membership); United States v. Smith, 292 F.3d 90, 100 (1st Cir. 2002) (same, with regard to evidence of illegal drug dealing).

[59] It is not impossible to imagine government responses to the fantasy defense that are more responsive to the problems of intent that it raises. *See, e.g.*, United States v. Crow, 164 F.3d 229, 237 n.4 (5th Cir. 1999) (describing evidence that defendant instructed minor on how to make and send a pornographic videotape as probative of his knowledge that she was not an adult and as inconsistent with his fantasy role-play defense).