Limiting Judicial Discretion to Exclude Prejudicial Evidence

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Modern evidence law grants courts discretion to exclude otherwise admissible evidence when its probative value is outweighed by unfair prejudice. However, the meaning of probative value and unfair prejudice, as well as the manner in which those characteristics of evidence may be weighed, is unclear. As a result, there are no coherent limits on judicial discretion to exclude prejudicial evidence. This Article defines probative value and unfair prejudice and proposes how those characteristics should be weighed. Essential to the definitions and proposal is the conclusion that the discretion to exclude exists when the admission of evidence will induce the jury to employ inferential processes that are likely to detract from the accuracy of factfinding.

INTRODUCTION

Federal Rule of Evidence 403 gives courts discretion to exclude otherwise admissible evidence when its probative value is "substantially outweighed" by, among other things, unfair prejudice.[1] While this dis-

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[1] FED. R. EVID. 403 reads as follows: "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." Over 22 states have adopted a form of Rule 403. *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE T-32 to -39 (Supp. 1984). Many other states have adopted similar rules permitting discretion to exclude prejudicial evidence. *See, e.g.*, CAL. EVID. CODE § 352 (West 1966). The scope of this Article does not encompass the subject of the extent of judicial discretion under Rule 403 to exclude evidence based on the "considerations" mentioned in that rule. Although this Article addresses the limits of judicial discretion to exclude when Rule 403 dangers arise, there are theoretical links between the considerations and

cretionary power existed at common law,[2] it gained importance when evidence law was codified. Codification creates the danger that the imprecision and rigidity of the written word will obscure underlying statutory policy. Rule 403 was designed to control this problem by allowing discretionary exclusion of evidence when admission would undermine accurate factfinding and procedural fairness, the basic goals of modern evidence law.[3] This function makes Rule 403, in theory, a "cornerstone" of the Federal Rules.[4]

Rule 403 has failed to fulfill its intended function. This failure originates in the sparse and ambiguous language of Rule 403, which neither defines probative value or unfair prejudice, nor suggests how these seemingly noncomparable qualities of evidence should be weighed. The few commentators who have attempted to define probative value and unfair prejudice assign these terms abstract meanings that provide no basis upon which to estimate relative weight.[5] Rule

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dangers that make analysis concerning the latter relevant to the former. *See* Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 517 n.87 (1983).

The analysis concerning the limits of judicial discretion to exclude evidence in the presence of unfair prejudice also applies when one of the other Rule 403 dangers is present. This Article defines unfair prejudice as the tendency of evidence to induce the jury to commit inferential error. *See infra* notes 75-80 and accompanying text. Evidence that confuses the issues or misleads the jury is dangerous for the same reason. The courts, in fact, rarely distinguish between the dangers of prejudice, confusion of the issues, and misleading the jury. They often discuss both confusion of the issues and misleading the jury in terms of unfair prejudice. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 531 (5th Cir. 1984) (exclusion of letters concerning asbestos hazards because probative value "substantially outweighed by the danger of confusing these issues and misleading the jury, to the unfair prejudice of the defendants"); Adams v. Providence & Worcester Co., 721 F.2d 870, 872 (1st Cir. 1983) (exclusion of letter concerning discharge for medical reasons appropriate when admission "clearly caused confusion and resulted in prejudice"); Wilk v. American Medical Ass'n, 719 F.2d 207, 232 (7th Cir. 1983) (admission of evidence concerning chiropractic profession improper when emphasis on "financial greed" and "quackery" created "danger of unfair prejudice and confusion of issues"); *see also* Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 238 n.64 (1976).

[2] *See* Construction, Ltd. v. Brooks-Skinner Bldg. Co., 488 F.2d 427, 431 n.15 (3d Cir. 1973) (Rule 403 is "a useful synopsis of extant law"); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 516-17 (1898).

[3] *See, e.g.*, FED. R. EVID. 102.

[4] Peterfreund, *Relevance and Its Limits in the Proposed Rules of Evidence for the United States District Courts: Article IV*, 25 RECORD OF N.Y.C.B.A. 80, 83 (1970).

[5] *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[03], at 403-19 to -20 (1982) (unfair prejudice "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers . . . mainsprings of human action")

403's grant of discretion has been taken by the courts as license for an unprincipled, ad hoc approach to each case. Most courts are content to conclude evidence has probative value or is unfairly prejudicial without considering the meaning of those terms.[6] Not surprisingly, many cases

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(citations omitted); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5214, at 266 n.17 (1978) ("[I]t is clear that the balancing test requires one to balance incommensurable factors. It is like weighing so many pounds against so many feet since the units are measuring different qualities."); *id.* at 270-71 (probative value is a function of the "strength of the immediate inference" and "the strength and number of intermediate inferences between the immediate inference and an ultimate issue in the case").

A recent article illustrates the inadequacy of commentary in this area. Based upon their questioning of lawyers and laypeople, the authors concluded that there is great disagreement concerning what kinds of evidence are prejudicial. Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1156. Because of this disagreement, the authors suggested it is doubtful that judges can accurately predict what evidence is prejudicial. *Id.* at 1193. Their conclusion is based upon the assumption that "[i]f judges' perceptions of the prejudice associated with various matters do not coincide with those of jurors, the former cannot accurately assess the likelihood or extent of prejudice in any case." *Id.* at 1153.

This reasoning is misdirected. It assumes that the concept of prejudice has no inherent content and that evidence is prejudicial only if lawyers and laypeople agree that it is. Since no definition of prejudice is offered by the authors and little has been accomplished by way of definition by others, it is hardly surprising that there is no consensus among attorneys, much less laypeople, concerning what evidence is prejudicial. The authors do not support their assumption that evidence is prejudicial only when laypeople regard it as such. In fact, once laypeople become aware of the dangers presented by a piece of evidence, the prejudicial potential of that evidence must be significantly reduced.

The challenge presented by Rule 403 is not to determine if everyone harbors the same misconception as to what is prejudicial evidence. Rather, the objective is to give the concept of prejudice intrinsic content by reference to the policies underlying Rule 403.

[6] *See, e.g.*, United States v. Vik, 655 F.2d 878, 881-82 (8th Cir. 1981) (court failed to consider prejudicial impact of prior crimes evidence); United States v. Dolliole, 597 F.2d 102, 108 (7th Cir. 1979) (court assumed, without elaboration, that prior crimes evidence would not be used for improper purpose); United States v. Day, 591 F.2d 861, 877-78 (D.C. Cir. 1978) (court found it "difficult to perceive" what prejudice might follow from admission of other crimes evidence); United States v. Weaver, 565 F.2d 129, 134-35 (8th Cir. 1977) (no consideration given to impact of prior crime evidence); Durns v. United States, 562 F.2d 542, 548 (8th Cir. 1977) (same); United States v. Herzberg, 558 F.2d 1219, 1225 (5th Cir. 1977) (testimony concerning bad reputation of defendant determined "not excessively prejudicial" without statement of reasoning); United States v. Araujo, 539 F.2d 287, 290 (2d Cir. 1976) (failure to acknowledge prejudicial impact of prior crimes evidence); Giblin v. United States, 523 F.2d 42, 45 (8th Cir. 1975) (photograph of victim's skeleton not prejudicial, no analysis given), *cert.*

do not even attempt to weigh probative value against unfair prejudice[7] or, while purporting to weigh, give no explanation for the result.[8] The appellate courts commonly excuse these lapses on the ground that Rule 403 grants discretion,[9] ignoring the fact that the rule explicitly condi-

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denied, 424 U.S. 971 (1976); United States v. Moore, 522 F.2d 1068, 1075 (9th Cir. 1975) (court failed to consider prejudicial impact of similar crimes evidence). *See generally* C. WRIGHT & K. GRAHAM, *supra* note 5, § 5214, at 265 ("American law provides no rules for determining the probative worth of evidence"); *id.* at 277 ("courts seldom discuss the meaning of 'prejudice' ").

[7] *See, e.g.*, United States v. Pry, 625 F.2d 689, 692 (5th Cir. 1980) (no attempt to balance prejudicial impact of evidence of prior wrong against its probative value); United States v. Fleming, 594 F.2d 598, 607 (7th Cir.) (no attempt to balance prejudicial impact of photographs of victim's nude and bound body against its probative value), *cert. denied*, 442 U.S. 931 (1979); Simpson v. Norwesco, Inc., 583 F.2d 1007, 1013 (8th Cir. 1978) (no attempt to balance prejudicial impact of cartoon against its probative value); United States v. Brown, 547 F.2d 1264, 1266 (5th Cir. 1977) (no attempt to balance prejudicial impact of evidence of appellant's fingerprints on stolen check against its probative value).

[8] *See, e.g.*, Fury Imports, Inc. v. Shakespeare Co., 625 F.2d 585, 589 (5th Cir. 1980) (court failed to articulate why prejudicial impact of evidence bearing on when a claim arose outweighs probative value); United Fidelity Life Ins. Co. v. Law Firm of Best, Sharp, Thomas & Glass, 624 F.2d 145, 149 (10th Cir. 1980) (court failed to articulate why prejudicial impact of testimony concerning settlement efforts outweigh probative value); United States v. De Fillipo, 590 F.2d 1228, 1240 (2d Cir. 1979) (court failed to articulate why prejudicial impact of prior crimes evidence does not outweigh probative value); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979) (court failed to articulate why prejudicial impact of expert testimony concerning unreliability of identification evidence outweighs probative impact); United States v. Briscoe, 574 F.2d 406, 408 (8th Cir. 1978) (court failed to articulate why prejudicial impact of exculpatory evidence outweighs probative value); Government of V.I. v. Felix, 569 F.2d 1274, 1280 (3d Cir. 1978) (court failed to state why prejudicial impact of testimony concerning firearm restriction does not outweigh probative value); United States v. Cady, 567 F.2d 771, 775 (8th Cir. 1977) (court failed to articulate why prejudicial impact of similar crimes evidence outweighs prejudicial impact); Rigby v. Beech Aircraft Co., 548 F.2d 288, 293 (10th Cir. 1977) (court upheld trial court decision to exclude but failed to explain why prejudicial impact of exhibits outweigh probative value).

[9] *See, e.g.*, United States v. Longoria, 624 F.2d 66, 68 (9th Cir. 1980) (admission of prior crimes evidence affirmed without discussion of prejudicial impact or balancing on grounds trial court entitled to great deference); United States v. Martin, 599 F.2d 880, 889 (9th Cir. 1979) (court affirmed admission of guns into evidence without review of prejudice or balance on grounds trial court is entitled to wide discretion); United States v. D'Alora, 585 F.2d 16, 21 (1st Cir. 1978) (court merely mentioned balancing test, then relied on discretion vested in trial court); United States v. Miroyan, 577 F.2d 489, 495 (9th Cir. 1978) (balancing probative value against prejudice "rests squarely within the sound discretion of the trial judge"); United States v. Jackson, 576 F.2d 46, 49 (5th Cir. 1978) (court assumed trial court determined probative value outweighed potential

tions discretion on a finding that probative value substantially outweighs unfair prejudice.[10] As a consequence, the invocation of Rule 403 has been reduced to a meaningless "ritualistic incantation."[11] The imprecision of the rule has obscured its underlying policies, causing Rule 403 to fall victim to the same problem it was intended to remedy.

This Article will propose limits on judicial discretion to exclude prejudicial evidence under Rule 403 by suggesting standards for interpretation and application. Part I describes the nature and source of the discretionary power created by Rule 403. This power was clearly intended to be limited. The statutory goals of accurate factfinding and procedural fairness are the source of both the discretionary power and its limitations. Part I further analyzes the meaning of accuracy and fairness in the courtroom and assesses the function of evidentiary rules in promoting these goals. Rule 403 can advance accuracy and fairness by excluding evidence that may induce the jury to employ illogic or improper bias in decisionmaking. Part II interprets the language of Rule 403. Definitions of probative value and unfair prejudice are proposed consistent with the statutory goals articulated in part I. These terms do not describe abstract, noncomparable qualities of evidence, but refer at least in part to the same specific phenomenon: the effect of evidence on the jury's inferential processes. Part III describes how probative value and unfair prejudice, once properly defined, should be weighed. The prevailing balancing approach is rejected as a methodology for resolving Rule 403 issues. Rather, this Article proposes that in applying Rule 403 the court must predict whether admission of evidence will induce the jury to employ inferential processes that are likely to advance or detract from the accuracy of factfinding. Part III considers the relationship between this prediction and the exercise of discretion to exclude.

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prejudice); United States v. Peden, 556 F.2d 278, 280 (5th Cir. 1977) (court noted trial judge "carefully balanced" probative force against prejudicial impact without reviewing specifics of the balance); United States v. Parker, 549 F.2d 1217, 1222 (9th Cir.) (court failed to indicate why probative value of other crimes evidence outweighs prejudicial impact, relying on trial court's wide discretion), *cert. denied*, 430 U.S. 971 (1977); United States v. Cowsen, 530 F.2d 734, 738 (7th Cir.) (court failed to review particulars of balance and admitted evidence of threats to witness), *cert. denied*, 426 U.S. 906 (1976); United States v. Jenkins, 525 F.2d 819, 824 (6th Cir. 1975) (admission of defendant's prison record and firearm assumed to be proper unless trial court committed "grave abuse of discretion"). *See generally* C. WRIGHT & K. GRAHAM, *supra* note 5, §§ 5212, 5223.

[10] There are rare exceptions. *See, e.g.*, John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 635 (3d Cir. 1977) ("[T]he balance required is not a *pro forma* one. A sensitive analysis . . . is in order before passing on such an objection.").

[11] United States v. Alessi, 638 F.2d 466, 476 (2d Cir. 1980).

This prediction of human cognitive behavior is the controlling factor in the exercise of discretion under Rule 403. The conclusion notes that the issues identified by this Article as pertinent to Rule 403 decisionmaking are not politically or morally neutral. The discretionary power created by Rule 403 permits the judge to decide what social and political attitudes will control questions of admissibility. Given the dangers inherent in bestowing such power upon the judiciary, the need to identify limits to that power becomes apparent.

I. THE POLICIES UNDERLYING RULE 403

A. The Nature and Source of Rule 403 Discretion

Decisionmaking under Rule 403 is, by its terms, a two-step process. The court must first weigh the probative value of evidence against its potential to inflict unfair prejudice. If the danger of unfair prejudice "substantially outweighs" probative value, the court has discretion to exclude the evidence. Rule 403 specifies no limits to this discretion.

However, the discretion to exclude evidence under Rule 403 is not limitless. Although the courts read a broad grant of discretion in Rule 403,[12] they have never denied that this discretion is subject to abuse.[13] Commentators agree that the discretionary power created by Rule 403 is not absolute.[14] Some suggest, however, that the limits of Rule 403 discretion are ultimately definable only in terms of good sense and an intuitive grasp of fairness.[15] These standards have proved to be ineffective limits on Rule 403 discretion.[16] A preferable approach is to derive standards limiting the exercise of Rule 403 discretion from the purposes underlying the rule. These purposes can be identified by consid-

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[12] *See, e.g.*, Pierce Packing Co. v. John Morrell & Co., 633 F.2d 1362, 1364 (9th Cir. 1980) (trial judge's ruling will not be overturned unless clear abuse of discretion); Simpson v. Norwesco, Inc., 583 F.2d 1007, 1013 (8th Cir. 1978) (trial judge in best position to weigh exigencies of each case and decisions entitled to broad discretion); *see also* cases cited *supra* note 9. *But see* Adams v. Providence & Worcester Co., 721 F.2d 870, 872 (1st Cir. 1983) (evidence excluded on appeal although trial judge allowed admission); Wilk v. American Medical Ass'n 719 F.2d 207, 231-32 (7th Cir. 1982) (appellate court in excluding evidence recognized "difficulties encountered by . . . trial judge in trial of . . . length and complexity"), *cert. denied*, 104 S. Ct. 1592 (1984).

[13] *See, e.g.*, Cohn v. Papke, 655 F.2d 191, 194 (9th Cir. 1981); Rozier v. Ford Motor Co., 573 F.2d 1332, 1347 (5th Cir. 1978).

[14] *See, e.g.*, E. CLEARY, MCCORMICK ON EVIDENCE 547 (3d ed. 1984) [hereafter MCCORMICK ON EVIDENCE]; C. WRIGHT & K. GRAHAM, *supra* note 5, § 5212, at 256.

[15] *See, e.g.*, J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 403[03], at 403-15.

[16] *See supra* notes 6-8.

ering the rule's language and the language of some of the other Federal Rules of Evidence.

The language of Rule 403 suggests that one of its goals is administrative in nature: the elimination of evidence that, if admitted, may cause "undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403 calls these threats to its administrative goal "considerations." Other grounds for excluding evidence are not focused upon administrative efficiency. These grounds are "unfair prejudice, confusion of the issues [and] misleading the jury." Rule 403 calls these "dangers," implying that a decision to exclude evidence on these grounds is concerned with more significant principles than administrative "considerations." However, Rule 403 does not explicitly identify those significant principles.

Rule 102, which defines the general principles underlying all the Federal Rules, is constructed similarly. Administrative concerns such as "unjustifiable expense and delay" are identified. Like Rule 403, Rule 102 implies that such concerns are inferior to a more basic goal.[17] However, unlike Rule 403, Rule 102 identifies that goal: the ascertainment of truth in a context of procedural fairness.

The nature of the dangers specified in Rule 403 suggests that the unstated primary goal of the rule is also securing truth through procedural fairness.[18] Obviously, confusion of the issues or misleading the jury jeopardizes accurate factfinding. While the precise meaning of unfair prejudice is unclear,[19] it is apparent that fairness is compromised by evidence that is "unfairly" prejudicial. Unfair prejudice also presents an obstacle to accurate factfinding. The advisory committee note to Rule 403 suggests evidence is unfairly prejudicial because it induces decisionmaking on an emotional basis.[20] Rule 401, which de-

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[17] FED. R. EVID. 102 reads as follows: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." The phrase "to the end that" contained in Rule 102 suggests that the administrative concerns mentioned before that phrase are significant because they relate to the more fundamental policy goals mentioned after that phrase.

[18] Both courts and commentators recognize that Rule 102 identifies the policies that should control the exercise of discretion under Rule 403. *See, e.g.*, Petrocelli v. Gallison, 679 F.2d 286, 292 n.6 (1st Cir. 1982); C. WRIGHT & K. GRAHAM, *supra* note 5, § 5212, at 250.

[19] For analysis of the meaning of unfair prejudice, see *infra* text accompanying notes 75-99.

[20] FED. R. EVID. 403 advisory committee note.

fines "relevant evidence," assumes that logic is the key to relevancy[21] and thus ensures accurate factfinding. Emotion is therefore dangerous since it may lead to inaccuracy.[22]

Rule 403 emerges not so much like a rule in the conventional sense, but more like a statement of principle: concern for truth and fairness may override specific rules of admissibility. Rules are usually considered as "applicable in an all-or-nothing fashion."[23] They "set out legal consequences that follow automatically when the conditions provided are met."[24] A principle, on the other hand, "states a reason that argues in one direction but does not necessitate a particular decision."[25] The discretionary power created by Rule 403 and the elastic nature of concepts like truth and fairness suggest that the essence of Rule 403 is flexibility rather than rigidity.

The classification of Rule 403 as an embodiment of a broad principle has important ramifications for its interpretation.[26] The language of Rule 403 cannot be read in a literal, bloodless fashion. Rather, understanding the rule requires analysis of the principles it embodies. A more precise notion of the meaning of the abstract concepts of truth and fairness within the context in which Rule 403 operates is necessary.

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[21] "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case . . . . Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand." FED. R. EVID. 401 advisory committee note (citing James, *Relevancy, Probability and The Law*, 29 CALIF. L. REV. 689, 696 n.15 (1941)). However, the advisory committee also cautioned against "unduly" emphasizing the logical process. *Id.*

[22] Some commentators have argued that, although the law of evidence may hold out accurate factfinding as its primary goal, in reality the law serves other purposes. *See, e.g.*, Nesson, *Reasonable Doubt and Permissive Sufferances: The Value of Complexity*, 92 HARV. L. REV. 1187, 1194 (1979) ("generally articulated and popularly understood objective of the trial system is to determine the truth about a particular disputed event. But another, perhaps even paramount objective of the trial is to resolve the dispute."). Following this approach, it is arguable that Rule 403 should serve as a mechanism for quickly resolving difficult evidentiary issues through the application of a dose of discretion. Viewed in this way, however, Rule 403 emerges as a mechanism for undermining the rest of the rules. *See* C. WRIGHT & K. GRAHAM, *supra* note 5, § 5223, at 316 (appellate courts have abused Rule 403 by using it as an issue-ducking device).

[23] R. DWORKIN, TAKING RIGHTS SERIOUSLY 24 (1977).

[24] *Id.* at 25.

[25] *Id.* at 26.

[26] This classification also has important ramifications for the application of Rule 403. Since Rule 403 is not an all-or-nothing rule, to expect success from a precise, mechanical approach is unrealistic. *See infra* notes 104-18 and accompanying text.

B. The Meaning of Accuracy and Fairness in the Courtroom

Analysis of Rule 403's potential for advancing truth and fairness is central to defining the scope of its grant of discretionary power. Although concepts such as truth and fairness cannot be described with photographic accuracy, their contours in the context of submission and evaluation of evidence at trial are discernable. As the following discussion demonstrates, both truth and fairness share a similar meaning in this context: rendition of verdicts by an unbiased jury based upon the logical implications of the evidence. Rule 403 can advance truth and fairness by excluding evidence that tends to induce the jury to think illogically or employ an improper bias.

1. Truth in the Courtroom

The search for truth in a judicial setting is not a quest for universal verities. Truth in the courtroom consists only of those parts of reality deemed legally relevant.[27] However, revealing even this limited version of the truth is difficult. Reality can be distorted by a witness describing her perception.[28] Reality can be further obscured when a juror listens to the testimony and draws inferences. A verdict never perfectly mirrors past reality because of imperfections in the faculties of witnesses and jurors.[29] However, unless that verdict reflects reality to some acceptable degree, the process of justice becomes illegitimate.

Thus, truth in the courtroom is the product of several factors. Relevant evidence must come from reliable witnesses and the jury must draw inferences from the evidence in a way likely to yield an accurate decision. Rule 403 can play a narrow but important role in achieving this model of truth. Rule 403 does not permit the exclusion of evidence on relevancy grounds; it presupposes the relevancy of evidence under consideration. Rule 403 also does not provide for exclusion based upon the unreliability of a witness. Evaluations of such matters are usually recognized to be the domain of the jury.[30] Rule 403's primary focus is whether the jury will use the evidence in a way that will enhance or detract from accurate factfinding.

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[27] *See* FED. R. EVID. 401 (defining relevant evidence); FED. R. EVID. 402 (permitting admission of relevant evidence and exclusion of irrelevant evidence).

[28] The unreliability of eyewitness testimony has been well documented. *See, e.g.*, E. LOFTUS, EYEWITNESS TESTIMONY (1979).

[29] Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trial*, 66 COLUM. L. REV. 223, 231-32 (1966).

[30] *See* Sartor v. Arkansas Gas Corp., 321 U.S. 620, 627-28 (1944); C. WRIGHT & K. GRAHAM, *supra* note 5, § 5214, at 265-66.

Since Rule 403 must be applied before evidence is admitted for jury consideration, the court must predict whether the evidence will promote or undermine accurate factfinding. A judge normally cannot make this prediction with certainty because she usually does not have personal knowledge concerning the facts in dispute,[31] and is usually aware of little or no more evidence than the jury.[32] However, a judge can make a reliable prediction by considering the inferential processes a jury will likely employ when evaluating an item of evidence.

Inferential processes concern *how* jurors think when they decide the meaning of evidence. Inferential processes are likely to lead to the truth when they permit the jury to fully and accurately perceive the logical implications of evidence and use those implications in an unbiased fashion. Inferential processes are likely to distort the truth when they are based on inferential error. An inferential error occurs when the jury decides that evidence is probative of a fact when it is not, or more or less probative of a fact than it is. Inferential error can also occur when evidence induces the jury to use bias in its decisionmaking. Any preconceived and unfounded belief about some aspect of reality is a "bias."

For example, evidence that the defendant in a criminal prosecution has a prior conviction may induce the jury to use the commonly held bias that a person previously convicted of a crime is dispositionally in-

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[31] The prohibition against personal knowledge of the facts in dispute is evidenced by the following criteria for judge disqualification given in 28 U.S.C. § 455(b)(1)-(5) (1982):

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts . . .;
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> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
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> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
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> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
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> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person [is a party or has some interest in the proceeding].

[32] A judge may be exposed to evidence outside the hearing of the jury when a judge rules certain evidence to be inadmissible. *See* FED. R. EVID. 103(c).

clined toward repeated criminal behavior.[33] This bias is at least a partial distortion of reality; not all, or even most, convicts are born criminals.[34] Thus, evidence of a single prior conviction may induce the jury to use an unreliable inferential process in its decisionmaking. Similarly, vivid photographic evidence depicting the wounds suffered by a shooting victim may be given more probative weight by a jury than objective analysis would allow, while the persuasiveness of relatively pallid self-defense testimony may be underestimated. Finally, complex or voluminous evidence of a scientific nature might be so confusing to a lay jury that it draws totally unwarranted conclusions.

Thus, a judge can predict whether the admission of an item of evidence will distort the truth by considering the likelihood that the jury will use bias or commit an error in estimating the value or meaning of evidence.[35] At least three factors are employed in predicting the probability of inferential error. First, the judge's experience concerning the usual juror reaction to the type of evidence in question is relevant. Second, the judge must be sensitive to how jurors in the instant case are likely to respond, given their particular backgrounds. Finally, the specific context in which the evidence is offered must be considered.[36]

Application of Rule 403 in a manner that promotes truth requires judicial inquiry into the reliability of the inferential processes that an item of evidence may induce the jury to employ. Thus, an important factor in the discretionary exclusion of evidence under Rule 403 is its tendency to lead the jury into inferential error.

2. Fairness

Defining fairness, like defining truth, is profoundly difficult. However, aspects of fairness that can be promoted by Rule 403 and ways to ensure promotion of fairness can be identified. Many of the safeguards considered necessary to the conduct of a fair trial merely focus on the likelihood certain evidence will induce the jury to think illogically or in a biased manner. Rule 403 can promote fairness in the same way it

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[33] *See* 1 H. UNDERHILL, CRIMINAL EVIDENCE § 205, at 447 (5th ed. 1956); *see also* Drew v. United States, 331 F.2d 85, 89 n.8 (D.C. Cir. 1964) (quoting H. UNDERHILL, *supra*).

[34] *See infra* note 40.

[35] *See infra* notes 114-17 and accompanying text.

[36] General knowledge concerning how juries react to certain types of evidence may be derived from experience and from a wealth of studies undertaken by professional psychologists. *See generally* Gold, *supra* note 1, at 510-24 (discussing human inferential processes and Rule 403).

promotes truth: by focusing a judge's attention on the effect evidence will have on the reliability of the jury's inferential processes and, thus, the potential accuracy of jury decisionmaking.

For example, lack of bias by the trier of fact is considered a fundamental aspect of fairness.[37] The jury should decide the case solely on the basis of evidence presented in open court, not on any knowledge or beliefs the jurors brought with them to court.[38] Such bias is normally an issue when qualifications of individual jurors are examined during the *voir dire* process. An indication of bias or opinion, such as knowledge of facts relevant to the case or familiarity with a party, is cause for disqualification.[39]

However, the threat of bias does not end once twelve honest and conscientious jurors are empaneled. Even the most responsible juror inevitably interprets evidence under a backdrop of preexistent beliefs that

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[37] *See, e.g.*, Murphy v. Florida, 421 U.S. 794, 799 (1975) ("[C]onstitutional standard of fairness requires . . . 'a panel of impartial "indifferent" jurors.' ") (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)); *In re* Murchison, 349 U.S. 133, 136 (1955) ("[F]air trial in a fair tribunal is a basic requirement of due process. Fairness . . . requires an absence of actual bias."); Jackson v. United States, 408 F.2d 306, 308 (9th Cir. 1969) ("[D]efendant is entitled to be tried by an unprejudiced and legally qualified jury.").

[38] *See, e.g.*, Irvin v. Dowd, 366 U.S. 717, 722 (1961) (juror must be indifferent to case and base verdict upon evidence presented at trial). The need for objectivity has not been construed to require complete ignorance concerning the facts of a case. *See id.*; United States v. Rosado, 728 F.2d 89, 94 (2d Cir. 1984); United States v. McNeill, 728 F.2d 5, 9 (1st Cir. 1984); Matthews v. Lockhart, 726 F.2d 394, 397 (8th Cir. 1984). Knowledge of matters implicated in the trial will not require excusing the jury providing the jurors will evaluate the facts presented without any preconceived biases. *See* Murphy v. Florida, 421 U.S. 794, 800 (1975) (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)); United States v. Blanton, 719 F.2d 815, 824-28 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1592 (1984); United States v. Moon, 718 F.2d 1210, 1218-19 (2d Cir. 1983); *see also* United States v. Ramsey, 726 F.2d 601, 603 (10th Cir. 1984) (trial judge's *voir dire* of jury adequate to explore problem of potential juror bias).

[39] *See* Reynolds v. United States, 98 U.S. 145, 155 (1878) (preconceived opinion sufficient cause for discharge of juror); Sims v. United States, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968) (discharge for cause of juror related to victim or holding same occupation as victim). However, as with prior knowledge of the case, *see supra* note 38, acquaintance with a party or with a party to a similar suit is not always regarded as automatic grounds for removal. *See* Stokes v. Delcambre, 710 F.2d 1120, 1128 (5th Cir. 1983) (trial court may exercise discretion in removing only some jurors with prior acquaintance to party); United States v. Anderson, 626 F.2d 1358, 1374 (8th Cir. 1980) (prior acquaintance will not always require removal), *cert. denied*, 450 U.S. 912 (1981); United States v. Jones, 608 F.2d 1004, 1008 (4th Cir. 1979) (relative of victim to similar crime not subject to per se disqualification), *cert. denied*, 444 U.S. 1086 (1980).

cannot be extinguished by a few cautionary words from the bench. Most of these beliefs are benign and even necessary for comprehension of the evidence. However, some of these beliefs are wrong and may lead to illogical and inaccurate factfinding.

The threat of bias affects not only the qualification of jurors but also the admissibility of evidence. Returning to a prior example, a juror may assume that evidence showing a past criminal record demonstrates the accused has a criminal disposition that, in turn, evidences guilt in the instant case. The exclusion of prior crimes evidence under Federal Rule 404 is premised in part on the notion that this assumption is often inaccurate.[40] Absent a specific rule of exclusion such as Rule 404, the admissibility of evidence that may induce the jury to employ a misleading bias in its decisionmaking must be considered under Rule 403. The potential for bias raises an issue of fairness because it jeopardizes the reliability of the jury's inferential processes and, thus, the accuracy of the jury's factfinding.

Providing a meaningful opportunity for a litigant to be heard is as fundamental to our notion of fairness in judicial proceedings as the conduct of those proceedings without bias.[41] In an adversary system the accuracy of the jury's decision often depends on presentation of both sides of the story.[42] The danger that an opponent's evidence will mislead or be misinterpreted by the jury is usually decreased by the opportunities afforded litigants to reveal inaccuracies or other defects in the evidence. Those opportunities become inadequate when the evidence misleads in such a subtle way that defects cannot be adequately explained or understood by the jury. For example, the jury may use bias or illogic to make a decision without realizing it.[43] No amount of coax-

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[40] *See* FED. R. EVID. 404 advisory committee note (citing Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956)). Some empirical data supports this conclusion. *See, e.g.*, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 522, table 6.47 (1980) (only 0.5% of parolees released during 1977 who had been convicted of murder or nonnegligent manslaughter had been convicted of new murder or nonnegligent manslaughter during the first year after release). Studies indicate that a person's behavior in a given situation cannot be accurately predicted on the basis of personality test scores or behavior in another similar situation. *See* R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 106-08 (1980). These studies suggest that a person who behaves in a given fashion in one situation will not necessarily repeat that behavior. Slight differences in the external situation often produce great differences in behavior. *Id.* at 120-21.

[41] Washington v. Texas, 388 U.S. 14, 19 (1967).

[42] *See id.*

[43] *See generally* R. NISBETT & L. ROSS, *supra* note 40, at 195-227. Inferential error resulting from unconscious application of a bias may not be subject to the safeguard of

ing from counsel or the court can prevent an unconscious error. Furthermore, rebuttal of such evidence is practically impossible because of the difficulty in detecting bias. Rule 403 permits the exclusion of such evidence when its likely effect is to reduce the reliability of the jury's inferential processes.[44]

Other procedures associated with a fair trial are also designed to ensure an accurate decision by the jury. The right to counsel[45] and the right to confront witnesses[46] enable litigants to expose the defects of an opponent's evidence that may deceive the jury. Although these rights are often premised upon constitutional considerations rather than concern for the accuracy of jury decisionmaking, the law of evidence is preoccupied by this concern.

Thus, the policies of fairness and accuracy underlying Rule 403 can be promoted if the court exercises its power to exclude evidence by considering the effect of evidence on the reliability of the jury's inferential processes. Rule 403 serves a unique and important function in this regard. Other evidentiary rules protect against admission of evidence that misrepresents a fact or event.[47] However, few other rules are directly concerned with evidence that, while accurately reflecting a fact or event, may still lead the jury away from the truth because the evidence induces the jury to draw illogical or otherwise improper inferences from that fact or event.[48] Although exclusion of patently inaccurate evidence is important, the threat presented by evidence with more latent problems may be even greater. Evidence is seldom wholly inaccurate

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self-control. Thus, it is more dangerous than intentional abdication of responsibility by the decisionmaker. The latter concern is the current focus of Rule 403 analysis. *See infra* notes 70-75 and accompanying text.

[44] Since jurors may not recognize their own inferential error, the efficacy of instructions to prevent such error is limited. Many courts, however, simply assume instructions will successfully minimize prejudice. *See, e.g.*, United States v. Dennis, 625 F.2d 782, 801 (8th Cir. 1980); United States v. Lutz, 621 F.2d 940, 944 (9th Cir. 1980); United States v. DeLillo, 620 F.2d 939, 946 (2d Cir. 1980); United States v. D'Alora, 585 F.2d 16, 21 (1st Cir. 1978). If cautionary instructions prevented inferential error, any need for Rule 403 would be obviated. Several courts have recognized the limited usefulness of instructions to cure unfair prejudice. *See, e.g.*, United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980); United States v. Schiff, 612 F.2d 73, 82 (2d Cir. 1979).

[45] U.S. CONST. amend. VI.

[46] *Id.*

[47] *See, e.g.*, FED. R. EVID. 602 (excluding testimony of witness who lacks personal knowledge); FED. R. EVID. 802 (excluding hearsay); FED. R. EVID. 1002 (excluding evidence of contents of writing other than original).

[48] Several other rules in article IV of the Federal Rules are also specific applications of the policies underlying Rule 403. *See* FED. R. EVID. 403 advisory committee note.

and, as inaccuracy increases, so does its tendency to be exposed. On the other hand, evidence that confuses often generates an illusion of probativeness, while adding nothing to the search for truth.

Rule 403 should be interpreted in light of this focus on the reliability of the jury's inferential processes. When this approach is used, the terms probative value and unfair prejudice can be defined in ways that suggest appropriate parameters for the exercise of discretion under the rule.

II. Interpreting the Language of Rule 403: Probative Value and Unfair Prejudice

Rule 403 does not explicitly direct the court to evaluate the likely effect of evidence on the reliability of the jury's inferential processes. Instead, the court is directed to weigh the probative value of evidence against the danger of unfair prejudice it creates. The rule does not define these terms. Courts and commentators have assumed that these terms refer to two distinct characteristics of evidence that should be evaluated in two very different ways. The following discussion demonstrates that these assumptions are unsupported by the previously identified principles underlying Rule 403. Moreover, such assumptions provide no apparent basis for comparing unfair prejudice and probative value, making the required weighing of the two values a contest between apples and oranges in which it is impossible to pick a winner.

This section proposes that both probative value and unfair prejudice should be interpreted as referring to the effect of evidence on the jury's inferential processes. Under this interpretation, evidence has probative value if it enhances the accuracy of jury factfinding. Accurate factfinding is enhanced when evidence logically increases the certainty of a fact in issue and the jury correctly perceives both the fact affected, and the extent to which its certainty is logically established. On the other hand, evidence is unfairly prejudicial when it detracts from the accuracy of factfinding by inducing the jury to commit an inferential error. Inferential errors occur when the jury perceives evidence to be logically probative of a fact when it is not, perceives the evidence to be more probative of fact than it logically is,[49] or bases its decision on improper bias. This

[49] Inferential error also occurs when the jury underestimates the probative value of evidence. However, when that type of error occurs, it does not result in unfair prejudice but, rather, diminishes the probative value of the evidence in question. It makes no sense to argue that the party against whom the evidence is introduced is unfairly prejudiced when it is admitted and the jury makes such an error. If anything, that party benefits by the jury's error. *See infra* note 67 and accompanying text.

interpretation makes the language of Rule 403 consistent with its underlying policies and provides a common theoretical basis for comparing probative value with unfair prejudice.

A. Probative Value

The prevailing definition of probative value suggests it is a product of the logical implications of evidence that can be totaled almost like a column of numbers. Thus, commentators conclude that probative value equals the product of the strength of the immediate inferences that may be drawn from the evidence in question and the strength and number of inferences between the evidence and the ultimate fact to be proven.[50] The inferences that may be drawn from the evidence and the strength of those inferences are all those "reasonably deducible from the proof presented."[51] Another prominent commentator suggests that the probative value of evidence is a function of how the evidence in question affects the probability of the ultimate fact to be proven when viewed from the perspective of the completely rational decisionmaker.[52] Others suggest that courts should consider the "maximum reasonable probative force" of the evidence.[53]

Although these descriptions allow courts to make comfortable judgments about the value of evidence based on logic, a mechanism with which judges are familiar and adept at using, logic alone is a misleading basis for making such judgments. Something has value if it can be used to advance some purpose or achieve some goal.[54] The basic goal of a trial is to produce a judgment based on an accurate view of the facts. Thus, probative value is the capacity of evidence to achieve this goal.[55] That capacity cannot reliably be measured simply by reference to the inferences logically deducible from the evidence. Just as gold has no value to the person dying of thirst in the desert, the value of evidence to the jury is a function not of its intrinsic logical worth but, instead, its usefulness in the context within which it is offered.

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[50] *See, e.g.*, E. MORGAN, BASIC PROBLEMS OF EVIDENCE 185-86 (1961); C. WRIGHT & K. GRAHAM, *supra* note 5, § 5214, at 270-71; *cf.* United States v. Ravich, 421 F.2d 1196, 1204 n.10 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

[51] *See* S. SALTZBERG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 102 (3d ed. 1982).

[52] Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1023, 1025-30 (1977).

[53] J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 403[03], at 403-25 to -26.

[54] *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 2814 (3d ed. 1966) (defining value as the "relative worth, utility, or importance: degree of excellence").

[55] *See supra* note 22.

Many courts recognize this approach and measure Rule 403 probative value by considering the necessity and importance of the evidence in the context in which it is offered. This context includes, among other things, the presence of other evidence that establishes the disputed fact,[56] the relative strength of the offeror's case,[57] the difficulty of proving the fact in question,[58] the importance of the fact in the offeror's case,[59] and the evidence offered by the opponent.[60]

This contextual approach to measuring probative value will not necessarily lead to a conclusion that evidence has less value than its purely logical implications would suggest. In fact, if probative value is defined solely in terms of the logical strength of the inferences generated by an isolated item of evidence, the practical value of any piece of evidence may even be underestimated. For example, a piece of evidence may seem insignificant by itself because the inferences derivable from it are weak. However, once other evidence already admitted establishes a fact in issue to a degree of certainty just short of the requisite burden of proof, the addition of otherwise weak evidence may alter the very outcome of a trial. Even if an item of evidence does not constitute this vital last link in the chain of proof, its probative value may still be enhanced by other evidence. Thus, evidence proving motive in a murder case may, when viewed alone, permits only a weak inference of guilt. Evi-

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[56] *See, e.g.*, Gross v. Black & Decker, Inc., 695 F.2d 858, 863 (5th Cir. 1983); United States v. Dolliole, 597 F.2d 102, 106 (7th Cir. 1979); Heckt v. Pro-Football, Inc., 570 F.2d 982, 997 (D.C. Cir. 1977); Friedman v. National Presto Indus., 566 F. Supp. 762, 765-66 (E.D.N.Y. 1983); C. WRIGHT & K. GRAHAM, *supra* note 5, § 5222, at 314.

[57] *Cf.* United States v. Pirolli, 673 F.2d 1200, 1203 (11th Cir. 1982) (evidence admissible in light of strength of other evidence concerning defendant's criminal activities); United States v. Albert, 595 F.2d 283, 288 (5th Cir. 1979) (government's case weak; therefore, incremental value of evidence strong and probative value outweighs unfair prejudice).

[58] *See, e.g.*, United States v. Hearst, 563 F.2d 1331, 1337 (9th Cir. 1977) (defendant's state of mind during robbery difficult to prove; evidence of prior crimes highly probative on this issue), *cert. denied*, 435 U.S. 1000 (1978). The difficulty in proving a particular fact is related to the necessity of a particular piece of evidence in the offeror's case. *Cf.* Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 91 (D.S.C. 1979) (documents concerning state of mind, knowledge, and adequacy of testing crucial to elicit testimony and challenge testimony of witnesses), *aff'd*, 644 F.2d 877 (1981); *see also* cases cited *infra* note 59.

[59] *See, e.g.*, Roshan v. Fard, 705 F.2d 102, 105 (4th Cir. 1983); Gross v. Black & Decker, Inc., 695 F.2d 858, 863 (5th Cir. 1983); United States v. Alpern, 564 F.2d 755, 761 (7th Cir. 1977); United States v. Spletzer, 535 F.2d 950, 956 (5th Cir. 1976); United States v. Arteaga-Limones, 529 F.2d 1183, 1197-98 (5th Cir. 1976).

[60] *See, e.g.*, United States v. Jackson, 405 F. Supp. 938, 943 (E.D.N.Y. 1975).

dence proving opportunity to commit the murder, in the absence of any other evidence, may also be unpersuasive. However, if evidence of motive and opportunity coexist, the probative value of each of these parts of the prosecution's case is enhanced. The addition of each new incriminating fact affirms or corroborates the correctness of the inference of guilt to be drawn from all the other incriminating facts.[61]

Thus, the capacity of an item of evidence to promote accurate factfinding is a function of its potential to do so when viewed in the context of all the other evidence in the case. That capacity is also affected by the likelihood the jury will realize that potential in its decisionmaking. Thus, the appropriate context within which to measure the probative value of evidence consists not only of all other evidence in the case, but also includes the jury. The inability of the jury to fully understand the logical implications of the evidence can significantly reduce probative value.

Evidence presents a Rule 403 problem precisely because of the danger the jury will not use the evidence in a perfectly logical way. For example, complex evidence requiring specialized knowledge to fully understand may confuse and mislead the jury. The jury may derive limited value from such evidence because of failure to perceive its logical effect on certain issues. The jury may even derive only illogical inferences from such evidence, in which case the evidence may be treated as having no probative value but producing unfair prejudice.[62] To speak of the logical value of evidence in such cases seems anomalous when the logic is not fully or even partially appreciated by the jury.[63]

Thus, probative value should be viewed as a product of the logical potential of evidence in the evidentiary and cognitive context within which it is offered.[64] This contextual approach to probative value is consistent with the expressed intent of the drafters of Rule 403.[65] It is

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[61] *See* D. PIRAGOFF, SIMILAR FACT EVIDENCE 135 (1981).

[62] See *infra* text accompanying notes 75-99 for discussion of the meaning of unfair prejudice.

[63] *Cf.* C. WRIGHT & K. GRAHAM, *supra* note 5, § 5214, at 268 (probative value of real proof can be diminished by jury's perceptual deficiencies).

[64] This is consistent with Bayesian analysis that considers the probative force of an item of evidence to be the extent to which it modifies our previous assessment, based on already admitted evidence, of the probability that a disputed fact exists. *See* 1A WIGMORE, EVIDENCE § 37, at 1010 (Tillers rev. 1983) [hereafter WIGMORE].

[65] *See* FED. R. EVID. 403 advisory committee note (need for the evidence and the availability of other means of proof are factors influencing the weighing of probative value and unfair prejudice) (citing Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 1, 12-15 (1956)).

further supported by Rule 403 case law, which reveals that the assessment of probative value and its comparison to unfair prejudice requires consideration of intangible, subjective factors peculiar to each case.[66] Thus, an accurate assessment of probative value requires the court to consider the reliability of the inferential processes which the jury will likely employ in using the evidence in question. As a result, a contextual analysis of probative value is consistent with the policies of Rule 403.

This approach arguably confuses probative value with unfair prejudice; when the court separately weighs unfair prejudice the factors that deflate probative value from its logical maximum will then be taken into account. However, unless probative value is accurately measured at the outset, rather than based on some theoretical maximum with no connection to reality, the weighing process will often yield misleading results.

For example, the maximum logical probative force of an analysis of the relevant market in antitrust litigation might very strongly indicate a given defendant has monopolized the market. However, because of the complex nature of the evidence it may be extremely unlikely that the jury will ever understand that it implicates that defendant. It would make no sense to conclude that the jury's error results in unfair prejudice to the defendant. If anything, the defendant benefits from the error. If we add to this hypothetical the fact that the jury may mistakenly infer from the evidence that a second defendant is guilty of monopolization, that defendant suffers unfair prejudice. Yet, if we weigh that unfair prejudice against the maximum logical probative value of the evidence to implicate the first defendant, it may appear that the evidence represents a net gain for accurate factfinding when, in reality, it represents a loss. Only if we measure probative value with reference to its probable rather than ideal benefits can the weighing process reveal that this evidence is likely to jeopardize the accuracy of jury factfinding.[67] This is because the inferential errors that cause a jury to undervalue evidence cannot always be considered sources of unfair prejudice.

While the prevailing theory of probative value requires measuring

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[66] *See, e.g.*, United States v. Long, 574 F.2d 761, 767 (3d Cir.) (appellate disagreement with weight given to probative value and unfair prejudice involves "highly subjective factors"), *cert. denied*, 439 U.S. 985 (1978); Construction Ltd. v. Brooks-Skinner Bldg. Co., 488 F.2d 427, 431 (3d Cir. 1973) (balancing probative value and unfair prejudice can be made only by one familiar with "the full array of evidence in [the] case").

[67] *See* McCORMICK ON EVIDENCE, *supra* note 14, § 185, at 547 n.37.

the maximum logical force of evidence,[68] unfair prejudice is usually assessed with reference to the extent to which it is likely to be realized.[69] Weighing an ideal of probative value against a realistic measure of prejudice produces a view of the total effect of evidence on the jury that is distorted in favor of admissibility.

If we measure the danger presented by evidence by reference to a prediction of a jury's probable reaction, we should not ignore that reality when we measure the value of evidence. Valuing evidence solely by its maximum logical effect might be justifiable if its probable actual benefit could not be accurately predicted. However, if the actual value cannot be predicted, there seems no reason to assume the actual dangers can be accurately predicted. In fact, while there will be problems foreseeing how a jury will use evidence, these difficulties are not necessarily insurmountable. Although resolution of such problems cannot be reduced to a neat statutory formula, Rule 403 provides the flexibility to resolve such problems. Using a definition of probative value that encourages courts to avoid resolution of these problems perpetuates unprincipled decisions that undermine Rule 403's underlying policies.

Valuing evidence in terms of its maximum logical effect also cannot be justified by the general orientation of the Federal Rules favoring admissibility.[70] One of the purposes of Rule 403 is to protect against the dangers created by the expansive scope of admissibility under the Federal Rules.[71] Interpreting Rule 403 as biased in favor of that which it was intended to control makes little sense. While this orientation might be a proper basis for deciding a Rule 403 issue when probative value and unfair prejudice are evenly weighted, it should not become a method for avoiding an initial honest evaluation of probative value.

Similarly, defining probative value in terms of some logical ideal cannot be justified as a means of limiting the judge's intrusion into the jury's function of weighing the evidence.[72] By weighing probative value realistically under Rule 403, the judge does no more than decide admissibility, which is a matter traditionally within the judge's, not the jury's, domain.[73] Once the evidence is admitted, the judge's Rule 403

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[68] *See, e.g.*, S. SALTZBERG & K. REDDEN, *supra* note 51, at 102; J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 403[03], at 403-18.

[69] *See, e.g.*, S. SALTZBERG & K. REDDEN, *supra* note 51, at 102.

[70] *See generally*, Rothstein, *Some Themes in the Proposed Federal Rules of Evidence*, 33 FED. B.J. 21, 21-23 (1974) (discussing the bias in favor of admissibility present in the then proposed Federal Rules of Evidence).

[71] C. WRIGHT & K. GRAHAM, *supra* note 5, § 5212, at 250.

[72] *See* E. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 368 (1978).

[73] C. WRIGHT & K. GRAHAM, *supra* note 5, § 5212, at 252 n.17.

estimate of probative value is not binding on, or even disclosed to, the jury. The jury's power to assign weight remains undiminished.

Thus, probative value under Rule 403 can and should be accurately measured by considering both the degree to which the evidence increases the certainty of the existence of a fact in issue, given the other evidence in the case, as well as the probability the jury will correctly perceive the degree of certainty and the fact affected. Focusing on the ability of the jury to understand the implications of the evidence is consistent with the policies underlying Rule 403 and brings the definition of probative value closer in line with the commonly accepted meaning of value.

B. Unfair Prejudice[74]

Current case law considers emotion the hallmark of unfair prejudice.[75] This notion may have been derived from the advisory committee's note to Rule 403, which suggests that unfair prejudice is commonly caused by emotion.[76] Although the note leaves open the possibility of other causes, none are identified.

Equating all emotion with prejudice is erroneous. If probative value refers to the capacity of evidence to produce a judgment based on accurate factfinding, unfair prejudice must refer to the capacity of evidence to subvert this objective. While emotion is often an improper basis for a judgment, it sometimes has an acceptable and even vital role in promoting accurate factfinding. The ability of twelve laypersons to interject human sensibilities into a proceeding otherwise dominated by the cold logic of the law may embody the true worth of the jury system. This ability can add to rather than detract from accurate factfinding by advancing the jury's empathic understanding of how and why the participants acted a particular way.

Equating emotion with unfair prejudice is also inconsistent with lay attitudes concerning justice. Emotional aspects of a case move a jury

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[74] Portions of this section have been adapted from Gold, *supra* note 1.

[75] *See, e.g.*, United States v. Salisbury, 662 F.2d 738, 741 (11th Cir. 1981) (evidence of prior bad acts not so "heinous" as to incite the jury to irrationality), *cert. denied*, 457 U.S. 1107 (1982); United States v. Hearst, 563 F.2d 1331, 1337 (9th Cir. 1977) (prior crimes evidence not likely to "inflame" the jury), *cert. denied*, 435 U.S. 1000 (1978); United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975) (evidence concerning defendant's lies about Swiss bank transactions not "highly inflamatory"), *cert. denied*, 425 U.S. 958 (1976); *see also* C. WRIGHT & K. GRAHAM, *supra* note 5, § 5215, at 275-77.

[76] FED. R. EVID. 403 advisory committee note.

because those aspects are commonly perceived as vital to the rendition of justice. Excluding all evidence with emotional appeal would eliminate public confidence in our system of laws as a moral force. The parameters of justice are not purely coincident with the realm of logic, but also encompass common intuition.[77]

Just as emotion is not always an improper basis for decision, logic is not a talisman against inaccuracy and unfairness. The inferences derived from evidence can be relentlessly logical. However, when that logic flows from improper premises the evidence is prejudicial. For example, if a juror believes "once a thief, always a thief," evidence of the defendant's prior criminal record will logically lead to the conclusion that the defendant is guilty as charged. Because the premise is wrong, the evidence giving effect to the premise through the process of logic leads to inaccuracy and unfairness.

Defining unfair prejudice in terms of the distinction between emotion and logic is, in part, the product of a simplistic view of the danger Rule 403 guards against. Proponents of this view envision the typical case as one in which the jury is confronted with the gruesome debris of the crime and is so repulsed that it is prepared to convict whomever is available without seriously considering guilt or innocence.[78] For example, the danger of unfair prejudice is often seen in terms of the jury's inclination to convict a defendant with a criminal history not because the defendant is guilty as charged, but out of hatred for the defendant, who is seen as a bad person.[79]

Certainly a jury may be so emotionally moved by a particular piece of evidence that it neglects the issues it has been charged to decide and intentionally renders judgment on some other basis. Evidence leading to this result is prejudicial. However, it seems unlikely that this occurs frequently.[80] While an occasional juror may lose sight of the issues to

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[77] *See* Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1375-76 (1971).

[78] *See* J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 403[03], at 403-19 to -22 (evidence is unfairly prejudicial when it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case." (citations omitted)).

[79] *See, e.g.*, Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 777-78 (1981). *But cf.* United States v. Murzyn, 631 F.2d 525, 531 (7th Cir. 1980) (probability that jury would convict defendant because he was a "bad man" outweighed by government's need to use evidence to rebut defendant's testimony), *cert. denied*, 450 U.S. 923 (1981).

[80] For example, Professors Kalven and Zeisel report data that, for the most part, positively reflects upon a jury's ability to understand its charge and the evidence. *See*

be decided, a simultaneous lapse by the entire jury, or even a majority of its members must be rare. Efforts by counsel to induce a jury to act in this manner are frequently obvious and offensive. In any event, if such dereliction of duty were commonplace, the jury system would not endure. It seems far more likely that most jurors diligently attempt to perform their tasks as triers of fact, but occasionally are unequal to the task.

The appropriate interpretation of unfair prejudice refers to a more complex concept than simply reliance on emotion in decisionmaking. If evidence is unfairly prejudicial because it subverts the goal of accurate factfinding, unfair prejudice must refer, in part, to the tendency of evidence to lead the jury to commit an inferential error.

One type of inferential error was mentioned in connection with defining probative value. As described above, the probative value of evidence is the product of its logical implications viewed in the context of the rest of the evidence, discounted by the probability the jury will not fully perceive those implications and will undervalue the evidence.[81] The inferential errors that produce unfair prejudice are different. These errors are the product of evidentiary inferences based upon an improper bias,[82] or inferences that have no logical connection to the evidence, or inferences that, while logically derivable from the evidence, are overvalued because they are believed to an illogically high degree.[83]

H. KALVEN & H. ZEISEL, THE AMERICAN JURY 149-62 (1966).

[81] *See supra* notes 54-64 and accompanying text.

[82] By improper bias, I mean any preconceived belief formed by the jury about some aspect of reality that is unfounded.

[83] The theory that unfair prejudice refers to the tendency of evidence to induce inferential error is suitable for understanding most reported unfair prejudice cases. There is one category of these cases, however, that is not explicitly dealt with by this analysis. The doctrine of multiple admissibility described in Federal Rule of Evidence 105 contemplates that evidence which is admissible as to one issue, but not another, may be received in evidence. However, when the jury considers the evidence for its inadmissible purpose, unfair prejudice may result. *See, e.g.*, United States v. Brown, 490 F.2d 758, 762-64 (D.C. Cir. 1974). This is the "reverberating clang" problem identified by Justice Cardozo in Shepard v. United States, 290 U.S. 96, 102-04 (1933). However, the analysis contained in this Article concerning the meaning and application of Rule 403 is also applicable when the evidence is inadmissible for a given purpose because of a rule of exclusion that itself is directed at preventing inferential error. For example, evidence of defendant's prior conviction is inadmissible under Rule 404(b) to prove character because it induces the jury to employ an improper bias that suggests the evidence may be highly probative when, in fact, it usually is not. *See supra* note 40 and accompanying text.

However, when evidence is inadmissible because of an exclusionary rule premised on some other policy, the unfairly prejudicial nature of that evidence is not definable by its

Thus, unfair prejudice would follow from evidence that the defendant in a criminal prosecution has a prior conviction if the jury interprets that evidence in light of the common belief that "once a crook always a crook."[84] Since this bias at least partially distorts reality,[85] evidence which encourages this bias may lead to inferential error. Unfair prejudice also occurs when the jury incorrectly decides that evidence is logically probative of an alleged fact or event. For example, evidence of damage is usually not probative of liability. When a jury concludes that the seriousness of plaintiff's injuries suggests defendant must have been negligent, the evidence of damage has been prejudicial. Prejudice arises not because of the jury's emotional reaction to the evidence, but because the evidence has induced an inferential error. Finally, unfair prejudice occurs when the jury decides that evidence is more probative of a fact or event than it is. For example, the prejudicial impact of photographs of a victim's gory remains derives from the potential of such vivid evidence to dominate the minds of jurors. The fact that such evidence evokes an emotional reaction from the jury does not necessarily make it prejudicial. There may be nothing wrong with shocking a jury with the repulsiveness of a wound, provided the impression created by the evidence is commensurate with its objective worth.[86]

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tendency to induce inferential error. For example, evidence that a murder victim stated she feared the defendant would kill her may be admissible to prove the decedent's state of mind, but is inadmissible hearsay when offered to prove the identity of the culprit. *See* United States v. Brown, 490 F.2d 758 (D.C. Cir. 1974). The unfairly prejudicial nature of such evidence is an aspect of its potential to undermine those other policies underlying the rule of exclusion involved.

Interestingly, the rules of exclusion that raise the "reverberating clang" problem frequently have multiple policy bases. For example, the policies underlying Rule 404(a) include a concern for efficiency and fairness, not just improper bias leading to inferential error. *See* C. WRIGHT & K. GRAHAM, *supra* note 5, § 5232, at 346. Similarly, the hearsay rule is concerned both with excluding unreliable evidence and with the danger that the jury may not appreciate that unreliability and, therefore, will commit inferential error by overestimating the value of the evidence. *See infra* note 96 and accompanying text.

Thus, deciding whether the analysis contained in this Article concerning unfair prejudice applies to a given "reverberating clang" problem requires consideration of the primary policy underlying the exclusion. This consideration also affects the evaluation of probative value. *See infra* text accompanying note 96.

[84] *See supra* note 33.

[85] *See supra* note 40.

[86] *See, e.g.*, United States v. Fleming, 594 F.2d 598, 607-08 (7th Cir.) (pictures of victim's bound, nude body probative on issues of *corpus delecti*, location of wounds, presence of ropes on victim's hands), *cert. denied*, 442 U.S. 931 (1979); United States

The theory that unfair prejudice is linked to inferential error rather than simply emotion is consistent with important findings of Professors Kalven and Zeisel in their classic study, *The American Jury*.[87] Professors Kalven and Zeisel developed what they considered "a central proposition about jury decision-making . . . fundamental to the understanding of jury psychology and jury process," which they termed the "liberation hypothesis."[88] They observed that the jury does not often consciously and explicitly yield to emotion when the law regards emotion as an improper basis for decision. Their research indicated, however, that juries do unconsciously yield to emotion when the meaning of the evidence or the proper inferences to be drawn therefrom are doubtful. Juries then begin unconsciously to rely on emotion to resolve their doubts, enabling them to draw an inference or reach a verdict.[89] In this way emotion liberates the jury from the purely logical implications of the evidence.

Thus, the "liberation hypothesis" suggests that it is not emotion per se that jeopardizes the reliability of the factfinding process. Rather, juries turn to emotion as a basis for decisionmaking only after that process has already been confused or obscured. The danger of unfair prejudice is created by that aspect of evidence that confuses or obscures, such as the vividness of grisly photos or the similarity of prior crimes, not by the emotions that such evidence generates.

Defining unfair prejudice as the tendency of evidence to cause certain types of inferential error is also consistent with the notion that Rule 403's basic purpose is advancement of accurate factfinding.[90] This focuses Rule 403 on the fundamental defect of the adversary system: counsel do not present evidence to reveal truth but, rather, to manipulate the jury's inferential processes into a direction favorable to their clients.[91] Further, this interpretation of unfair prejudice is consistent

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v. Cline, 570 F.2d 731, 734 (8th Cir. 1978) (unpleasant photos of victim's body supported testimony concerning path of bullets and clear condition of immediate death); Giblin v. United States, 523 F.2d 42, 44-45 (8th Cir. 1975) (photos of victim exhumed from grave necessary to corroborate eyewitness's bizarre testimony), *cert. denied*, 424 U.S. 971 (1976); *cf.* Grimes v. Employers Mut. Liab. Co., 73 F.R.D. 607, 610 (D. Alaska 1977) (Films illustrating injury of plaintiff in personal injury action were not unduly prejudicial because "[w]hile the scenes are unpleasant, so is plaintiff's injury.").

[87] H. KALVEN & H. ZEISEL, *supra* note 80.

[88] *Id.* at 164-65.

[89] *Id.*

[90] *See supra* text accompanying notes 27-36.

[91] Hart & McNaughton, *Evidence and Inference in the Law*, in EVIDENCE AND INFERENCE 48, 52-53 (D. Lerner ed. 1958).

with a theme running throughout the Federal Rules. Several rules make inadmissible evidence that, while clearly relevant, may be misperceived by the jury.[92] For example, the hearsay rule requires the exclusion of relevant, sometimes highly probative evidence.[93] The traditional justification for the loss of this evidence is that its reliability is suspect because it cannot be tested by cross-examination or other means.[94] Lack of reliability alone is usually an insufficient reason to exclude evidence.[95] Hearsay evidence is suspect not merely because it is unreliable, but also because the jury will not always fully appreciate the unreliability of such evidence.[96] This failure to accurately perceive and evaluate the evidence may lead to inaccurate factfinding and therefore justifies exclusion. The same reasoning justifies the exclusion of unfairly prejudicial evidence under Rule 403.

Unfair prejudice is measurable by reference to two factors: the extent to which an inferential error will detract from the goal of accurate factfinding, and the likelihood the jury will commit such an error. The potential damage of unfairly prejudicial evidence is, as with probative value, measurable in terms of the context within which the evidence is offered. For example, if the case is a close one[97] or the proponent offers little or no other evidence on a given point,[98] the unfairly prejudicial effect of evidence may be great. On the other hand, the prejudicial impact of one item of evidence may be small when the proponent offers overwhelming independent evidence.[99]

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[92] The rules following Rule 403 in article IV of the Federal Rules can all be partly justified on this basis. *See* FED. R. EVID. 404 (limitations on use of character evidence); FED. R. EVID. 407 (limitation on use of subsequent remedial measures to prove negligence or culpable conduct); FED. R. EVID. 408 (exclusion of evidence concerning compromise or offers to compromise); FED. R. EVID. 410 (inadmissibility of criminal pleas, plea discussions, and related statements); FED. R. EVID. 411 (inadmissibility of liability insurance coverage to establish fault); FED. R. EVID. 412 (limitations on admissibility of victim's past behavior in rape case).

[93] FED. R. EVID. 802.

[94] *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 14, § 245, at 728.

[95] For example, witnesses are not incompetent to testify simply because they are obviously biased. *See* FED. R. EVID. 601 & advisory committee note.

[96] *See* Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 919-20 (1937). A number of commentators have argued that juries' inability to correctly perceive the unreliability of hearsay has been exaggerated. *See, e.g.*, Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 335-36 (1961).

[97] *See, e.g.*, United States v. Mann, 590 F.2d 361, 370 (1st Cir. 1978).

[98] *See, e.g.*, United States v. Frick, 588 F.2d 531, 537 (5th Cir. 1979).

[99] *See, e.g.*, United States v. Lentz, 624 F.2d 1280, 1289 (5th Cir. 1980).

C. Measuring Unfair Prejudice and Probative Value

Courts may be uneasy with definitions of unfair prejudice and probative value that refer to the effect of evidence on the reliability of a jury's inferential processes. By focusing Rule 403 on the psychology of jury decisionmaking, courts are confronted with an issue that cannot be resolved by legal analysis alone. Judges must predict jury reaction to evidence, something they were not taught in law school. Courts tend to avoid such issues.

However, even judges and lawyers are not incapable of resolving these issues. The law is not unaccustomed to evaluating human cognitive behavior. For example, intent is an almost ubiquitous issue in the law. Judging intent is simply an after-the-fact estimation of what was in the mind of the actor. Predicting the probable reaction of a juror is similar. Both require an assessment of how people think. In fact, the courts have frequently resolved Rule 403 issues by relying upon their lay assumptions about juror psychology.[100] Many of the Federal Rules are also based on such assumptions.[101] Unfortunately, many of the assumptions made by the courts seem at best unproven and all too frequently unsound.[102]

Recent empirical research in cognitive psychology, however, is helpful in evaluating Rule 403 problems. A portion of this literature has been described in a prior article.[103] That research suggests that people, hence jurors, will predictably commit profound inferential errors under certain circumstances. These patterns of human decisionmaking provide the courts with a guide to evaluating the effect of evidence on the reliability of the jury's inferential processes. Continuing research simulating

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[100] *See, e.g.*, *supra* note 6.

[101] *See, e.g.*, FED. R. EVID. 804(b)(3). The dying declaration exception to the hearsay rule rests on the assumption that declarants are unlikely to fabricate while under fear of impending death. *Id.* advisory committee note (Notes to Subdivision (b), Exception (2)).

[102] *See, e.g.*, United States v. Salisbury, 662 F.2d 738, 741 (11th Cir. 1981) (court assumes that evidence of prior bad acts would not incite jury to irrational or emotional decision), *cert. denied*, 457 U.S. 1107 (1982); United States v. Masters, 622 F.2d 83, 87 (4th Cir. 1980) (judge's instructions can ameliorate emotional effect of evidence); United States v. Johnson, 558 F.2d 744, 746 (5th Cir. 1977) (evidence that defendant neglected to take tax deductions excluded because only indirectly probative of fact in issue and could have resulted in unfair prejudice), *cert. denied*, 434 U.S. 1065 (1978); United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975) (evidence concerning defendant's lies about Swiss bank transfers not "highly inflamatory"), *cert. denied*, 425 U.S. 958 (1976).

[103] *See* Gold, *supra* note 1.

actual trial conditions will add to our knowledge concerning jury reaction to different kinds of evidence under different conditions. Utilizing this research, Rule 403 can correct some of the invalid assumptions about juror psychology currently underlying the Federal Rules.

While this research is helpful to measure the probative or prejudicial potential of evidence, it will not provide a precise formula for weighing one against the other. However, defining both probative value and unfair prejudice in terms of the effect of the evidence on the reliability of the jury's inferential processes facilitates resolution of that issue. As the next section demonstrates, this common denominator finally provides a basis for comparing the two characteristics as mandated by Rule 403.

III. Application of Rule 403 Under the Contextual Approach

This Article has thus far described *what* a court must evaluate under Rule 403 by proposing definitions of unfair prejudice and probative value based on the principles underlying Rule 403. Once the probative and prejudicial potentials of evidence have been estimated, Rule 403 requires a comparison of the two. The remainder of this Article discusses *how* a court should weigh unfair prejudice against probative value to appropriately exercise the discretion to exclude.

A. Balancing as a Methodology to Resolve Rule 403 Issues

Commentators have concluded that Rule 403 requires a balancing of probative value and unfair prejudice.[104] Discretion to exclude presumably arises only when this balancing reveals that unfair prejudice substantially outweighs probative value.[105] Courts have adopted this approach, suggesting that probative value and unfair prejudice can be evaluated like weights on a set of scales. Ironically, while courts profess reliance upon a mechanistic concept of balancing, an inconsistent, ad hoc pattern of Rule 403 decisions has resulted.[106]

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[104] *See, e.g.*, C. Wright & K. Graham, *supra* note 5, § 5214, at 263. After asserting that Rule 403 mandates a balancing test, Professors Wright and Graham concede that balancing probative value against unfair prejudice is literally impossible. *Id.* at 266 n.17. This suggests a belief that the policy underlying Rule 403 is advanced by an artificial procedure purporting to balance. *See id.* at 263; *see also* J. Weinstein & M. Berger, *supra* note 5, ¶ 403[02], at 403-17 to -18. Nothing is accomplished by this facade. Unless there is some basis for actually comparing probative value and unfair prejudice, Rule 403 can provide no limits on the discretion to exclude.

[105] *See supra* note 104.

[106] *See supra* notes 6-9 and accompanying text.

Initially, it is necessary to understand the implications of balancing legal interests or concepts. While balancing is a popular methodology, particularly among first year law students and Supreme Court justices,[107] usually little thought is given to the meaning of balancing. Legal concepts, unlike tangible objects, do not have qualities like mass or weight subject to precise quantification and comparison.[108] Balancing in a legal context normally requires the evaluation of the object balanced in terms of some value or competing set of values. The items balanced are roughly compared in terms of their imagined effect on, or relation to, the relevant values. Thus, balancing cannot reasonably be undertaken until the values forming the standard for balancing are clear. Courts have tried to balance under Rule 403 without recognizing the relevant values. Thus, it is not surprising that their efforts to assign weights to probative value and unfair prejudice seem arbitrary, and their conclusions concerning the balance unexplainable.[109]

We have demonstrated that the value or principle underlying Rule 403 is the promotion of accurate factfinding.[110] We have defined probative value and unfair prejudice in terms that permit the court to evaluate the potential of evidence to advance or detract from accurate factfinding. This framework clarifies the object of the balancing test and permits comparison on a common basis: the effect of the evidence on juror inferential processes.

Although identifying the object of this test is a necessary first step, the problems inherent in using a balancing approach in Rule 403 cases are not entirely resolved. The relationship between unfair prejudice and probative value sometimes does not resemble the type of relationship suggested by a balancing test. The metaphor of the scales suggests that the court is to compare levels of prejudice and probative value: the extent that an improper inference will detract from accuracy balanced against the degree that a proper inference will promote accuracy. How-

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[107] *See, e.g.*, Douglas Oil Co. v. Petrol Stops N.W., 441 U.S. 211, 223 (1979) (disclosure of grand jury proceedings); Stone v. Powell, 428 U.S. 465, 489 (1976) (application of exclusionary rule through habeas corpus procedure); Barker v. Wingo, 407 U.S. 514, 530 (1972) (right to speedy trial); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967) (reasonableness of search under fourth amendment); Konigsberg v. State Bar of Cal., 366 U.S. 36, 50-51 (1961) (constitutionality of government regulations on speech).

[108] "Discretion is an intuitive process not susceptible to the quantification presupposed by the metaphor of the scales." C. WRIGHT & K. GRAHAM, *supra* note 5, § 5214, at 264.

[109] *See supra* notes 7-8.

[110] *See supra* text accompanying notes 27-48.

ever, usually the court must focus not only on the effect of these inferences on accuracy, but also on the probability the jury will draw one or both of those inferences. Making that probability judgment is not a matter of balancing. A review of the factual patterns usually creating Rule 403 issues illustrates the inadequacy of balancing as a description of the methodology necessary to resolve those issues. Three distinct patterns are presented, only one of which requires the court to engage in a process resembling a balancing of probative value against unfair prejudice.

In the first pattern of cases the jury may infer a single fact from the evidence in question. The evidence poses the danger that the jury will infer a fact that does not logically follow from the evidence, rather than draw the inference that logically flows therefrom.[111] Complex or confusing evidence generates this type of error. For example, a mathematical analysis of the relevant market in antitrust litigation might logically permit the inference that defendant has monopolized that market. If confused, the jury may infer that defendant has not monopolized the market or that someone else has. The jury will not enjoy the benefits and suffer the detriments of such evidence. The jury will either understand the evidence or misunderstand it. In such a case, characterizing the court's primary job under Rule 403 as balancing a quantity of probative value against a quantity of prejudice is incorrect. Rather, the primary inquiry should be: of two possible inferences, which is the jury most likely to derive from the evidence?

Admittedly, the extent to which the logically correct inference will advance the truth and the degree to which an improper inference will detract from accuracy are not unimportant factors. These concerns may even affect the probability a jury will derive a particular inference from the evidence.[112] These are also significant concerns after the probabili-

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[111] *See, e.g.*, LeSueur Creamery, Inc. v. Haskon, Inc., 660 F.2d 342, 352 (8th Cir. 1981) (exclusion of plaintiff's tax returns in civil action to recover damages for lost profits upheld because jury might improperly infer from profit data that plaintiff suffered no damage), *cert. denied*, 455 U.S. 1019 (1982); Hill v. Rolleri, 615 F.2d 886, 890 (9th Cir. 1980) (evidence that a traffic citation was issued was properly excluded in personal injury action arising out of motor vehicle collision since jury might improperly infer negligence); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 86 (E.D.N.Y. 1975) (medical newsletter published two years after injuries occurred that described dangerous nature of drug was excluded in civil action against drug manufacturer because jury might improperly infer defendant's notice prior to injuries).

[112] It seems likely that as the potential value of evidence increases, the logical implications of the evidence will often become more salient and, thus, the probability that the jury will draw the appropriate inference improves.

ties are predicted. For example, if the jury is equally likely to draw proper or improper inferences, the extent of the resulting benefit or distortion can become critical. If the distorting effect of the improper inference is great while the beneficial effects of the proper inference are small, such evidence should be excluded. Similarly, if the jury is more likely to employ the improper rather than the proper inference, the court could consider risking admission of the evidence if the proper inference has great value while the improper inference would have little impact on the accuracy of the jury's factfinding. Considering both weights and probabilities is a complex procedure that is not adequately described by a simplistic concept of balancing.

In the second type of case the jury also infers a single fact from the evidence in question. However, in this type of case a fact inferred logically flows from the evidence. Although the proper inference is made, the jury may believe in the certainty of the fact to an illogically high degree, thus causing prejudice.[113] For example, graphic photos depicting the defendant standing over the victim's grisly remains permit a logical inference of guilt because of presence at the scene of the crime. However, because the evidence is so vivid, the jury may believe in the defendant's guilt to an unwarranted degree and neglect the implications of more pallid exculpatory evidence.

Again, the court's first focus is not balancing quantities of probativeness and prejudice but, rather, whether the jury is likely to commit the error of inflating the import of the evidence. The court must first identify the fact logically inferable from the evidence and the degree to which the evidence logically establishes the certainty of that fact. The court must then predict what the jury will likely believe to be the certainty of the fact inferable from the evidence. Finally, the court must compare this prediction to the normative degree of certainty. In the case of the grisly photos, the vividness of the evidence will predictably make it more memorable for the jury. This enhances the extent to which the

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[113] *See, e.g.*, Smith v. Hussman Refrigerator Co., 619 F.2d 1229, 1245 (8th Cir. 1980) (evidence that NLRB failed to issue complaint after charges were filed properly excluded in action brought by employees against union and employer since jury may have accorded evidence undue weight); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979) (expert testimony concerning unreliability of eyewitness identification properly excluded because jury may accord expert testimony undue importance); Marx & Co. v. Diners' Club, Inc., 550 F.2d 505, 511 (2d Cir.) (statistical evidence properly excluded because jury may have accorded evidence undue weight), *cert. denied*, 434 U.S. 861 (1977); Thomas v. C.G. Tate Constr. Co., 465 F. Supp. 566, 571 (D.S.C. 1979) (videotape of plaintiff showing effects of injuries excluded).

jury will use that evidence when considering guilt.[114] If the evidence is logically probative of guilt to a high degree because, for example, the photo reveals the victim's wounds were still bleeding or the gun is still smoking, the evidence will probably not mislead the jury. If error is unlikely, the court has dispensed with a Rule 403 issue without balancing qualities of probative value and unfair prejudice.

If error is likely, the court must assess whether permitting reliance on a logical inference to an illogically high degree represents a net gain or loss to accurate factfinding. The extent to which the jury may exaggerate the certainty of the inferred fact, as well as the likelihood a jury will make such an error, are both factors in the court's decision. Characterizing this complex decision as a simple matter of balancing is not analytically helpful because it ignores the relevance of these additional factors.

Balancing the weight of probative value against the weight of unfair prejudice is the court's central focus only in the third factual pattern. The evidence in this situation may cause the jury to infer more than one fact from the evidence, at least one of which is logical and at least one of which is illogical, or otherwise improper.[115] For example, evidence of a defendant's prior criminal record may logically permit the jury to infer that she had the requisite knowledge to crack the bank's safe. That same evidence may simultaneously be used to improperly infer that the defendant has a criminal disposition and, thus, is probably guilty of committing the crime with which she is now charged. The first inference gives the evidence its probative value. The second inference is prejudicial because it is probably factually incorrect,[116] and even

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[114] *See* Gold, *supra* note 1, at 519.

[115] *See, e.g.*, Cohn v. Papke, 655 F.2d 191, 194 (9th Cir. 1981) (evidence of party's homosexuality); Harris v. Harvey, 605 F.2d 330, 339 (7th Cir. 1979) (newspaper article that described criminal charges against plaintiff); LaMade v. Wilson, 512 F.2d 1348, 1350 (D.C. Cir. 1975) (prior inconsistent testimony of plaintiff's expert given at hearing on worker's compensation claim was prejudicial in action to recover damages for personal injury).

[116] *See supra* note 40. Occasionally, evidence of defendant's prior bad acts will be highly probative of both defendant's character and guilt. For example, evidence of repeated convictions for the same offense significantly increase the probability defendant has committed the crime again. While isolated instances of an individual's behavior are less probative of character or conduct, a consistent pattern of behavior is persuasive. Evidence of this pattern, however, is still inadmissible under Rule 404(a). If the evidence is also relevant to some other matter, it may be admissible under Rule 404(b). The court must apply Rule 403 and weigh the probative value under Rule 404(b) against the prejudice under Rule 404(a). FED. R. EVID. 404(b) advisory committee note. An interesting question emerges: in weighing the evidence under Rule 403, may

if not, the jury may believe in the certainty of its inference to an irrationally high degree.[117] The probative value of the first inference must be considered and then balanced against the effect of the prejudicial second inference. Even here, however, the court must consider the possibility the jury will use the evidence only to draw one of the possible inferences. If the jury uses the evidence in such a fashion, the case will resemble the first pattern described above, in which the court attempts to identify the one inference most likely to follow from the evidence. Thus, simple balancing again may be inappropriate.

Obviously, many cases are hybrids of these patterns. It is clear, however, that balancing does not adequately describe the methodology needed to resolve Rule 403 cases. By limiting themselves to this methodology, courts ignore issues central to determining whether the evidence in question advances or detracts from accurate factfinding. Specifically, the courts have been insensitive to the complex problems of predicting human cognitive behavior posed by Rule 403. To call that task balancing is a semantic mistake because it invites the courts to forsake the needed effort in favor of the unprincipled judicial discretion so often justified in the name of balancing. Past application of balancing confirms that simplistic analysis of Rule 403 problems is unwise.[118]

B. The Effect of Weighing Probative Value and Unfair Prejudice on the Discretion to Exclude

The search for effective limits to Rule 403 discretion has been confused by the two step structure of Rule 403. The first step, weighing probative value against unfair prejudice, can provide a coherent standard for limiting discretion if probative value and unfair prejudice are

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the court consider, in addition to the probative value existing under Rule 404(b), the probative value of the evidence on the issues of character and conduct even though the evidence is clearly inadmissible on those issues under Rule 404(a)? A court could follow this procedure. Since the purpose of Rule 403 is to provide the court with a mechanism for deciding whether the evidence is likely to advance or detract from the accuracy of jury factfinding, the court should value the evidence in light of all the issues on which it is logically probative. The resulting damage to Rule 404(a) would be slight. The primary justification for Rule 404(a) is that the character evidence has little probative value but is highly prejudicial. FED. R. EVID. 404(a) advisory committee note. If this assumption concerning the degree of probative value is inaccurate, the policy underlying Rule 404(a) is not significantly undermined.

[117] Even though the evidence may be inadmissible to prove character under Rule 404(a), because the evidence is relevant to prove knowledge under Rule 404(b), the evidence may be admissible under Rule 105.

[118] *See supra* notes 6-9 and accompanying text.

properly defined and compared. This Article has described the bases for such a standard. However, exercise of discretion under Rule 403 is described by the rule as a separate decision made after evaluating probative value and unfair prejudice. This suggests that limitations to Rule 403 discretion are not defined solely by such an evaluation.

Judicial application of Rule 403 leads to a different conclusion. Courts engage in one, not two steps, treating the evaluation of probative value and unfair prejudice as determinative. If unfair prejudice substantially outweighs probative value, the evidence is excluded.[119] While at least one prominent commentator argues that Rule 403 in theory would provide the discretion to admit such evidence,[120] no citation has been provided suggesting a court has ever extended its power under Rule 403 that far.[121]

This does not mean courts have refrained from exercising discretion when applying Rule 403. Courts find ample opportunity for discretion by manipulating the ambiguities of Rule 403 to suit the perceived needs of the immediate case.[122] However, the courts have not viewed discretion under Rule 403 as a power arising once the antecedent conditions of the rule are met. Rather, discretion under Rule 403 has been exercised as a function of the weighing of probative value and unfair prejudice, which itself requires application of a delicate sense of judgment.[123]

The fallacy in this approach is not that the courts decide Rule 403

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[119] Ironically, in so applying Rule 403, courts have followed the procedure described in the original draft of that rule. Exclusion was mandatory when prejudice outweighed probative worth. Proposed Fed. R. Evid. 4-03, 46 F.R.D. 161, 225 (1969). At least one English court, however, seems to have exercised its discretion under a principle of law comparable to Rule 403 to refuse to exclude evidence even though its probative value was outweighed by unfair prejudice. R. v. Mackie, 57 Crim. App. 453, 464-65 (1973).

[120] C. WRIGHT & K. GRAHAM, *supra* note 5, § 5222, at 310.

[121] *Id.* In fact, appellate courts have not hesitated to reverse trial courts when the latter have admitted evidence with unfair prejudice outweighing probative value. These reversals occur notwithstanding the fact that Rule 403 by its terms makes exclusion discretionary. *See, e.g.*, Cohn v. Papke, 655 F.2d 191 (9th Cir. 1981); United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980); Harless v. Boyle-Midway Div. Am. Home Prods., 594 F.2d 1051 (5th Cir. 1979); Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978).

[122] *See supra* note 6.

[123] *See, e.g.*, United States v. Calhoun, 604 F.2d 1216, 1218 (9th Cir. 1979) ("trial judge has broad discretion in assessing the balance of these factors in a given case"); United States v. Lucero, 601 F.2d 1147, 1148 (10th Cir. 1979) ("trial courts have discretion to strike the balance between probative value and prejudice"). *See generally* Tapper, *Proof and Prejudice*, in WELL AND TRULY TRIED 189-90 (E. Campbell & L. Waller eds. 1982).

issues in one step rather than the two steps suggested by the language of the rule. Although there may be concerns relevant to Rule 403 discretion that are not described by unfair prejudice or probative value, these terms summarize the principle applicable in the vast majority of cases. Thus, courts have correctly treated the second step of Rule 403 as surplusage. The problem with current Rule 403 jurisprudence is its failure to recognize the rule's underlying principle: evidence that is otherwise admissible should be excluded if its admission would detract from the basic goals of procedural fairness and accurate factfinding underlying the Federal Rules.[124] While all Federal Rules presumably exist to advance these same goals, Rule 403 is the fail-safe mechanism permitting deviation from other rules when interests of fairness and accuracy will be jeopardized. Once the probative value and unfairly prejudicial character of evidence have been defined and compared in terms of those interests, the discretion to exclude under Rule 403 should be exercised consistent with the results. The interests theoretically promoted by Rule 403 should also be the source of limits to the discretion to exclude.

C. Resolving Hard Cases

This Article proposes a framework for analyzing Rule 403 premised upon policies underlying the statute. However, resolution of Rule 403 questions will remain difficult. Predicting a jury's reaction to evidence and deciding whether those reactions will advance or detract from accurate factfinding is a complex task. Often courts will be unable to make these predictions and decisions with any significant degree of confidence even after considering all the relevant circumstances. This section offers some advice for resolving difficult cases.

The language of Rule 403 suggests a potential solution. Unless unfair prejudice *substantially* outweighs probative value, Rule 403 withholds discretion to exclude. Unfortunately, some courts assume that this requirement relieves them of the responsibility to weigh probative value and unfair prejudice. If evidence has any probative value, courts conclude that the possibility of satisfying the substantiality test is too small to warrant serious consideration of the prejudicial impact of the evidence.[125] Of course, these decisions ignore the rest of the language of

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[124] *See supra* notes 17-22 and accompanying text.

[125] *See, e.g.*, United States v. King, 713 F.2d 627, 631 (11th Cir. 1983) ("the federal rules favor admission of evidence over exclusion if the evidence has *any* probative value") (emphasis added); United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980) ("general rule is that the balance should be struck in favor of admission"); *see also*

Rule 403 and, in effect, render that statute superfluous. Rule 403 directs courts to measure both the potential for probative value and prejudice. If evaluation of the evidence stops once it is deemed to have probative value, Rule 403 sets forth little more than a redundant relevance requirement.

Reliance on "substantially" to resolve close cases should not result in a literal and inflexible approach. Inclusion of "substantially" in Rule 403 has been criticized as suggesting that if the potential for prejudice clearly exceeds the potential for probative value, even if only slightly, the court has no discretion to exclude.[126] This may lead to the conclusion that evidence must be admitted even though it clearly detracts from the accuracy of jury decisionmaking.[127] Such a result would be inconsistent with the policies underlying Rule 403.

A better interpretation treats "substantially" as a recognition by the drafters that it is often impossible to confidently conclude that the potential for probative value outweighs the potential for unfair prejudice, or vice versa. Given the complexity of the issues to be resolved by Rule 403, it would be reasonable to expect that such fine lines would be difficult, if not impossible, to draw. In such difficult cases, admission of the disputed evidence is logical because it is admissible under the other Federal Rules and it is not clear the evidence will be harmful. Under this interpretation, the word "substantially" does not relieve the court of the need to search for unfair prejudice and does not resolve all hard cases in favor of admissibility. "Substantially" simply suggests the evidence is admissible when, after a thorough search for and evaluation of the potential for probative value and unfair prejudice, it is impossible to conclude one outweighs the other.[128] In essence, the word merely confirms that the burden of proof is on the person objecting to the evidence.

CONCLUSION

Judicial discretion to exclude relevant evidence poses significant dangers. Predictability and uniformity, the basic goals of codified evidence law, are undermined by discretion. This cost is justified in theory because discretion to exclude evidence otherwise admissible under specific evidence rules is sometimes necessary to preserve the paramount values of accuracy and fairness. The costs of exclusion under Rule 403 are

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supra note 6.

[126] ALASKA R. EVID. 403 evidence rules commentary.

[127] *See* S. SALTZBERG & K. REDDEN, *supra* note 51, at 101.

[128] *Id.*

only justifiable if the rule is applied in a manner consistent with its theoretical justifications. This Article has provided the previously missing link between theory and practice by suggesting Rule 403 decisions must focus on the reliability of the inferential processes which are generated by the evidence in question.

The approach suggested here for application of Rule 403 will not eliminate the dangers of discretion. By creating a rule that gives courts discretion to exclude relevant evidence, Congress shifted to the courts the power to make decisions about the appropriateness of a wide range of political and social values. As described above, when a court examines evidence for unfair prejudice, it must decide whether the evidence has a tendency to induce the jury to employ an improper bias or infer something not logically permitted by the evidence. This is rarely a politically neutral decision. Attitudes are classified as either biases or objective observations of reality depending upon the values of the classifier. Similarly, the judgment that a logical link exists between an item of evidence and the inference it generates is the product of the individual experience and attitude of the judge.[129] For example, some judges may consider evidence of a defendant's juvenile criminal record logically probative of the fact that she is either a victim of circumstance or a born criminal.

The discretion to exclude relevant evidence under Rule 403 grants judges the power to decide what social and political attitudes will be used to litigate issues of life, liberty, and property. The principal danger inherent in bestowing such power upon the judiciary is not that judges are usually insulated from the democratic process and, thus, may hold unpopular or unusual attitudes. The more serious problem is that judges and those whose legal rights they decide may be unable to pierce the black-robed myth of impartiality to see judicial discretion as the political and moral force that it is. Because of that danger, limiting Rule 403 discretion in ways consistent with the purpose of that rule is especially important. While these limits do not prevent trial courts from using political and moral values when deciding issues of admissibility, they make it easier to identify the values that are used. As a conse-

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[129] *See, e.g.*, United States v. Hernandez-Miranda, 601 F.2d 1104, 1108 (9th Cir. 1979) (prior conviction for marijuana smuggling irrelevant in prosecution for heroin smuggling because "experience does not permit that [logical] connection between the two events to be made"); FED. R. EVID. 401 advisory committee note ("whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand") (citing James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 696 n.15 (1941)).

quence, the extent to which Rule 403 discretion undermines predictability and uniformity of decisionmaking is minimized, while the opportunity to hold judges politically and morally accountable for what are political and moral judgments is enhanced.