

10-1988

## The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?

Edward J. Imwinkelried

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### Recommended Citation

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# VANDERBILT LAW REVIEW

VOLUME 41

OCTOBER 1988

NUMBER 5

## The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?

*Edward J. Imwinkelried\**

"The discretion of a Judge is the law of tyrants . . . . In the best it is oftentimes caprice; in the worst it is every vice, folly and passion to which human nature is liable."

— Lord Camden<sup>1</sup>

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\* Professor of Law, University of California, at Davis; former Chair, Evidence Section, American Association of Law Schools. The Author would like to express special thanks to Mr. Ronald Richards, class of 1989, University of California, at Davis Law School, for his research assistance on this Article.

1. *The King v. Almon*, 5 Geo. 3 (Hilary Term 1765), reprinted in 8 St. Tr. (Howell) 54, 57 n. (1810) (quoting *Hindson v. Kersey*, (C.P. 1765) (Lord Camden, C.J.)).

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## I. INTRODUCTION

In the common law system of evidence, logically relevant evidence is presumptively admissible.<sup>2</sup> The logical relevance of an item of evidence, however, does not guarantee its admission. The common law has developed a number of rules that exclude logically relevant evidence. In some cases, the common law excludes evidence because of doubts about the credibility or reliability of that type of evidence. For example, the best evidence rule rests primarily on skepticism about the trustworthiness of secondary evidence concerning a document's contents.<sup>3</sup> When the issue is the content of a document, the common law prefers that the document itself be produced in court, because the production of the document is obviously the most reliable method of establishing its contents. The common law enforces this preference by excluding other evidence of the document's contents, such as oral testimony describing the document, unless there is an adequate excuse for the nonproduction of the document. In other cases, the common law excludes evidence to promote a social policy. The common-law privileges for confidential relationships are illustrative. For example, the attorney-client privilege often bars the admission of relevant, trustworthy evidence in order to encourage the flow of information between client and attorney.<sup>4</sup>

The Federal Rules of Evidence became effective on June 1, 1975.<sup>5</sup> The Rules are now in effect not only in federal court, but also in the thirty-one states that have adopted evidence codes patterned after the Federal Rules.<sup>6</sup> While the Federal Rules codify most of the common-law exclusionary rules of evidence, the Rules omit others. For example, almost all jurisdictions require that a prosecutor corroborate any confession by the defendant.<sup>7</sup> In order to introduce a defendant's confession, the prosecutor must present independent, corroborating evidence that a criminal act has occurred. The rationale for the corroboration requirement is doubt about the credibility of confession evidence; confessions are sometimes coerced, and even when there is no police coercion, an innocent person may have an ulterior motive or psychological

2. 1 J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264-66 (1898).

3. E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 229-230 (3d ed. 1984).

4. *Id.* § 87.

5. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926 (1975).

6. See generally 3 G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987); 4 G. JOSEPH & S. SALTZBURG, *supra*.

7. See, e.g., *Opper v. United States*, 348 U.S. 84, 92-93 (1954) (exploring lower court split); *Smith v. United States*, 348 U.S. 147, 156 (1954); *United States v. Wilson*, 529 F.2d 913, 915 (10th Cir. 1976); Hagie, *The Operation, Legal Basis and Purpose of the Corpus Delicti Rule in California Criminal Law*, 15 LINCOLN L. REV. 53 (1984).

compulsion to confess to a crime.<sup>8</sup> The corroboration requirement is one of the common-law doctrines omitted from the Federal Rules of Evidence.<sup>9</sup> In other jurisdictions, as a matter of decisional law the courts decided to exclude generally any statements made by a defendant during plea bargaining.<sup>10</sup> These courts did so to further the social policy of encouraging plea bargaining, which eases the burden on the criminal justice system.<sup>11</sup> Under this case law doctrine, if the police questioned the defendant and the defendant reasonably believed that he could bargain for concessions during the questioning, the defendant's statement to the police might be excludible.<sup>12</sup> Like the corroboration rule, however, this doctrine has been omitted from the Federal Rules; the only exclusionary rule recognized by the Federal Rules is restricted to "plea discussions with an attorney for the prosecuting authority . . . ."<sup>13</sup>

The question naturally arises: Have these uncodified exclusionary doctrines survived despite the adoption of the Federal Rules of Evidence? In a series of articles,<sup>14</sup> the Author has argued that the Federal Rules operate much like a self-contained, civil-law code,<sup>15</sup> abolishing common-law rules that Congress failed to codify. The basis for this argument is Federal Rule of Evidence 402, which reads: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."<sup>16</sup> Like the common law, the main clause of rule 402 indicates that logically relevant evidence is presumptively admissible. The exceptive language that follows indicates that relevant evidence may be excluded on the basis of one of the listed sources of law. The list, however, omits

8. See generally NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) [hereinafter WICKERSHAM REPORT].

9. 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5200 (1978).

10. E. CLEARY, *supra* note 3, § 274.

11. *Id.*

12. Suppose that the defendant was charged with a property crime and that during police interrogation the defendant made a statement tending to show his guilt of the offense. Because of this exclusionary doctrine, at a related civil trial for conversion the plaintiff might be unable to offer the statement against the defendant.

13. FED. R. EVID. 410(4).

14. See Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIGATION 129 (1987) [hereinafter Imwinkelried, *Federal Rule of Evidence 402*]; Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465 (1985) [hereinafter Imwinkelried, *The Need to Amend*]; Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577 (1984) [hereinafter Imwinkelried, *Judge versus Jury*].

15. See R. SCHLESINGER, *COMPARATIVE LAW: CASES, MATERIALS, TEXT* 281-82 (4th ed. 1980) (describing the operation of a civil-law code).

16. FED. R. EVID. 402.

any mention of case or decisional law. This omission suggests that rule 402 deprives the judiciary of the common-law power to prescribe exclusionary rules of evidence, and the legislative history of rule 402 confirms that suggestion.<sup>17</sup>

The United States Supreme Court appears to have embraced this conception of the Federal Rules. In 1984 the Court, in *United States v. Abel*,<sup>18</sup> considered whether bias impeachment is permissible under the Federal Rules of Evidence. Article VI of the Federal Rules, devoted to impeachment, does not enumerate bias as one of the modes of impeachment. Nevertheless, the Court concluded that bias impeachment is acceptable under the Federal Rules. Although that conclusion is hardly remarkable, the Court's reasoning is significant. The Court pointed out that evidence of bias is logically relevant to the witness' credibility and added that "[r]ule 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, by Act of Congress, or by applicable rule."<sup>19</sup> The Court quoted approvingly an article written by Professor Edward Cleary, Reporter for the Advisory Committee on the Federal Rules,<sup>20</sup> which asserted that "[i]n principle, under the Federal Rules no common law of evidence remains."<sup>21</sup>

More recently, in *Bourjaily v. United States*,<sup>22</sup> the Court reaffirmed this conception of the Federal Rules of Evidence. In *Bourjaily*, the Court considered whether the prosecution may "bootstrap" to satisfy the foundation for the coconspirator hearsay exception; that is, whether the prosecution could use the contents of the coconspirator's statement to prove the existence of a conspiracy. In two pre-Federal Rule cases, *Glasser v. United States*<sup>23</sup> and *United States v. Nixon*,<sup>24</sup> the Court had prohibited bootstrapping. The defense in *Bourjaily* urged the Court to hold that the common-law prohibition survived because the Federal Rules "evidenced no intent to disturb the bootstrapping rule . . ."<sup>25</sup> The defense argued that the common-law rule that allowed bootstrapping was so well settled that it should survive the adoption of the Federal Rules, "without affirmative evidence . . . indicating" Congress' intent to abolish the rule.<sup>26</sup> Writing for the majority,

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17. See Imwinkelried, *Federal Rule of Evidence 402*, *supra* note 14, at 130-38.

18. 469 U.S. 45 (1984).

19. *Id.* at 51.

20. *Id.*

21. *Id.* (quoting Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 *NEB. L. REV.* 908, 915 (1978)).

22. 107 S. Ct. 2775 (1987).

23. 315 U.S. 60 (1942).

24. 418 U.S. 683 (1974).

25. *Bourjaily*, 107 S. Ct. at 2780.

26. *Id.*

Chief Justice Rehnquist rejected that argument.<sup>27</sup>

If the Federal Rules function as a self-contained, civil-law code and implicitly abolish uncodified rules, the judiciary has lost its common-law power to formulate exclusionary rules of evidence. Unless they can point to a basis for exclusion in the Constitution, a statute, or court rule adopted pursuant to statutory authority, judges can no longer preclude the admission of relevant evidence. Thus, logically relevant evidence generally is admissible even when the judge doubts the credibility of the source of the evidence, and even when the exclusion might serve an extrinsic social policy. While excluding relevant evidence for either reason might be well intentioned, rule 402 takes that power away from federal judges.

This conception of the Federal Rules understandably is unsettling to commentators and judges schooled in the common law of evidence. In this "Age of Statutes,"<sup>28</sup> some yearn—almost nostalgically—to return to the common law of yesteryear.<sup>29</sup> Commentators have argued that particular common-law rules have survived the adoption of the Federal Rules,<sup>30</sup> and courts have continued to enforce common-law restrictions on the admission of relevant evidence that are nowhere codified in the Federal Rules.<sup>31</sup> To justify the continued use of these common-law rules, commentators and courts often point to Federal Rule of Evidence 403. Rule 403 authorizes the trial judge to balance the probative value of an item of evidence against its attendant probative dangers, and to exclude relevant evidence when the dangers substantially outweigh the probative value. Rule 403 states: "Although [logically] 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."<sup>32</sup> If the

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27. The Court found that evidence of congressional intent would only confirm the plain meaning of Rule 104, which "on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege." *Id.*

28. See generally G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

29. Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663, 667-69 (1987).

30. *E.g.*, Langum, *Uncodified Federal Evidence Rules Applicable to Civil Trials*, 19 WILLAMETTE L. REV. 513 (1983) [hereinafter Langum, *Uncodified Federal Evidence Rules*]; Langum, *The Hidden Rules of Evidence: Michigan's Uncodified Evidence Law*, 61 MICH. B.J. 320 (1982) [hereinafter Langum, *The Hidden Rules*].

31. See P. GIANNELLI & E. IMWINKELRIED, *SCIENTIFIC EVIDENCE* §§ 1-5 to 1-6 (1986). *Scientific Evidence* noted that the common-law test for the admissibility of scientific evidence was the *Frye* standard, requiring the proponent to establish general acceptance of the scientific technique in question. Although the Federal Rules do not expressly incorporate any "general acceptance" language, most courts have continued to adhere to *Frye*.

32. FED. R. EVID. 403.

expression "probative value" includes the credibility of the source of the evidence, under rule 403 a judge may exclude relevant evidence when he doubts its reliability. Similarly, if "prejudice" includes injury to an extrinsic social policy, the rule enables a judge to bar relevant evidence to effect that policy. In short, rule 403 might empower a judge to resurrect the common law that rule 402 apparently abolished.

The thesis of this Article is that, in order to reconcile rule 403 with rule 402, rule 403 must be construed narrowly. Part II of this Article argues that the language "probative value" in rule 403 does not authorize the trial judge to exclude evidence because of doubts about the credibility of the source of the evidence. Part III contends that the "prejudice" prong of rule 403 permits a judge to exclude relevant evidence only when the evidence poses a risk to the integrity of the fact-finding process. Rule 403 does not authorize a judge to bar relevant evidence in pursuit of an extrinsic social policy, such as the encouragement of plea bargaining. Finally, Part IV concludes that rule 403 should be interpreted restrictively, to carry out the legislative intent of both rule 402 and 403 and to prevent judicial usurpation of the power of the juror and the legislator.

## II. THE PROBATIVE VALUE SIDE OF THE RULE 403 BALANCE: MAY A TRIAL JUDGE EXCLUDE LOGICALLY RELEVANT EVIDENCE BECAUSE OF DOUBT ABOUT THE CREDIBILITY OF THE SOURCE OF THE EVIDENCE?

At first blush, the wording of federal rule 403 appears to support the contention that the rule authorizes a judge to consider the credibility of the source of evidence. Rules 401 and 402 use the adjective "relevant."<sup>33</sup> In contrast, rule 403 employs the language "probative value,"<sup>34</sup> which admittedly is ambiguous,<sup>35</sup> but arguably denotes a concept broader than bare logical relevance.<sup>36</sup> The difficulty is defining the breadth of "probative value."

Courts and commentators agree that the concept of probative value allows the trial judge to consider at least three elements in balancing under rule 403. First, a judge may consider the facial vagueness<sup>37</sup> or uncertainty<sup>38</sup> of the proposed testimony. When the weakness of testi-

33. FED. R. EVID. 401-402.

34. FED. R. EVID. 403.

35. 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5214, at 269.

36. See Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 234 (1976).

37. *United States v. Maestas*, 554 F.2d 834, 836 n.2 (8th Cir.), *cert. denied*, 431 U.S. 972 (1977).

38. *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1255-56 (E.D.N.Y. 1985) (contending that, on its face, the proposed expert testimony was speculative); *Knight v. State*, 635 S.W.2d 650, 652 (Tex. Ct. App. 1982) (noting that the witness was uncertain).

mony is evident on its face, a judge certainly should be permitted to consider that weakness. Second, a judge may consider the number of intermediate propositions between the item of evidence and the ultimate consequential fact that the item is offered to prove.<sup>39</sup> The larger the number of intermediate inferences the jury must draw, the greater the probability that the jury will commit some inferential error.<sup>40</sup> This element comes into play when the evidence is circumstantial.<sup>41</sup> Consider the following illustration:

Duncan is on trial for the April 1 murder of Mr. Wilson. The prosecutor offers into evidence an authenticated love letter written by Duncan and mailed to Mrs. Wilson in January of the same year. The defense's objection is lack of relevancy to guilt. . . . As Professor Morgan has pointed out, . . . the trier of fact would have to take at least five inferential steps to connect Duncan as author of the love letter to Duncan as the killer of Mr. Wilson. The implicit chain of reasoning might go something like this: (1) From the expression in the letter we infer Duncan's love of Mrs. Wilson; (2) from that we infer Duncan's desire for exclusive possession of Mrs. Wilson; (3) from that we reason that Duncan's wish was to get rid of Mr. Wilson; (4) from that the inference is to the formation of a plan to kill Mr. Wilson and (5) finally to Duncan's probable execution of the plan by killing Mr. Wilson.<sup>42</sup>

In deciding whether to admit this evidence, a judge may consider the length of the chain of inference.<sup>43</sup> Finally, a judge may consider the strength of the inference from the evidence to the consequential fact that it is offered to prove.<sup>44</sup> Suppose that in the above hypothetical Duncan had written the letter several years before the homicide. The remoteness in time lowers the probative value of the evidence.<sup>45</sup> Remoteness in place can have the same effect.<sup>46</sup> Whenever the item of evidence is removed in space or time from the events alleged in the pleadings, the removal creates the possibility of intervening events, such as Mrs. Wilson's affair with another man, which reduce the probative value of the evidence.<sup>47</sup>

The common denominator of these elements is that a judge can evaluate them by considering the evidence on its face. Assume, for example, that a witness testifies, "I had a conversation with Duncan five years ago, and I've got a vague recollection that during the conversation

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39. See Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 388 (1952).

40. 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5214, at 271.

41. *Id.* § 5213, at 259-60.

42. Schmertz, *Relevancy and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence*, 33 FED. B.J. 1, 2-3 (1974).

43. *Id.* at 3.

44. See M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 403.1, at 180 (2d ed. 1986).

45. See Dolan, *supra* note 36, at 263.

46. *Id.*

47. See Weinstein & Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 43, 57 (1969).



he said that he'd fallen in love with a woman named Willet or Wilson or some name like that." The uncertainty of the testimony, the length of the chain of intermediate inferences, and the remoteness in time are obvious on the face of the testimony. A consensus exists that a judge may consider these elements in assessing probative value under rule 403.

The consensus ends, however, when a trial judge attempts to go beyond the face of the evidence to consider the credibility of the source of the evidence. Some commentators argue that a judge has that power. One commentator, for example, contends that in balancing under rule 403, a judge should consider whether the source of the evidence has been impeached.<sup>48</sup> Some courts have embraced this contention. In applying rule 403, one court stressed that the evidence in question had been impeached by inconsistent testimony.<sup>49</sup> Another court has indicated that in administering rule 403 a judge may consider whether the evidence has been corroborated.<sup>50</sup> Still another court has held that the trial judge properly excluded expert testimony under rule 403 because there was powerful evidence of the expert's bias and the testimony was utterly lacking in credibility.<sup>51</sup>

The prevailing view, however, is to the contrary. Leading law review commentators<sup>52</sup> and treatise writers<sup>53</sup> have concluded that a judge may not consider the credibility of the source of the evidence in gauging probative value under rule 403. Likewise, the overwhelming majority of courts asserts that a judge cannot pass on credibility in assessing probative value.<sup>54</sup> This majority view is better reasoned than the minority

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48. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 589 (1984).

49. *Pollard v. Metropolitan Life Ins. Co.*, 598 F.2d 1284, 1286 (3d Cir.), cert. denied, 444 U.S. 917 (1979). *Pollard* is criticized in 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5214, at 231.

50. *United States v. Murzyn*, 631 F.2d 525, 529 (7th Cir. 1980), cert. denied, 450 U.S. 923 (1981).

51. *United States v. Davis*, 772 F.2d 1339, 1344 (7th Cir.), cert. denied, 474 U.S. 1036 (1985); see also *People v. Brown*, 111 Cal. App. 3d 523, 168 Cal. Rptr. 806 (1980). *Brown* is criticized in 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5214, at 231.

52. See, e.g., Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 67 (1984); Trautman, *supra* note 39, at 387.

53. See, e.g., 3 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 252, at 18-19 (1979); 22 C. WRIGHT & K. GRAHAM, *supra* note 9, §§ 5162, 5213-14.

54. See *United States v. Castello*, 830 F.2d 99 (7th Cir. 1987); *United States v. Gardea Carasco*, 830 F.2d 41, 44 (5th Cir. 1987) (stating that "[i]t is the sole province of the jury . . . to assess the weight of the evidence and the credibility of witnesses . . . [w]e cannot declare testimony incredible as a matter of law unless it is 'so unbelievable on its face that it defies physical laws'"); *United States v. Wright*, 783 F.2d 1091, 1099 (D.C. Cir. 1986) (stating that the judge could not exclude evidence simply because it was self-serving); *United States v. Welsh*, 774 F.2d 670, 672 (4th Cir. 1985) (stating that "as a general rule, the credibility of a witness has nothing to do with whether or not his testimony is probative . . . the law does not consider credibility as a component" of probative value); *United States v. Pinalto*, 771 F.2d 457, 459 (10th Cir. 1985) (noting that

rule. In the American trial system, the jury traditionally evaluates credibility.<sup>55</sup> Allowing the trial judge to weigh credibility under rule 403 would invade the jury's province<sup>56</sup> and usurp its function.<sup>57</sup> Because the sixth and seventh amendments secure constitutional rights to jury trial, empowering a judge to pass on credibility also would raise serious questions about the constitutionality of rule 403.<sup>58</sup> A maxim of statutory construction holds that a court should prefer an interpretation of a statute that eliminates any substantial questions about its constitutionality.<sup>59</sup>

A narrow interpretation of "probative value" in rule 403 not only removes concerns about the statute's constitutionality, but also is more consistent with the statutory scheme of the Federal Rules. A broad interpretation of rule 403 would undermine rules 104, 602, and 901—the rules that govern preliminary fact-finding procedures.<sup>60</sup> Under rule 104(a), a judge cannot pass on the credibility of foundational evidence; a judge must accept the evidence at face value and inquire only whether, if believed, the evidence creates a rational, permissive inference of personal knowledge or authenticity.<sup>61</sup> Rule 104(b) states that when the fulfillment of a conditional fact determines the logical relevance of certain evidence, the judge decides only whether the proponent has introduced "evidence sufficient to support a finding of the fulfillment of the condition."<sup>62</sup> Rule 602 applies this procedure to the foundational fact of a witness' personal knowledge, and rule 901(a) states that the same procedure governs the preliminary fact of the authenticity of

"[d]etermination of credibility of evidence is reserved exclusively for the trier of fact"); *Western Indus. v. Newcor Canada, Ltd.*, 739 F.2d 1198, 1202 (7th Cir. 1984) (noting that "a judge in our system does not have the right to prevent evidence from getting to the jury merely because he does not think it deserves to be given much weight"); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1154 (5th Cir. Unit A Sept. 1981) (stating that "[a]lthough we find the court's skepticism about the test results understandable in light of Mrs. Eisenhower's testimony, we cannot sanction the type of credibility choice made by the district court here . . . '[r]ule 403 does not permit exclusion of evidence because the judge does not find it credible'"); *United States v. Thompson*, 615 F.2d 329, 332-33 (5th Cir. 1980); *Bowden v. McKenna*, 600 F.2d 282, 284-85 (1st Cir.) (stating that "[w]eighing probative value . . . means probative value with respect to a material fact if the evidence is believed, not the degree the court finds it believable"), *cert. denied*, 444 U.S. 899 (1979).

55. 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5214, at 265.

56. *Bowden*, 600 F.2d at 284-85.

57. 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5220, at 306.

58. *Id.* § 5214, at 266.

59. 2A N. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 57.24 (rev. ed. 1984).

60. The proposed New York Evidence Code § 403 is patterned directly after Federal Rule of Evidence 403. The official comment to the New York provision states that the rule "does not permit exclusion of evidence because the Court does not find it credible." 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5214, at 231 (Supp. 1987).

61. See generally *Imwinkelried, Judge Versus Jury*, *supra* note 14, at 577.

62. *Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 182 (1929); *Imwinkelried, Judge Versus Jury*, *supra* note 14, at 582.

evidence. An expansive interpretation of rule 403 would frustrate this preliminary fact-finding procedure. If the judge can subject all evidence to rule 403 analysis and rule 403 empowers the judge to consider credibility, the limitations on the judge's role imposed by rules 104, 602, and 901 become meaningless. To reconcile rule 403 with these statutes, rule 403 should be construed narrowly. Thus, the constitutional concerns and the Federal Rules' statutory framework dictate the conclusion that the language "probative value" in rule 403 does not permit a judge to consider the credibility of the source of evidence. In short, rule 403 cannot serve as a vehicle for resurrecting common-law exclusionary rules based on doubts about the credibility or reliability of evidence.

### III. THE PREJUDICE SIDE OF THE RULE 403 BALANCE: MAY A TRIAL JUDGE EXCLUDE LOGICALLY RELEVANT EVIDENCE TO FURTHER AN EXTRINSIC SOCIAL POLICY?

It is relatively easy to demonstrate that rule 403 does not allow the trial judge to consider the credibility of the source of the item of evidence. The next issue is more troublesome, however. Rule 403 expressly authorizes a judge to exclude evidence on the ground that the admission of the evidence might cause "prejudice."<sup>63</sup> Like "probative value," "prejudice" is ambiguous. The issue presented is whether "prejudice" should be construed as empowering a judge to bar relevant evidence in order to further some extrinsic social policy.

The common-law "legal relevancy" doctrine was the forerunner of Rule 403.<sup>64</sup> Dean Wigmore popularized the doctrine and attempted to rationalize it.<sup>65</sup> The early advocates of the doctrine argued that legal relevancy required that each item of evidence have "plus value"—probative worth exceeding bare logical relevance.<sup>66</sup> Wigmore rejected that argument. He argued that the core concept of legal relevancy was balancing, weighing probative value against certain "auxiliary rules of probative policy."<sup>67</sup>

Suppose that in the above hypothetical<sup>68</sup> the prosecution attempted to introduce evidence that, four years before the murder of Mr. Wilson, Duncan assaulted a Mr. Grimes, the boyfriend of a woman in whom Duncan was interested. Although this evidence may be probative to Duncan's prosecution, its admission would implicate several aux-

63. FED. R. EVID. 403.

64. Trautman, *supra* note 39, at 387.

65. *Id.* at 387 n.8 (citing 1 J. WIGMORE, EVIDENCE § 28 (P. Tillers rev. ed. 1983)).

66. Dolan, *supra* note 36, at 267.

67. Weinstein & Berger, *supra* note 47, at 73 (citing 8 J. WIGMORE, EVIDENCE § 2175 (J. McNaughton rev. ed. 1961)).

68. See *supra* note 41 and accompanying text.

iliary policies of judicial administration.<sup>69</sup> One policy is ensuring that the jury decides the case on a proper basis. If the jury learns of Duncan's attack on Mr. Grimes, the jury may infer that Duncan is a violent person and penalize him for his violent past.<sup>70</sup> Even if the jurors have a reasonable doubt about Duncan's guilt, subconsciously they may be tempted to convict Duncan because of his status as a recidivist. A conviction on that basis would be improper because the Supreme Court has held that the eighth amendment forbids a legislature from criminalizing a status.<sup>71</sup>

Another judicial administration policy directs a court to use its time efficiently. Rule 403 mentions "waste of time" as a factor that can warrant the exclusion of relevant evidence.<sup>72</sup> The presentation of testimony about Duncan's attack on Mr. Grimes might consume days of trial time. The admission of this testimony also would implicate another judicial administration policy: A jury should concentrate on the central, historical issues in a case. Rule 403 states that a judge should consider whether the proffered evidence will "confus[e] . . . the issues."<sup>73</sup> The purpose of Duncan's trial is to determine whether he murdered Mr. Wilson; thus, lengthy testimony about an earlier attack on Mr. Grimes may distract the jury from the issue of Mr. Wilson's murder. Judicial administration policies such as these can countervail<sup>74</sup> against the probative value of an item of evidence and justify its exclusion.

As previously stated, modern commentators concur that under both the common-law legal relevancy doctrine and rule 403, a judge must balance the probative value of an item of evidence against the impact of the item's admission on certain policies.<sup>75</sup> The pivotal question is what policies may the judge consider under rule 403. There is agreement that a judge may consider judicial administration policies.<sup>76</sup> For example, in the hypothetical involving the evidence of Duncan's earlier assault on Mr. Grimes,<sup>77</sup> all the policies discussed relate to the way in which a trier of fact should decide a case—the trier of fact should concentrate on the central issues, avoid distractions, and ultimately decide the case on a proper basis. The focus, therefore, is on the

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69. See Trautman, *supra* note 38, at 387.

70. See generally E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:03 (1984).

71. *Robinson v. California*, 370 U.S. 660 (1962).

72. FED. R. EVID. 403.

73. *Id.*

74. Schmertz, *supra* note 42, at 5.

75. See *supra* notes 64-74 and accompanying text; see also Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 1, 12 (1956); Trautman, *supra* note 39, at 389-90, 393-94.

76. Trautman, *supra* note 39, at 387.

77. See *supra* notes 69-73 and accompanying text.

cognitive behavior of the jury during the trial.<sup>78</sup>

Although commentators concur that rule 403 allows a judge to consider intrinsic judicial administration policies, a major controversy persists over whether a judge also may consider extrinsic social policies.<sup>79</sup> May a judge bar relevant evidence on the ground that the admission of the evidence might deter socially desirable conduct?<sup>80</sup> To illustrate, assume that the police questioned Duncan about Mr. Wilson's killing. Assume further that during the questioning Duncan formed the impression that he was engaged in plea bargaining with the police. Duncan consequently made an incriminating statement; he believed that the statement was a quid pro quo for charge concessions. Could a judge exclude the statement under rule 403 on the theory that the admission of the statement would prejudice the extrinsic policy of encouraging plea bargaining?

There is a plausible case that the judge has that power. Professor Peter Quint has argued that, in an analogous setting, a judge may consider the impact of the admission of evidence on first amendment activity outside the courtroom.<sup>81</sup> The evidence in question might be testimony about ideological speech protected by the first amendment. The admission of the testimony could have a chilling effect on the exercise of first amendment rights.<sup>82</sup> Citizens might fear that their otherwise constitutionally protected statements would come back later to haunt them as evidence in a subsequent trial.<sup>83</sup> For that reason, they would be deterred from asserting their constitutional rights. Professor Quint contends that in resolving a legal relevancy objection to testimony about first amendment activity, a judge should consider the effect of the ruling on expressive conduct outside the courtroom.

Case law lends further support to the position that rule 403 allows a judge to weigh the effect of the admission of evidence on extrinsic social policies. Adopting Professor Quint's view, one case holds that, under rule 403, a judge should consider whether the admission of the evidence will tend to chill the exercise of first amendment rights.<sup>84</sup> In another case, the Justice Department opposed the admission of certain classified material by arguing that rule 403 requires a judge to consider

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78. Gold, *supra* note 52, at 64.

79. Weinstein & Berger, *supra* note 47, at 84, 86.

80. Travers, *An Essay on the Determination of Relevancy Under the Federal Rules of Evidence*, 1977 ARIZ. ST. L.J. 327, 360.

81. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg*, 86 YALE L.J. 1622, 1624, 1662 (1977).

82. *Id.* at 1641.

83. *Id.* at 1645.

84. *United States Football League v. National Football League*, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986).

the impact that admission of the evidence would have on national security interests.<sup>85</sup> Decisions involving collateral matters also suggest that rule 403 can be used to implement substantive social policies.<sup>86</sup> The collateral source rule holds that when a plaintiff sues for personal injuries, the defense may not introduce evidence of payments that the plaintiff has received from sources such as social insurance programs. In a case decided before the adoption of the Federal Rules of Evidence, the Supreme Court held that the legal relevancy doctrine requires that evidence of collateral source payments be excluded.<sup>87</sup> The Court stated that admitting evidence of the payments "would violate the spirit of the federal statutes" such as the Federal Employers' Liability Insurance Act.<sup>88</sup> The Court's language implies that the legal relevancy doctrine allows the judge to consider substantive social policies. The proponents of a broad reading of rule 403 argue that in each of these cases the exclusion of the evidence does nothing to enhance a judicial administration policy. Rather, the stated purpose for exclusion is the pursuit of a socially desirable objective unrelated to the goal of accurate dispute resolution.<sup>89</sup>

Professor Quint's commentary and the case law construing rule 403 strengthen the argument that the term "prejudice" in the rule empowers the judge to consider injury or prejudice to extrinsic social policies. Federal Rule of Evidence 501 provides additional, analogical support for that argument. Rule 501 directs that privilege law "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>90</sup> Privileges are designed to promote extrinsic policies such as encouraging full, frank communication between attorney and client.<sup>91</sup> In rule 501, Congress expressly authorized the courts to develop privilege doctrine by common-law process. The broad authorization to create evidentiary doctrines based on extrinsic social concerns under rule 501 makes it more plausible to construe rule 403 as permitting a judge to consider similar concerns.

Although rule 501 furnishes indirect, analogical support for a broad reading of rule 403, the most powerful support for this construction is a statement in the Advisory Committee Note on rule 403. The first para-

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85. *United States v. Smith*, 750 F.2d 1215, 1216, 1220-21 (4th Cir. 1984) (holding that the judge could not consider the effect on national security), *vacated*, 780 F.2d 1102 (4th Cir. 1985).

86. 1 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 403[01], at 403-17 (1986); 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5223, at 313-14 n.35 (Supp. 1987).

87. *Eichel v. New York Cent. R.R.*, 375 U.S. 253, 255-56 (1963).

88. *Id.* at 255; *see also* 1 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 403[01], at 403-17.

89. Travers, *supra* note 80, at 328-29.

90. FED. R. EVID. 501.

91. E. CLEARY, *supra* note 3, § 72.

graph of that Note refers to "[t]he rules which follow this Article . . . ."<sup>92</sup> Article IV includes rules 407 through 410. Rule 407 bars evidence of subsequent remedial repairs.<sup>93</sup> Rules 408<sup>94</sup> and 409<sup>95</sup> ordinarily preclude the admission of statements or payments made incident to compromise negotiations. Rule 410 similarly announces a general prohibition against the introduction of statements made during plea bargaining.<sup>96</sup> As Professor Arthur Travers has pointed out, these rules rest primarily on considerations of extrinsic social policy.<sup>97</sup> The principal rationale for each rule is to influence positively conduct outside the courtroom by encouraging remedial measures to promote safety, or by fostering settlement negotiations to ease the burden on the judicial system. Professor Travers argues that the Advisory Committee's character-

92. FED. R. EVID. 403 advisory committee's note.

93. Rule 407 reads:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FED. R. EVID. 407.

94. Rule 408 states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

95. Rule 409 provides: "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." FED. R. EVID. 409.

96. Rule 410 reads:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty which was later withdrawn; (2) a plea of nolo contendere; (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

FED. R. EVID. 410.

97. Travers, *supra* note 80, at 329, 334, 356-60.

ization of these rules as "concrete applications" of rule 403 is either an anomalous misstatement or an indication that rule 403 authorizes the judge to consider extrinsic policies, such as the social concerns inspiring rules 407 through 410.<sup>98</sup> This view suggests that, unless the Committee misunderstood the statute that it helped to draft, the Committee's Note seems to permit a judge to factor extrinsic social policies as well as judicial administration concerns into rule 403 balancing.

The three subsections of Part III of this Article analyze the soundness of that conclusion. Subpart III(A) derives a model for rule 403 decisionmaking from the rule's text and legislative history. This subsection concludes that the model should exclude extrinsic social policy considerations. Subpart III(B) addresses the argument that rule 501 indicates that it is proper for a judge to weigh extrinsic social policy concerns under rule 403. Subpart III(C) discusses the argument that the reference to rules 407 through 410 in the Advisory Committee Note to rule 403 proves that it is appropriate to factor substantive policies into rule 403 balancing.

#### A. *A Model of Judicial Decisionmaking Under Rule 403*

Rule 403 undeniably grants the judiciary some discretionary power. The decision to grant this power, however, was controversial. In 1942, when the American Law Institute discussed rule 303 of the proposed Model Code of Evidence, a statute similar to current rule 403, vigorous opposition arose to giving the trial bench wide discretion.<sup>99</sup> A California Bar report on rule 303 insisted that "such powers should never be entrusted to any judge."<sup>100</sup> That opposition resurfaced during Congressional debates over the proposed Federal Rules of Evidence.<sup>101</sup> The practicing bar particularly was concerned that rule 403 granted the trial bench undue power.<sup>102</sup>

To make rule 403 palatable to the bar, proponents stressed that the rule gives the bench only a carefully "structured discretion."<sup>103</sup> The text and legislative history of the rule show that Congress intended to limit the power accorded by the rule. The text of rule 403 lists several factors that a judge may balance against the probative value of the evidence. Unlike many lists in article IV of the Federal Rules, the list in rule 403

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98. *Id.* at 363.

99. 1 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 403[02], at 403-23.

100. California State Bar, Committee on Administration of Justice, *Report on Model Code of Evidence*, 19 CAL. ST. B.J. 262, 270 (1944) (emphasis omitted).

101. 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5212, at 252-58.

102. *See id.* at 257.

103. *Id.* at 256-57.



does not begin with the language, "such as."<sup>104</sup> On its face, the list purports to be exhaustive. The legislative history of rules 403 and 404 reinforces that conclusion. The third paragraph of the Advisory Committee Note on rule 403 points out that "[t]he rule does not enumerate surprise as a ground for exclusion . . . ."<sup>105</sup> The Note then states that, because the text of the rule omits any mention of surprise, the judge cannot consider surprise in the rule 403 balancing process.<sup>106</sup> That statement would be a *non sequitur* unless the list in rule 403 is exclusive. Similarly, the Senate Committee Report on rule 404 indicates that the list in rule 403 is exclusive. The Report points out that if evidence of a defendant's other crimes (such as Duncan's earlier attack on Mr. Grimes) otherwise is admissible under federal rule 404(b), "the trial judge may exclude it only on the basis of those considerations set forth in Rule 403 . . . ."<sup>107</sup> The Report's use of "only" confirms that the list of factors in rule 403 is exclusive. Therefore, a judge can exclude logically relevant evidence under rule 403 only on the basis of one of the listed factors.<sup>108</sup>

The task then is to define the factors listed in the rule. These factors should derive their meaning from the legislative purpose that inspired the rule. The purpose underlying both the common-law legal relevancy doctrine and rule 403 is the protection of the integrity of the fact-finding process.<sup>109</sup> The doctrine and the rule are calculated to facilitate accurate fact-finding<sup>110</sup> and the search for truth.<sup>111</sup> The likelihood of ascertaining the truth is maximized objectively when the trier of fact uses a logical reasoning process:<sup>112</sup> the jury treats the item of evidence as proof of the fact that the judge admits the item to prove; the jury assigns the item the proper weight on that factual proposition; and the jury resists the temptation to treat the item as probative of another fact, which the item legitimately cannot be admitted to establish.<sup>113</sup>

This ideal model of jury decisionmaking helps to define the probative dangers against which a judge may guard under rule 403. An item of evidence can be excluded under the rule when its admission realisti-

104. Compare FED. R. EVID. 403 with FED. R. EVID. 404(b), 407-408, 410.

105. FED. R. EVID. 403 advisory committee's note.

106. *Id.*

107. S. REP. NO. 1277, 93d Cong., 2d Sess. 24-25, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7071.

108. Travers, *supra* note 80, at 350.

109. *See id.* at 360.

110. Dolan, *supra* note 36, at 284; Gold, *supra* note 52, at 68; Weinstein & Berger, *supra* note 47, at 73.

111. *See* Weinstein & Berger, *supra* note 47, at 79-80.

112. *See generally* Gold, *supra* note 52, at 59.

113. *Id.* at 73.

cally would jeopardize logical jury decisionmaking.<sup>114</sup> The item could distort the fact-finding process<sup>115</sup> by inducing the jury to err at one of the steps in its inferential process.<sup>116</sup> The judge must attempt to predict the likely effect of the evidence on the jury's reasoning process.<sup>117</sup> Drawing on his knowledge of juror psychology, the judge tries to forecast the probable response of the typical juror to the item of evidence.<sup>118</sup>

As previously stated, the juror ideally should ascribe to an item of evidence only the probative value that the item deserves. Suppose, however, that the judge believes that, realistically, the jury is likely to misestimate and overvalue the probative worth of the item.<sup>119</sup> The judge may fear that the jury will draw a stronger inference than is warranted from the evidence.<sup>120</sup> Giving the item undue weight would constitute an inferential error.<sup>121</sup> For example, it is widely assumed that lay jurors overestimate the objectivity and certainty of scientific testimony.<sup>122</sup> Based on this assumption, a danger exists that the jurors would exaggerate the importance of any scientific testimony and draw an erroneous inference of guilt.<sup>123</sup> If the defense challenged the admission of that testimony under rule 403, the judge properly could consider that danger as a factor cutting against admissibility.

The inferential process also is imperiled when a judge admits evidence that realistically tempts the jury to decide a case on an improper basis.<sup>124</sup> The philosopher Jeremy Bentham called this problem the risk of "misdecision."<sup>125</sup> The Advisory Committee Note to rule 403 states that the term "[u]nfair prejudice" means "an undue tendency to sug-

114. *Id.* at 65.

115. Travers, *supra* note 80, at 328, 335.

116. Gold, *supra* note 52, at 83.

117. *Id.* at 68-69.

118. *Id.* at 69; *see also* 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5215, at 278.

119. *See* Gold, *supra* note 52, at 81; Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1027 (1977); Travers, *supra* note 80, at 328, 344.

120. Quint, *supra* note 81, at 1643, 1669 (noting the tendency of a jury to give undue weight to political views during a trial for espionage).

121. Gold, *supra* note 52, at 90; *see also* Lempert, *supra* note 119, at 1030-31.

122. *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (noting that jurors sometimes attribute a "mystic infallibility" to scientific testimony); *People v. Kelly*, 17 Cal. 3d 24, 32, 549 P.2d 1240, 1245, 130 Cal. Rptr. 144, 149 (1976) (observing that a "misleading aura of certainty . . . often envelops a new scientific process"); *People v. Collins*, 68 Cal. 2d 319, 320, 438 P.2d 33, 33, 66 Cal. Rptr. 497, 497 (1968) (stating that mathematics is "a veritable sorcerer in our computerized society" and can "cast a spell" over the trier of fact); *Reed v. State*, 283 Md. 374, 385, 391 A.2d 364, 370 (1978); *see also* Gold, *supra* note 52, at 69.

123. Lempert, *supra* note 119, at 1027; *see also* Dolan, *supra* note 36, at 241.

124. Dolan, *supra* note 36, at 226; *see also* *United States v. 0.161 Acres of Land*, 837 F.2d 1036 (11th Cir. 1988).

125. 6 J. BENTHAM, *THE WORKS OF JEREMY BENTHAM* 105-09 (J. Bowring ed. 1962), *cited in* Dolan, *supra* note 36, at 226.

gest decision on an improper basis, commonly, though not necessarily, an emotional one."<sup>126</sup> For example, testimony about Duncan's uncharged crime, the earlier attack on Mr. Grimes, poses this danger. On the one hand, testimony about the crime may be relevant for a legitimate purpose, other than to establish a damning character trait. Duncan may have committed the prior attack with a *modus operandi* strikingly similar to the manner in which Wilson was killed; and therefore testimony about the attack on Mr. Grimes may be relevant to establish that Duncan was the killer.<sup>127</sup> On the other hand, the same testimony gives rise to an inference that Duncan has a character trait or propensity for violence.<sup>128</sup> Unless Duncan places his character in issue, the prosecution cannot introduce evidence of Duncan's disposition for violence. Even if the judge gives the jury a limiting instruction that forbids consideration of testimony about the earlier assault as character evidence, the obvious character inference may influence the jury subconsciously.<sup>129</sup> The testimony incidentally shows Duncan's violent character,<sup>130</sup> and, exposed to that information, the jurors may be tempted to penalize Duncan for his criminal past.

The same type of inferential error explains why and to what extent first amendment activity should be protected under rule 403. Professor Quint correctly points out that the typical jury represents majoritarian interests.<sup>131</sup> As previously stated, the judge must attempt, in applying rule 403, to predict how the typical juror is likely to react to the item of evidence.<sup>132</sup> In making that prediction, the judge can consider the inevitable biases of lay jurors.<sup>133</sup> Suppose that the first amendment activity in question is advocacy of an unpopular political belief or association with an unpopular political group, such as the Communist Party.<sup>134</sup> The admission of testimony about this type of first amendment activity can inflame the jury;<sup>135</sup> the antipathy against the belief or group may be so intense that the jury will be inclined to penalize the defendant for entertaining the belief or belonging to the group.<sup>136</sup> The jury's bias may

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126. FED. R. EVID. 403 advisory committee's note; see also *People v. Hoze*, 195 Cal. App. 3d 949, 955, 241 Cal. Rptr. 14, 17 (1987).

127. See generally E. IMWINKELRIED, *supra* note 70, § 3:10.

128. See FED. R. EVID. 404(a)(1).

129. Recent Case, *Criminal Law—Admissibility of Evidence of Other Crimes*, 24 TEMP. L.Q. 245, 246 (1950).

130. Note, *Admissibility of Evidence of Similar Offenses in Criminal Prosecutions in West Virginia*, 54 W. VA. L. REV. 142, 144 (1951).

131. Quint, *supra* note 81, at 1657.

132. See *supra* notes 114-18 and accompanying text.

133. Dolan, *supra* note 36, at 226.

134. Quint, *supra* note 81, at 1623.

135. *Id.* at 1678; see also Dolan, *supra* note 36, at 239.

136. Quint, *supra* note 81, at 1645; see also Dolan, *supra* note 36, at 239.

tempt the jury to censor the defendant covertly.<sup>137</sup> Thus, the testimony poses a classic danger of misdecision, a verdict on an improper basis.<sup>138</sup> The point is not simply that the admission of the testimony might deter third parties from exercising first amendment rights, but rather that the admission of the testimony might induce the jury to resolve this case on an illegitimate basis; that risk, in turn, creates the possibility of a chilling effect.

The factors listed in rule 403 have an important common denominator: They all relate to trial concerns.<sup>139</sup> More specifically, the concerns subsumed under the concept of "prejudice" are probative dangers that threaten to vitiate the fact-finding process itself.<sup>140</sup> Each danger that the jury will overvalue the evidence or draw an improper inference from the evidence creates the risk of a type of inferential error. Rule 403 implements judicial administration policies by empowering the judge to exclude evidence that realistically creates these dangers. The focus of these policies is the behavior of the trier of fact. As the presiding government representative at a trial, the judge has a unique responsibility to supervise that behavior and implement those administration policies. Those policies provide the framework for rule 403 decisionmaking.

To incorporate extrinsic social policies into the model for decision-making under rule 403 is both unnecessary and undesirable. No logical necessity exists to factor extrinsic policies into the model because those policies are readily distinguishable from the judicial administration policies discussed above. Some commentators suggest that judicial administration policies differ only in degree from extrinsic social policies,<sup>141</sup> but that suggestion is unsound. The two types of policies are funda-

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137. See Quint, *supra* note 81, at 1658.

138. This reasoning also furnishes the correct rationale for the Supreme Court's collateral source decision in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963). On close reading, it becomes clear that in *Eichel* the Court did not exclude the evidence to implement any extrinsic social policy. Rather, the Court was concerned about a decision on an improper basis. The Court noted that as a matter of substantive law, the defendant was not entitled to reduce the plaintiff's recovery by the amount of the disability payments that the plaintiff had received. *Id.* at 255. The defendant argued alternatively that the payments were logically relevant to show that the plaintiff was overstating his disability; that is, the defendant offered the evidence to establish a motive for malingering. The Court was willing to assume that there was at least some probative value on that issue. The Court feared, however, that if the testimony was admitted, the jury would decide the damages issue on an improper basis and "misuse" the testimony "for the incompetent purpose of a set-off against lost earnings." *Id.* (quoting *Eichel v. New York Cent. R.R.*, 319 F.2d 12, 20 (2d Cir. 1963)). In short, *Eichel* is explicable even under a narrow interpretation of "prejudice" in rule 403.

139. M. GRAHAM, *supra* note 44, § 403.1, at 179; Schmertz, *supra* note 42, at 5.

140. Schmertz, *supra* note 42, at 5.

141. Guernsey, *Toward a Unified Approach to Privileges and Relevancy*, 17 MEM. ST. U.L. REV. 1, 14 (1986).

mentally and qualitatively different.<sup>142</sup> Extrinsic policies relate to behavior outside the courtroom, while judicial administration policies bear on courtroom decisionmaking. Although the trial judge is peculiarly well trained and positioned to supervise judicial administration policies, the judiciary's responsibility for the formulation of extrinsic social policy is radically different. The judiciary shares that responsibility with the legislative and the executive branches. In most respects, the legislature's power to announce extrinsic social policy is plenary.<sup>143</sup>

Moreover, to incorporate extrinsic policies into the model for rule 403 decisionmaking is undesirable. As previously stated, the purpose of rule 403 is to facilitate accurate fact-finding.<sup>144</sup> Incorporating extrinsic policy into the model often would frustrate that purpose. Exclusionary rules premised on extrinsic social policy can lead to the exclusion of relevant, reliable evidence and can handicap the jury's reasoning process.<sup>145</sup> In many instances, excluding probative evidence because of an extrinsic social policy will decrease the probability of finding the truth. Rule 403 was conceived as a means to the end of correct fact-finding, and it would be counterproductive to factor extrinsic social policy into the concept of prejudice in rule 403 decisionmaking.

### *B. The Argument Based on Federal Rule of Evidence 501*

Advocates in favor of an expansive interpretation of "prejudice" contend that the scope of rule 403 cannot be analyzed solely in terms of the basic policy underlying the rule. They contend that resolution of the scope of rule 403 also should take into account federal rule 501 and the Advisory Committee Note to rule 403, which refers to statutes that appear to effect extrinsic policies, such as rule 407.

Federal rule 501 provides that witnesses' evidentiary privileges "shall be governed by the principles of the common law as they may be interpreted by the courts . . . in the light of reason and experience."<sup>146</sup> The privileges rest on extrinsic social policies. For example, the physician-patient privilege is designed to affect behavior outside the courtroom. The privilege protects the confidentiality of physician-patient communications in order to encourage patients to make full disclosure to their physicians, and to enable physicians to diagnose more effectively. According to advocates of a broad interpretation of rule 403, rule

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142. Weinberg, *The Judicial Discretion to Exclude Relevant Evidence*, 21 *MCGILL L.J.* 1, 25-26 (1975).

143. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 224, 318 (1978); see also J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § 4.8 (3d ed. 1986).

144. See *supra* notes 109-13 and accompanying text.

145. Schmertz, *supra* note 42, at 7.

146. *FED. R. EVID.* 501.

501 is proof that Congress was willing to grant to the judiciary some power to formulate extrinsic policy. They argue that judicial administration policies "are very similar to the policies that underpin the justifications for a privilege . . ." <sup>147</sup> Because the two types of policies are so similar, Congress likely intended the concept of "prejudice" in rule 403 to extend to extrinsic policy. Although this contention has some superficial appeal, it is flawed in the final analysis.

In many jurisdictions this contention cannot be advanced at all. Although the final version of article V includes only rule 501, which relegates the courts to common-law privilege doctrine, the original version of article V included a detailed set of privileges. <sup>148</sup> The majority of the states adopting a version of the Federal Rules have followed the original version of article V, which includes specific provisions on privileges such as attorney-client and psychotherapist-patient relationships. <sup>149</sup> In these jurisdictions article V "forecloses common-law development and restricts privileges to those specifically listed in the rules." <sup>150</sup> In short, in a majority of jurisdictions the advocates of a broad interpretation of rule 403 cannot look to rule 501 for support because those jurisdictions do not authorize the judiciary to create privileges by common-law process.

In federal practice and in the minority of states that have adopted the federal version of rule 501, the analogical argument concededly is available. Even in these jurisdictions, however, the argument is weak. The original version of article V included nine separate statutes, rules 5-02 through 5-10, which regulated individual privileges. <sup>151</sup> The same original draft included a version of rule 403. <sup>152</sup> While Congress ultimately decided against enacting proposed rules 5-02 through 5-10, Congress passed rule 403. <sup>153</sup> Significantly, neither Congress nor the states

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147. Guernsey, *supra* note 141, at 15.

148. See Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 243-82 (1969).

149. 1 G. JOSEPH & S. SALTZBURG, *supra* note 6, § 23.2, at 2-3. Seventeen states have enacted a version of article V. *Id.*

150. *Id.*

151. Preliminary Draft, 46 F.R.D. at 248-79.

152. *Id.* at 225.

153. Although the wording of the final version of rule 403 differs somewhat from the original version of the rule, the listing of the factors to be balanced against probative value is identical in both versions. In particular, both versions employ the expression "unfair prejudice." Proposed Rule 4-03 reads:

(a) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(b) Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

adopting Congress' version of rule 501 felt compelled to broaden rule 403 in light of their decision to delete proposed rules 5-02 through 5-10. The legislative history of rule 501 both in Congress and in the states adopting Congress' version of rule 501 discloses no indication that Congress intended rule 501 to have any impact whatsoever on the scope of rule 403. The plain inference is that, in the legislators' minds, the rule's scope remained the same after the enactment of rule 501. If so, courts should interpret the scope of rule 403 as if rule 501 did not authorize resort to common-law process. The advocates of a broad scope for rule 403 may think that rule 501's reference to the judges' common-law power furnishes some insight into the scope of rule 403, but the legislators who passed rule 501 apparently thought otherwise.

The very nature of the extrinsic policy that underlies evidentiary privileges further weakens the analogy between the policies protected by rule 403 and the policies that the judiciary can implement under rule 501. Traditional evidentiary privileges rest on a single, narrow extrinsic policy: The protection of confidential relations. In describing the requisites for recognition of a privilege, Dean Wigmore declared that any asserted privilege must serve to protect the confidentiality of a vital social "*relation . . . which in the opinion of the community ought to be sedulously fostered.*"<sup>154</sup> That policy is so limited that it cannot rationalize other provisions in article IV that are based to some extent on extrinsic policy. For example, recall that rule 407 bars evidence of subsequent remedial measures. The Advisory Committee Note makes it clear that the extrinsic policy rationale of rule 407 is to remove a disincentive for safety precautions.<sup>155</sup> By no stretch of the imagination can rule 407 be explained as a protective measure for a confidential relationship. The policy that underlies evidentiary privileges under article V bears little resemblance to the extrinsic policies promoted by some of the article IV provisions. This lack of resemblance makes it frivolous to argue that rule 501 justifies incorporation of extrinsic policies into rule 403 decisionmaking.

### C. *The Argument Based on the Advisory Committee Note to Federal Rule of Evidence 403*

As noted in the preceding subsection, the promotion of extrinsic social policies explains some of the provisions in article IV. Thus, the provisions of article IV cannot be explained exclusively in terms of judi-

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*Id.*

154. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (J. McNaughton rev. ed. 1961) (emphasis in original).

155. FED. R. EVID. 407 advisory committee's note.

cial administration policies. Further, the Advisory Committee Note to Rule 403 refers to other provisions in article IV and characterizes them as "concrete applications" of rule 403.<sup>156</sup> If the other provisions of article IV address extrinsic policy concerns and if those provisions represent applications of rule 403, it appears that rule 403 should be construed as addressing those concerns. More specifically, as the proponents of a broad reading of rule 403 claim, "prejudice" in rule 403 should be interpreted to include damage to extrinsic social policy. This argument, however, like the proponents' contention based on rule 501, is fallacious.

To be sure, the argument contains an element of truth. Professor Travers correctly points out that rules like rule 407 implement extrinsic social policies,<sup>157</sup> and in that respect those rules are akin to privileges.<sup>158</sup> Some commentators refer to these rules as "quasi-privilege[s]."<sup>159</sup> The argument, however, rests on an incomplete understanding of the rules. The argument fails to recognize that these rules also are explicable partially in terms of the judicial administration policies previously discussed.<sup>160</sup> There is nothing anomalous about the Advisory Committee's statement that the rules are "concrete applications" of rule 403.<sup>161</sup> Even if the term "prejudice" in rule 403 is interpreted narrowly, the statement is demonstrably correct.

One can demonstrate most easily the application of the Advisory Committee's statement to rule 411, which lays out the general rule excluding evidence of liability insurance.<sup>162</sup> To a limited extent, rule 411 promotes an extrinsic social policy.<sup>163</sup> If evidence of liability insurance routinely were admissible against tort defendants, its admissibility might create a disincentive to obtaining insurance. Citizens who maintain liability insurance serve the public's interest by ensuring that any just claim will be paid. The principal *raison d'être* for rule 411, however, is a judicial administration policy.<sup>164</sup> As the Advisory Committee Note to the rule states, disclosure of a defendant's liability insurance during trial could "induce juries to decide cases on improper grounds."<sup>165</sup> Using "deep pocket" reasoning,<sup>166</sup> a jury might be tempted

156. FED. R. EVID. 403 advisory committee's note.

157. Travers, *supra* note 80, at 362.

158. 2 D. LOUISELL & C. MUELLER, *supra* note 53, § 163, at 376 (pointing out that Dean McCormick noted the "functional relationship" between such rules and evidentiary privileges).

159. 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5213, at 262.

160. See *supra* notes 69-78 and accompanying text.

161. FED. R. EVID. 403 advisory committee's note.

162. FED. R. EVID. 411.

163. 2 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 411[02], at 411-17.

164. *Id.* at 411-15.

165. FED. R. EVID. 411 advisory committee's note.



to return a verdict for the plaintiff in order to shift the loss to the insurer.<sup>167</sup> A jury's awareness of the defendant's insured status might also result in excessive damages because the jury realizes that damages will not come out of the pocket of the individual defendant.<sup>168</sup> In short, rule 411 is a classic illustration of one of the inferential errors that rule 403 empowers the judge to guard against: The jury's misusing an item of evidence and deciding an issue in the case on an improper basis.

The other type of inferential error against which rule 403 guards is exaggeration of the probative value of the evidence. The other provisions in article IV, rules 407 through 410, are explicable in terms of that inferential error. Rule 407 announces the general proposition that evidence of subsequent remedial measures is inadmissible.<sup>169</sup> As with rule 411, rule 407 effects an extrinsic social policy.<sup>170</sup> Encouraging precautionary measures by manufacturers and landowners furthers society's interest.<sup>171</sup> The routine admissibility of testimony about remedial steps might discourage manufacturers and landowners from taking those steps.<sup>172</sup> That extrinsic social policy, however, is not the exclusive justification for rule 407. The Advisory Committee Note to rule 407 states explicitly that the rule "rests on two grounds."<sup>173</sup> The other ground for the rule is that the jury may overvalue the probative worth of evidence of a subsequent repair.<sup>174</sup> The issue in these cases is the antecedent negligence or culpable conduct of the defendant. On that issue, the probative value of evidence of a later precautionary measure is often weak<sup>175</sup> because the inference of earlier fault is tenuous.<sup>176</sup> Before adoption of the Federal Rules, the Supreme Court acknowledged that the ban on evidence of subsequent repairs rests in part on this relevance rationale.<sup>177</sup> The draftsmen of the state versions of rule 407 in Oregon and New York also recognized that one of the bases for the rule is the fear that a jury will exaggerate the probative value of the evidence.<sup>178</sup>

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166. Schmertz, *supra* note 42, at 19.

167. 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5362, at 429 (quoting from E. MORGAN, BASIC PROBLEMS OF EVIDENCE 212 (1961)).

168. Slough, *supra* note 75, at 15.

169. FED. R. EVID. 407.

170. Travers, *supra* note 80, at 358-59.

171. Trautman, *supra* note 39, at 394.

172. Travers, *supra* note 80, at 357-58.

173. FED. R. EVID. 407 advisory committee's note.

174. 2 D. LOUISELL & C. MUELLER, *supra* note 53, § 164, at 382.

175. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 266 (4th ed. 1986); *see also* 2 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 407[02], at 407-10.

176. S. SALTZBURG & K. REDDEN, *supra* note 175, at 267.

177. *Columbia & P.S. Ry. v. Hawthorne*, 144 U.S. 202, 207 (1892); *see also* 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5282, at 92-93.

178. 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5282, at 17 n.21 (Supp. 1987).

Like rule 411, rule 407 is a "concrete application" of rule 403 because rule 407 rests in part on the rationale of preventing inferential error.

Rules 408 and 409 exhibit the same pattern. Rule 408 provides that compromise offers and accompanying statements cannot be used "to prove liability for or invalidity of the claim . . ." <sup>179</sup> Rule 409 extends a similar prohibition to evidence of payments for medical expenses. <sup>180</sup> Like rules 407 and 411, these two rules are based partially on extrinsic social policy. Rule 408 implements the "sensible" <sup>181</sup> social policy <sup>182</sup> of encouraging out-of-court settlements. Rule 409 also serves a social policy. <sup>183</sup> A potential defendant may act as a Good Samaritan and cover an injured party's medical expenses even when the potential defendant does not believe that he was at fault in causing the accident. Such payments are certainly to be encouraged. Admitting evidence of these payments, however, might deter the Good Samaritan because a jury might misconstrue the payments as an admission of liability in a subsequent trial.

Although rules 408 and 409 indisputably effect extrinsic social policies, social policy is not the sole rationale for the rules. The Advisory Committee Note to rule 408 states that the rule is "based on two grounds," <sup>184</sup> and the Note to rule 409 declares that that rule rests on "parallel" considerations. <sup>185</sup> Dean Wigmore, <sup>186</sup> the drafters of the proposed New York Evidence Code, <sup>187</sup> and recent cases <sup>188</sup> recognize that the alternative basis for the rules which exclude compromise statements and humanitarian payments is relevancy. The vast majority of civil cases settle. <sup>189</sup> Parties to most civil claims reach a compromise before a suit is filed. <sup>190</sup> Pretrial discovery is so expensive <sup>191</sup> and the outcome of trial is so uncertain that even parties who are firmly convinced of the merit of their litigation position may attempt to settle before trial. A grave risk exists that the jury will overestimate the probative value of compromise statements. The average juror might view the party's will-

179. FED. R. EVID. 408.

180. FED. R. EVID. 409.

181. 2 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 408[02], at 408-20.

182. 2 D. LOUISELL & C. MUELLER, *supra* note 53, § 170, at 443, § 171, at 452.

183. 2 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 409[01], at 409-13.

184. FED. R. EVID. 408 advisory committee's note.

185. FED. R. EVID. 409 advisory committee's note.

186. 2 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 408[02], at 408-16 to -17 (quoting 4 J. WIGMORE, EVIDENCE § 1061, at 28-29 (3d ed. 1940)).

187. 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5302, at 43 n.46 (Supp. 1987).

188. *See, e.g.*, Miller v. Component Homes, Inc., 356 N.W.2d 213, 215 (Iowa 1984).

189. Kelner, *Settlement Techniques—Part One*, 16 TRIAL 39 (Feb. 1980).

190. *Id.*

191. *See generally* Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 219, 223.

ingness to settle as an implicit admission of weakness in the party's litigation position, especially if the juror has never been involved in litigation before.<sup>192</sup> Although the party's willingness to settle is ambiguous evidence of the weakness of the party's litigation position, the inference from that willingness is treacherous.<sup>193</sup> In short, as with rules 407 and 411, rules 408 and 409 are based partially on one of the inferential errors subsumed under the concept of "prejudice."

The final rule invoked by the proponents of a broad reading of rule 403 is rule 410. That rule usually precludes the prosecution from introducing statements made by a defendant during plea bargaining with a prosecuting attorney.<sup>194</sup> Like the other rules cited by the proponents, rule 410 implements an extrinsic social policy.<sup>195</sup> Just as the Federal Rules should encourage the out-of-court settlement of civil cases, they also should encourage plea bargaining. The criminal justice system is overburdened. The widespread practice of plea bargaining eases the burden on the system and makes it possible to dispose of the cases that do go to trial within a constitutionally permissible period.<sup>196</sup> As one commentator stated bluntly, in most jurisdictions prosecutors "must [plea bargain] in order to stay in business."<sup>197</sup>

Advocates of an expansive interpretation of rule 403, however, often fail to recognize that rule 410 is based partially on the judicial administration policy of preventing inferential error by the trier of fact. If the typical juror learns that a defendant has offered to plead guilty, the juror almost invariably will treat the offer as strong evidence of guilt.<sup>198</sup> A juror is likely to view the offer as a type of confession. As in the case of attempts to settle civil claims, a juror may overvalue the evidence.<sup>199</sup> An innocent defendant may be willing to plead guilty.<sup>200</sup> The Supreme Court has ruled that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."<sup>201</sup> The Court has acknowledged that a guilty plea can be the most intelligent tactical option

192. 23 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5322, at 298.

193. *Id.*

194. FED. R. EVID. 410.

195. See 2 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 410[01], at 410-24 to -43.

196. The sixth amendment to the United States Constitution guarantees a speedy trial. U.S. CONST. amend. VI.

197. Polstein, *How to "Settle" a Criminal Case*, 8 PRAC. LAW. 35, 37 (1962).

198. 2 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 410[01], at 410-25.

199. *Id.*

200. Enker, *Perspectives on Plea Bargaining*, in THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 112-14 app. A (1967).

201. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

for an innocent defendant when the evidence against him is strong and the maximum punishment is severe.<sup>202</sup> In other cases, a defendant may offer to plead guilty to protect a loved one whom he believes to have committed the crime. Just as a civil defendant's offer to settle may be motivated by many reasons other than the validity of the plaintiff's claim, a criminal defendant's expressed interest in plea bargaining may be prompted by motivations other than his guilt of the charged crime. In short, rule 410 rests on relevancy grounds as well as policy grounds.<sup>203</sup>

The Advisory Committee's statement that rules 407 through 411 are concrete applications of rule 403 can be understood properly in this light. Even narrowly interpreted, rule 403 empowers the trial judge to shield the jury from evidence likely to cause an inferential error. The error could arise from either overvaluing the probative weight of the evidence or misusing the evidence and deciding the case on an improper basis. While rules 407 through 411 all implement extrinsic social policies to some extent, they have another common denominator: They are designed to guard against inferential error by the jury. In this sense, the Advisory Committee was correct in characterizing rules 407 through 411 as "concrete applications" of the probative dangers listed in rule 403.

#### IV. CONCLUSION

In summary, rule 403 does not authorize a judge to exclude relevant evidence because he either doubts the credibility of the source of the evidence or wishes to promote an extrinsic social policy. The expression "probative value" in rule 403 empowers a judge to consider the facial definiteness of the evidence, the length of the chain of inferences, and the strength of those inferences. A judge can evaluate all those factors without usurping the jury's power to assess credibility. In the same vein, the term "prejudice" in the rule should be read narrowly. The concept of prejudice permits a judge to safeguard the integrity of the fact-finding process. A judge does so by shielding the jury from technically relevant evidence that threatens to prompt inferential error by the trier of fact. Expanding the notion of prejudice to include damage to extrinsic social policies would distort the concept, because that broad interpretation would deny the jury evidence that it is likely to value correctly and use properly. Depriving the jury of that type of evidence would undermine rather than enhance the accuracy of fact-finding.

The stakes involved in the dispute over the scope of rule 403 are critical. One of the stakes is the future of rule 403. Rule 403 has been

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202. *Id.*

203. See 2 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 410[01], at 410-24 (1986).

called a cornerstone of the Federal Rules.<sup>204</sup> After reviewing the legislative history of the rule, courts have concluded almost uniformly that Congress viewed exclusion of relevant evidence under the rule as an exceptional,<sup>205</sup> extraordinary<sup>206</sup> remedy. Congress intended that judges would invoke this drastic remedy sparingly<sup>207</sup> and infrequently.<sup>208</sup> An expansive reading of rule 403 would violate that intent. If "probative value" is interpreted to include credibility, or if "prejudice" is construed to include injury to an extrinsic social policy, rule 403 will lead to the exclusion of relevant evidence in far more cases than Congress contemplated. The frequent exclusion of evidence under rule 403 would be a misuse of the rule<sup>209</sup> and an affront to the legislative intent underlying the rule.

Furthermore, a broad interpretation of rule 403 would imperil the future of the Federal Rules as a comprehensive evidence code.<sup>210</sup> The Supreme Court's decisions in *United States v. Abel*<sup>211</sup> and *Bourjaily v. United States*<sup>212</sup> demonstrate that the rules should function very much like a self-contained, civil-law code.<sup>213</sup> As the Supreme Court noted in *Abel*, "[i]n principle, under the Federal Rules no common law of evidence remains."<sup>214</sup> A broad interpretation of "probative value" or "prejudice" in rule 403 would in effect allow the courts to revive many of the common-law rules omitted from the Federal Rules.<sup>215</sup> Rule 403 is

204. Peterfreund, *Relevancy and Its Limits in the Proposed Rules of Evidence for the United States District Courts: Article IV*, 25 REC. N.Y. CTRY B.A. 80, 83 (1970) (this characterization was made when rule 403 was the proposed rule 4-03).

205. See *United States v. Blanton*, 793 F.2d 1553, 1564 (11th Cir.), cert. denied, 107 S. Ct. 678 (1986); 2 D. LOUISELL & C. MUELLER, *supra* note 52, § 125, at 13 (Supp. 1987).

206. See *United States v. Caldwell*, 820 F.2d 1395 (5th Cir. 1987); *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985), cert. denied, 107 S. Ct. 89 (1986); *United States v. Betancourt*, 734 F.2d 750 (11th Cir.), cert. denied, 469 U.S. 1021 (1984); *United States v. Pirolo*, 673 F.2d 1200, 1203 (11th Cir.), cert. denied, 459 U.S. 871 (1982); 1 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 403[01], at 403-9 n.6 (1986).

207. See *United States v. Finestone*, 816 F.2d 583, 585 (11th Cir.), cert. denied, 108 S. Ct. 338 (1987); *United States v. Sawyer*, 799 F.2d 1494, 1506 (11th Cir. 1986), cert. denied, 107 S. Ct. 961 (1987); *United States v. Cole*, 755 F.2d 748, 766 (11th Cir. 1985); *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir.), cert. denied, 460 U.S. 1083 (1983); *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.), cert. denied, 444 U.S. 862 (1979); M. GRAHAM, *supra* note 44, § 403.1, at 14 (1987 Supp.); 2 D. LOUISELL & C. MUELLER, *supra* note 52, § 125, at 18 (1985); Weinstein & Berger, *supra* note 47, at 79.

208. See WEINSTEIN & BERGER, *supra* note 47, at 86; 1 J. WEINSTEIN & M. BERGER, *supra* note 86, ¶ 403[02], at 403-27.

209. 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5223, at 315.

210. Travers, *supra* note 80, at 361.

211. 469 U.S. 45 (1984).

212. 107 S. Ct. 2775 (1987).

213. Imwinkelried, *Federal Rule of Evidence 402*, *supra* note 14, at 129; see also *supra* notes 15-26 and accompanying text.

214. *Abel*, 469 U.S. at 51 (quoting Cleary, *supra* note 21, at 915).

215. 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5223, at 318. According to the drafters of

not a magic solvent for all evidentiary problems.<sup>216</sup> Widening the scope of rule 403 would defeat the statutory scheme of the Federal Rules.

Finally, and most importantly, a broad reading of rule 403 would expand undesirably judicial power at the expense of both the jury and the legislature. One of the leading modern commentators on procedure, Professor Stephen Saltzburg, has documented convincingly the dangerous trend toward the unnecessary expansion of the trial judge's authority.<sup>217</sup> A broad interpretation of rule 403 would exacerbate that trend and give the judiciary a potent license with which to justify its authority.<sup>218</sup> When a judge bars probative evidence because of the judge's own doubt about the credibility of the source of the evidence, the judge arrogates the jury's authority. Likewise, when a judge excludes relevant evidence to promote an extrinsic social policy other than the policies inspiring an evidentiary privilege, the judge encroaches on the legislative function of formulating extrinsic policy. Under our democratic philosophy, the legislator is directly accountable to the community, and jurors serve at trials in part because they bring community values to bear on the process of dispute resolution.<sup>219</sup> We may not share Lord Camden's pessimistic view of judicial discretion,<sup>220</sup> but apologists for Jacksonian democracy<sup>221</sup> have forced us to realize that to expand the judge's power at the expense of either the juror or the legislator has profound political implications.<sup>222</sup> These implications, the legislative history of rule 403, and the comprehensive statutory scheme of the Federal Rules all point to the same conclusion: Congress never intended rule 403 to be construed as a panacea for all evidentiary ills. The common law of evidence is dead, and rule 403 cannot be used to resurrect it.

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the New Jersey Code, a revival of common-law rules omitted from the Federal Rules is not a legitimate role for the judiciary under rule 403. NEW JERSEY SUPERIOR COURT COMM'N, REPORT ON EVIDENCE 86 (1963); 22 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5223, at 318 n.18.

216. *Id.* § 5223, at 316.

217. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978).

218. Gold, *supra* note 52, at 61.

219. Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 403 (1985).

220. *See supra* note 1 and accompanying text.

221. 21 C. WRIGHT & K. GRAHAM, *supra* note 9, § 5052, at 251; Imwinkelried, *Judge Versus Jury*, *supra* note 14, at 585-86.

222. *See generally* Kaus, *All Power to the Jury—California's Democratic Evidence Code*, 4 LOY. L.A.L. REV. 233 (1971).

