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A Political-choice Approach to Limiting Prejudicial Evidence†

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INTRODUCTION

Trials are complex legal, social, and political events. They are supposed to simultaneously resolve disputes efficiently, utilize adversarial procedures, determine the truth, inspire public confidence in the legal system, and help define the limits of acceptable social behavior. The rules of evidence are expected to facilitate achieving these goals by regulating the flow of information to the jury. If evidence threatens to frustrate these objectives, by wasting time, confusing the issues, or arousing the emotions of jurors, it should be excluded. One of the primary vehicles for accomplishing this task is the prejudice rule, exemplified by Federal Rule of Evidence 403.

Separating prejudicial from valuable evidence becomes problematic when an item of evidence simultaneously furthers some of the trial's goals and frustrates others. Consider, for example, whether to allow evidence of the defendant's prior alcohol-related problems in a drunk driving case.¹ Admitting the evidence is consistent with the adversarial principle that the parties select the evidence, fosters informed decisionmaking by giving the jury accurate information about the defendant, and makes a symbolic statement that repeated intoxication is unacceptable behavior. It also increases the likelihood of a conviction and severe sentence, and will legitimate the state's exercise of power, help convince the public that the government is doing something about the drunk driving problem, and promote public order and safety. On the negative side, admitting evidence of prior intoxication takes up additional trial time, might distract the jury's attention away from the merits of the specific charge, increases the likelihood that the jurors will become angry at the defendant and lose their impartiality, and to the extent that it makes embarrassing information about the defendant public, undermines the ideology of individual dignity. Using a person's past against him also clashes with the ideology of rehabilitation, finality,

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1. See *People v. Grisham*, 125 Mich. App. 280, 285-86, 335 N.W.2d 680, 683 (1983).

and paying one's debt to society. Evidence of prior intoxicated behavior helps determine the truth of the current charge if the defendant is in fact guilty, but misleads the jury if the defendant was not guilty this time.

Whether a court decides to admit or to exclude evidence that is both relevant and prejudicial, its decision will promote some values at the expense of others. When values conflict, and it becomes impossible to further all desirable social goals at once, difficult political choices have to be made favoring some principles over others. Usually, such decisions are made by the legislature or the appellate courts. However, the task of regulating prejudicial evidence has been delegated to trial judges by Federal Rule of Evidence 403² and its common law antecedents. Allocating such broad power to trial judges to make individualized decisions about the relative importance of competing principles is inconsistent with the general hierarchical structure of our legal system. Trial judges customarily exercise more limited, reviewable discretion within a framework of standards set by higher authority.³

The absence of guidance from appellate courts would be inconsequential if trial judges could be trusted to simply recognize prejudice, like obscenity, when they see it. Empirical research casts doubt on this proposition.⁴ The absence of standards also might be unimportant if trial judges could be trusted to act without bias.⁵ Empirical research casts doubt on this proposition also, suggesting that judges in reality make decisions consistent with

2. FED. R. EVID. 403 provides: "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." Twenty-five states have adopted the rule as written. ARIZ. R. EVID. 403 (1977); ARK. R. EVID. 403 (1975); COLO. R. EVID. 403 (1980); DEL. R. EVID. 403 (1980); HAW. R. EVID. 403 (1980); IDAHO R. EVID. 403 (1985); IOWA R. EVID. 403 (1983); ME. R. EVID. 403 (1976); MICH. R. EVID. 403 (1978); MINN. R. EVID. 403 (1977); MISS. R. EVID. 403 (1986); MONT. R. EVID. 403 (1977); NEV. REV. STAT. ANN. § 48.035 (Michie 1971); N.H. R. EVID. 403 (1985); N.M. STAT. ANN. § 11-403 (1973); N.C. R. EVID. 403 (1984); N.D. R. EVID. 403 (1977); OR. REV. STAT. § 40.160 (1981); S.D. CODIFIED LAWS ANN. § 19-12-3 (1978); UTAH R. EVID. 403 (1983); VT. R. EVID. 403 (1983); WASH. R. EVID. 403 (1979); W. VA. R. EVID. 403 (1985); WIS. STAT. ANN. § 904.03 (West 1974); WYO. R. EVID. 403 (1978). Five other states adopted modified versions of Rule 403: ALASKA R. EVID. 403 (1979) (deleted "substantially"); FLA. STAT. ANN. § 90.403 (West 1978) (deleted "or by considerations of undue delay, waste of time"); OHIO R. EVID. 403 (1980) (deleted "waste of time"); OKLA. STAT. ANN. tit. 12, § 2403 (West 1980) (deleted "waste of time" but added "or unfair and harmful surprise"); TEX. R. EVID. 403 (1983) (deleted "waste of time").

3. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-39 (1977); Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 750-54.

4. 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, 1163-73 (demonstrating significant disagreement among lawyers, as surrogate judges, concerning the prejudicial effect of a wide range of different kinds of evidence).

5. McElroy, *Some Observations Concerning the Discretion Reposed in Trial Judges by the American Law Institute's Code of Evidence*, in MODEL CODE OF EVIDENCE 356, 357-58 (1942).

their political orientation.⁶ The current rule's incoherent requirement that uncertain amounts of probative value be balanced against uncertain amounts of prejudice would be trivial if judges were able to reach fairly consistent decisions in practice. Unfortunately, the cases show wide variation in results.⁷

The variation in results may be partly attributable to the lack of agreement about what prejudice means. For example, in jurisdictions that have adopted Federal Rule of Evidence 403, courts may exclude relevant evidence for the sake of efficiency, to prevent "undue delay, waste of time, or needless presentation of cumulative evidence."⁸ In others, courts have held that evidence should never be excluded because it is repetitious,⁹ or that efficiency rarely justifies exclusion.¹⁰ Some courts approve excluding relevant evidence to prevent prejudicing jurors against a party,¹¹ while others say that harm to a party can never be grounds for exclusion.¹²

Assuming agreement could be reached on the definition of prejudice, variation in decisions probably would not be significantly reduced unless a workable procedure were available for applying the rule. The usual description of the procedure as a balancing of probative value against prejudicial effect is problematic. Assigning the initial weights to an item's probative value and prejudicial effect is, like Goldilocks' decision about the relative merits of beds and porridges, a question of personal bias. Even if it were possible to quantify the two concepts, judges still would face the metaphysical task of balancing incommensurable qualities.¹³ By adopting a balancing test paradigm, the appellate courts have avoided setting standards, and simply delegated decisionmaking to the trial judges, and thus guaranteed a wide diversity of results.¹⁴

6. See, e.g., Champagne & Nagel, *The Psychology of Judging*, in *THE PSYCHOLOGY OF THE COURTROOM* 257 (N. Kerr & R. Bray eds. 1982) (summarizing research).

7. E.g., compare *State v. Rodriguez*, 145 Ariz. 157, 167-68, 700 P.2d 855, 865-66 (1985) (testimony of expert witness on unreliability of eyewitness identification excluded) with *State v. Chapple*, 135 Ariz. 281, 292-96, 660 P.2d 1208, 1219-23 (1983) (testimony of expert witness on unreliability of eyewitness identification admitted). See also *Booth v. Maryland*, 482 U.S. 496, 508 (1987) (majority finds family's expression of grief and anger in victim impact statement would "inflame the jury and divert it from deciding the case on the relevant evidence"); *id.* at 2542 (Scalia, J., dissenting) (disagreeing that such evidence is unfair).

8. FED. R. EVID. 403.

9. E.g., *People v. McKibbons*, 96 Ill. 2d 176, 449 N.E.2d 821 (common law), *cert. denied*, 464 U.S. 844 (1983); *State v. Hutchinson*, 99 N.M. 616, 625, 661 P.2d 1315, 1324 (1983) (decided under state version of Rule 403).

10. See Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 65 (1984).

11. E.g., *Grisham*, 125 Mich. App. at 285-86, 335 N.W.2d at 683 (prejudice to defendant); *State v. Beachman*, 189 Mont. 400, 616 P.2d 337 (1980) (prejudice to state).

12. E.g., *Pettitt v. Lizotte*, 454 A.2d 329, 332 (Me. 1982); *Christensen v. Economy Fire & Cas. Co.*, 77 Wis. 2d 50, 61-62, 252 N.W.2d 81, 87 (1977).

13. See Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 8 n.26, 50-52 (1983).

14. Compare *Dial v. Travelers Indem. Co.*, 780 F.2d 520 (5th Cir. 1986) (evidence defendant collected insurance on other fires offered to prove motive for arson; on balance admissible)

This article suggests a new approach to the problem of what to do with relevant but prejudicial evidence. It develops a comprehensive theory for limiting prejudicial evidence more consistent with contemporary jurisprudence. That theory conceives of the admissibility decision as a political choice among conflicting values. Part I analyzes whether a prejudice rule is even needed by examining the consequences of abandoning it. Part II proposes a way to resolve disagreements over the appropriate meanings of prejudice by grounding a general definition in the theory that trials serve multiple functions. Part III criticizes the conventional balancing test paradigm, and proposes an alternative procedural model based on the premise that in order to decide the admissibility of prejudicial evidence, the courts must make political choices. It argues that the political-choice model better describes the cases, more appropriately allocates policy-making to the appellate courts, and is more consistent with contemporary jurisprudential principles.

I. THE JUSTIFICATION FOR A PREJUDICE RULE

The prejudice rule has ancient roots. Thayer traced its origins back to the thirteenth century,¹⁵ although trials at that time had neither witness testimony nor formal rules of evidence as we know them.¹⁶ Certainly by the late 1600's, a rule was in place permitting the exclusion of relevant evidence likely to confuse the jury,¹⁷ unfairly surprise the opponent who might not be prepared to respond,¹⁸ delay the trial,¹⁹ or arouse the passions of jurors.²⁰ In some form or other, a prejudice rule has been incorporated

with *Roberts v. State*, 163 Ga. App. 92, 93-94, 293 S.E.2d 40, 41-42 (evidence defendant collected insurance on other fires offered to prove motive for arson; on balance too prejudicial to be admitted), *rev'd*, 250 Ga. 414, 297 S.E.2d 274 (1982).

15. J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 516 (1898).

16. See 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 302-08 (7th ed. 1956).

17. *E.g.*, *Trial of Ambrose Rookwood*, 13 Howell, St. Tr. 139, 209-12 (1696) (introduction of certain evidence would lead to confusion).

18. See *Trial of Christopher Layer*, 16 Howell, St. Tr. 93, 246, 256 (1722) (evidence surprises witness who cannot be prepared to defend); *Trial of Ambrose Rookwood*, 13 Howell, St. Tr. at 209-12 (introduction of certain evidence would be unjust because man would have no opportunity to defend himself). See also 2 G. GILBERT, *THE LAW OF EVIDENCE* 817 (C. Lofft ed. 1795) (evidence excluded if it would surprise party).

19. *E.g.*, *Spenceley v. De Willott*, 7 East 108, 110 (1806) (inconvenience of trying numerous collateral issues); *Wright v. McKee*, 37 Vt. 161, 163-64 (1864) (makes trials long, tedious and expensive); *Trial of Henry Harrison*, 12 Howell, St. Tr. 833, 864 (1692) (causes delay).

20. See *People v. Corey*, 148 N.Y. 476, 489, 42 N.E. 1066, 1071 (1896) (evidence that defendant had syphilis would arouse jurors' passions and antipathy); *People v. Dye*, 75 Cal. 108, 112, 16 P. 537, 539 (1888) (evidence that defendant involved in scheme to blackmail wife's lover should have been excluded as exposing him to jurors' contempt); *R. v. Rowton, Leigh & C.* 520, 540 (1865) (trial might be overwhelmed with prejudice).

in all of the major restatements of the rules of evidence.²¹ Virtually all modern scholarly writings accord it a place in the jurisprudence of evidence, with only minor disagreements about how flexible it should be.²²

However, neither historical practice nor general consensus necessarily justifies the continued existence of a rule of evidence or trial procedure.²³ In the 1940's, Edmund Morgan mounted a strong intellectual attack against the concept of a prejudice rule. Morgan argued not only that the common law cases excluding prejudicial evidence were so inconsistent that no restatement of an American prejudice rule was possible, but also that there should be *no* prejudice rule. Rather, the regulation of relevant but prejudicial evidence should be left entirely up to the trial judge. Morgan's view was incorporated into the A.L.I. Model Code of Evidence.²⁴ Rule 303 provided that trial judges could exclude prejudicial evidence in their discretion,²⁵ but that such decisions "should depend so completely upon the circumstances of the particular case and be so entirely in the discretion of the trial judge that a decision in one case should not be used as a precedent in another."²⁶

Morgan's position commanded widespread consensus among the evidence scholars of that time.²⁷ One wrote:

Attempting to control [prejudice] through resort to a pattern of [rules] cannot allay the confusion. A trial is a swift moving thing, and the judicial mind should not be pulled this way and that by a congeries of

21. See 1 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 28, 1863, 1904 (1904) [hereafter all references to Wigmore's treatise are to the first edition unless otherwise specified]; UNIF. R. EVID. 403, 13 U.L.A. 151 (1953); FED. R. EVID. 403; MODEL CODE OF EVIDENCE Rule 303 (1942).

22. Some scholars appear to trust judicial neutrality and argue for a flexible rule. See J. MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 200 (1947) (prejudice should be defined to help guide discretion, but must also be left flexible); C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 152, at 320 (1954) (primarily discretion, but in some situations discretion has hardened into rules). Others distrust the ability of trial judges to be neutral, and argue for a more precisely defined rule. See Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 393 (1952) (there must be legal standards by which discretionary rulings can be measured to guard against whim and caprice).

23. See, e.g., *Williams v. Florida*, 399 U.S. 78 (1970) (calling 12-person jury an historical accident and approving the use of smaller juries in criminal cases).

24. Morgan, *The Code of Evidence Proposed by the American Law Institute*, 27 A.B.A. J. 587, 590 (1941). See also Ladd, *Determination of Relevancy*, 31 TUL. L. REV. 81, 89 (1956) (Dean Ladd worked with Morgan on the Advisory Committee that drafted the Model Code of Evidence).

25. MODEL CODE OF EVIDENCE Rule 303 (1942).

26. MODEL CODE OF EVIDENCE Rule 303 comment (1942).

27. Many important evidence scholars of the mid-twentieth century were members of the A.L.I. Advisory Committee, including Maguire, Ladd, and McCormick. MODEL CODE OF EVIDENCE iii (1942). There was little disagreement among them over Morgan's position. See A.L.I., *Minutes of Evidence Conference Held at Northeast Harbor, Maine, September 9-13, 1940* at 21 (mimeo; copy at University of Iowa College of Law library). The aging Wigmore, chief opponent of the non-rule position, was not a member of the committee, a snub about which he apparently was bitter. See Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A. J. 23, 23 (1942).

finely spun precedents. . . . [T]he fabric of law, dedicated as it is to the adjustment of human ills and human turmoil, must never be tortured into an . . . abstraction fathered by an ill-fitting precedent. . . . In short, the modern trend of judicial thinking appears to have accepted the Aristotelian concept of individualization, recognizing the inability of human lawmakers to lay down in advance rules which will fit all particular cases arising in the future.²⁸

The attack on the prejudice rule was repulsed by the practicing bar. No state enacted the Model Code of Evidence, and its spectacular failure is often attributed to this one proposal.²⁹ Yet the idea of replacing the rule with complete discretion refuses to die. Nixon's Department of Justice revived it when the Federal Rules of Evidence were being drafted, arguing that trial judges should not be required to exclude prejudicial evidence that might help convict a criminal defendant.³⁰ A few modern appellate courts that have encountered difficulty in articulating a useful prejudice rule suggest that it might be preferable to leave the decision to trial judges.³¹ Even a few evidence scholars continue to question the wisdom of having a prejudice rule. For example, Professor Kuhns argues that there are too many varieties of situations in which potential prejudice may occur, and too many varying degrees of probative value and prejudicial effect, to formulate a meaningful rule.³² Decisions about prejudicial impact therefore are better left to the trial judge's discretion.

Despite these criticisms, a prejudice rule seems to deserve a place in the jurisprudence of evidence for three reasons: 1) The absence of a rule necessarily confers broad power on trial judges to make decisions according to their personal biases, which will tend to result in inconsistent rulings. 2) Conferring power on trial judges to issue rulings in the absence of standards set by higher authority is inconsistent with the usual hierarchy of the legal system. 3) Empirical research indicates that there is likely to be little intuitive

28. Slough, *Relevancy Unraveled* (pt. 1), 5 U. KAN. L. REV. 1, 3-4 (1956) (footnotes omitted).

29. See Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 221-22 (1976).

30. See 2 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 124, at 5-6 (1985).

31. See *Dente v. Riddell, Inc.*, 664 F.2d 1, 5 (1st Cir. 1981) (interpreting Federal Rule 403's use of word "may" as permitting trial judge to ignore the written rule and make own decision whether to admit or exclude prejudicial evidence); *Brown v. Billy Marlar Chevrolet, Inc.*, 381 So. 2d 191, 193 (Ala. 1980) (leaving admissibility of prosthetic device to discretion of trial judge); *State v. Hults*, 9 Wash. App. 297, 303-04, 513 P.2d 89, 93-94 (1973) (admissibility of cumulative evidence in trial judge's discretion); *Cope v. Sevigny*, 289 A.2d 682, 689 (Me. 1972) (trial judge may decide if relevance overridden by extraneous non-probative factors).

32. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 804-05 (1981). Kuhns' argument is premised in part on the presupposition that judges are reasonable persons who will reach roughly the same conclusions as jurors (and as each other) about the degree of probative value and prejudicial effect of evidence. *Id.* at 778 n.4.

agreement among trial judges concerning the prejudicial effect of various items evidence.

If trial judges are given power to decide the admissibility of evidence, but no rule or principle³³ to guide their decisions, they will have to be guided by their personal views. Such autonomous decisions are likely to vary because different judges will disagree about whether particular items of evidence are too prejudicial to be admitted. In a number of common situations in which the current prejudice rule is invoked, and varying decisions reached, the eventual verdict may be affected. For example:

1. Empirical research indicates that jurors are likely to return larger verdicts for civil plaintiffs if they find out that the defendant has insurance or other ample resources.³⁴ Yet some judges have permitted plaintiffs to offer evidence of the defendant's financial resources, others have excluded it.³⁵

2. Research by psychologists shows that jurors' decisions in criminal cases can be affected by their perception of the amount of suffering felt by victims. Evidence of suffering can increase the severity of the sentence.³⁶ Yet, in homicide cases, some courts have allowed the state to introduce evidence about the suffering felt by a victim's family, and others have not.³⁷

3. Empirical research demonstrates that expert testimony by a psychologist on the unreliability of eyewitness identifications can affect how jurors evaluate the evidence and increase the likelihood of an acquittal.³⁸ Yet, in criminal cases in which the primary evidence against the defendant was

33. Dworkin distinguishes between rules and principles, but points out that it is not always clear whether a statement is a rule or a principle. R. DWORKIN, *supra* note 3, at 23-28. The statement that certain evidence is prejudicial and should be excluded if that prejudice outweighs its probative value is such an ambiguous statement possessing both rule-like and principle-like characteristics.

34. See Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1959).

35. Compare *Love v. Wolf*, 226 Cal. App. 2d 378, 388-89, 38 Cal. Rptr. 183, 189 (1964) (evidence concerning defendant drug company's profits admitted) with *Pagel v. Yates*, 128 Ill. App. 3d 897, 902-03, 471 N.E.2d 946, 951 (1984) (evidence of defendant's wealth should be excluded).

36. See Dane & Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts*, in *THE PSYCHOLOGY OF THE COURTROOM* 83, 99-100 (N. Kerr & R. Bray eds. 1982) (summarizing research).

37. Compare *People v. Free*, 94 Ill. 2d 378, 413-15, 447 N.E.2d 218, 235-36 (victim's husband permitted to testify about children who missed their mother), *cert. denied*, 464 U.S. 685 (1983) with *People v. Bernette*, 30 Ill. 2d 359, 371-72, 197 N.E.2d 436, 443-44 (1964) (victim's wife not permitted to testify about young children). See also *Booth v. Maryland*, 107 S. Ct. 2529, 2535-36 (1987) (majority thinks expressions of grief and anger in victim impact statement would "inflame jury and divert it from deciding the case on the relevant evidence"); *id.* at 2542 (White, J., dissenting) (disagreeing that such evidence is unfair or prejudicial).

38. See Wells, Lindsay & Tousingant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 L. & HUM. BEHAV. 275 (1980). See also Wells, *The Eyewitness*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 43, 61-62 (S. Kassir & L. Wrightsman eds. 1985) (summarizing research).

eyewitness identification, some judges have permitted the defense to offer such evidence, and others have refused to allow it.³⁹

4. Research has confirmed that jurors are more likely to convict a person of a crime if they find out he was guilty of similar criminal conduct.⁴⁰ Yet, in sex crime cases, some courts have permitted the state to introduce evidence that the defendant was previously involved in pornography, others have excluded it.⁴¹

Conferring broad power on trial judges can only increase the variation that results from bias. Despite naive assurances from a few judges that they can be impartial,⁴² most contend that judges are not neutral. Rather, they are influenced at least subconsciously by their ideological predispositions, especially in criminal cases.⁴³ Experienced observers of the courts point out that many judges seem routinely to allow the state to introduce prejudicial evidence against criminal defendants.⁴⁴ Anecdotal illustrations of judges disregarding rules of evidence to the detriment of criminal defendants are legion.⁴⁵ More systematic empirical studies also show striking ideological patterns to judicial decisionmaking in criminal cases, confirming that political biases affect rulings.⁴⁶ The broader the power of trial judges, and the

39. Compare *State v. Chapple*, 135 Ariz. 281, 292-97, 660 P.2d 1208, 1219-24 (1983) (expert testimony admissible) with *United States v. Foshier*, 590 F.2d 381, 384 (1st Cir. 1979) (expert testimony properly excluded). Cf. *State v. Rodriguez*, 145 Ariz. 157, 167-68, 700 P.2d 855, 865-66 (1985) (within trial judge's discretion to exclude).

40. See Hatton, Snortum & Oskamp, *The Effects of Biasing Information and Dogmatism Upon Witness Testimony*, 23 PSYCHONOMIC SCI. 425 (1971) (prior record for traffic violations and one assault conviction increased conviction rate for reckless driving). These results are consistent with Doob & Kirschenbaum, *Some Empirical Evidence on the Effect of s.12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88 (1972).

41. Compare *State v. Spargo*, 364 N.W.2d 203, 209 (Iowa 1985) (investigator's testimony that defendant had previously been involved in pornography was admissible) with *People v. Chandler*, 65 A.D.2d 920, 921, 410 N.Y.S.2d 459, 460 (1978) (police should not be allowed to testify about finding pornographic books in the defendant's apartment).

42. E.g., McElroy, *supra* note 5, at 357-58.

43. See M. FRANKEL, *PARTISAN JUSTICE* 48-49 (1980). See also R. NEELY, *WHY COURTS DON'T WORK* 10 (1983) (Chief Justice Neely of the West Virginia Supreme Court writes that courts are not neutral; rather, judges let politics and emotion influence decisions.).

44. E.g., Graham, *The Relationship Among Federal Rules of Evidence 607, 801(d)(1)(A), and 403: A Reply to Weinstein's Evidence*, 55 TEX. L. REV. 573, 578 (1977).

45. E.g., *Dresser v. State*, 454 N.E.2d 406, 409 (Ind. 1983) (affirming judge's decision to admit evidence that had failed the balancing test). See also *Spargo*, 364 N.W.2d 203 (trial judge allowed investigator to testify to unsubstantiated charge that defendant had previously been involved with child pornography, in violation of hearsay, personal knowledge, and character evidence rules); *State v. Lavaris*, 41 Wash. App. 856, 859-60, 707 P.2d 134, 136-37 (1985) (judge permitted state to "impeach" witness in derogation of both hearsay and impeachment rules, resulting in the jury hearing a co-defendant's accusation against the defendant), *aff'd*, 106 Wash. 2d 340, 721 P.2d 515 (1986); *Murdock v. State*, 664 P.2d 589, 600-01 (Alaska App. 1983) (defendant's ability to impeach a key witness against him restricted in apparent violation of *Davis v. Alaska*, 415 U.S. 308 (1974)).

46. See Rowland, Songer & Carp, *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 L. & Soc'y REV. 191, 195-97 (1988). Much of the earlier research is summarized in Champagne & Nagel, *supra* note 6.

less they are guided by standards, the greater will be opportunities for that bias to affect the outcome of cases.

The delegation of such a degree of autonomy to trial court judges also is inconsistent with traditional legal theory. Allocating power to trial judges to make decisions that can affect the outcome of cases, but providing them with no standards by which to exercise it, is incompatible with the basic hierarchy of the legal system. Standards and guidelines usually are set by higher political authority—the legislature or supreme court. Trial judges may have discretion to act, but they must make their decisions within boundaries.⁴⁷ Trial courts can therefore be held accountable to political authority through the review process.⁴⁸ The absence of a prejudice rule would leave trial judges accountable to no one.

Recent empirical research by Teitelbaum, Sutton-Barbere and Johnson⁴⁹ provides further evidence of the need for a prejudice rule. Their research indicates that trial judges are unlikely to share a common intuitive definition of prejudice. Using lawyers as surrogate judges, Teitelbaum and his colleagues found wide disagreement concerning the prejudicial effect of various items of evidence, and whether they should be excluded or admitted. On two issues that can significantly affect a jury's verdict—evidence of a civil defendant's financial resources and a criminal defendant's record of conviction for related offenses⁵⁰—the surrogate judges showed the *least* agreement.⁵¹ Without guidelines, such disagreements are likely to result in a wide variation in rulings leading to inconsistent jury decisions.

Wigmore's solution to the problem was to draft a minutely detailed, codified set of prejudice rules. He thought the variability in decisions could be reduced by specifying hundreds of situations in which potentially prejudicial evidence should be excluded or admitted. He devoted over 400 sections of his treatise to explicating them.⁵² His solution was never very practical, however. It is not realistic to think that rules can be drafted telling a trial judge whether to exclude such evidence as a drug defendant's diary entry which reads "Coast Guard at our Stern. Goodbye to my dreams[,]"⁵³ statistics showing that children are often molested by relatives

47. See R. DWORKIN, *supra* note 3, at 31-39.

48. See Christie, *supra* note 3, at 747-57.

49. *Supra* note 4, at 1163-73.

50. See *supra* notes 34 & 40 and accompanying text.

51. Teitelbaum, Sutton-Barbere & Johnson, *supra* note 4, at 1201 (Table 2).

52. 1 & 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 24-465 (3d ed. 1940). Wigmore argued that no simple definition such as that contained in the ALI Model Rules was adequate, but that most of his individual rules should be included in any codification. CODE OF EVIDENCE 11-14 comment by Wigmore (Preliminary draft no. 10, 1940).

53. *United States v. Mehtala*, 578 F.2d 6, 9 (1st Cir. 1978).

and delay reporting it,⁵⁴ a homicide victim's wedding photograph showing her wedding ring used to identify the decomposed body,⁵⁵ or a rape defendant's offer to expose his penis to the jury so they could see that a prior injury had left him incapacitated.⁵⁶

Contemporary scholars would undoubtedly concede the impossibility of limiting prejudicial evidence through a series of precisely drafted rules. Yet, having no rule appears equally unacceptable. A better approach is to articulate a set of principles to explain when relevant evidence should be excluded as prejudicial. This approach requires both a definition of prejudice consistent with a coherent theory of proper trial practice, and a procedural mechanism for making decisions in close cases.⁵⁷

II. THE MEANING OF PREJUDICE

No agreement exists on the proper definition of prejudice. Courts and commentators appear to label evidence prejudicial for five different reasons: 1) unnecessarily arousing emotions, 2) interfering with rational truth-seeking, usually by confusing or misleading jurors, 3) upsetting the normal balance of the adversary system, by surprising the opponent, or interfering with jury impartiality, 4) being inefficient through wasting time, presenting repetitive or cumulative evidence, or otherwise delaying the trial, and 5) symbolically undermining important political interests of the state. Each of these proposed meanings has its adherents and detractors.

A. Arousing Emotion

Prejudice commonly is equated with the tendency of evidence to arouse strong emotions in jurors. Emotional arousal is mentioned by Professor Green as the primary evil to be prevented by the prejudice rule,⁵⁸ and by Weinstein and Berger as one of several important definitions.⁵⁹ Wigmore argues that emotions cause prejudice because they mislead jurors into making hasty decisions based on passion instead of slowly evaluating all the evidence.⁶⁰ Many appellate courts also label as prejudicial evidence that arouses

54. *State v. Petrich*, 101 Wash. 2d 566, 575-76, 683 P.2d 173, 180 (1984), *modified*, *State v. Kitchen*, 110 Wash. 2d 403, 756 P.2d 105 (1988).

55. *State v. Hutchinson*, 99 N.M. 616, 624-25, 661 P.2d 1315, 1323-24 (1983).

56. *Garvik v. Burlington, C.R. & N. Ry.*, 124 Iowa 691, 694-95, 100 N.W. 498, 500 (1904).

57. *E.g.*, Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 498-503 (1983).

58. Green, *Relevancy and Its Limits*, 1969 LAW & SOC. ORD. 533, 543.

59. J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, ¶¶ 403[01], 403[03] (1988).

60. *See* J. WIGMORE, *supra* note 21, §§ 21, 28, 1904.

emotions, is likely to "inflare" the minds of the jurors,⁶¹ creates sympathy for a party,⁶² a crime victim,⁶³ or the victim's family,⁶⁴ or stimulates feelings of antipathy, abhorrence, or distrust.⁶⁵

The prevailing view, however, is that emotional arousal by itself is not a sufficient condition to constitute prejudice. Only if emotion causes jurors to misevaluate or ignore evidence is it prejudicial. The danger is not emotionalism *per se*, but that jurors might incorrectly decide a case if they vote with their hearts rather than their heads.⁶⁶ Courts fear that strong emotions will incite jurors into making irrational decisions,⁶⁷ misusing, exaggerating, or ignoring evidence,⁶⁸ or disregarding their instructions on the law.⁶⁹

Emotional arousal may not even be a necessary condition to constitute prejudice. The drafters of Federal Rule of Evidence 403 wrote that prejudice means "an undue tendency to suggest decision on an improper basis, commonly, *though not necessarily*, an emotional one," claiming "ample support in the authorities" for the proposition.⁷⁰ Professor Lempert points

61. *E.g.*, *Meanes v. State*, 668 S.W.2d 366, 374 (Tex. Crim. App. 1983) (en banc) (whether victim's bloody shirt would inflame jury), *cert. denied*, 466 U.S. 945 (1984); *Iverson v. McDonnell*, 36 Wash. 73, 74-75, 78 P. 202, 203 (1904) (evidence of insurance would inflame minds of jury).

62. *See Brown v. Billy Marlar Chevrolet, Inc.*, 381 So. 2d 191, 193 (Ala. 1980) (showing jury how artificial leg functioned would arouse sympathy for plaintiff); *State Farm Mut. Auto. Ins. Co. v. Griffin*, 51 Ala. App. 426, 432, 286 So. 2d 302, 307 (1973) (proving insurance company had already paid uninsured motorist benefits would arouse sympathy for defendant).

63. *See State v. Bott*, 310 Minn. 331, 337-38, 246 N.W.2d 48, 53 (1976) (whether victim could exhibit scars turned on whether evidence would arouse passions).

64. *E.g.*, *Elizondo v. State*, 130 Tex. Crim. 393, 395-96, 94 S.W.2d 457, 458 (1936) (sympathy for surviving wife and children of homicide victim).

65. *E.g.*, *State v. Martin*, 472 So. 2d 91, 96 (La. Ct. App. 1985) (arouse hostility against defendant); *McCormack v. Riley*, 576 S.W.2d 358, 361 (Tenn. Ct. App. 1978) (hostility against party); *People v. Bernette*, 30 Ill. 2d 359, 371-72, 197 N.E.2d 436, 443-44 (1964) (evidence about victim's children inadmissible because it would arouse anger, hate and passion in jurors).

66. *See* FED. R. EVID. 403 advisory committee's note.

67. *See United States v. Astling*, 733 F.2d 1446, 1457 (11th Cir. 1984) (incite jury to an irrational decision); *Shamburger v. Behrens*, 380 N.W.2d 659, 661 (S.D. 1986) (decide case on improper basis); *Patricia R. v. Sullivan*, 631 P.2d 91, 96 (Alaska 1981) (decide against plaintiff based on her low social status).

68. *See Zamora v. State*, 361 So. 2d 776, 783 (Fla. Dist. Ct. App. 1978) (emotional evidence might distract jury from fair consideration of evidence); *State v. Bowden*, 113 R.I. 649, 659-60, 324 A.2d 631, 637 (1974) (evidence arousing passions of jury excludable if it tends to influence the outcome of the case), *cert. denied*, 419 U.S. 1109 (1975); *State v. Germain*, 433 So. 2d 110, 119 (La. 1983) (strong emotional reaction could overwhelm jurors and cause them to lose sight of the need for the state to furnish evidence of guilt).

69. *See State v. Couture*, 146 Vt. 268, 277, 502 A.2d 846, 852 (1985) (inflamed jurors, causing confusion of issue whether conviction related only to credibility or related to substantive issues); *People v. Free*, 94 Ill. 2d 378, 415, 447 N.E.2d 218, 236 (exclusion depends on whether emotional evidence causes jury erroneously to believe certain issue material), *cert. denied*, 464 U.S. 865 (1983).

70. FED. R. EVID. 403 advisory committee's note (emphasis added). This comment is frequently quoted by appellate courts.

out that more subtle psychological reactions also can cause jurors to lose the ability to process information rationally. Evidence that dovetails with jurors' biases and stereotypes, or that reduces their regret at reaching a wrong decision, may improperly influence verdicts exactly as strong emotions would. For example, finding out that a defendant is covered by insurance is hardly likely to arouse strong emotions, yet it may cause jurors to return a large verdict for a plaintiff despite weak evidence. Lempert therefore would define prejudice as any characteristic of an item of evidence, including its emotional impact, likely to affect the jurors' states of mind and induce "estimation" problems.⁷¹

Professor Gold goes even further, arguing that emotion should not be included as any part of the definition of prejudice. Lawsuits are inherently emotional. In order for jurors to fully understand a case, Gold asserts, they must understand both the facts and the emotional reactions of the participants. To equate prejudice with emotional arousal, and exclude emotional evidence, is to present jurors with an unreal picture of the case which will hinder rather than promote fully informed decisions. Gold argues that the definition of prejudice must therefore recognize a legitimate role for emotionalism, not try to prevent it all.⁷²

Professor Gold is obviously right to some extent, but there must be limits. Just because trials are inherently emotional should not give license to the parties to offer all manner of scurrilous evidence. At other phases of trial, only a limited range of emotional arousal is considered acceptable. For example, during closing argument, parties are permitted to display emotional reactions to their cases⁷³ and to emphasize the evidence that has particular emotional impact.⁷⁴ However, they are prohibited from appealing to emotions that are *not* related to the evidence, such as by suggesting that a large verdict will impact on the jurors' own insurance rates.⁷⁵ Nor may attorneys suggest that emotion be *substituted* in place of evidence as a basis for decision, such as by arguing that the jurors should base a verdict on

71. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1030, 1036 (1977). In psychological terms, this theory is that evidence is prejudicial if it is likely to induce juror decision-making through heuristics (short cuts based on stereotypical assumptions). See Saks & Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123 (1980).

72. Gold, *supra* note 57, at 503-10. See also Gold, *supra* note 10 (making similar argument); Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C.L. REV. 481, 498-502 (1987) (emotionalism is an important and desirable part of the trial process).

73. See *Ferguson v. Moore*, 98 Tenn. 342, 351-52, 39 S.W. 341, 343 (1897) (legitimate for attorney to shed tears during argument).

74. *E.g.*, *State v. Carter*, 91 N.J. 86, 101-08, 449 A.2d 1280, 1291-92 (1982) (racial motive for killing); *Southern Ry. v. Jarvis*, 266 Ala. 440, 445, 97 So. 2d 549, 553 (1957) (emphasizing tragedy of loss of a young life).

75. *E.g.*, *Finney v. G.C. Murphy Co.*, 400 Pa. 46, 50, 161 A.2d 385, 387 (1960).

racial or religious grounds,⁷⁶ or use their verdict to deter other would-be criminals.⁷⁷

This distinction between emotions inherent in the nature of the dispute and unrelated emotions also is found in evidence cases. As a general rule, only evidence likely to arouse emotions not directly connected to the dispute is excluded. Courts do not consider evidence unfairly prejudicial just because it stirs the sensibilities of the jurors, arouses feelings of horror, indignation, sympathy or antipathy,⁷⁸ or is disgusting or indecent.⁷⁹ For example, gruesome photographs of murder victims, however horrible, are admissible as long as they accurately show the condition of the body at a time relevant to the case—death, discovery of the body, or autopsy. Their emotional impact is considered inherent in the nature of the case and not prejudicial.⁸⁰ However, a photograph of the victim at some other time—for example, showing what she looked like in her coffin—is likely to be labelled prejudicial, even though its actual impact may be less.⁸¹

Similarly, not all evidence connecting a person to illegal drugs is prejudicial. If a person involved in a crime took drugs just before the crime, talked about drugs during it, or was carrying drugs when he was arrested, evidence of his drug use is part of the events surrounding the crime, and not prejudicial.⁸² However, evidence of drug use at a time not connected to the basic event being litigated is likely to be excluded.⁸³

76. *E.g.*, *State v. Wilson*, 404 So. 2d 968, 970 (La. 1981) (racial prejudice); *McWilliams v. Sentinel Pub. Co.*, 339 Ill. App. 2d 83, 103-04, 89 N.E.2d 266, 277 (1949) (religious prejudice).

77. *E.g.*, *Hines v. State*, 425 So. 2d 589, 591 (Fla. Dist. Ct. App. 1983) (send message to criminals); *Commonwealth v. Long*, 258 Pa. Super. 312, 318, 392 A.2d 810, 813 (1978) (fight crime in subways).

78. *E.g.*, *Burnett v. Caho*, 7 Ill. App. 3d 266, 272, 285 N.E.2d 619, 624 (1972) (just because evidence stirs sensibilities of jurors is no reason to exclude it); *Darling v. Charleston Community Memorial Hosp.*, 50 Ill. App. 2d 253, 320-23, 200 N.E.2d 149, 183 (1964) (competent evidence may not be excluded merely because it might arouse feelings of horror or indignation in the jury), *cert. denied*, 383 U.S. 946 (1966).

79. *E.g.*, *Dunkin v. City of Hoquiam*, 56 Wash. 47, 48, 105 P. 149, 151 (1909) (injury to anus, wound may be exhibited to jury).

80. *E.g.*, *People v. Foster*, 76 Ill. 2d 365, 375-76, 392 N.E.2d 6, 10 (1979) (photos of decaying dismembered body not prejudicial); *Zamora*, 361 So. 2d at 783 (photo of decomposing corpse not prejudicial). *See also* *Reimer v. State*, 657 S.W.2d 894, 897 (Tex. Ct. App. 1983) (in eleven years, no case reversed because of introduction of photographs of crime scene and body of victim); J. TANFORD & R. QUINLAN, *INDIANA TRIAL EVIDENCE MANUAL* § 48.5 (2d ed. 1987) (no case in 25 years disapproved admitting photographs of crime victim).

81. *E.g.*, *Eddy v. State*, 496 N.E.2d 24, 26 (Ind. 1986) (suggesting that photographs of the corpse in its coffin not admissible).

82. *E.g.*, *United States v. Lawson*, 780 F.2d 535 (6th Cir. 1985) (cocaine found in hotel at time of arrest not prejudicial); *United States v. Evans*, 697 F.2d 240 (8th Cir. 1983) (evidence of drug deal offered to connect defendant to alleged co-conspirator and refute defendant's explanation that he went to St. Louis on vacation, necessary to complete telling of story, not prejudicial).

83. *E.g.*, *People v. Grisham*, 125 Mich. App. 280, 285-86, 335 N.W.2d 680, 683 (1983) (evidence of defendant's unrelated alcohol abuse prejudicial); *State v. Beachman*, 189 Mont. 400, 616 P.2d 337 (1980) (evidence that prosecutor smoked marijuana with defendant, offered to explain why defendant went into hiding, excluded as prejudicial).

Thus, it is not helpful to define prejudice as arousing emotions. Too many courts routinely approve the admissibility of highly emotional evidence. Such a definition also would be inconsistent with the courts' recognition during other parts of the trial that a certain amount of emotionalism is inevitable. Instead, the definition of prejudice should help judges distinguish between permissible and impermissible emotionalism. One logical way of attempting this task is to more specifically articulate the functions, values, and social objectives served by trials, and label as prejudicial evidence incompatible with them.

B. Interfering With Verdict Accuracy: Confusing Issues and Misleading Jurors

The second common meaning given to prejudice is interference with the truth-seeking process. Evidence is said to be prejudicial if it confuses the issues,⁸⁴ confuses or misleads the jury,⁸⁵ diverts or distracts the jury from the facts,⁸⁶ or causes the jurors to make inferential errors.⁸⁷ In this category, courts tend to include both the risk of jurors making factual mistakes and the danger jurors will not apply the proper legal standards for determining responsibility.

The most commonly expressed fear is that certain evidence will not advance informed, factual decisionmaking, but will produce side-effects that cause the jury to make factual errors. Prejudice is said to occur when jurors draw unwarranted inferences from evidence,⁸⁸ ignore undisputed facts,⁸⁹ overlook gaps in one side's case,⁹⁰ or otherwise become unable to keep the

84. J. WIGMORE, *supra* note 21, §§ 28, 1863, 1904; MODEL CODE OF EVIDENCE Rule 303 (1942); FED. R. EVID. 403. *See also* Gould v. Bebee, 134 La. 123, 128, 63 So. 848, 850 (1913) (citing Wigmore and Greenleaf).

85. J. THAYER, *supra* note 15, at 516; MODEL CODE OF EVIDENCE Rule 303 (1942); FED. R. EVID. 403. *See also* State v. Lapan, 101 Vt. 124, 139-40, 141 A. 686, 693 (1928) (evidence inadmissible because it would confuse jurors and divert them from real issues).

86. *Evans*, 697 F.2d at 249 (prejudice equated with diverting jury from issues); *Zamora*, 361 So. 2d at 783 (evidence might distract jury from fair consideration of evidence); State v. Titworth, 255 N.W.2d 241, 246 (Minn. 1977) (evidence might divert jury from facts of crime charged).

87. Gold, *supra* note 57, at 506.

88. *E.g.*, State v. Reingold, 49 Or. App. 781, 783-85, 620 P.2d 964, 965-66 (1980) (defendant charged with receiving stolen property; bringing seller of stolen goods into court in prison garb might cause jurors to assume defendant could likewise have easily identified him as a thief), *petition for review denied*, 52 Or. App. 117, 631 P.2d 340 (1981). *See* Gold, *supra* note 57, at 506-07.

89. *E.g.*, Pagel v. Yates, 128 Ill. App. 3d 897, 902, 471 N.E.2d 946, 951 (1984) (evidence of relative wealth of parties will cause jurors to decide case based on who can afford to bear the loss, diverting them from central evidence of liability).

90. *E.g.*, *Germain*, 433 So. 2d at 119 (causes jurors to lose sight of state's need to furnish proof, may overlook gaps in case).

evidence in its proper perspective.⁹¹ For example, in *Roberts v. State*,⁹² a defendant was charged with committing arson for the insurance proceeds. Evidence of several past fires in houses owned by him was offered to show that the defendant had experience with and knowledge about how fire insurance worked. It was excluded. The court feared that jurors would overlook the fact that there was no evidence that the defendant deliberately set any of the prior fires, infer that he probably set all of them, infer a propensity to arson, and conclude that he was probably guilty of the crime charged.⁹³ In other words, jurors might not base their verdict on the weight of the relevant evidence, but on a distorted or abbreviated view of what happened that is disproportionately influenced by the prejudicial evidence. In extreme cases, the jury may reach a factually incorrect verdict, convicting an innocent person. This is the standard argument made for excluding evidence of prior criminal or immoral activity.⁹⁴

However, defining prejudice as interfering with truth-determination and causing factual errors is problematic. Assume a defendant claims to be innocent of a crime for which he is on trial. Among the evidence against him is the testimony of an elderly woman that she saw him near the scene moments after the crime. Suppose the defense attorney seeks to elicit evidence that the woman has poor eyesight and needs thick glasses in order to see.⁹⁵ In addition, the defense offers expert evidence from a psychologist on the general unreliability of eyewitness identifications made by strangers. To both offers, the prosecutor objects that the evidence is prejudicial because it is likely to lead the jury into erroneously inferring that this particular witness was mistaken,⁹⁶ an inference that ultimately could cause the jury to acquit a guilty man. In order for the judge to evaluate whether the evidence will mislead the jury concerning what happened, the judge must know what

91. *E.g.*, *United States v. Bailleaux*, 685 F.2d 1105, 1109 (9th Cir. 1982) (courts must guard against possibility that jurors will base their decision to convict on evidence of a defendant's prior record rather than on evidence of whether he committed the crime charged); *Weiby v. Wentz*, 264 N.W.2d 624, 628 (Minn. 1978) (testimony by physicians as to the onset of a disease logically relevant to prove when it should have been detectable but outweighed by danger that jury would be confused and misled). See Lempert, *supra* note 71, at 1030-31 (calling this an estimation problem).

92. 163 Ga. App. 92, 293 S.E.2d 40, *rev'd*, 250 Ga. 414, 297 S.E.2d 274 (1982).

93. *Id.* at 93-94, 293 S.E.2d at 41-42.

94. See Beaver & Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMPLE L.Q. 585, 601-06 (1985) (also summarizing, but exaggerating, some empirical support for the proposition); Dolan, *supra* note 29, at 226; Gold, *supra* note 57, at 505; Lempert, *supra* note 71, at 1036-39.

95. This is a variation of Monroe Freedman's famous ethical hypothetical in Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474-75 (1966).

96. See *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979) (excluding expert testimony on unreliability of eyewitness testimony because of its potential for confusion).

really happened. Obviously, the judge cannot know whether the defendant committed the crime or is the victim of mistaken identity.

The factual-error approach to defining prejudice also is inconsistent with the general theory of trials. Although a few writers have suggested that one of the purposes of trials is to reveal the objective, historical truth of what happened,⁹⁷ most scholars reject this position.⁹⁸ In the first place, the fallible nature of human perception and memory make accurate reconstruction of past events unlikely.⁹⁹ Therefore, the best result that can be hoped for is an approximation of historical truth. Second, even this approximate truth must be reconstructed according to rules of evidence and procedure that often frustrate truth-seeking, e.g., by excluding illegally seized evidence.¹⁰⁰ Trials appear less concerned with truth than with *proof*—whether the parties can satisfy the rules of a closed system.¹⁰¹ Third, the paradigm that a single picture of what happened will emerge from the evidence is not very helpful in describing the typical trial. In most cases, the plaintiff's and defendant's versions of events will differ substantially. In many cases, the jury would be equally justified in reaching any one of several verdicts. Whatever verdict it reaches will be acceptable to the appellate courts, as long as it is supported by *some* of the evidence.¹⁰²

But the jury's verdict task is not accurately described even as approximating the truth based on whatever proof has been offered. A factual decision about what probably happened is rarely a sufficient basis for a verdict. Most kinds of civil and criminal liability depend on the defendant's

97. See Gerber, *Victory vs. Truth: The Adversary System and its Ethics*, 19 ARIZ. ST. L.J. 3 (1987); Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 4-5 (1986); Meese, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271, 271-72 (1987).

98. E.g., J. TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 5-6 (1983); Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 121-24 (1987).

99. See Markus, *A Theory of Trial Advocacy*, 56 TULANE L. REV. 95, 96 (1981). See generally E. LOFTUS, *EYEWITNESS TESTIMONY* 20-87 (1979) and J. TANFORD, *supra* note 98, at 23-24 (both summarizing psychological literature on intrinsic problems of perception, memory, and recall).

100. See Loh, *The Evidence and Trial Procedure*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 16-18 (S. Kassir & L. Wrightsman eds. 1985). See also Leonard, *supra* note 97, at 25-31 (analyzing rules of character evidence and concluding they do not advance truth determination).

101. See A. Yarmolinsky, *Misuses of Applied Social Research*, in *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* 44, 45 (M. Saks & C. Baron eds. 1980) (distinguishing a trial from the scientific search for an answer that does not exclude any data).

102. See Brilmayer, *Wobble, or the Death of Error*, 59 S. CAL. L. REV. 363, 375 (1986) (concluding from an examination of how appellate courts review verdicts that overall the law shows little interest in whether the result was correct, only whether procedures have been followed).

mental state.¹⁰³ Also, the jury is expected to apply the facts to the law in a particular manner according to a complicated set of legal instructions. Prejudice occurs if jurors make legal mistakes and do not determine liability according to their instructions.

Courts have justified excluding evidence accordingly, because of the dangers that it will cause jurors to overemphasize minor issues,¹⁰⁴ ignore important issues,¹⁰⁵ or otherwise fail to abide by specific instructions.¹⁰⁶ For example, evidence of a defendant's wealth or insurance may cause a jury to ignore the central issue of legal liability, and award damages based on the defendant's ability to pay and the plaintiff's need.¹⁰⁷ If jurors correctly determine that the plaintiff has a weak case on the facts, but award a verdict anyway because the defendant can afford it, the error is legal, not factual. Other evidence, especially evidence offered for a limited purpose, may be used by the jury in ways contrary to law. For example, the hearsay rule prohibits accusatory statements of bystanders from being considered as evidence of guilt, but permits them to be admitted to show why the police investigated the defendant.¹⁰⁸ If jurors violate the limiting instruction and consider the evidence substantively, they have again made a legal error, not a factual one.

A better definition of prejudice therefore would be interference with the goal of *legally accurate* decisionmaking.¹⁰⁹ If evidence will tend to confuse the jurors as to the important *legal* issues, cause them to ignore issues, fail to abide by jury instructions, or otherwise apply the facts to an erroneous

103. Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 197-99 (1983).

104. *E.g.*, *State v. Kim*, 64 Haw. 598, 606-07, 645 P.2d 1330, 1337 (1982) (admission of testimony may detract from principal issues by creating a "battle of the experts"); *Gould*, 134 La. 123, 63 So. 848 (evidence of good character likely to be overemphasized by jurors and therefore misled them).

105. *E.g.*, *McCormack v. Riley*, 576 S.W.2d 358, 361 (Tenn. Ct. App. 1978) (most important definition of prejudice is distracting the jury from the main issue).

106. *E.g.*, *Weiby*, 264 N.W.2d at 628 (malpractice case alleging failure to diagnose; expert opinion about onset of disease might be used by jury as evidence of when physician of ordinary competence should have diagnosed it).

107. *See Pagel*, 128 Ill. App. 3d at 902, 471 N.E.2d at 951 (jury will tend to favor those least able to bear loss even if their evidence is weak); *Iverson v. McDonnell*, 36 Wash. 73, 74-75, 78 P. 202, 203 (1904) (evidence of insurance will confuse jurors about proper basis for deciding case).

108. *See Torres v. State*, 442 N.E.2d 1021 (Ind. 1982) (statements made to police that a certain person committed crime, offered into evidence not for their truth but to show knowledge of police officer upon which he based his investigation, would be prejudicial if jury likely to use them as independent evidence of defendant's guilt). *See also Couture*, 146 Vt. at 276, 502 A.2d at 852 (evidence of prior conviction prejudicial because jury likely to think it bore on substantive issues).

109. *E.g.*, *Saltzburg, A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011, 1015 (1978).

construction of the law, prejudice occurs.¹¹⁰ A few commentators have even suggested that this is the only legitimate meaning of prejudice, arguing that the only principle by which trials should be guided is the need to reach an accurate verdict.¹¹¹ Wigmore, for example, rationalized several ways in which courts used the concept of prejudice, including emotional arousal, factual error, and legal confusion, as all deriving from the tendency to "divert the jury from a clear study of the exact purport and effect of the evidence, and thus to obscure and suppress the truth rather than to reveal it."¹¹² As the following sections will demonstrate, however, limiting the definition of prejudice to this one concept would leave too many cases unaccounted for, and be inconsistent with a comprehensive theory of the functions of trials.

C. *Surprise and Other Harms to the Parties' Adversarial Interests*

In Rookwood's trial in 1696, the argument was made that evidence which unfairly surprised one of the parties was prejudicial and should be excluded.¹¹³ Since that time, the relationship between surprise and prejudice has been a matter of disagreement. Greenleaf included surprise as a ground for excluding prejudicial evidence in his 1844 treatise,¹¹⁴ but neither Jones¹¹⁵ nor Thayer¹¹⁶ mentioned it in treatises written fifty years later. In the first half of the twentieth century unfair surprise was revived as one of the meanings of prejudice. Wigmore included it in the 1940 edition of his treatise.¹¹⁷ Morgan and the ALI Advisory Committee included surprise in the 1942 Model Code of Evidence,¹¹⁸ and this definition was carried over

110. See J. THAYER, *supra* note 15, at 516; 1 J. WEINSTEIN & M. BERGER, *supra* note 59, ¶ 403[04]; Kuhns, *supra* note 32, at 777-78.

111. See J. FRANK, *COURTS ON TRIAL* (1949) (general critique of trial procedure); Gerber, *supra* note 97; Meese, *supra* note 97, at 271-72, 280; Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404-07 (1906).

112. 1 J. WIGMORE, *supra* note 21, § 1863; 1 J. WIGMORE, *supra* note 52, §§ 1864, 1904.

113. Trial of Ambrose Rookwood, 13 Howell, St. Tr. 139, 210 (1696) (man would have no opportunity to defend himself). Other early cases equating prejudice with surprise include: Trial of Christopher Layer, 16 Howell, St. Tr. 93, 246, 256 (1722); Trial of John Hampden, 9 Howell, St. Tr. 1053, 1103 (1684).

114. 1 S. GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 52 (2d ed. 1844) (exclusion required if the adverse party, having had no notice of such a course in evidence, is not prepared to rebut it).

115. B. JONES, *THE LAW OF EVIDENCE IN CIVIL CASES* §§ 136-37 (2d ed. 1908).

116. J. THAYER, *supra* note 15, at 266, 516-18. See also Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141, 145 (1889) (listing four reasons for excluding relevant evidence; surprise not among them).

117. 1 J. WIGMORE, *supra* note 52, § 29a (exclude evidence if the opponent would be unprepared to rebut surprise *false* evidence); *id.* § 194 (prior bad acts of witnesses excluded on ground of unfair surprise); *id.* § 979 (extrinsic evidence to prove misconduct excluded on ground of unfair surprise); *id.* § 1845 (evidence not disclosed in discovery may be inadmissible because of unfair surprise). *But see id.* § 1849 (circumstantially relevant evidence may not be excluded because of surprise).

118. MODEL CODE OF EVIDENCE Rule 303 (1942) (would unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered).

to the 1953 Uniform Rules of Evidence.¹¹⁹ However, when modern rules of discovery provided an alternative way to alleviate the problem of trial by ambush, surprise fell into intellectual disfavor once again. The drafters of the Federal Rules of Evidence explicitly rejected surprise as one of the definitions of prejudice.¹²⁰

Nevertheless, the notion that surprise to the opponent may justify excluding evidence refuses to die. It is still mentioned in dictum as ground for exclusion in the common law decisions of some states.¹²¹ The most recent edition of McCormick's hornbook criticizes using surprise as a reason to exclude evidence, but also points out that there still are occasions where it is used, such as when the surprise results from a breach of discovery rules.¹²² If one party evades a discovery request and then tries to offer the withheld evidence at trial, courts are still likely to exclude it.¹²³

Most scholars, however, would argue that excluding surprise evidence, even for violation of discovery rules, is not justified.¹²⁴ Depriving the jury of information because of the proponent's trickery does not necessarily advance the trial's truth-seeking function. If the surprise evidence were false or misleading, granting a continuance would satisfy this objective just as well as exclusion, because it would give the opponent an opportunity to gather the necessary counter-evidence. If the surprise evidence were reliable, granting a continuance is preferable to exclusion because it maximizes the amount of reliable information on which the jury can base its verdict. Therefore, it is argued, not even surprise based on deliberate violation of discovery rules should be considered prejudicial.¹²⁵

This argument is based on a dubious premise. It envisions evidence law as driven by only a single dominant principle: The rules should facilitate accurate decisionmaking. This vision of evidence is inconsistent with the

119. UNIF. R. EVID. 45 (1953) (would unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered). Similarities between the Model Code and Uniform Rules are not surprising. The Model Code was explicitly used as the basis for the Uniform Rules, Dean Ladd and Professor McCormick served on both drafting committees, and the Uniform Rules Committee "had established the practice of submitting its drafts of material to Professor Morgan [who] . . . had been chairman of the original [ALI] committee." UNIF. R. EVID. at 4 (1953). See also Trautman, *supra* note 22, at 392 (listing surprise as one of the grounds for excluding relevant evidence).

120. FED. R. EVID. 403 advisory committee's note (rule does not include surprise as a ground for exclusion; granting continuance more appropriate remedy than exclusion). Interestingly, the Committee cited Wigmore for support, although he had conceded that surprise could be a ground for exclusion. See *supra* note 117.

121. *E.g.*, *Martin*, 472 So. 2d at 96 (summary of state prejudice rule continues to include surprise as ground for exclusion).

122. MCCORMICK ON EVIDENCE § 185 n.27 (E. Cleary ed.) (3d ed. 1984) [hereinafter cited as MCCORMICK ON EVIDENCE].

123. *E.g.*, *Murray v. State*, 479 N.E.2d 1283, 1287 (Ind. 1985) (court may prohibit witness from testifying whose name was withheld from witness list in bad faith).

124. *E.g.*, Dolan, *supra* note 29, at 243-44.

125. See FED. R. EVID. 403 advisory committee's note (continuance preferred remedy).

general theory of American litigation. That theory holds that trials are shaped by at least two competing principles: verdict accuracy and adversariness. The more fundamental characteristic of our trial system is in fact its adversarial structure, not its commitment to accurate results.¹²⁶ Even the most vocal critics of the "sporting" theory of justice concede that adversariness is the dominant feature of trials in the United States.¹²⁷ It is unlikely, therefore, that a description of the prejudice rule which fails to recognize the importance of adversariness will be very helpful.

Withholding evidence in violation of discovery rules, and then attempting to introduce it, is contrary to fundamental notions of fair play inherent in the adversary system. The principle that trials are adversarial does *not* mean that they are unstructured. Like boxing or baseball, trials are contests played according to elaborate rules. Those rules are designed to assure each litigant a fair chance before an impartial decision-maker, and the parties are expected to play by those rules.¹²⁸ Discovery is an important part of the modern rules designed to keep trials fair by controlling, at least to some extent, the natural tendency of lawyers to try to win at any cost.¹²⁹ Therefore, including at least this narrow use of surprise in the definition of prejudice is consistent with, not in conflict with, the discovery rules. Both derive from fundamental expectations about the adversary system.

Indeed, the centrality of adversariness suggests that surprise is too narrow a definition of this facet of prejudice. The discovery rules are not the only ones designed to curb overzealous parties. The rules of ethics and the constitutional constraints on police conduct serve a similar purpose.¹³⁰ It may be that evidence obtained in violation of any of these rules governing fair play should be considered prejudicial.

There is substantial case support for the proposition that prejudice can mean harm to the parties' interests in a fair adversarial process conducted according to the rules. Appellate courts suggest that judges' rulings should facilitate both sides' opportunities to present and respond to evidence, preserve the impartiality of the jury so that the opportunity to present a case is meaningful, and guard against either side being given an advantage

126. *E.g.*, S. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO LITIGATION 1-5 (1988); Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160-61, 1216-17 (1958).

127. *E.g.*, M. FRANKEL, *supra* note 43, at 11-12; Pound, *supra* note 111, at 404-07.

128. *E.g.*, Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713-17 (1983) (adversary system characterized by impartial decisionmaker, party presentation of evidence, and elaborate set of rules to keep contests fair and reduce judicial arbitrariness). *See also* McCORMICK ON EVIDENCE § 184 (evidence law premised on truth and party control over presentation).

129. *See* S. LANDSMAN, *supra* note 126, at 4-5.

130. *Id.*

or handicap apart from the natural strengths and weaknesses of its case.¹³¹ For example, courts often justify excluding evidence of the bad character of or prior misconduct by a party out of fear that it would give the proponent an unfair competitive advantage by placing a civil party,¹³² criminal defendant,¹³³ or the government¹³⁴ in a bad light. Other courts exclude highly emotional evidence on the same basis—if jurors become strongly aroused for or against a party, they may lose their impartiality, or discount a party's evidence a priori because it comes from a tainted source.¹³⁵ Such a situation is incompatible with the fundamental premise of the adversary system that each litigant will receive a fair hearing. Therefore, evidence that threatens to harm a party's adversarial interest should also be considered prejudicial.

D. Inefficiency: Wasting Time, Repetitive Evidence, and Delay

Prejudice also is equated with wasting time. Concerns about inefficiency and practical inconvenience are among the oldest reasons evidence is excluded as prejudicial. As early as the seventeenth century, judges debated whether some kinds of evidence, such as character evidence, might have too little relevance to be worth the risk of causing lengthy delay.¹³⁶ In the late nineteenth century, Thayer asserted that courts limited evidence to avoid delay and tediousness, if the evidence would "take too much time in the presenting of it, in view of other practicable ways of handling the case."¹³⁷ In this century, waste of time has been included as a definition of prejudice in all three major attempts to codify American evidence law,¹³⁸ and is

131. *E.g.*, *Bailleaux*, 685 F.2d at 1111 ("Unfair prejudice results from [evidence] which makes conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged.") (emphasis in original).

132. *E.g.*, *E.I. du Pont de Nemours v. Berkeley & Co.*, 620 F.2d 1247 (8th Cir. 1980) (prior attempts to gain unfair competitive advantages); *Baker Pool Co. v. Bennett*, 411 S.W.2d 335 (Ky. 1967) (prior shoddy business practices on unrelated transactions).

133. *E.g.*, *United States v. Margiotta*, 662 F.2d 131 (2d Cir. 1981) (prior scheme to extort contributions to state Republican party), *cert. denied*, 461 U.S. 913 (1983).

134. *E.g.*, *United States v. Milstead*, 671 F.2d 950 (5th Cir. 1982) (an informant's prior acts of cooperation with the government suggesting a pattern of use of informants).

135. *E.g.*, *Zamora*, 361 So. 2d at 783 (prejudice occurs when evidence arouses emotions which distract the jury from impartially considering the evidence).

136. *See* Trial of Henry Harrison, 12 Howell, St. Tr. 833, 864 (1692) (excluding evidence that would cause delay); Trial of Thomas White, alias Whitebread, 7 Howell, St. Tr. 311, 374 (1679) (similar).

137. J. THAYER, *supra* note 15, at 517-18. *See also* *Reeve v. Dennett*, 145 Mass. 23, 28, 11 N.E. 938, 943 (1887) (Holmes, J.) (excluding endlessly cumulative evidence for the sake of operating courts with some degree of efficiency was a "concession to the shortness of life"). *But see* 4 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 552-54 (1827) (delay is ground for exclusion because it prejudices the other party, efficiency for its own sake not a valid goal).

138. MODEL CODE OF EVIDENCE Rule 303 (1942) ("undue consumption of time"); UNIF. R. EVID. 403, 13 U.L.A. 151 (1953) ("undue consumption of time"); FED. R. EVID. 403 ("undue delay, waste of time, or needless presentation of cumulative evidence").

particularly emphasized in the Federal Rules of Evidence.¹³⁹ Contemporary writings routinely include the achievement of an economical and efficient process as one of the major goals of the trial system.¹⁴⁰ Inefficiency is therefore usually included among the legitimate meanings of prejudice.¹⁴¹

However, amid this chorus of opinion that inefficiency should be equated with prejudice are occasional discordant notes. One is sounded by Professor Gross, who disagrees that efficiency is a valid principle of trials at all. He argues that American litigation is inherently inefficient, and that this inefficiency furthers the legitimate goals of litigation—especially arriving at accurate verdicts—better than efficiency.¹⁴²

Another concern is voiced by Professor Leonard, who similarly rejects the notion that efficiency for its own sake is a legitimate goal of trial procedure. Leonard argues that efficiency only justifies excluding evidence when exclusion also would advance the trial's truth-seeking function. Delay and waste of time on trivial matters warrants exclusion because it can cause jurors to forget important evidence or become confused about the proper basis for decision, not just for the sake of efficiency.¹⁴³ Thus, to Professor Leonard, it would be superfluous to include inefficiency among the meanings of prejudice.

A third caution comes from Professor Dolan. He asserts that in reality, appellate courts rarely rely on efficiency concerns alone as justification for excluding evidence.¹⁴⁴ Dolan's observation appears accurate. Despite the modern emphasis on the need for efficient litigation,¹⁴⁵ few courts cite it as

139. See FED. R. EVID. 403 ("undue delay, waste of time, or needless presentation of cumulative evidence"); FED. R. EVID. 102 (these rules are to be construed to eliminate "expense and delay"); FED. R. EVID. 611(a) (court shall control presentation of evidence so as to avoid needless consumption of time).

140. E.g., 1 J. WEINSTEIN & M. BERGER, *supra* note 59, ¶ 403[06]; Dolan, *supra* note 29, at 226. See also Weinstein, *Some Difficulties in Devising Rules for Determining the Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 241 (1966) (among goals of trials are economizing resources, creating rules that are easy to apply, adding to system's efficiency).

141. See MCCORMICK ON EVIDENCE, *supra* note 122, § 185 (evidence excludable if proof and counter-proof will consume undue amount of time); J. MAGUIRE, *supra* note 22, at 205 (character evidence excluded in part to avoid wasting courts' time); Trautman, *supra* note 22, at 392 (evidence may be excluded if it will consume too much time or unnecessarily embarrass the personnel of the court). See also Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057 (1986) (hearsay excluded to avoid waste of time, high costs).

142. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 740, 748-56 (1987).

143. Leonard, *supra* note 97, at 12-13.

144. Dolan, *supra* note 29, at 242-43.

145. See *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (use of unitary capital jury, despite its proven tendency to result in conviction-prone juries, justified in interests of efficiency); *Morris v. Slappy*, 461 U.S. 1, 11, 14 (1983) (right to counsel limited in interests of efficient trial schedules and convenience of witnesses); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 865 (1982) (deportation of potential defense witness by prosecutor handling case justified in part because housing aliens imposes financial burden on government). *But cf.* *State v. King*, 12 Ohio App. 2d 38, 230 N.E.2d 652 (1967) (closing arguments may not be limited to accommodate crowded court schedule).

justification for excluding evidence. In a random sample of seventy-three common law prejudice rule cases from 1945 to 1987, not a single opinion explicitly recognized inefficiency, delay, or waste of time as a form of prejudice.¹⁴⁶ In a second random sample of eighty-four cases from jurisdictions that have enacted Rule 403, which explicitly sanctions exclusion of inefficient evidence, only three opinions cited inefficiency as justifying the exclusion of evidence.¹⁴⁷ Not a single federal case in the sample even discussed efficiency except to reprint Rule 403 verbatim.

Cases in which the exclusion of evidence on efficiency grounds is unambiguously approved are rare.¹⁴⁸ When courts do approve the exclusion of cumulative, time-wasting evidence, they usually also justify the exclusion on independent grounds—the evidence confuses the jury¹⁴⁹ or invades the privacy of a witness,¹⁵⁰ or completely lacks relevance.¹⁵¹ In a few opinions, courts explicitly state that the exclusion of evidence on efficiency grounds is disfavored, even if the evidence is cumulative and repetitive.¹⁵² Thus, some scholars have suggested that efficiency is, if not totally superfluous, at least an inferior principle compared to truth-seeking and adversarial fairness.¹⁵³

146. The sample was drawn by selecting the third annotation in the second column on every odd-numbered page under all headnotes in the Decennial Digests relating to relevancy, the prejudice rule, and specific applications of the rule in both civil and criminal cases. Those are the headnotes covering the equivalent of Federal Rules of Evidence 401-411. The choices of the third case, second column and odd page were random. These cases were then read, and those not involving the application of the prejudice rule rejected. The possibility of bias in the way the cases are coded and categorized by the West Publishing Company was reduced by comparing this sample to a smaller one drawn in similar fashion from the two dozen state evidence treatises available in the University of Iowa College of Law library, which produced no obvious inconsistencies.

147. The sample produced 21 federal cases decided after the effective date of Rule 403, and 63 appellate opinions from states that had a version of Rule 403 in effect. The sample was drawn from annotations in decennial digests in the manner described *supra* note 146, and verified by a parallel sample drawn from annotated editions of the Federal and Uniform Rules.

148. One such case is *Kim*, 64 Haw. at 606-07, 645 P.2d at 1337 (whether the trial would be unnecessarily delayed by the creation of a battle of experts). See also *Rittenhoffer v. Cutter*, 83 N.J.L. 613, 83 A. 873 (1912) (character evidence in civil case excluded because it would make the trial intolerably long and tedious and greatly increase the expense and delay of litigation).

149. *Murdock v. State*, 664 P.2d 589 (Alaska App. 1983) (cumulative evidence prejudicial if it also threatens to mislead jury); *Titworth*, 255 N.W.2d at 246 (prejudice "increased as more time and attention are diverted from the facts").

150. *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1983) (repetitive evidence excludable if it also invades privacy of witness).

151. *State v. Hults*, 9 Wash. App. 297, 303, 513 P.2d 89, 93 (1973).

152. *E.g.*, *Martin v. State*, 453 N.E.2d 1001 (Ind. 1983) (exclusion required only if wastes time and is *also* prejudicial for some other reason); *State v. Hutchinson*, 99 N.M. 616, 624-25, 661 P.2d 1315, 1323-24 (1983) (evidence not excludable just because repetitious).

153. *E.g.*, *Gold*, *supra* note 10, at 65 (administrative goals like efficiency are inferior to truth-seeking and adversarial fairness goals).

The paucity of case authority does not mean that time-wasting should be dropped from the definition of prejudice. To do so would be inconsistent with the general principle that efficiency is an important objective of the litigation system. That theory sees routine expression both by courts¹⁵⁴ and legal scholars.¹⁵⁵ For example, attorney participation in the voir dire of prospective jurors has been curtailed and even eliminated in the name of efficiency.¹⁵⁶ The number of witnesses and amount of time available for presenting evidence may be limited.¹⁵⁷ Even closing arguments, which have been held to be a constitutional right,¹⁵⁸ can be regulated for efficiency. Courts routinely approve the imposing of time limits as short as fifteen minutes.¹⁵⁹ It would be incongruous for evidence presentation to be the one aspect of the trial to be exempt from efficiency concerns.

Despite Gross's complaint that efficiency is a poor measure of the quality of a litigation system,¹⁶⁰ the weight of opinion is that efficiency deserves a place among the principles of evidence law protected by the prejudice rule.

There is a unity of theme that underlies the corpus of evidence law. The rules are intended to increase the likelihood that adjudicative outcomes comport with the values of administrative efficiency, fairness, and reliable factfinding at trial. . . . In different circumstances, each value may have a different priority, and one may sometimes be arrayed against the others. Speedy trials, for example, may promote cost-effective processing of cases but could work unfairness to certain litigants and enhance factfinding errors.¹⁶¹

154. See *Lockhart*, 476 U.S. at 181 (use of unitary capital jury, despite its proven tendency to be conviction-prone, justified in interests of efficiency); *Morris*, 461 U.S. at 11, 14 (right to counsel limited in interests of efficient trial schedules and convenience of witnesses); *Valenzuela-Bernal*, 458 U.S. at 865 (deportation of potential defense witness by prosecutor handling case justified in part because housing aliens imposes financial burden on government); *Engle v. Isaac*, 456 U.S. 107, 126-29, 134 (1982) (writ of habeas corpus entails significant costs, extends ordeal, undermines certainty and finality, wastes resources).

155. See *Arenella*, *supra* note 103, at 199-200 (need to allocate scarce dispute resolution resources efficiently); Pulaski, *Criminal Trials: "A Search for Truth" or Something Else?*, 16 CRM. L. BULL. 41, 41-42 (1980) (importance of finality); Weinstein, *supra* note 140, at 241 (economizing of resources).

156. See Tanford, *An Introduction to Trial Law*, 51 Mo. L. REV. 623, 628-29, 632 (1987).

157. E.g., *MCI Communications v. American Tel. & Tel.*, 708 F.2d 1081 (7th Cir.) (order limiting parties to 26 days for cases-in-chief upheld), *cert. denied*, 469 U.S. 891 (1983); *Maloney v. Wake Hosp. Sys.*, 45 N.C. App. 173, 262 S.E.2d 680 (1980) (court may limit cumulative witnesses).

158. *Herring v. New York*, 422 U.S. 853 (1975). This has always been the uniform opinion of the state courts as well. See Tanford, *Closing Argument Procedure*, 10 AM. J. TRIAL AD. 47, 50-65 (1986).

159. E.g., *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (upholding 15-minute time limit), *petition for review denied*, 278 Ark. 497, 646 S.W.2d 703 (1983). See Tanford, *supra* note 158, at 72-74.

160. Gross, *supra* note 142, at 740.

161. Loh, *supra* note 100, at 18. See also J. MAGUIRE, *supra* note 22, at 205 (rules of character evidence reflect desire to avoid wasting time on remote issue).

E. Undermining the Political Interests of the State

In 1889, Thayer proposed another definition of prejudice. Without stating whether he approved, Thayer suggested that judges routinely excluded relevant evidence in order to further important political interests of the state. He called evidence that undermined those interests "impolitic," and asserted that courts would limit evidence when they feared the political consequences of admitting it.¹⁶² Thayer neither explained in detail what he meant, nor gave any examples, nor cited any cases in support. He never followed up on this brief reference in more detail, and it apparently generated no scholarly debate. When the ALI advisory committee met fifty years later to draft the Model Rules of Evidence, they never even discussed the possibility of defining prejudice this way.¹⁶³ Neither the Model Rules nor its progeny, the Uniform and Federal Rules, included undermining the political interests of the state among their definitions of prejudice.

However, the idea of a political dimension to the prejudice rule has recently resurfaced. Professor Letwin suggests that political considerations often play a part in evidence decisions in criminal trials. If permitting certain kinds of evidence would threaten the state's interest in detecting and prosecuting criminal acts, courts will exclude it. He argues, for example, that evidence of the unchaste character of rape victims is excluded in order to encourage the reporting of crime and increase convictions, thereby facilitating the state's ability to prosecute its rape laws.¹⁶⁴ Professor Trautman has articulated a slightly different political use of the prejudice rule. He suggests that courts also exclude as prejudicial evidence that would embarrass the personnel of the court or upset members of the community.¹⁶⁵ Those observations are consistent with many comments on the criminal justice system generally. For example, Seidman describes the Burger Court's criminal procedure decisions as being mostly intended to further a crime control strategy, rather than the fair or accurate determination of guilt.¹⁶⁶ In all these descriptions, however, is a tone of criticism—the suggestion that trials should not be used to further the political interests of the state. Only Professor Nesson has even indirectly suggested that a political dimension to the rules of evidence might be a good thing, arguing that evidence law needs to facilitate public acceptance of verdicts.¹⁶⁷

162. Thayer, *supra* note 116, at 145.

163. See A.L.I., Code of Rules of Evidence 11-14 (Preliminary draft No. 10, 1940); A.L.I., Minutes of Evidence Conference held at Northeast Harbor, Maine, *supra* note 27, at 19-21.

164. Letwin, "Unchaste Character," *Ideology, and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35, 59 n.81 (1980).

165. Trautman, *supra* note 22, at 392.

166. See Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 437-38 (1980).

167. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1357-60, 1367-69 (1985).

A theory of the meaning of prejudice must include some kind of ideological dimension if it intends to account for all the cases. Appellate opinions justify excluding evidence under the prejudice rule for the good of society,¹⁶⁸ or to promote respect for the administration of justice.¹⁶⁹ The most common political justification is the need for crime control. Courts assert that the state has an interest in detecting and prosecuting crime, and preventing wrongdoers from escaping justice. Therefore, under the prejudice rule, judges may consider "whether admitting testimony . . . might have the effect of deterring the reporting of crimes."¹⁷⁰ On such grounds, courts have excluded evidence of the prior sexual history of rape victims,¹⁷¹ and tried to limit cross-examination of child witnesses.¹⁷²

Crime control ideology also appears to affect the way courts apply the prejudice rule. Some courts have held that defense evidence must demonstrate a higher standard of relevancy than incriminating evidence.¹⁷³ Others exclude defense evidence that would have been admitted if offered by the state, especially evidence of prior crimes to impeach one of the state's witnesses.¹⁷⁴ The ideology of punitive justice is occasionally asserted in civil cases as well.¹⁷⁵

168. See *Gould*, 134 La. at 128, 63 So. at 850 (excluding evidence because it would be bad for society if wrongdoers escaped justice).

169. See *Beachman*, 189 Mont. 400, 616 P.2d 337 (evidence that prosecutor smoked marijuana excluded as prejudicial); *Bradley v. Onstott*, 180 Ind. 687, 692, 103 N.E. 798, 799 (1914) ("the trial may be embarrassed"); *Garvik v. Burlington, C.R. & N. Ry.*, 124 Iowa 691, 694-95, 100 N.W. 498, 500 (1904) (civil case in which defendant's employee accused of rape, defense wanted him to show penis to jury to prove incapacitated; held too indecent, would disgrace administration of justice, subject courts to ridicule).

170. *Kim*, 64 Haw. at 606-07, 645 P.2d at 1337 (summarizing state rule).

171. *E.g.*, *Johnson v. State*, 146 Ga. App. 277, 280, 246 S.E.2d 363, 365 (1978). See *Tanford & Bocchino, Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 566-67 (1980).

172. *E.g.*, *People v. District Court*, 719 P.2d 722, 726 (Colo. 1986) (en banc) (can restrict embarrassing questions); *State v. Strable*, 313 N.W.2d 497, 499 (Iowa 1981) (trial court placed blackboard between child and defendant).

173. See *State v. Rodriguez*, 145 Ariz. 157, 167-68, 700 P.2d 855, 865 (1985) (expert testimony on unreliability of eyewitness identification excluded because not of "considerable" relevance; no particular prejudicial effect articulated); *Hinds v. State*, 469 N.E.2d 31, 38 (Ind. App. 1984) (defendant who tries to introduce evidence that another committed similar crimes to disprove identity must meet "stricter standard of relevance" than state must meet to offer evidence of the defendant's prior crimes to prove identity; difference is state's interest in prosecuting its criminal laws).

174. See *United States v. Solomon*, 686 F.2d 863, 872-73 (11th Cir. 1982) (approving exclusion of evidence of chief state's witness's convictions, although witness's credibility was crucial issue, then upholding conviction because the jury found witness credible and appeals court not supposed to second-guess); *Couture*, 146 Vt. at 276, 502 A.2d at 852 (refusing to allow defendant to impeach state's witness with evidence of a prior felony conviction); *Murdock*, 664 P.2d 589 (defense not allowed to prove victim's long criminal record).

175. *Gould*, 134 La. at 128, 63 So. at 850 (evidence of a civil defendant's good character excluded on the grounds that it interfered with the state's interest in making sure wrongdoers were punished).

Crime control is not the only facet of prevailing American ideology asserted to justify excluding relevant evidence. Other political reasons may weigh against permitting evidence to be introduced. *State v. Zuck*¹⁷⁶ makes a good example. Zuck was charged with robbery and kidnapping. The case against him was based almost entirely on the testimony of a man who claimed to be an accomplice, although there was little evidence to suggest the witness had been involved in the crime. The defense wanted to introduce evidence of the witness's past psychiatric history of paranoia and schizophrenia to explain why he might be falsely confessing. The court asserted two political reasons for excluding it. One was the state's interest in detecting and prosecuting crime. The court said that if people thought embarrassing evidence about themselves would be made public, potential witnesses might not come forward. The other was the importance of individual privacy. Allowing lawyers to pry into prior psychiatric records would invade the witness's privacy. In addition, the court implicitly feared that admitting the evidence could result in the defendant's acquittal. Almost any acquittal is politically damaging to the state because it has a delegitimizing effect. It frustrates the state's need to appear to be preserving order, undercuts the ability of the trial to serve its ritual function of defining the boundaries of acceptable behavior, and raises doubts about the ability of the police, prosecutor, and courts to protect the public from criminals. The court therefore excluded the evidence.

The scattered opinions that actually discuss the political expediency of admitting evidence are consistent with empirical research showing that judges' decisions are influenced by political ideology, whether or not there is any explicit acknowledgment of that fact in the written opinion.¹⁷⁷ For example, a study of criminal cases by Rowland, Songer and Carp compared decisions by judges appointed by President Reagan to those appointed by President Carter. They found that Reagan appointees to both the trial and appellate courts were significantly more likely to decide in favor of the government and against defendants.¹⁷⁸

A theory of evidence law that denies that trials serve political functions would be inconsistent with contemporary socio-legal theory. Trials are among the most visible legal events, and therefore will serve an important social symbolic function whether intended or not. Functionalists like Durkheim point out that trials help define the limits of acceptable social conduct, reinforcing community behavioral and moral norms. In this respect, the public perception about how trials are conducted is just as important as

176. 134 Ariz. 509, 513, 658 P.2d 162, 166 (1983).

177. See Champagne & Nagel, *supra* note 7 (summarizing research). See also R. NEELY, *supra* note 43, at 10 (Chief Justice Neely of the West Virginia Supreme Court writes that courts are not neutral; rather, judges let politics and emotion influence decisions.).

178. Rowland, Songer & Carp, *supra* note 46, at 195-98.

actual procedural fairness or verdict accuracy.¹⁷⁹ Judicial decisions about what evidence to admit or exclude thus will inevitably constitute symbolic statements about social values.

Judges are government officials, of course. As such, they will tend to assert the values and interests of the state when making discretionary decisions. Modern Weberian social theory views government not just as a servant of public interests,¹⁸⁰ but as an independent organization with its own interests and goals. Most members of an organization will naturally try to advance the autonomy and power of their organization when they make decisions.¹⁸¹ Thus, judges will tend to rule in ways that preserve the dignity and status of the courts. To the extent that judges see themselves as members of the government generally, they will be likely to rule in ways that reinforce the prevailing ideology of the state.

Explicit recognition of a political dimension to the rules of evidence seems preferable to pretending that it does not exist. A fourth definition of prejudice then becomes appropriate: Evidence is prejudicial if it undermines the trial's political function. Judges may exclude evidence that threatens facets of prevailing ideology, such as individual privacy and crime control.¹⁸² They may exclude evidence so that the trial's appearance coincides with public expectations that it will be conducted fairly, will respect the dignity of the individual,¹⁸³ and will punish those perceived to be wrongdoers.¹⁸⁴ This will facilitate public acceptance of trials as a good way for society to resolve disputes,¹⁸⁵ thereby legitimating the state's claim to a monopoly over coercive dispute resolution.

179. See Goodpaster, *supra* note 98, at 140-46. See also Booth v. Maryland, 482 U.S. 496, 508 (1987) (trials must be, and also appear to be, fair).

180. The State may sometimes disguise its interests by using the rhetoric of acting in the public interest. N. POULANTZAS, *POLITICAL POWER AND SOCIAL CLASSES* 50, 123, 130-34 (T. O'Hagan trans. 1975).

181. See Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in *BRINGING THE STATE BACK IN* 9-16 (P. Evans, D. Rueschemeyer & T. Skocpol eds. 1985); R. Stryker, *Limits on Technocratization of the Law: The Elimination of the NLRB's Division of Economic Research* 18-22 (University Microfilms 1986); Stryker, *Limits on Technocratization of Law: The Elimination of the National Labor Relations Board's Division of Economic Research*, 54 AM. SOC. REV. 341, 342-43 (1989).

182. See Scheingold & Gressett, *Policy, Politics, and the Criminal Courts*, 1987 AM. B. FOUND. RES. J. 461, 464-69 (The political culture of criminal trials reflects two competing and often incompatible ideological value systems: "crime control," which requires that trials help preserve social order, and "due process," which requires that trials help preserve individual rights.).

183. Arenella, *supra* note 103, at 200-08. See also Leonard, *supra* note 97, at 2-3 (also must satisfy expectations of individual litigants).

184. Nesson, *supra* note 167, at 1357-60, 1368-69. See also Weinstein, *supra* note 140, at 241 (trials must tranquilize disputants).

185. Loh, *supra* note 100, at 16.

III. THE PROCEDURE FOR LIMITING PREJUDICIAL EVIDENCE

Identifying evidence as prejudicial does not resolve whether evidence with prejudicial characteristics is admissible or inadmissible. Trial judges often will have to make a decision under conditions of uncertainty. Some evidence both will display characteristics defined as prejudicial and also will possess some degree of relevance. For example, in a criminal case involving eyewitness identification, the defense may offer the testimony of an expert psychologist to provide the "social framework"¹⁸⁶ necessary to give the jury a realistic understanding of the problems of eyewitness unreliability. Such testimony would be of some assistance to the jury in reaching an accurate assessment of the defendant's guilt. Its admission also would entail some risks. The jurors might take it out of context and base their decision on scientific generalities rather than a serious discussion of the evidence. The evidence injects an issue of the scientific validity of the underlying psychological research that could take considerable time to explore. Allowing this testimony threatens the legitimacy of the entire criminal justice system that depends heavily on eyewitnesses. Thus, both relevance and potential prejudice are present in uncertain degrees.

Without a workable procedural mechanism for resolving disputes over the admissibility of evidence with conflicting characteristics, trial judges' rulings are likely to vary. Some judges may look at the cup as half full and admit the evidence because it possesses some relevance and therefore furthers verdict accuracy.¹⁸⁷ Others may see the cup as half empty and exclude the evidence because of its potential prejudicial effect.¹⁸⁸ Some may allow their biases to dictate their decisions.¹⁸⁹ If this happens, the inevitability of wide variation in decisions likely to have significant impact on the verdict is reintroduced.¹⁹⁰

A. *Impartial Balancing*

The traditional model for deciding the admissibility of evidence that is both relevant and prejudicial is the weighted balancing test of Federal Rule

186. See Walker & Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987).

187. See, e.g., *State v. Buell*, 22 Ohio St. 3d 124, 129-30, 489 N.E.2d 795, 801, cert. denied, 479 U.S. 871 (1986); *State v. Chapple*, 135 Ariz. 281, 292-97, 660 P.2d 1208, 1218-24 (1983) (both approving use of eyewitness experts).

188. See, e.g., *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979) (danger of causing more confusion than it clears up; jurors delegating task to expert); *State v. Rodriguez*, 145 Ariz. 157, 167-68, 700 P.2d 855, 865-66 (1985) (factual confusion).

189. See *Rodriguez*, 145 Ariz. at 167-68, 700 P.2d at 865-66 (court's discussion of evidence, including its conclusion that eyewitness identifications in this case were "positive," indicates court believed defendant was probably guilty and was afraid expert evidence might create enough doubt for an acquittal; evidence excluded).

190. For discussion of the empirical evidence that expert testimony on eyewitness unreliability can affect verdicts, see Wells, Lindsay & Tousignant, *supra* note 38. See also Wells, *supra* note 38, at 61-62 (summarizing research).

of Evidence 403. If evidence possesses both characteristics, it is admissible unless the prejudicial effect substantially outweighs its probative value.

Wigmore was the first evidence scholar to articulate this balancing test as the most appropriate paradigm for limiting prejudicial evidence.¹⁹¹ Wigmore's views dominated the development of evidence law in the early twentieth century,¹⁹² profoundly influencing the way judges and scholars conceptualized it. It is no wonder, then, that his balancing test became the predominant theoretical explication of the mechanics of the prejudice rule. By 1940, when eminent scholars like Morgan, Maguire, Ladd and McCormick assembled to draft the ALI Model Code of Evidence, no one questioned that this was the most appropriate model of what the courts were (and should be) doing.¹⁹³

Disagreements about the balancing test have been minor, mostly concerning how the scales should be weighted. Professor Dolan suggests that too much prejudicial evidence gets before the jury, and proposes that the scale be rebalanced to favor exclusion.¹⁹⁴ Nixon's Justice Department argued in the other direction, that not enough prejudicial evidence was heard by the jury, and urged that judges be given discretion to admit even substantially prejudicial evidence.¹⁹⁵

Despite the consensus among evidence scholars, there are fundamental problems with the balancing paradigm. Wigmore developed it as part of an overall theory that derived all meanings of prejudice from the single principle that trials were supposed to reveal the truth.¹⁹⁶ To Wigmore, balancing made sense because similar qualities were on both sides of the scale: the tendency of evidence to facilitate truth seeking (relevancy) versus its tendency to obscure and suppress truth. The modern understanding, however, is that

191. J. WIGMORE, *supra* note 21, §§ 42, 1904. The balancing test first appeared several years earlier in 1 S. GREENLEAF, A TREATISE ON EVIDENCE, § 14a (J. Wigmore 16th ed. 1899), but that section was added by Wigmore; it did not appear in earlier editions of Greenleaf's treatise.

192. See A.L.I., Minutes of Evidence Conference held at New York City, Jan. 17-19, 1942, at 2-3 (mimeo on file in University of Iowa Law Library) (committee consisting of Professors Morgan, Maguire, Ladd and McCormick noting that every lawyer in the U.S. knows Wigmore's name and thinks of him as God when it comes to evidence).

193. MODEL CODE OF EVIDENCE Rule 303 (1942) (judge may exclude evidence if he finds that its probative value is outweighed by the risk that its admission will create prejudice). Discussions of the proposed rule can be found in A.L.I., Minutes of Evidence Conference held at Northeast Harbor, Maine, *supra* note 27, at 19-23; A.L.I., Minutes of Evidence Conference held at the Association of the Bar of the City of New York, Dec. 18-21, 1940, at 1-2 (mimeo on file at University of Iowa Law Library); A.L.I., Minutes of Evidence Conference held at New York City, *supra* note 192, at 19.

194. See Dolan, *supra* note 29, at 233.

195. See D. LOUISELL & C. MUELLER, *supra* note 30, § 124, at 5-6 (Nixon Justice Department argued for explicit statement in Federal Rules that judge could admit evidence even if prejudicial effect substantially outweighed probative value). See also *Dente v. Riddell*, 664 F.2d 1 (1st Cir. 1981) (interpreting Federal Rule 403's use of word "may" as permitting trial judge to ignore the written rule and make own decision whether to admit or exclude prejudicial evidence).

196. J. WIGMORE, *supra* note 21, § 1904.

prejudice comprises several quite distinct values—factual and legal accuracy, adversariness, efficiency, and numerous aspects of political ideology. That means that different qualities now must occupy the two sides of the scale.

Thomas Grey has criticized the use of a balancing metaphor in this kind of situation. He argues that the metaphor is inappropriate when there exists no procedure by which judges can measure the competing qualities or convert them to a common scale.¹⁹⁷ He gives an example of how impossible such a task is by quoting a statement from *Rowland v. Christian*,¹⁹⁸ that whether there is a duty in tort will be determined by balancing:

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, [] the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.¹⁹⁹

Analyzing how judges choose among incommensurable and conflicting values by invoking the metaphor of balancing masks the true political or existential nature of those decisions with the "pseudo-science" of legal formalism. This, Grey argues, is fundamentally inconsistent with contemporary hermeneutical jurisprudence.²⁰⁰

A second problem with the balancing paradigm is that it appears inconsistent with the way prejudice is handled at other stages of the trial, such as in closing argument. In closing argument, the parties may make any relevant argument they want to, *however illogical and remote the possibility*, as long as it is based on evidence. No argument is prohibited as long as it has some minimal connection to the facts and law, even if it also has substantial potential to confuse issues, waste time, or undermine the state's interests. No balancing takes place. If the argument has any legitimate purpose it is allowed. For example, suppose evidence has been introduced in a criminal case that the defendant's father had been convicted of a crime,²⁰¹ and the jury has been instructed that bias can affect credibility. The prosecuting attorney may argue that the defendant probably knew about her parents' criminal activities, probably sided with the parents and resented the state's arresting them, is now probably still angry at the state,

197. Grey, *supra* note 13, at 8 n.26, 50-52. Grey was referring to choices by appellate judges, but his argument is equally applicable to choices by trial judges.

198. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

199. Grey, *supra* note 13, at 52 n.183 (Grey misquotes *Rowland*, 69 Cal. 2d at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100; the missing clause at [] reads, "the moral blame attached to the defendant's conduct.").

200. Grey, *supra* note 13, at 50-52.

201. *See* Clark v. State, 264 Ind. 524, 324 N.E.2d 27 (1976), *cert. denied*, 439 U.S. 1050 (1978).

and therefore is unlikely to tell the truth. The defense attorney is assumed to be capable of pointing out how silly such an argument is, and the jury is trusted to ignore it. What the attorneys may not do in argument is try to divert the jurors *away* from the evidence. The parties may not try to induce jurors to rely on emotions instead of facts,²⁰² to disregard the law,²⁰³ or to forsake their impartiality.²⁰⁴ A general parallel exists between the rules of admissible evidence and the rules of permissible arguments;²⁰⁵ it is anomalous for the prejudice rule to be the one exception.

The balancing paradigm also does not describe the cases very well. Although most appellate opinions state the black-letter prejudice rule in terms of balancing,²⁰⁶ only about one-third give any indication that the court actually engaged in a good faith attempt to follow the balancing procedure.²⁰⁷ As often as not, courts appear to be paying mere lip service to the idea. Faced with a situation involving both relevancy and prejudice, courts announce the balancing metaphor, but then do not use it to determine the admissibility of potentially prejudicial evidence. Instead, they appear to

202. *E.g.*, Klein v. Herring, 347 So. 2d 681 (Fla. App. 1977) (asking jury to consider defendant's vast resources when setting damages). See Tanford, *supra* note 156, at 685-91.

203. *E.g.*, State v. Thomas, 307 Minn. 229, 239 N.W.2d 455 (1976). See Tanford, *supra* note 156, at 691-92.

204. *E.g.*, Stanley v. Ellegood, 382 S.W.2d 572 (Ky. 1964) (error to ask the jury to put themselves in plaintiff's position when deciding the amount of damages—the so-called “golden rule” argument).

205. *E.g.*, compare FED. R. EVID. 411 (evidence of liability insurance not admissible) with *Altenbaumer v. Lion Oil Co.*, 186 F.2d 35 (5th Cir. 1950) (error to raise insurance in argument), *cert. denied*, 341 U.S. 914 (1951); compare FED. R. EVID. 201 (court may take judicial notice of facts of common knowledge, no evidence required) with *State v. Williams*, 107 Ariz. 262, 485 P.2d 832 (1971) (attorney in argument may tell jury about growing crime problem; a matter of common knowledge; no evidence required).

206. A random sample of prejudice rule cases, drawn according to the procedure discussed in note 146, *supra*, produced the following results: Of 62 state court opinions from jurisdictions adopting Rule 403, 39 (63%) claimed to be using a balancing test, 15 (24%) said they used some other procedure, chiefly the presence or absence of relevance, and eight (13%) gave no indication what they were doing. Of 57 opinions from common law states, 31 (54%) stated that judges were supposed to balance, 18 (32%) described the procedure as something other than balancing, and 8 (14%) gave no indication.

207. In a sample of 139 prejudice rule cases selected at random from both common law and Federal Rule jurisdictions, only 50 (36%) showed any evidence of weighing. See note 146, *supra* for description of sampling method. See *United States v. Wyatt*, 611 F.2d 568 (5th Cir. 1980) (in counterfeiting trial, government offered currency into evidence that had been stamped with word “counterfeit;” danger of confusion of issues and misleading, but relevance outweighs prejudice); *Weiby v. Wentz*, 264 N.W.2d 624, 627-28 (Minn. Ct. App. 1978) (medical misdiagnosis case; evidence of subsequent symptoms relevant to show that plaintiff was seriously ill was inadmissible because it might mislead jury and confuse them as to applicable standard of care by causing jury to assume symptoms probably discernible at time of misdiagnosis); *State v. Reingold*, 49 Or. App. 781, 783-85, 620 P.2d 964, 965-66 (1980) (prosecution for receiving stolen goods; prosecutor brought thief into court in shackles to be identified; probative value low because thief did not testify, danger of misdecision high because jurors would assume anyone could tell person was a thief), *petition for review denied*, 52 Or. App. 117, 631 P.2d 340 (1981).

use a minimal relevancy test similar to the minimal-connection-to-evidence test used to regulate closing arguments. If offered evidence has probative value, however slight, it will be admissible regardless of prejudicial effect.²⁰⁸ Evidence is only excluded if it lacks any relevancy and is offered *solely* to cause prejudice.²⁰⁹

A good example is *People v. Alsteens*,²¹⁰ a murder case in which the prosecution offered eight photographs of the victim to prove the position of the body. The probative value of the photographs was slight, since they were offered only to acquaint the jury with the uncontested circumstances surrounding the scene of the crime. The prejudicial effect was significant enough for the appeals court to refer to the use of multiple photographs as unnecessary and to "disapprove of their admission." Although the court stated that the prejudice rule required balancing, it determined that the photographs were properly admissible by looking only at whether they had probative value. The court held that they were "'instructive to show material facts' [and not] merely 'calculated to excite . . . prejudice.'"²¹¹

In some opinions, courts appear to forsake even the pretext of balancing in favor of the minimal relevancy test. Several courts have done so explicitly. The North Carolina Supreme Court stated that "[r]elevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy," but only "if the *only* effect of the evidence is to excite prejudicial sympathy."²¹² The Illinois Supreme Court has said "[e]vidence which is otherwise admissible . . . is not rendered inadmissible by its potentially prejudicial impact."²¹³ Similar statements appear in cases from Louisiana,²¹⁴ Arizona,²¹⁵ Georgia,²¹⁶ Indiana,²¹⁷ and New

208. See Shaffer, *Judges, Repulsive Evidence and the Ability to Respond*, 43 NOTRE DAME LAW. 503, 504-06 (1968) (report of Indiana Judicial Conference discussion among judges on controlling exhibits as generally agreeing that if relevant and accurate, exhibits should be admitted regardless of their prejudicial effect).

209. *E.g.*, *United States v. Calandrella*, 605 F.2d 236, 254 (6th Cir.) (fraud case; witness testified about prior unrelated conduct that showed not fraud but bad judgment; minimal relevance to show his "business acumen"; no prejudice under 403 because of slight probative value; admissible), *cert. denied*, 444 U.S. 991 (1979).

210. 49 Mich. App. 467, 212 N.W.2d 243 (1973).

211. *Id.* at 477-78, 212 N.W.2d at 248 (quoting *People v. Eddington*, 387 Mich. App. 551, 562, 198 N.W.2d 297, 301 (1972)). See also *United States v. Henry*, 727 F.2d 1373 (5th Cir. 1984) (evidence of prior illegal acts relevant background, because not offered *solely* to impugn the defendant's character).

212. *State v. Swift*, 290 N.C. 383, 396, 226 S.E.2d 652, 662 (1976).

213. *People v. Foster*, 76 Ill. 2d 365, 374, 392 N.E.2d 6, 9 (1979).

214. *State v. Clift*, 339 So. 2d 755, 760 (La. 1976) ("If evidence is relevant . . . the fact that it is prejudicial does not bar its admission.").

215. *State v. Snodgrass*, 121 Ariz. 409, 412, 590 P.2d 948, 951 (1979) (if photographs have any relevance they are admissible despite tendency to arouse prejudice).

216. *Cagle Poultry & Egg Co. v. Busick*, 110 Ga. App. 551, 552, 139 S.E.2d 461, 463 (1964) (relevant photographs are not subject to objection as prejudicial).

217. *City of Terre Haute v. Deckard*, 243 Ind. 289, 295, 183 N.E.2d 815, 818 (1962) (material evidence not inadmissible because it is prejudicial).

York.²¹⁸ In Oklahoma, the legislature omitted the words "although relevant" from its version of Rule 403,²¹⁹ thereby deleting any language that could be interpreted as requiring balancing.

Other courts have implicitly abandoned the balancing procedure. Commonly, when an appellate court reviews a claim that unduly prejudicial evidence was admitted, they examine the evidence only for probative value. If they find it, the inquiry stops, as if no further analysis were required. For example, *People v. Bailey*²²⁰ is an armed robbery case in which the evidence against Bailey was weak. Only the co-defendant had been identified. Bailey objected to testimony that he frequently associated with the co-defendant on prejudice grounds. The court carefully analyzed relevancy and determined that because friends were more likely to be accomplices than strangers, the evidence had a small degree of probative value. Then it stopped. The court held the evidence properly admissible without even discussing prejudicial effect. Other courts similarly have ended their review without discussing prejudicial effect after finding minimal relevancy to testimony about a homicide victim's young children,²²¹ evidence of a corporate defendant's wealth,²²² a wedding photograph of a murder victim,²²³ and an "emotionally gripping" record of a dying declaration.²²⁴

Most situations in which the courts engage only in cursory review for minimal relevancy, and uphold the admissibility of evidence without balancing, involve inculpatory evidence admitted against criminal defendants. Even if the trial judge admitted highly prejudicial evidence against a defendant, the appellate courts tend to approve of that decision.²²⁵ For

218. *Leotta v. Plessinger*, 8 N.Y.2d 449, 461-62, 171 N.E.2d 454, 460, 209 N.Y.S.2d 304, 312-13 (1960) (evidence if relevant "cannot be excluded on the ground that it might be prejudicial").

219. OKLA. STAT. ANN. tit. 12, § 2403 (West 1980). See also *Roberts v. State*, 561 P.2d 511, 518 (Okla. Crim. App. 1977) (evidence admissible if it has some relevance, excludable only if offered solely to prejudice jury).

220. 36 Mich. App. 272, 277-78, 193 N.W.2d 405, 407 (1972). See also *United States v. Ricardo*, 619 F.2d 1124, 1131 (5th Cir.) (once court determined evidence of prior criminality to be relevant, inquiry stopped; prejudice not discussed), cert. denied, 444 U.S. 1063 (1980); *McCarson v. Foreman*, 102 N.M. 151, 692 P.2d 537 (N.M. Ct. App. 1984) (court finds truck driver's prior involvement with cocaine trafficking has some relevance on issue of negligent entrustment; does not discuss potential prejudicial effect).

221. *People v. Free*, 94 Ill. 2d 378, 413-15, 447 N.E.2d 218, 235-36, cert. denied, 464 U.S. 865 (1983).

222. *Love v. Wolf*, 226 Cal. App. 2d 378, 387-89, 35 Cal. Rptr. 183, 188-89 (1964).

223. *State v. Hutchinson*, 99 N.M. 616, 624-25, 661 P.2d 1315, 1323-24 (1983).

224. *State v. Larson*, 281 N.W.2d 481 (Minn.), cert. denied, 444 U.S. 973 (1979).

225. See *Perry v. State*, 158 Ga. App. 349, 352-53, 280 S.E.2d 390, 392-93 (1981) (evidence defendant seen masturbating relevant to show intent in rape case); *State v. Chavis*, 617 S.W.2d 903 (Tenn. Crim. App. 1980) (evidence defendant was in the area where the rape occurred 24 hours earlier relevant to show identity in burglary/rape case); *Hammen v. State*, 87 Wis. 2d 791, 797-99, 275 N.W.2d 709, 713 (1979) (evidence defendant involved in drug dealing relevant to show his state of mind for assaulting a woman); *State v. Ledet*, 337 So. 2d 1126, 1128 (La. 1976) (evidence of gun not used in robbery and not found in defendant's possession relevant because presence of two guns makes use of gun in robbery more likely).

example, in *Dresser v. State*,²²⁶ the Indiana Supreme Court determined that gruesome photographs were unnecessary, repetitive, inflammatory, had virtually no relevance, and “failed the balancing test,” yet approved their admission rather than reverse a conviction.²²⁷ Empirical data demonstrate that these are not isolated instances of bad decisionmaking, but that appellate courts systematically rule against criminal defendants when making prejudice rule decisions.²²⁸ Some interpret this as evidence that judges do not balance in good faith, but allow a bias against criminal defendants to control the outcome.²²⁹ Indeed, such a conclusion is virtually inescapable if one starts with the assumption that judges are supposed to determine admissibility by balancing relevancy against prejudicial effect.

However, what if the assumption of balancing is wrong? The failure of the balancing test to account for many of the cases, its inconsistency with the procedure used to limit prejudicial arguments, and Grey's criticism, suggest that the balancing metaphor is inappropriate. There may be an alternative procedural paradigm that better describes the cases, is more compatible with general trial procedures, and would be of more assistance to judges trying to reach consistent, principled decisions. One such alternative model is that when evidence has both relevancy and prejudicial effect, thereby advancing some of the trial's functions and undermining others, its admissibility is determined by political choice.

B. Political Choice

The political-choice paradigm begins with a premise: When a legal decision involves conflicting fundamental values that cannot all be respected, it is the province of the appellate courts, not the trial judges, to chose which values to favor over others. This decision is a political choice. When evidence has both probative value and prejudicial effect, the decision to admit or

226. 454 N.E.2d 406 (Ind. 1983).

227. *Id.* at 409.

228. In a random sample of opinions reviewing the admissibility of prejudicial evidence, appellate courts reversed trial judges in favor of criminal defendants only 9% of the time (9/96). For comparison purposes, the same sample produced reversal rates of 60% (3/5) in favor of the state, and 38% (10/26) in favor of civil parties. The sample included both common law and Rule 403 cases covering a twenty-year period (1967-86), drawn according to criteria discussed *supra* in note 146.

229. *E.g.*, Graham, *supra* note 44, at 578. See also Baer & Mills, *Discretion and Disparity on the Criminal Side of the Supreme Court in New York County*, 31 N.Y.L. SCH. L. REV. 691, 698-701 (1987); Zinn & Stewart, *Ideology in the Courtroom*, 21 NEW ENG. L. REV. 711, 717 (1986) (both suggesting that judicial bias may be class-based, not directed against all defendants, only lower social class defendants). The idea of class bias is reinforced by an interesting piece of anecdotal evidence. In one group of 31 Supreme Court cases concerning evidence and trial procedure between 1980 and 1986, Justice Rehnquist voted against the defendant in all but one case. The one case in which he voted in the defendant's favor was *United States v. Gillock*, 445 U.S. 360 (1980), in which the defendant was a state legislator.

exclude that evidence presents such a conflict. Admitting the evidence usually will advance the trial's goal of achieving accurate verdicts based on complete information, but may upset the trial's adversarial balance, threaten its efficiency, or undermine its political symbolic role. Excluding such evidence may preserve a fair adversarial balance, promote efficiency, and help the trial fulfill its ritual function, but at the cost of reducing the jury's ability to reach an accurate, fully informed verdict. Therefore, the decision to admit or exclude evidence necessarily entails making a political choice to favor some values over others. This approach avoids the misleading implication that there is a politically neutral basis, namely balancing, for deciding which set of values takes precedence. It reveals rather than masks the political nature of the admissibility decision, and is therefore likely ultimately to reduce the wide variation now found in the cases.

Consider the use of gruesome photographs. Employing the traditional balancing metaphor, one would expect to find three groups of cases. In some cases, the photographs would have particular probative value on an important issue and would be admissible. In other cases, the photographs would be offered primarily to evoke emotional reactions in jurors, would have only tangential relevancy, and would be inadmissible. In a third group, the evidence would be about equally balanced between admissibility and exclusion, with some cases being decided each way.

No such pattern exists. Instead, the cases uniformly hold that gruesome photographs are admissible, even when the level of probative value is so small as to be practically nonexistent. In Texas, for example, the appellate courts did not reverse a single decision to admit gruesome photographs over an eleven year period.²³⁰ A survey of Indiana cases turned up no instances in twenty-five years in which appellate courts reversed a decision to admit gruesome photographs.²³¹

These courts appear not to be balancing, but to have made a political choice that gruesome photographs are admissible. Admitting the photographs furthers all the primary functions of the trial that the prejudice rule is supposed to protect. A gruesome crime scene photograph provides relevant information about what happened and provides no immaterial information, so it furthers the goal of informed, accurate decisionmaking.²³² Party control over the selection of evidence and allowing the prosecution to prove its case

230. *Reimer v. State*, 657 S.W.2d 894, 897 (Tex. Ct. App. 1983) (surveying Texas cases).

231. J. TANFORD & R. QUINLAN, *supra* note 80, § 48.5.

232. *See State v. Montes*, 136 Ariz. 491, 499, 667 P.2d 191, 199 (1983) (photos relevant to show how crime was committed, to corroborate witnesses' testimony, to aid jury in understanding testimony, to show location of wounds, and to establish cause of death); *King v. State*, 667 P.2d 474, 477 (Okla. Crim. App. 1983) (photo showing bloody crime scene was more accurate than police officer's sketch).

“to the hilt” are both consistent with adversarial procedures.²³³ The photograph is efficient because it is easier and faster to use a photograph than to have witnesses describe the scene in words.²³⁴ It furthers the state’s interests by increasing the likelihood of conviction, demonstrating symbolically that the state is concerned with individual victims, and avoiding the unpopular perception that relevant evidence is being excluded by a legal system soft on crime.²³⁵ On appeal, the efficiency and political functions are strengthened. Ordering a new trial is always inefficient. Ruling that the trial judge made a serious mistake undermines the myth of judicial competence. Reversing convictions arouses public anger at the courts. Against all these reasons to approve the admissibility of the gruesome photograph is usually only a single argument that it may arouse the anger of the jury and thus upset the fair balance of the adversary system.²³⁶ The political decision is easy, which explains why almost all cases reach the same result.

Or consider evidence of uncharged misconduct offered to prove motive, intent, common plan or absence of mistake.²³⁷ The tendency of jurors to misuse such evidence as an indication of the defendant’s criminal propensity is obvious. Therefore, the balancing paradigm again leads one to expect to find such evidence admitted if probative of a contested issue, and excluded when only remotely relevant.

However, no such pattern is found in these cases either. Evidence of uncharged misconduct is routinely held admissible when offered against a defendant, even when the probative value is very low.²³⁸ For example, in

233. See *State v. Crenshaw*, 98 Wash. 2d 789, 807, 659 P.2d 488, 498 (1983) (brutal crime need not be explained to jury in lily-white manner, state may prove case to the hilt). See also *State v. McCall*, 139 Ariz. 147, 158, 677 P.2d 920, 931 (1983) (state not required to prove case in sterile manner), *cert. denied*, 467 U.S. 1220 (1984).

234. See *State v. Maurer*, 15 Ohio St. 3d 239, 265-66, 473 N.E.2d 768, 792 (1984) (photos provided independent evidence; jury would be better able to conclude whether killing was deliberate by seeing wounds), *cert. denied*, 472 U.S. 1012 (1985); *Commonwealth v. Chalifoux*, 362 Mass. 811, 817, 291 N.E.2d 635, 639 (1973) (although point could have been made by oral testimony, it was more effectively demonstrated through photographs).

235. Cf. *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1983) (expressing concern for witness’s right of privacy). See also *Free*, 94 Ill. 2d at 415, 447 N.E.2d at 236 (evidence of victim’s family, including photograph, admissible because common sense tells us that murder victims do not live in vacuum and they leave behind family members).

236. See *King*, 667 P.2d at 476 (only objection made was that photo inflamed passions of jury against defendant); *Snodgrass*, 121 Ariz. at 412, 590 P.2d at 951 (only prejudice described was arousing the jury against the defendant).

237. See FED. R. EVID. 404(b).

238. See *Perry*, 158 Ga. App. at 352-53, 280 S.E.2d at 392-93 (defendant charged with rape; evidence he was seen masturbating said to have some relevance to prove identity of rapist whom victim had already positively identified, therefore admissible); *Chavis*, 617 S.W.2d at 906-07 (defendant charged with rape; evidence he was snooping around a nearby apartment 24 hours earlier found relevant to show he was in the area, therefore admissible); *Hammen*, 87 Wis. 2d at 797-800, 275 N.W.2d at 713 (defendant charged with assault; evidence that he was involved in drug deal before the assault had some probative value to show state of mind, therefore admissible).

State v. Ledet,²³⁹ a defendant was charged with knowingly driving the getaway car in a robbery. The state introduced a gun *not* used in the robbery that had been found on the driver's side of the car. The court found it had some slight relevance, because the more guns that were present, the more likely one of them would be used in the robbery. The court also found the gun slightly relevant to show the defendant's knowledge that a robbery would take place. He must have suspected something because he chose to come armed. The gun was found admissible without balancing.²⁴⁰

The refusal to balance is not just deference to the trial judge's discretion. On those rare occasions when the state is able to appeal from a trial judge's decision to exclude uncharged misconduct evidence, no such deference is shown. The appeals courts usually reverse such pro-defense rulings and order evidence of the defendant's prior misconduct admitted.²⁴¹ Similarly, when the defendant tries to introduce evidence of someone else's misconduct, it is routinely excluded even when clearly relevant.²⁴²

The near uniformity of decisions allowing evidence of the defendant's prior acts of misconduct can be explained because the situation again presents a relatively easy political choice. Such evidence provides material information about what happened and judges believe a limiting instruction reduces the chance it will be misused; therefore it furthers the goal of informed, accurate, decisionmaking.²⁴³ Allowing the prosecution to control its selection of evidence and to strike hard blows is consistent with adversary

239. 337 So. 2d 1126 (La. 1976).

240. *Id.* Of course, the gun was not proved to be owned by the defendant, nor was the defendant shown to be aware of its presence in the car. A co-defendant who admitted being the robber and who corroborated Ledet's denial of knowledge that a robbery was occurring was sentenced to five years. Ledet, who was only alleged to have driven the getaway car, got 20 years at hard labor without parole.

241. *E.g.*, *United States v. Booth*, 669 F.2d 1231 (9th Cir. 1981) (reversing pretrial order in armed robbery case excluding from evidence a list of gun stores and ammunition because defendant could not be connected to it); *State v. White*, 71 Or. App. 299, 692 P.2d 167 (1984) (reversing pretrial order in arson case excluding evidence that defendant filed a post-fire fraudulent insurance claim).

242. *E.g.*, *State v. Beachman*, 189 Mont. 400, 404-05, 616 P.2d 337, 339-40 (1980) (evidence that defendant smoked marijuana with prosecutor, offered as explanation why he fled jurisdiction, conceded to be relevant by appeals court, but held inadmissible). *See also* *United States v. Milstead*, 671 F.2d 950 (5th Cir. 1982) (defense evidence of pattern of plea bargains by government informer-witness to show bias was relevant, but excluded); *Murdock v. State*, 664 P.2d 589 (Alaska Ct. App. 1983) (defense evidence of witness's pattern of arrests and lenient treatment by state relevant to show bias, but excluded).

243. *E.g.*, *State v. Rosenfeld*, 93 Wis. 2d 325, 331-32, 286 N.W.2d 596, 599 (1980) (evidence of possibly related act of bribery relevant and admitted pursuant to limiting instruction); *Sanville v. State*, 593 P.2d 1340, 1345 (Wyo. 1979) (evidence of other bad checks written on same closed account admissible to show intent, plan, and common scheme; cautionary instruction reduced prejudice). *But see* *Wissler & Saks, On the Inefficiency of Limiting Instructions*, 9 LAW & HUMAN BEHAVIOR 37, 41-44 (1985) (experiments demonstrate that limiting instructions do not work).

procedures.²⁴⁴ Once the case gets to the appellate level, it is more efficient to affirm than to order a new trial. Such evidence increases the chance of a conviction, so it furthers the state's interest in legitimating its criminal justice system. It coincides with the popular perception about what kinds of evidence are relevant, so it avoids the appearance that relevant evidence is being excluded by a legal system soft on crime.²⁴⁵ Against all these reasons to approve the admissibility of uncharged misconduct evidence is the argument that it will prejudice the jury against the defendant,²⁴⁶ the weak argument that admitting the evidence wastes time when it is cumulative,²⁴⁷ and the unpalatable argument that jurors might ignore their limiting instruction and misuse the evidence.²⁴⁸

In some situations, however, the choices will be difficult. For example, suppose the defense in a criminal case calls a psychologist as an expert witness on the unreliability of eyewitness identifications. Arguments in favor of admissibility include its relevancy and its compatibility with the adversarial process because of the ready availability of similar experts to the other side. Arguments against admissibility include the inefficiency of allowing a battle of experts, the possibility that jurors will overvalue the expert's testimony, and the fact that it undermines the legitimacy of the criminal justice system that is based on the premise that eyewitnesses are reliable. The choice is difficult, so courts have reached varying conclusions.²⁴⁹

244. *E.g.*, *State v. Gagne*, 343 A.2d 186 (Me. 1975) (defendant charged with robbery, state called three witnesses to prove he had participated in attempted rape of witness at unrelated time, state entitled to rebut because defendant brought it up first); *Clift*, 339 So. 2d at 760 (defendant charged with possession of heroin; state proved defendant arrested for marijuana which led eventually to heroin charge; state entitled to present to the jury the alleged criminal act in its entirety).

245. *E.g.*, *State v. White*, 71 Or. App. 299, 302, 692 P.2d 167, 169 (1984) (evidence of misconduct necessary because state's case otherwise is weak).

246. *E.g.*, *People v. Grisham*, 125 Mich. App. 280, 285-86, 335 N.W.2d 680, 683 (1983) (thereby preventing the objective determination of guilt necessary to fair adversarial system); *State v. Eaton*, 31 Or. App. 653, 655-57, 571 P.2d 173, 174-75 (1977) (carrying false driver's license not likely to blacken defendant's character in minds of jury).

247. *See State v. Kumpula*, 355 N.W.2d 697, 703 (Minn. 1984) (photo of defendant in prison yard offered to prove he used to have moustache held not prejudicial error despite fact that it was cumulative of other evidence).

248. The evidence that jurors disregard limiting instructions is strong. *See, e.g.*, *Wissler & Saks*, *supra* note 243, at 41-44 (evidence of defendant's prior criminal record admitted for limited purpose of impeachment found to have no effect on perception of credibility but did affect conviction rate). However, the instruction satisfies the appearance of justice, and it is difficult for a court to take the position that jurors cannot follow instructions because that threatens the legitimacy of the entire trial system based on such instructions. *See Rosenfeld*, 93 Wis. 2d at 331-32, 286 N.W.2d at 599 (holding that limiting instruction "eliminated the danger of possible prejudice"); *Gagne*, 343 A.2d at 195 (appeals court convinced that trial judge's "unusually forceful [limiting] instruction must have deeply impressed the jury").

249. *See Foshier*, 590 F.2d at 383 (judge focused on concern that evidence would be overvalued and therefore lead to an inaccurate verdict; testimony excluded); *Rodriguez*, 145 Ariz. at 167-68, 700 P.2d at 865-66 (court focused on fact that testimony undermined the

Another difficult choice is whether to admit or exclude relevant evidence of a civil party's insurance or other financial resources. For example, suppose evidence is elicited that the person who took the plaintiff's statement was an investigator for the defendant's insurance company. Such evidence is relevant to show bias and to explain the complete circumstances of the taking of the statement, although it discloses the defendant's insured status to the jury.²⁵⁰ Arguments in favor of admissibility include its relevancy, the inefficiency of ordering a new trial, the state's interest in spreading the risk of loss through insurance, and the fact that impeachment is basic to the adversarial trial process. Arguments against admissibility include the possibilities of inaccurate verdicts if jurors award damages on the basis of insurance rather than liability, of upsetting the adversarial balance if it causes jurors to favor the plaintiff, and of undermining the ideology of equal justice regardless of wealth. Again, courts reach quite different decisions depending on which values they decide are the more important.²⁵¹

As these examples demonstrate, viewing the decision to admit evidence that is simultaneously relevant and prejudicial as a political choice does not necessarily lead to a reduction in the variability of decisions from jurisdiction to jurisdiction. Each jurisdiction is free to make its own political choices. It might, however, reduce the variability of decisions *within* particular jurisdictions.²⁵² If the appellate courts would recognize the necessity to make explicit political choices when evidence is both relevant and prejudicial, it would be an advantage compared to the balancing test.

The balancing metaphor allows appellate courts to avoid making policy decisions about the admissibility of controversial evidence, such as expert testimony on the unreliability of eyewitnesses,²⁵³ prosthetic devices,²⁵⁴ and

reliability of witness testimony; excluded it); *Chapple*, 135 Ariz. at 290-97, 660 P.2d at 1218-24 (court focused on relevancy and how evidence would affect verdict accuracy, found it admissible).

250. See FED. R. EVID. 411 (evidence of insurance not required to be excluded if offered to show bias or other relevant purpose).

251. See *Pagel v. Yates*, 128 Ill. App. 3d 897, 902, 471 N.E.2d 946, 951 (1984) (focused on tendency of evidence to cause jury to favor plaintiff and to produce inaccurate verdicts, held evidence should have been excluded); *Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 448, 589 P.2d 1037, 1039 (1979) (focuses on impeachment as being fundamental to fair adversarial procedure, admissible); *Burnett v. Caho*, 7 Ill. App. 3d 266, 273, 285 N.E.2d 619, 625 (1972) (focuses on adversarial process and culpability of plaintiff, admissible); *Leotta*, 8 N.Y.2d at 461-62, 171 N.E.2d at 460, 209 N.S.Y.2d at 312-13 (focuses on advancing factually accurate verdicts, admissible); *Rutherford v. Gilchrist*, 218 Iowa 1169, 1171-75, 255 N.W. 517-19 (1934) (focused on tendency to divert jury from proper issues, excluded).

252. Compare *Rodriguez*, 145 Ariz. at 167-68, 700 P.2d at 865-66 (expert testimony on unreliability of eyewitnesses excluded) with *Chapple*, 135 Ariz. at 290-97, 660 P.2d at 1218-24 (expert testimony on unreliability of eyewitnesses admissible).

253. See *Fosher*, 590 F.2d at 383 (avoids issue by saying balancing is in discretion of trial judge).

254. *Cope v. Seigny*, 289 A.2d 682, 689 (Me. 1972) (avoids issue by saying that balancing is for trial court).

statistics concerning child abuse.²⁵⁵ As long as such evidence possesses both probative value and prejudicial effect in uncertain amounts, then any decision the trial court makes can be justified as the result of balancing. The appeals court need never deal with the important policy matters underlying the issue. By not establishing standards, the appeals courts deprive trial judges of guidance. Without guidance and precedent, consistent predictable rulings become virtually impossible.

The political-choice model also is consistent with general legal theory and with other trial procedures. It reflects the usual hierarchy of the legal system, in which the appellate courts make decisions based on policy considerations which the trial courts are supposed to apply.²⁵⁶ It also parallels the procedure used to resolve disputes about whether to limit other trial practices claimed to cause prejudice. For example, most appellate courts do not avoid the conflict over whether to limit partisan participation in the voir dire of prospective jurors. They do not allow each trial judge to reach her own balance, but resolve the matter by making a political choice between efficiency and adversariness.²⁵⁷ Most appellate courts do not avoid the conflict over whether to allow the parties to inform the jury during opening statements of the inflated claims made in the pleadings. They do not ask each trial judge to engage in balancing, but make the choice themselves between adversarial freedom and the danger of confusing the jury.²⁵⁸ Neither do most appellate courts leave trial judges to decide for themselves whether to permit a prosecutor in closing arguments to comment on the defendant's failure to produce evidence of his innocence. Again, they provide guidance to the lower courts.²⁵⁹ In each instance, the appellate courts chose among conflicting political values.

CONCLUSION

One of the primary vehicles for separating admissible from excludable evidence is the prejudice rule. In its commonest form, it allocates this winnowing task to the trial judge, who is supposed to balance the relevance

255. *State v. Petrich*, 101 Wash. 2d 566, 575-76, 683 P.2d 173, 180 (1984) (issue of scientific reliability avoided by deferring to trial court's balancing).

256. *See, e.g., R. DWORRN, supra* note 3, at 31-39.

257. *Compare Commonwealth v. Estremera*, 383 Mass. 382, 389-91, 419 N.E.2d 835, 840-41 (1981) (defendant has no right to ask questions) *with People v. Williams*, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981) (ruling that defendant has a right to ask voir dire questions).

258. *Compare Haynes v. Monroe Plumbing & Heating Co.*, 48 Mich. App. 707, 211 N.W.2d 88 (1973) (permitting pleadings to be read) *with Zindrick v. Drake*, 75 Ill. App. 3d 702, 393 N.E.2d 1277 (1979) (may not refer to *ad damnum* clause).

259. *Compare United States v. Schultz*, 698 F.2d 365 (8th Cir. 1983) (failure to call alibi witness may be commented on) *with State v. Purvis*, 525 S.W.2d 590 (Mo. Ct. App. 1975) (comment prohibited).

of evidence against vaguely defined prejudicial effects. Unfortunately, trial judges reach quite different decisions whether to admit such evidence as prior misconduct by a criminal defendant, the financial resources of civil litigants, the effect of a crime on the victim's family, and expert testimony on the unreliability of eyewitness identifications.

One reason for the inconsistent decisions is lack of agreement about the proper meaning of prejudice. Some courts exclude evidence because it arouses the jury's emotions, wastes time, or harms one of the parties. Others declare that emotionalism, inefficiency, and harm to the parties are not appropriate reasons for excluding relevant evidence. Another reason for the disarray may lie in conceptualizing the decisionmaking procedure as a balancing test. Relevance and prejudicial effect are incommensurable qualities that have no common measurement. Invoking the balancing metaphor masks the difficult political nature of the choices involved. Delegating broad power to trial judges is inconsistent with the usual hierarchy of the legal system in which trial judges exercise reviewable discretion within guidelines set by higher courts. It invites inconsistent rulings influenced by the judges' personal biases.

Disagreements over the appropriate meaning of prejudice can be resolved by grounding the definition in a comprehensive theory of the multiple functions of trials. That theory suggests that trials are guided by four principles simultaneously: adversariness, efficiency, verdict accuracy, and social-political symbolism. Evidence is prejudicial if it conflicts with any of these values.

The problems associated with the balancing test can be minimized by using an alternative procedural paradigm: political choice. The political-choice model is based on two premises. First, a decision to admit or exclude prejudicial evidence necessarily advances some values at the expense of others. That is a political choice. Second, this kind of policy decision is more appropriately made by appellate courts than by individual trial judges. Therefore, the appellate courts should accept their responsibility to make difficult decisions. They should articulate what values would be served by admitting or excluding certain types of evidence, and what values would be compromised, and then clearly choose between them. This would provide much clearer guidance to trial judges, minimize the role played by individual judges' biases, and reduce the variability in their decisions.