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Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases

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PROOF AND PREJUDICE: A CONSTITUTIONAL CHALLENGE TO THE TREATMENT OF PREJUDICIAL EVIDENCE IN FEDERAL CRIMINAL CASES

D. Craig Lewis*

Abstract: The United States Supreme Court held its 1970 decision *In re Winship* that in criminal prosecutions the Constitution requires proof of guilt beyond a reasonable doubt. Professor Lewis argues that *Winship* governs the validity of evidence rules in criminal cases and requires that rules of evidence do not impair the reliability of criminal convictions. The author concludes that Federal Rule of Evidence 403, which permits the admission of prejudicial evidence unless the danger of unfair prejudice substantially outweighs probative value, violates this requirement. Rule 403 substantially increases the risk of erroneous decisionmaking and prescribes a balancing test that unconstitutionally places the major risk of decisionmaking error on the defendant. The author proposes a revision to Rule 403 that would impose on the prosecution, rather than on the defendant, the burden of showing that probative value substantially outweighs the danger of unfair prejudice. Such a revision would make Rule 403 constitutional under *Winship*-based reliability demands.

I. Introduction 290
II. The Constitutional Demand for Reliability Guarantees in Criminal Trial Procedures 296
  A. The Reliability Demands of the *Winship* Reasonable Doubt Standard 296
  B. Constitutional Reliability Demands for the Admission of Evidence Against an Accused 301
    1. The Absence of *Winship*-Based Doctrine for the Admission of Reliability-Threatening Evidence 301
    2. The Constitutionality of the Admission of Prejudicial Evidence Against a Criminal Defendant: Existing Precedent 305
    3. Constitutional Reliability Demands for the Admission of Hearsay Evidence 310
  C. Summary: Constitutional Reliability Demands for the Admission of Evidence in Criminal Cases 313
III. The Constitutionality of Rule 403 315
  A. Rule 403 as a Procedural Control on the Reliability of Decisionmaking 315

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1. Probative Value and Unfair Prejudice as Reliability Concerns 315
2. The Impacts of Prejudicial Evidence on Reliable Decisionmaking.............................. 321
a. Factfinding Errors.......................... 324
b. Alteration of the Guilt-Determination Standard.................................. 325
c. Empirical Support for Reliability Concerns .. 327
B. The Impact of Rule 403 on Reliable Decisionmaking 328
1. The Impact of Rule 403 Balancing on Outcomes 328
2. The Impact of Rule 403 on Innocents 332
a. Filtering Innocents 333
b. The Necessity Doctrine and Its Impact on Innocents 337
3. The Empty Promise of Appellate Correction.... 343
C. Summary: The Unconstitutionality of Rule 403..... 348
IV. Striking a Constitutional Balance for the Admission of Unfairly Prejudicial Evidence in Criminal Cases......... 350
A. The Propriety of Balancing....................... 350
B. Restating Rule 403 to Strike a Constitutional Balance in Criminal Cases 352
1. A Proposed Revision of Rule 403 352
2. The Conformity of the Proposed Rule with Constitutional Reliability Demands............ 354
3. The Practical Consequences of the Proposed Revision...................................... 356
4. Retroactivity 361
V. Conclusion 362

The way to do complete justice indeed, is to let in the one side, without prejudicing the other.[1]

Lord Mansfield

I. INTRODUCTION

The Federal Rules of Evidence claim as their overriding purpose the search for truth and justice.[2] However, "truth" and "justice" are flexi-

1. Rex v. Philips, 97 Eng. Rep. 321, 327 (1757).
2. FED. R. EVID. 102 ("These rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined.").

ble concepts and must differ in civil and criminal cases to accommodate the fundamental societal interest in certainty about the reliability of a criminal conviction. In a criminal case, a judgment of conviction reflects an acceptably valid truth and a just result only when there is no reasonable doubt the defendant committed the charged crime.[3]

Federal Rule of Evidence 403 plays a central role in the operation of the Federal Rules of Evidence as a truthseeking procedural code.[4] In recognition that the admission of relevant evidence may threaten the reliability of the factfinding process, Rule 403 provides a balancing test by which probative, otherwise admissible evidence may be excluded.[5] This basis for the exclusion of evidence applies to nearly every other provision of the Federal Rules of Evidence.[6] Nonetheless, Rule 403

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3. *See infra* notes 90–92 and accompanying text (analysis of constitutional reliability demands in criminal cases). For discussions of the contextual nature of legal "truth," *see* Damaska, *Presentation of Evidence and Factfinding Precision,* 123 U. PA. L. REV. 1083, 1084–86 (1975) (characterization of outcome of legal evaluation as "true" or "false" depends on context, and is meaningful only within a given framework of legal reference); Freedman, *Judge Frankel's Search for Truth,* 123 U. PA. L. REV. 1060, 1063–65 (1975) (in society that respects the dignity of an individual, truthseeking in criminal matters may be subordinate to other values); Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity,* 92 HARV. L. REV. 1187, 1192–99 (1979) (concepts of statistical probability are inconsistent with values represented by concept of reasonable doubt); Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea,* 123 U. PA. L. REV. 1067, 1076–79 (1975) (factual truth in criminal matters must be distinguished from legal truth).

4. Rule 403 has been described as "the major rule explicitly recognizing the large discretionary rule [sic] of the judge in controlling the introduction of evidence." 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[01], at 403-05 (1988). "[Rule 403] finds its roots in Rule 303 of the Model Code of Evidence, a provision that the draftsman, Professor Morgan, described as 'one of the most important sections in the whole Code.'" 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5211, at 247–48 (1978) (footnotes omitted).

5. FED. R. EVID. 403 provides as follows:

> RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.
>
> 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.

6. *See* Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence,* 30 VILL. L. REV. 1465, 1480 (1985) ("Rule 403 was intended to have virtually universal application. On its face, the rule purports to apply to any item of evidence. The commentators have observed that rule 403 'apparently cuts across the entire body of the Rules,' and that 'every rule of admissibility [is] subject to the power of discretionary exclusion' under rule 403." (quoting Rothstein, *Some Themes in the Proposed Federal Rules of Evidence,* 33 FED. B.J. 21, 29 (1974) and 22 C. WRIGHT & K. GRAHAM, *supra* note 4, § 5213, at 262–63) (footnote omitted)).

The only exceptions to Rule 403 coverage are found in Rules 412 and 609. Rule 412 prescribes special procedures and its own balancing test for evidence of past sexual behavior of an alleged victim of rape or a sexual assault. *See infra* note 187 (discussion of Rule 412 balancing test). Rule 609 imposes restrictions on the use of evidence of prior convictions when offered for

"received virtually no attention by Congress" during the rules consideration process, and was enacted in the identical form submitted by the Supreme Court.[7]

A decision on the admissibility of evidence under Rule 403 requires a comparative weighing of probative value, as an admission-positive factor, against six listed admission-negative concerns. Three of these concerns, *unfair prejudice, confusion of the issues,* and *misleading the jury,* are regarded as "dangers" in the rule; the remaining three factors, *undue delay, waste of time,* and *needless presentation of cumulative evidence,* are called "considerations" and present what are clearly only administrative concerns.

Rule 403 is generic. It provides a balancing equation that is undifferentiated for civil and criminal cases, for evidence offered by the prosecution or by the accused, or for evidence that threatens prejudice in the factfinding process or the risk of mere wasting of time. By its terms, Rule 403 permits the exclusion of evidence because of any of these concerns only when they "substantially outweigh" the probative value of the evidence. Even when that test is met the rule does not mandate exclusion of the evidence; it provides instead that evidence "may" be excluded when the burden is met.[8] The legislative history of the rule shows it is intended to establish a "burden [that] demands

impeachment purposes, with different balancing tests from that provided by Rule 403. *See infra* note 214 (text of Rule 609).

7. Dolan, *Rule 403: The Prejudice Rule in Evidence,* 49 S. CAL. L. REV. 220, 221 (1976). However, Professor Dolan notes that a prejudice rule substantially similar to Rule 403, proposed about 30 years earlier in the Model Code of Evidence, had drawn a great deal of scholarly comment and criticism and may have substantially contributed to the general rejection of that Code. *Id.* at 221–22. This criticism appears to have focused on "which factors should be included in declaring particular evidence prejudicial and on whether the appropriate factors should be formulated as an independent rule of evidence or considered only supplemental to various fixed rules of exclusion." *Id.* at 222 n.5.

The present Rule 403 is a modified version of an original draft rule that distinguished between mandatory and discretionary grounds for the exclusion of evidence. *See infra* note 8 (discussion of changes from original draft).

8. As originally drafted, Rule 403 contained a subpart (a), which provided for the mandatory exclusion of evidence if its probative value was substantially outweighed by the three prejudicial "dangers," and a subpart (b) that provided discretionary exclusion for the three time-wasting "considerations." *See* 2 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 403[01] at 403-6. The rule was amended to its present form in response to objections that the mandatory language would invite too much appellate interference with trial court rulings admitting evidence despite prejudicial dangers. *See id.* at 403-7 n.4.

Although Rule 403 separately lists "unfair prejudice," "misleading," and "confusion" as "dangers" addressed by the rule, each presents a risk to reliable factfinding that is indistinguishable for many purposes in this Article. *See infra* notes 107–08 (discussion of reliability impacts of the "misleading" and "confusion" dangers). Accordingly, the term "unfair prejudice" frequently will be used in this Article to refer to all three of these reliability-threatening "dangers."

that the opponent convince the judge that the dangers attendant to admitting the evidence outweigh the probative value of the evidence by a wide margin."[9] This appears to be the construction favored by courts.[10]

The rule bears the imprimatur of its distinguished drafters, Congress, and the Supreme Court—reason, perhaps, for initial skepticism about a challenge to its validity. Although scholars have questioned the fairness of the federal rules' treatment of prejudicial evidence,[11] no one has seriously questioned the constitutionality of that treatment.[12]

9. Imwinkelried, *supra* note 6, at 1479.

10. *See id.* at 1473–74. Wright and Graham share this interpretation:

> The phrasing of Rule 403 makes it clear that the discretion to exclude does not arise when the balance between the probative worth and the countervailing factors is debatable; there must be a significant tipping of the scales against the evidentiary worth of the proferred evidence. Thus, the appellate court need not find that the trial judge abused his discretion; it is enough that he erred in concluding that he had any discretion.

22 C. WRIGHT & K. GRAHAM, *supra* note 4, § 5221, at 309–10 (footnotes omitted); *see also* United States v. McRae, 593 F.2d 700, 707 (5th Cir.) (primary purpose of Rule 403 is "limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect"), *cert. denied*, 444 U.S. 862 (1979).

11. There has been little scholarly consideration of the impacts of Rule 403 on the trial process. Professor Victor Gold has offered the most extensive critical analysis to date in two articles: Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497 (1983) [hereinafter Gold, *Observations*]; Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59 (1984) [hereinafter Gold, *Limiting Discretion*]. The major premises of these articles are discussed at length *infra* notes 98–109 and accompanying text. For a descriptive consideration of the rule, *see* Dolan, *supra* note 7.

There has been considerably more scholarly interest in the operation of FED. R. EVID. 404(b), which governs the admission of uncharged misconduct evidence. Uncharged misconduct evidence is a principal source of admissibility determinations under Rule 403. *See infra* notes 126–32 and accompanying text (discussion of uncharged misconduct evidence). For example, Professor Edward Imwinkelried has argued for a revision of Rule 404(b) that would allocate the burden of establishing admissibility of the evidence to the prosecution. *See* Imwinkelried, *supra* note 6, at 1497. Professor David Leonard recently has proposed a substantial revision of the treatment of character evidence in Rules 404 and 405 that would substitute a balancing test for the present outright prohibition. *See* Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 53–60 (1986–87). Other authors have proposed a revision of a state counterpart to Rule 404(b) to address policy concerns raised by that rule. *See* Krivosha, Lansworth & Pirsch, *Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict*, 60 NEB. L. REV. 657, 677–79 (1981).

12. One commentator who has extensively examined the developing jurisprudence for the application of Rule 403 to Rule 404(b) determinations has concluded that the jurisprudence demonstrates a "slow drift toward an inquisitorial criminal trial process violative of the sixth amendment." Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 714 (1981) (describing conclusions of subsequently published article, Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113 (1984) [hereinafter Reed, *Admission After Rules*]). However, the constitutional problem this commentator perceives is an interference with the

Rule 403 works a substantial change in the preexisting common law principles governing the admission of unfairly prejudicial evidence.[13] Moreover, the rule was drafted and approved during the early stages of development of the constitutional reasonable doubt standard established in *In re Winship*[14] and prior to the major extensions of *Winship* that have found a variety of traditional factfinding control devices constitutionally unacceptable. Under those decisions, the fifth and fourteenth amendment due process guarantees include assurance that a criminal conviction will be based on procedures designed to protect

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fundamental fairness of the trial process by reason of a lack of a procedural requirement of fair notice of the evidence, not the constitutional reliability concerns addressed in this Article. *Id.* at 163–69.

Another author has proposed a revision of the Rule 403 balancing test similar to that ultimately proposed here. *See* Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence,* 66 IOWA L. REV. 777, 806–08 (1981). However, his call for change is based on what he finds a more rational treatment of that evidence, not constitutional concerns. *See id.* at 803–09.

The Committee on Rules of Criminal Procedure and Evidence of the American Bar Association Criminal Justice Section has recently proposed a revision of FED. R. EVID. 404 that would incorporate a balancing test identical to the test this Article finds constitutionally required for Rule 403. That proposal is limited, however, to the treatment of evidence of "other crimes, wrongs, or culpable acts" of an accused and is justified on policy grounds rather than constitutional requirements. *See* Rothstein, *Federal Rules of Evidence: A Fresh Review and Evaluation,* 1987 A.B.A. CRIM. J. SEC., COMMITTEE ON RULES OF CRIM. PROCEDURE AND EVIDENCE REP., at proposed Rule 405A and accompanying comment.

The only treatise on uncharged misconduct evidence devotes a chapter to constitutional issues raised by the use of such evidence, including one section that considers the argument advanced here, that the use of the evidence undermines the constitutionally demanded standard of proof. E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 10:11 (1984). That section rejects the argument without substantive discussion, based on a perceived rejection by the courts. However, the single case cited in support of the rejection, Manning v. Rose, 507 F.2d 889 (6th Cir. 1974), did not consider the constitutional arguments raised here, and relied instead primarily on Spencer v. Texas, 385 U.S. 554 (1967) for its holding. *See Manning,* 507 F.2d at 893–94. *Spencer* does not refute the thesis of this Article. *See infra* notes 70–74 and accompanying text. For a similarly cursory consideration and rejection of due process challenges to the admission of such evidence, see Bray, *Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions,* 28 U. MIAMI L. REV. 489, 505 (1974).

Neither the Supreme Court nor the federal circuit courts have considered the possible application of the constitutionally required reasonable doubt standard to decisions on the admissibility of unfairly prejudicial evidence. *See infra* note 44 and accompanying text; *see also* 22 C. WRIGHT & K. GRAHAM, *supra* note 4, § 5195, at 203 ("In habeas corpus proceedings attacking state criminal convictions it is often said that, aside from [fourth amendment search protections, fifth amendment self-incrimination protections, sixth amendment confrontation clause rights, and the sixth amendment right to counsel], the admission and exclusion of evidence raises no constitutional questions.") (footnote omitted).

13. *See infra* note 132 (discussion of the change in common law burdens produced by Rule 403).

14. 397 U.S. 358 (1970).

the expectation that the government's burden of proof has established the defendant's guilt with reasonable certainty.[15]

Winship fostered a new dimension of due process in criminal cases, the parameters of which are still developing, but there has been no judicial or scholarly investigation of its possible application to procedures for the admission of evidence. For these reasons, an examination of the relationship between *Winship* and the constitutionality of Rule 403 is warranted.

This Article raises a constitutional challenge to the operation of Rule 403 in criminal cases and, in support of that challenge, presents two theses not previously advanced by courts or commentators. First, since *Winship* the constitutionality of evidentiary rules in criminal trials depends on their compatibility with the "beyond a reasonable doubt" standard of proof. Thus, *Winship* alters the constitutional framework for the law of evidence in criminal cases. Second, by failing to distinguish between civil and criminal actions, and by providing a balancing test that increases the risk of erroneous convictions, Rule 403 strikes an unconstitutional balance for the admission of unfairly prejudicial evidence against those accused of crime. In its present form, Rule 403 fails the *Winship* test.

Part II of this Article considers the Supreme Court's development of *Winship* doctrine as it relates to procedural influences on the decisionmaking process, concluding that *Winship* prohibits procedures that impair the reliability of convictions. Part III describes the connection between the application of Rule 403 and the reliability of criminal adjudications and explains that the Rule 403 balancing factors are measures of the impact of evidence on the reliability of the decisionmaking process. This part demonstrates that the effect of the rule in its present form can be to substantially increase the risk of error in decisionmaking and concludes that the rule prescribes an unconstitutional balancing test for the admission of evidence offered against an accused. Part IV proposes a revision of Rule 403 that would meet constitutional demands in criminal cases. The proposed revision shifts the burden to the prosecution to show that the probative value of its offered evidence substantially outweighs the danger of unfair prejudice.

15. *See infra* notes 16–43 and accompanying text (discussion of *Winship* and related decisions).

II. THE CONSTITUTIONAL DEMAND FOR RELIABILITY GUARANTEES IN CRIMINAL TRIAL PROCEDURES

A. *The Reliability Demands of the* Winship *Reasonable Doubt Standard*

The Supreme Court's decision in *In re Winship* purported to proclaim only what had "long been assumed": a constitutionally required reasonable doubt standard in criminal cases.[16] However, despite that modest claim there were indications that the Court was making a major statement about constitutional requirements of reliability for criminal adjudications. The Court's opinion is laced with references to the reliability requirements embodied in the reasonable doubt standard: It notes the aim of the standard "to safeguard men from dubious and unjust convictions,"[17] the role of the standard as "a prime instrument for reducing the risk of convictions resting on factual error,"[18] the fundamental principle represented by the standard's allocation of the major portion of the "margin of error" in criminal factfinding to the prosecution,[19] and the importance of the standard as a guarantee that "[the] government cannot adjudge [a person] guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."[20] In a concurring opinion, Justice Harlan further emphasized the reliability precepts of the standard, finding it "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[21]

It is now clear that *Winship* provided a radical basis for evaluating the constitutionality of trial procedures in both criminal and civil cases. *Winship* has produced a still-developing inquiry into the validity of a variety of procedural devices in criminal trials, as well as a new framework for determining the standard of proof due process requires

16. "Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." 397 U.S. at 362. "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

17. *Id.* at 362 (quoting Davis v. United States, 160 U.S. 469, 488 (1895)).

18. *Id.* at 363.

19. There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Id. at 364 (quoting Speiser v. Randall, 357 U.S. 513, 525–26 (1958)).

20. *Id.*

21. *Id.* at 372 (Harlan, J., concurring).

in civil litigation.[22] However, although *Winship* was the genesis of the constitutionalized reasonable doubt standard, read narrowly it required no more than the application of the standard to criminal cases through the use of traditionally acceptable trial procedures.

The Supreme Court's decision five years later in *Mullaney v. Wilbur*[23] first indicated that the *Winship* doctrine concerned more than the formal burden of proof instruction to a jury in a criminal case and extended to other procedures that effectively altered that burden on an element of a crime. In *Mullaney* a unanimous Court affirmed a First Circuit decision which had set aside a state murder conviction rendered under a procedure that allocated to the defendant the burden of proving, in order to reduce the crime of murder to manslaughter, that he had acted in the heat of passion on sudden provocation. The Court based its holding on a conclusion that the effect of the procedure was to unconstitutionally shift the burden of proof on the element of intent.[24] Rejecting the contention that the state's definition of the elements of the crime should control the allocation of the burden of proof, the Court held that

> *Winship* is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the "operation and effect of the law as applied and enforced by the State," . . . and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.[25]

Whatever the merit of the result in *Mullaney*, the decision heralded a new dimension of criminal due process that demands review of the substantive effect of procedural devices on the state's burden of proof.[26]

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22. This framework, derived from the *Winship* rationale, reflects judgments about the weight of the public and private interests at stake and the appropriate allocation of the risk of error between the litigants. Addington v. Texas, 441 U.S. 418, 423–25, 433 (1979) ("clear and convincing evidence" standard required for involuntary civil commitments); *see also* Rivera v. Minnich, 107 S. Ct. 3001, 3002 (1987) (preponderance standard permissible for paternity determinations); Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) ("clear and convincing evidence" standard required for involuntary termination of parental rights).

23. 421 U.S. 684 (1975).

24. *See id.* at 702.

25. *Id.* at 699 (footnote omitted) (quoting St. Louis S.W.R. Co. v. Arkansas, 235 U.S. 350, 362 (1914)).

26. *Mullaney* was followed by Patterson v. New York, 432 U.S. 197 (1977), a decision which, on similar facts, upheld the state's allocation to the defendant of the burden of proving absence of malice in a murder prosecution.

For a comparison of *Mullaney* and *Patterson* that is critical of *Mullaney*, see Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979). For a contrary view, see Saltzburg, *Burdens of Persuasion in Criminal Cases:*

Commentators have found *Mullaney* and subsequent *Winship*-based decisions inconsistently reasoned and in need of a coherent logical framework.[27] The issues that have generated this criticism can be generally summarized: They concern the questions of what are the "elements" of a crime as to which the government must retain the burden of proof beyond a reasonable doubt,[28] and what forms of presumption or inference may be applied to elements of a crime without unconstitutionally altering the burden of proof.[29]

There has been, however, no disagreement among commentators or members of the Court that a procedure is unconstitutional if it interferes with a factfinder's application of the reasonable doubt standard to a necessary element of the crime charged. In *Ulster County Court v. Allen,*[30] the Court described the test of the constitutional validity of "evidentiary devices:"

> The value of these evidentiary devices [presumptions and inferences], and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the

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Harmonizing the Views of the Justices, 20 AM. CRIM. L. REV. 393 (1983) (finding *Mullaney* correctly decided and offering an explanation of its consistency with later decisions).

27. *See* Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices,* 94 HARV. L. REV. 321, 322–25 (1980); Allen & DeGrazia, *The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts,* 20 AM. CRIM. L. REV. 1, 2–5 (1982); Jeffries & Stephan, *supra* note 26, at 1338–44; Schmolesky, County Court of Ulster County v. Allen *and* Sandstrom v. Montana: *The Supreme Court Lends an Ear But Turns Its Face,* 33 RUTGERS L. REV. 261, 304–308 (1981); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases,* 86 YALE L.J. 1299, 1305 (1977).

28. *See* Martin v. Ohio, 480 U.S. 228 (1987) (state may constitutionally place burden of proof of self-defense on defendant); McMillan v. Pennsylvania, 477 U.S. 79 (1986) (state may constitutionally treat "visible possession of firearm" as sentence-enhancing factor, triable by court on preponderance of evidence standard); *Patterson,* 432 U.S. 197 (state may constitutionally define murder without element of malice and shift burden of proving absence of malice to defendant); *Mullaney,* 421 U.S. 684 (under statute in question malice was element of murder, and state could not shift burden of disproving malice to defendant).

For examples of the scholarly debate on these issues, compare Underwood, *supra* note 27 (arguing that the reasonable doubt standard must apply to every fact relevant to criminal liability or severity of punishment) with Jeffries & Stephan, *supra* note 26 (criticizing Underwood and contending that proof beyond a reasonable doubt should be required only for constitutional minima for contemplated punishment).

29. *See* Francis v. Franklin, 471 U.S. 307 (1985) (rebuttable presumption of intent unconstitutionally shifted burden to defendant); Sandstrom v. Montana, 442 U.S. 510 (1979) (mandatory presumption of intent unconstitutional); Ulster County Court v. Allen, 442 U.S. 140 (1979) (permissive inference of possession of weapons constitutional where supported by rational inferences from facts in case).

For examples of scholarly consideration of this question, see Allen, *supra* note 27, at 332–48, and Saltzburg, *supra* note 26, at 412–21.

30. 442 U.S. 140 (1979).

> device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, *the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.*[31]

The four dissenters in *Ulster* agreed with this test,[32] taking issue instead with the measure of underlying factual validity the majority would require to support a permissive inference.[33]

The issue in *Ulster* was the legitimacy of a jury instruction, but the opinion appears to have a broader reach. The Court's declaration of the constitutional standard did not purport to apply only to instructions but instead claimed to be the "ultimate test of *any* device's constitutional validity."[34] An additional passage acknowledged the possibility of constitutional error whenever there is risk that a procedural influence has threatened irrational behavior by an otherwise rational factfinder:

> Because [a] permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.[35]

Ulster thus reiterated a suggestion implicit in *Mullaney,* that *Winship* principles extend to a jury's substantive application of the reasonable doubt standard as well as to the form of a court's instructions to the jury.

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31. *Id.* at 156 (emphasis added).

32. *See id.* at 169 (Powell, J., dissenting). Justice Powell wrote:

> [T]he use of presumptions in criminal cases poses at least two distinct perils for defendants' constitutional rights. The Court accurately identifies the first of these as being the danger of interference with "the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt."

Id.

33. The majority held that a permissive inference undermines the reasonable doubt standard "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Id.* at 157. Justice Powell's dissenting opinion argued that to be constitutional a presumption or inference at least must be more likely than not true as a general proposition. *Id.* at 168–72.

34. *Id.* at 156 (emphasis added).

35. *Id.* at 157.

Less than a month later, the Court made explicit what it had suggested in *Ulster* and *Mullaney*. In *Jackson v. Virginia,*[36] the Court held that federal habeas review of a state criminal conviction includes review of the substantive sufficiency of evidence to prove guilt beyond a reasonable doubt. The Court stated, "The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A 'reasonable doubt,' at a minimum, is one based upon 'reason.' "[37]

Thus, due process demands a rational application of the reasonable doubt standard by the jury to the determination of a defendant's guilt, as well as formal adherence to the standard in a court's directions to the jury. However, *Mullaney, Ulster,* and *Jackson* left undecided the question of what risk of departure from the mandates of *Winship* would produce constitutional error. A previously quoted passage from *Ulster* implied the possibility of constitutional error when there is "*any* risk that [an evidentiary device] . . . has caused the . . . factfinder to make an erroneous factual determination."[38] In *Francis v. Franklin,*[39] the Court considered and rejected the contention that constitutional error occurs only when it is likely that a factfinder's application of the reasonable doubt standard is adversely affected, finding instead that error occurs whenever there is a reasonable possibility of adverse impact on the application of the standard. *Franklin* involved a challenge to instructions on a rebuttable presumption of intent.[40] The Court found the instructions unconstitutional because a juror might have interpreted the instructions as shifting the burden of persuasion to the defendant on the element of intent, in violation of *Winship* and *Sandstrom v. Montana*.[41] In dissent, Justice Rehnquist argued that the test of constitutional error for a potentially burden-altering instruction should be that "it must be at least *likely* that a juror [gave an unconstitutional interpretation to the instruction] before constitutional error can be found."[42] Writing for the majority, Justice Brennan held:

36. 443 U.S. 307 (1979).

37. *Id.* at 316–17 (footnotes omitted).

38. 442 U.S. at 157 (emphasis added).

39. 471 U.S. 307 (1985).

40. The jury was instructed that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted," and "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." *Id.* at 309.

41. *Id.* at 325 (citing Sandstrom v. Montana, 442 U.S. 510 (1979)).

42. *Id.* at 342 (Rehnquist, J., dissenting; emphasis in original).

> [T]he dissent's proposed standard is irreconcilable with bedrock due process principles. . . . [I]t has been settled law since Stromberg v. California, 283 U.S. 359 (1931), that when there exists a *reasonable possibility* that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside. . . . The dissent's proposed alternative cannot be squared with this principle; notwithstanding a substantial doubt as to whether the jury decided that the State proved intent beyond a reasonable doubt, the dissent would uphold this conviction based on an impressionistic and intuitive judgment that it was *more* likely that the jury understood the charge in a constitutional manner than in an unconstitutional manner.[43]

Winship principles have thus established a new component of procedural due process. They have constitutionalized a demand for reasonable certainty about the reliability of a criminal conviction. That constitutional demand applies to the factfinder's de facto application of the reasonable doubt standard as well as to the form of the court's directions to the jury. It requires the allocation of the major risks of erroneous factfinding to the government. Moreover, it prohibits procedures that foster any reasonable possibility of factfinder departure from a rational application of the reasonable doubt standard in an individual case.

However, the Court has not yet satisfactorily explained the relationship between this new doctrine and procedures for the admission of evidence. This doctrine must apply to rules governing the admission of evidence that jeopardizes the reliability of the decisionmaking process in criminal trials.

B. Constitutional Reliability Demands for the Admission of Evidence Against an Accused

1. The Absence of Winship*-Based Doctrine for the Admission of Reliability-Threatening Evidence*

The Supreme Court's most extensive development of *Winship* doctrine has concerned jury instructions on presumptions and inferences, and the allocations of burdens of persuasion in criminal proceedings. As discussed in the preceding section, without exception in these cases the Court has been intolerant of procedural devices that jeopardize a factfinder's rational application of the standard to its determination of guilt or innocence. However, none of the Court's *Winship*-based decisions has decisively determined how *Winship* principles apply to prein-

43. *Id.* at 323 n.8 (citations omitted; initial emphasis added).

struction rulings on the admissibility of incremental items of evidence in the government's proof.[44]

The reason for this omission may be traceable to dictum in *Lego v. Twomey*.[45] There the Court rejected the contention that *Winship* demanded that the voluntariness of a confession be judged by the reasonable doubt standard. The rejection was premised on the fact that "the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts."[46] However, the Court stated further:

> Our decision in *Winship* was not concerned with standards for determining the admissibility of evidence. . . . *Winship* went no further than to confirm the fundamental right that protects "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[47]

The Court's broad statement that "*Winship* was not concerned with standards for determining the admissibility of evidence" is correct when limited to evidence, like the confession at issue in *Lego*, that does

44. Dictum in Lego v. Twomey, 404 U.S. 477 (1972), concerns this question, as discussed in the following text. The decision in Ulster County Ct. v. Allen, 442 U.S. 140 (1979), taken literally, would describe the constitutional test for evidence rules as well as instructional devices. In *Ulster*, the Court was speaking of "evidentiary devices" in the context of presumptions and inferences, but the Court's explication of the constitutional test was not limited to use for presumptions and inferences; instead it was said to be the "ultimate test of *any* device's constitutional validity." *Id.* at 156 (emphasis added). If by "device" the Court meant any procedure designed to manage or influence a jury's fact determination or deliberation process, then the *Ulster* test clearly would include rules governing the admissibility of evidence as well as those telling a jury what use it should make of the evidence admitted. Indeed, for purposes of the *Ulster* test there is little reason to distinguish a "device," such as a presumption or inference, and a court-administered procedure governing the admission of evidence, such as Rule 403. Both involve court-supervised influences on the jury's fact determination and deliberation process, both directly and predominantly concern the interest in the reliability of the jury's decision, and each addresses similar risks of adverse influence on the jury's application of the reasonable doubt standard. *Compare infra* notes 93–148 and accompanying text (discussion of reliability impacts of unfairly prejudicial evidence) *with* Allen, *supra* note 27, at 348–54 (finding "judicial comment"—presumptions, inferences, and instructions—essentially a form of presenting evidence to a jury, raising *Winship* concerns to the extent the comment may induce an inaccurate result).

Federal appellate courts occasionally have considered due process-based challenges to the admission of potentially prejudicial uncharged misconduct evidence. However, none has considered a *Winship*-based argument; instead, these courts have applied a more general "fundamental fairness" analysis that fails to account for the particular constitutional interests guaranteed by *Winship*. *See, e.g.*, Bryson v. Alabama, 634 F.2d 862 (5th Cir. 1981); Hills v. Henderson, 529 F.2d 397 (5th Cir.), *cert. denied*, 429 U.S. 850 (1976); Manning v. Rose, 507 F.2d 889 (6th Cir. 1974).

45. 404 U.S. 477 (1972).

46. *Id.* at 486.

47. *Id.* (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).

not threaten the reliability of a jury verdict. The reasonable doubt standard serves as a required measure of the totality of the government's evidence of guilt, not as a protection against bits of proof which may not be convincing evidence of guilt when viewed in isolation. Accordingly, when courts talk about a "burden" in the context of the admissibility of an individual item of proof, usually they are discussing the question whether the factfinder properly could choose to give incremental weight to the evidence. In this context admission of the evidence, even when there is substantial room for doubt about the weight it deserves, will not jeopardize the required certainty about a defendant's guilt because we can expect that the factfinder will rationally apply the reasonable doubt standard to the proof as a whole. For example, a jury considering a confession like that in *Lego* might harbor more than a reasonable doubt about the reliability of the confession if there is substantial evidence that it was coerced. If the confession were the only evidence of the defendant's guilt we could trust that the jury would acquit the defendant, absent reason to believe the jury would act irrationally. And if there was other evidence that resolved the doubt about the reliability of the confession, a rational jury could, consistently with the reasonable doubt standard, convict. The conviction would be based in part on the evidence of the confession, but the admission of that evidence would not have threatened expectations about the reliability of the conviction, even though the confession was unreliable proof of guilt standing alone.[48] Thus, where there is no risk that admission of an incremental item of proof will threaten the jury's rational application of the reasonable doubt standard to the proof as a whole, there are simply no *Winship* issues raised by the admission of the evidence.[49] On its facts, *Lego* is therefore con-

48. *See, e.g.,* Bourjaily v. United States, 107 S. Ct. 2775, 2778–79 (1987). The court stated:

> We have traditionally required that [admissibility determinations that hinge on preliminary factual questions] be established by a preponderance of proof. Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules, which embody certain legal and policy determinations. The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case or a civil case.

(Citations omitted).

49. No such challenge was involved in *Lego*. As the Court noted in that case:

> A high standard of proof is necessary . . . to ensure against unjust convictions by giving substance to the presumption of innocence. . . . A guilty verdict is not rendered less reliable or less consonant with *Winship* simply because the admissibility of a confession is determined by a less stringent standard [than reasonable doubt]. [Petitioner] does not challenge the constitutionality of the standard by which the jury was instructed to decide his guilt or innocence; nor does he question the sufficiency of the evidence that reached the jury

sistent with *Winship. Lego* does not, however, resolve the applicability of *Winship* to procedures for the admission of evidence that threatens the reliability of the decisionmaking process.[50]

Another explanation for the absence of *Winship*-based analysis of evidentiary issues may be found in the chronology of the development of *Winship* doctrine and of the Federal Rules of Evidence. The rules took effect in 1975, five years after *Winship.* It is possible that this relatively recent adoption of the rules has imbued them with a presumption of current validity that has deflected serious constitutional criticism.

In fact, any presumption of the constitutional validity of Rule 403 on that basis would be misplaced. Prior to the 1975 decision in *Mullaney v. Wilbur,* the reasonable doubt standard could be viewed as divorced from the workings of trials apart from the instructions given a jury.[51] The *Mullaney* decision contained the first indication from the Court that the constitutionally demanded reasonable doubt standard applies to a factfinder's substantive application of the standard as well as a court's duties of instruction. As has been noted, express indication that *Winship* applies to the substantive application of the standard did not come until *Jackson v. Virginia,*[52] four years later. Even now, nineteen years after *Winship,* the development of *Winship* doctrine is far from complete. The Federal Rules of Evidence were drafted, considered, and enacted before the first of these major doctrinal developments had occurred, and thus it should not be surprising if Rule 403

> to satisfy the proper standard of proof. . . . *Winship* is inapplicable because the purpose of a voluntariness hearing is not to implement the presumption of innocence.

404 U.S. at 486–87 (citation and footnote omitted).

50. Justice Brennan, joined by Justices Douglas and Marshall in dissent in *Lego,* did not dispute the majority's holding that the voluntariness issue did not involve *Winship* reliability guarantees. Instead, Justice Brennan's dissent was premised on a belief that the voluntariness question should be decided on a reasonable doubt standard to safeguard a separate right to be free from conviction based on an involuntary confession:

> If we permit the prosecution to prove by a preponderance of the evidence that a confession was voluntary, then . . . we must be prepared to justify the view that it is no more serious in general to admit involuntary confessions than it is to exclude voluntary confessions. . . . If we are to provide "concrete substance" for the command of the Fifth Amendment that no person shall be compelled to condemn himself, we must insist, as we do at the trial of guilt or innocence, that the prosecution prove that the defendant's confession was voluntary beyond a reasonable doubt.

404 U.S. at 494 (Brennan, J., dissenting) (footnote omitted). For discussion of Supreme Court decisions that do involve the constitutional requirements for admission of reliability-threatening evidence, see *infra* notes 75–88 (constitutional standards for admission of hearsay evidence).

51. *See supra* notes 16–26 and accompanying text (discussion of *Winship* and *Mullaney* decisions).

52. 443 U.S. 307 (1979); *see supra* discussion accompanying notes 36–37.

fails to reflect the new constitutional doctrine still being developed by the Court in this area.

2. *The Constitutionality of the Admission of Prejudicial Evidence Against a Criminal Defendant: Existing Precedent*

Since Rule 403 was enacted the Supreme Court has addressed its application in a criminal case but once. In *United States v. Abel*[53] the Court rejected a defendant's challenge to the admission of evidence, offered to impeach a defense witness for bias, that the defendant and the witness were members of a secret prison organization whose tenets included a requirement that members commit perjury, steal, and commit murder on behalf of other members. However, the defendant did not base his challenge to the evidence on constitutional grounds, but argued instead that admission of the evidence was an abuse of the trial court's discretion under Rule 403 "because the prejudicial effect of the contested evidence outweighed its probative value."[54] The Court noted the broad discretion accorded trial court rulings on the admissibility of evidence, the powerful force of the evidence in question on the issue of bias, and the precautions taken by the trial court to minimize any derivative prejudice to the defendant.[55] The Court found that "[t]hese precautions did not prevent *all* prejudice to [the defendant] from [the evidence], but they did, in our opinion, ensure that the admission of this highly probative evidence did not *unduly* prejudice [him]."[56] Accordingly, it found that the admission of the evidence was not an abuse of discretion under Rule 403.[57]

The Supreme Court's decision in *Abel* cannot be regarded as supportive of the constitutionality of the Rule 403 balancing test because the defendant in that case did not challenge the constitutionality of the rule. Moreover, the Court's ambiguous holding that the "highly probative" evidence did not "unduly" prejudice the defendant would be consistent with the rule proposed in Part IV of this Article, which demands a far greater showing of justification for admission of the evidence than is now required by Rule 403.

The first, and perhaps only, Supreme Court consideration of a challenge on constitutional grounds to the admission of potentially prejudicial evidence appears to have been in *Lisenba v. California*.[58] There

53. 469 U.S. 45 (1984).
54. *Id.* at 53.
55. *Id.* at 54.
56. *Id.* at 54–55 (emphasis original).
57. *Id.* at 55.
58. 314 U.S. 219 (1941).

the defendant complained, on fourteenth amendment due process grounds, about the admission of evidence of his prior uncharged wrongs and other allegedly inflammatory evidence. The defendant had been convicted on a state charge for the murder of his wife by drowning, with the apparent motive of collecting insurance proceeds on her life, after an abortive attempt to kill her by binding her and subjecting her to rattlesnake bites. The challenged evidence consisted of proof of the death of a former wife by drowning following a similar abortive murder attempt, accompanied by the defendant's collection of insurance proceeds on the former wife's life, and the introduction at trial of two rattlesnakes identified as having been sold to the defendant's alleged accomplice.

The Court's consideration and rejection of these challenges was cursory. Without citation of authority, the Court rejected the challenge to the evidence of the former wife's death, stating only that "[t]he Fourteenth Amendment leaves [the State] free to adopt a rule of relevance which the court below holds was applied here in accordance with the State's law."[59] Similarly, the Court cited no authority for its denial of the challenge to the admission of the snakes:

> We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process.[60]

Seven years after *Lisenba,* the Supreme Court decided *Michelson v. United States.*[61] In *Michelson* the defendant challenged the prosecutor's questioning of defendant's character witnesses about their knowledge of an arrest of the defendant twenty-seven years earlier, pursuant to the generally accepted common law rule permitting such questioning of reputation witnesses. Arguably, *Michelson* did not purport to resolve a constitutional issue; the majority never addressed the issues in constitutional terms and instead appears to have treated the issue as directed to the Court's supervisory powers over federal criminal trials.[62] However, two dissenters would have found a due process viola-

59. *Id.* at 227–28.
60. *Id.* at 228–29.
61. 335 U.S. 469 (1948).
62. Consider, for example, the final paragraph of the majority opinion:

The present suggestion is that we adopt for all federal courts a new rule as to cross-examination about prior arrest, adhered to by the courts of only one state and rejected

tion under the circumstances,[63] which suggests that the majority may have considered and rejected such a challenge.

But even if the *Michelson* majority was rejecting a constitutional challenge to the evidence, its conclusion was clearly grounded on the rationale that under the circumstances any prejudice was invited by, and in the control of, the defendant. The Court acknowledged the probable inadequacy of limiting instructions to avoid jury misuse of the evidence of the defendant's arrest:

> We do not overlook or minimize the consideration that "the jury almost surely cannot comprehend the Judge's limiting instructions," which disturbed the Court of Appeals. The refinements of the evidentiary rules on this subject are such that even lawyers and judges, after study and reflection, often are confused, and surely jurors in the hurried and unfamiliar movement of a trial must find them almost unintelligible.[64]

But, the Court found:

> [I]n cases such as the one before us, the law foreclosed this whole confounding line of inquiry, unless defendant thought the net advantage from opening it up would be with him. Given this option, we think defendants in general and this defendant in particular have no valid complaint at the latitude which existing law allows to the prosecution to meet by cross-examination an issue voluntarily tendered by the defense.[65]

Finally, in *Spencer v. Texas*[66] the Court rejected a general due process challenge to a Texas recidivist procedure in which the jury trying the issue of guilt was presented with evidence of the prior convictions supporting the recidivism charge, under instructions to disregard that evidence on the issue of guilt. The Court began its constitutional analysis by reviewing the variety of evidence rules permitting the use of evidence of prior convictions despite a potential for prejudice.[67] "In all these situations," the Court said, "the jury learns of prior crimes

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> elsewhere. The confusion and error it would engender would seem too heavy a price to pay for an almost imperceptible logical improvement, if any, in a system which is justified, if at all, by accumulated judicial experience rather than abstract logic.

Id. at 486–87 (footnote omitted).

63. In his dissent, Justice Rutledge stated:

> I think [the evidence of the prior conviction] was put in evidence in this case, not to call in question the witness' standard of opinion but, by the very question, to give room for play of the jury's unguarded conjecture and prejudice. This is neither fair play nor *due* process. It is a perversion of the criminal process as we know it.

Id. at 495 (Rutledge, J., joined by Murphy, J., dissenting; emphasis original).

64. *Id.* at 484–85.

65. *Id.* at 485.

66. 385 U.S. 554 (1967).

67. *Id.* at 560–61.

committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence."[68]

Ultimately, however, the Court based its decision on federalism concerns and the defendant's reliance on a generalized due process challenge rather than on a specific constitutional right:

> [I]t has never been thought that [cases acknowledging a due process right to fundamental fairness in criminal trials] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. . . .
>
> . . . In the procedures before us . . . no specific federal right . . . is involved; reliance is placed solely on a general "fairness" approach. In this area the Court has always moved with caution before striking down state procedures.[69]

This sparse precedent can be of little weight in a constitutional analysis of Rule 403's operation in criminal trials. The naked conclusions advanced in *Lisenba* express a federalism concern but are devoid of other reasoning. *Michelson* did not purport to be based on constitutional grounds, and moreover was premised on the defendant's control over the occurrence of prejudice, control that is missing for most issues under Rule 403. Of the three decisions, *Spencer* alone addressed the constitutional aspects of prejudicial evidence, but there are several reasons *Spencer* does not control the constitutionality of Rule 403.

First, *Spencer* was decided in 1967, three years before the Court's decision in *Winship*. The Court's decision in *Spencer* was premised in part on the generality of the defendants' challenge to the "fundamental fairness" of the procedure. However, a *Winship*-based challenge to a prejudicial procedure can no longer be said to be based solely on a general fairness approach. *Winship*'s constitutionalization of the reasonable doubt standard has added a new, specific, and fundamental interest in reliability to the constitutional equation. The *Spencer* Court's identification of a defendant's interest as one in the "fundamental fairness" of the proceedings, to be balanced against the "valid-

68. *Id.* at 561.
69. *Id.* at 564–65.

ity of the State's purpose in permitting introduction of the evidence"—an interest in avoiding multiple proceedings[70]—would not address a challenge to Rule 403 based on its impact on the *Winship* guarantee of the reliability of convictions.

In addition, to the extent *Spencer* might be viewed as approving, in dictum, the various rules permitting the use of prejudicial evidence, that approval must be taken in the context of the Court's assumption that the State's valid interest in the admission of the evidence would *outweigh* the prejudice to the defendant from its use.[71] That was the accepted balancing test prior to the adoption of Rule 403. Rule 403 has, however, reversed that balance.[72]

Moreover, the federalism concerns that were decisive in *Spencer* are missing in an analysis of Federal Rule of Evidence 403. Although acceptance of a *Winship*-based challenge to the constitutionality of the rule would cast serious doubt on the validity of any similar reliability-threatening state procedure, it is at least arguable that the *Spencer* concerns would support some measure of greater deference to state procedures than the Constitution would permit in the Court's review of the validity of a federal procedure.[73] That issue aside, the *Spencer* Court's repeated and decisive emphasis on federalism concerns precludes any controlling force for the decision in a constitutional analysis of Rule 403.[74]

The Court in none of these decisions considered a challenge to prejudicial evidence founded on the constitutional demand for reliability given explicit recognition in *Winship,* nor did it recognize and resolve

70. *Id.* at 561.

71. *See supra* text accompanying note 68 (quoting *Spencer*).

72. *See infra* note 132 (discussion of effect of Rule 403 on common law test).

73. The possible application of the arguments here to state procedures is a matter beyond the scope of this Article. The Supreme Court has acknowledged that federalism plays a part in *Winship* analysis. For example, the Court has recognized that the states have considerable latitude with respect to the definition of the elements of a crime for *Winship* purposes. *See, e.g.,* Martin v. Ohio, 480 U.S. 228 (1987) (state may constitutionally place burden of proof of self-defense on defendant); Patterson v. New York, 432 U.S. 197 (1977) (state may constitutionally place burden of proving absence of malice on defendant). On the other hand, the Court has shown no apparent deference to state interests where a state procedure has threatened the proper application of the reasonable doubt standard to a state's chosen elements. *See, e.g., supra* notes 39–43 and accompanying text (discussion of *Franklin*).

74. The Court's approach to *Spencer* was criticized in a contemporary survey as "almost archaic" and "hardly consistent with the Court's other . . . due process decisions." *The Supreme Court 1966 Term,* 81 HARV. L. REV. 69, 210, 211 (1967) (footnote omitted). *Spencer* was reaffirmed in a post-*Winship* decision, Marshall v. Lonberger, 459 U.S. 422 (1983). There, Justice Rehnquist's majority opinion reemphasized the federalism concerns as "central to our decision [in *Spencer*]." *Id.* at 438 n.6. Four dissenting Justices believed "the only premises that even arguably support the holding in *Spencer* are no longer valid." *Id.* at 457 (Stevens, J., dissenting).

the competing reliability concerns implicated by the admission of probative but prejudicial evidence. Thus, there is no Supreme Court decision that unambiguously delineates the boundaries of constitutionally acceptable allocations of the risks of error from the admission of prejudicial evidence, in light of *Winship*'s new emphasis on reliability. An indication of those boundaries can be found in the Court's *Winship*-based decisions which concern the validity of burden of proof-shifting presumptions and inferences. Additional guidance can be derived from the constitutional doctrine established by the Court for infringements on a criminal defendant's ability to cross-examine, a doctrine developed in response to concern about the impacts of hearsay on the reliability of the decisionmaking process.

3. *Constitutional Reliability Demands for the Admission of Hearsay Evidence*

An analogue of the constitutional issues raised by Rule 403 is found in the Supreme Court's decisions on the constitutionality of the admission of hearsay evidence against criminal defendants. Although the challenge to Rule 403 presented here is based on *Winship*'s fifth amendment due process guarantees, whereas those raised by hearsay evidence derive from the sixth amendment confrontation right, the two lines of inquiry involve identical interests and present the issues in an analogous setting. This overlap is constitutional as well; the confrontation right is made applicable to the states by the fourteenth amendment due process clause.[75]

At least since 1895, the Supreme Court has recognized that reliability concerns are the core of the confrontation clause.[76] The right "to confront and to cross-examine witnesses," the Court has held, "is primarily a functional right that promotes reliability in criminal trials."[77] Moreover, the Court has recognized that the admission of out-of-court statements against a criminal defendant demands a balancing of these reliability concerns against a competing societal interest in reliable factfinding that may be served by the admission of the statements.[78]

75. Pointer v. Texas, 380 U.S. 400, 403 (1965); *see also* Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1189 (1979) (adopting the position advanced by Justice Harlan in a concurring opinion in California v. Green, 399 U.S. 149, 172–89 (1970), that the confrontation clause states only a preference for the live testimony of a witness when available, and when the witness is not available the admissibility of the witness's hearsay declarations is governed by the due process clause).

76. *See* Mattox v. United States, 156 U.S. 237, 242–43 (1895).

77. Lee v. Illinois, 106 S. Ct. 2056, 2062 (1986).

78. *See* Bourjaily v. United States, 107 S. Ct. 2775 (1987). The Court in *Bourjaily* described its past efforts at confrontation clause analysis in distinctly balancing terms:

Since *Dutton v. Evans*,[79] this balancing approach has required a demonstration of "indicia of reliability" for out-of-court statements as a condition of their acceptability under the confrontation clause.[80] More recent decisions have found that requirement presumptively satisfied by the compliance of hearsay evidence with the requirements of a "firmly rooted hearsay exception."[81] However, for hearsay not within such an exception the Court has demanded "particularized guarantees of trustworthiness,"[82] which must provide reliability protections equivalent to those that normally would be provided by cross-examination.[83] This test does not lend itself to precise correlation with the balancing test of Rule 403, but at the least the hearsay test expresses a constitutional presumption against the admission of the evidence, absent a showing of predominant reliability or compliance with an established hearsay exception that ensures reliability.

This constitutional presumption disfavors the use of hearsay even though the reliability risks from "ordinary" hearsay are tempered by inherent protections against an inaccurate or irrational use of the evi-

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> [W]e have attempted to harmonize the goal of the [Confrontation] Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate factfinding, which may require consideration of out-of-court statements. To accommodate these competing interests, the Court has, as a general matter only, required the prosecution to demonstrate both the unavailability of the declarant and the "indicia of reliability" surrounding the out-of-court declaration.

Id. at 2782 (quoting Ohio v. Roberts, 448 U.S. 56, 65–66 (1980)).

79. 400 U.S. 74 (1970) (plurality decision).

80. *Id.* at 89.

81. *See, e.g.*, *Bourjaily*, 107 S. Ct. at 2782–83 (hearsay that falls within firmly rooted hearsay exception requires no independent inquiry into its reliability (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980))).

82. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." (footnote omitted)).

83. *See id.* The *Roberts* Court stated:

> Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule. . . ." The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," and "stem from the same roots."

Id. at 65–66 (quoting Dutton v. Evans, 400 U.S. 74, 86 (1970), California v. Green, 399 U.S. 149, 155 (1970), Snyder v. Massachusetts, 291 U.S. 97, 107 (1934), and Mattox v. United States, 156 U.S. 237, 244 (1895)).

dence by a factfinder. Although a defendant is denied the ability to test the reliability of hearsay by cross-examination, the defendant can point to that inability, the circumstances surrounding the making of the statement, and any unreasonable or contradictory inferences from the statement as reasons to doubt the statement's reliability; moreover, the statement will be evaluated by a factfinder who normally can be expected to make a rational application of the reasonable doubt standard to the proof.

It will be shown in Part III that those inherent protections are missing for unfairly prejudicial evidence and that "unfair prejudice" under Rule 403 is a measure of the risks that evidence may induce inaccurate or irrational factfinding, or factfinder departure from faithful application of the reasonable doubt standard. Those risks are parallel to the reliability risks presented by evidence of uncross-examined accomplice confessions. The Court's confrontation clause doctrine for that kind of evidence thus presents a closer analogy than "ordinary" hearsay to the constitutional demands for the treatment of unfairly prejudicial evidence.

The Court has held that evidence of an uncross-examined accomplice confession that incriminates a defendant "is so 'inevitably suspect' and 'devastating' that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions [cannot] be applied,"[84] generating the "concern that the admission of this type of evidence will distort the truthfinding process."[85] Thus, in *Bruton v. United States*[86] the admission of evidence of an accomplice confession was held to violate the defendant's confrontation right even though the jury had been instructed to disregard the confession as evidence against the defendant. In *Lee v. Illinois*[87] the Court addressed the demonstration of reliability constitutionally required for such evidence and held that there would need to "exist sufficient 'indicia of reliability' . . . to overcome [a] *weighty presumption against the admission* of such uncross-examined evidence."[88]

84. Lee v. Illinois, 106 S. Ct. 2056, 2063 (1986) (quoting Bruton v. United States, 391 U.S. 123, 136 (1968)).
85. *Id.*
86. 391 U.S. 123 (1968).
87. 106 S. Ct. 2056 (1986).
88. *Id.* at 2065 (emphasis added).

C. Summary: Constitutional Reliability Demands for the Admission of Evidence in Criminal Cases

A verdict of guilt must be more than a probably accurate reconstruction of historical events; it must inspire confidence that it reflects historical reality with the "utmost certainty" of which *Winship* spoke.[89] That historical reality is, however, unknowable, and our confidence in the "accuracy" of a verdict of guilt ultimately must turn on the extent to which the trial procedure permitted error in the verdict.[90] The constitutional measure of a procedure that affects the reliability of outcomes in criminal cases must be whether the procedure jeopardizes reasonable certitude that an innocent person has not been convicted. A procedure that jeopardizes that certitude is unconstitutional even if it might also enhance the possibility of obtaining an accurate conviction.[91]

89. *In re* Winship, 397 U.S. 358, 364 (1970).

90. This Article uses the term "accuracy" as a measure of the correctness of judicial determinations, like other writing on the topic. *See, e.g., infra* notes 103–04 and accompanying text (discussion of Professor Victor Gold's description of the connection between unfair prejudice and "accurate" factfinding); *infra* note 91 (Supreme Court's similar use of the term in Ake v. Oklahoma, 470 U.S. 68 (1985)); *infra* note 222 (Justice Harlan's similar use in concurring opinion in *Winship*). However, such uses of "accuracy" may generate semantic disagreement. Professor Ronald Allen has criticized "accuracy" as a meaningless measure of results in judicial determinations because " '[a]ccuracy' . . . is a measure of decisionmaking in conditions of certainty where reality is known," and "[d]ecisionmaking in the criminal justice system is decisionmaking in uncertainty." Allen, *Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justice's Views on Burdens of Persuasion in Criminal Cases*, 74 J. CRIM. L. & CRIMINOLOGY 1147, 1152 (1983); *see also infra* note 154 (discussing Professor Weissenberger's criticism of "accuracy" as a useful measure of the validity of evidence rules). Professor Allen prefers the term "rationality" as a measure of judicial decisionmaking, which he describes as "the correlation of a particular process or aggregate outcome with the process or outcome that we think would be provided by well-informed, disinterested decisionmakers." Allen, *supra*, at 1152 (footnote omitted).

As used in this Article, the "accuracy" of a judicial decision is the justifiable confidence that can be placed in the decision as a prediction of an unknowable, but nonetheless existent, reality. This kind of confidence in probable correctness is what standards of proof are about. If the reader understands that such references are meant to address expectations of correctness while acknowledging their ultimate uncertainty, the term should produce no semantic confusion.

91. There is a natural tendency to regard the government's interest in obtaining a conviction as one that competes with a defendant's interest in avoiding an inaccurate conviction. In this view, the balancing challenge presented by probative but unfairly prejudicial evidence involves a conflict of interests. However, this view fails to recognize the extent to which the interests of the government and the defendant are shared. The Court stated in *Ake v. Oklahoma*:

> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. . . .
>
> . . . The State's interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.

That constitutional test invites confusion about the demonstration of reliability that should be required for incremental items of proof in the government's case in criminal trials. When the only risk of unreliability presented by evidence is the risk that, considered in isolation, the evidence is less than convincing proof of guilt, the risk must be judged against the fact that the outcome will reflect the factfinder's application of a highly demanding measure of certainty to its ultimate evaluation of the totality of the proof. Thus, for unexceptional evidence risks of unreliability are accommodated by the expectations that factfinder rationality and the reasonable doubt standard will safeguard against erroneous convictions. Accordingly, the appropriate test for admissibility of an incremental piece of proof ordinarily is whether the proof offers the possibility of assisting toward a more reliable reconstruction of events. That question is satisfactorily answered by a trial court's determination that the evidence has probative value.[92]

This general principle does not, however, apply to evidence that threatens the normal expectation of rational and accurate decisionmaking or jeopardizes trust in the factfinder's faithful application of the standard of proof. For such evidence, the unreliability of these safeguards and the resulting threat to the integrity of the factfinding process demand special scrutiny of the potential impact of the evidence on the outcome—scrutiny found, for nonhearsay evidence, in the Rule 403 balancing test. The validity of that balancing test in criminal cases therefore will depend on the extent to which it provides safeguards against an erroneous conviction comparable to those provided by the reasonable doubt standard in circumstances where the integrity of the decisionmaking process can be presumed.

> Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.

470 U.S. at 68, 78–79 (1985); *see also* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969) (commenting on constitutional concerns raised by the operation of presumptions in criminal cases). The authors emphasized:

> By speaking in comparative terms, the court should not allow itself to stray into a balancing process involving elements which should not be balanced. To allow the government's interest to control the acceptable level of imprecision occasioned by the presumption is to lose sight of the meaning of that interest. The interest of the government is in proving that guilty persons are guilty; its interest is not simply in winning cases. The governmental interest in acquitting the innocent cannot be subordinated to its interest in convicting the guilty.

Id. at 186.

92. *See supra* note 48 (quoting Supreme Court's description of process for determining admission questions).

III. THE CONSTITUTIONALITY OF RULE 403

A. *Rule 403 as a Procedural Control on the Reliability of Decisionmaking*

1. *Probative Value and Unfair Prejudice as Reliability Concerns*

Although the Rule 403 balancing test necessarily presupposes an ability to meaningfully compare and to execute a rational balancing of probative value and the exclusion-justifying dangers, many courts and commentators may not perceive a shared theoretical basis by which such comparisons can be made.[93]

The concept of "probative value" in Rule 403 addresses the concern for reliability in factfinding. Although commentators have differed as to how the probative value of evidence should be assessed,[94] there is no dispute that ultimately it is a measure of the extent to which evidence may contribute to a more accurate factual determination. Indeed, there is a common tendency to think of the admission of probative evidence as always enhancing accurate factfinding, and its exclusion as invariably detracting from accuracy.[95] The relationship between unfair prejudice and this concern for accuracy in factfinding is less obvious, inviting the conclusion that Rule 403 requires a balancing of incomparables. For example, Charles Alan Wright and Kenneth Graham have contended that the balancing test of Rule 403 "requires one to balance incommensurable factors. It is like weighing so many pounds against so many feet since the units are measuring different qualities."[96] Similarly, Edward Imwinkelried has justified the admission-presumptive bias of Rule 403 in part because "[e]ven if the judge could objectively gauge either probative value or [prejudicial] danger, the factors themselves could not be so measured against each other. Striking a balance between such factors is a 'procrustean task,' and judges will inevitably differ in the manner in which they balance the factors."[97]

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93. *See* Gold, *Limiting Discretion*, *supra* note 11, at 60–63 (describing failure of courts and commentators to rationally compare probative value and prejudice for balancing purposes).

94. *See infra* note 112 (discussing proper measurement of probative value and prejudice).

95. *See, e.g.*, 1 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 402[01], at 402-8 ("The fundamental condition for enhancing the possibility of accurate fact finding is that as much relevant information as possible be placed before the trier." (footnote omitted)).

96. 22 C. WRIGHT & K. GRAHAM, *supra* note 4, § 5214, at 266 n.17.

97. Imwinkelried, *supra* note 6, at 1486–87 (quoting Comment, *Evidence—Other Crimes—Balancing Relevance and Need Against Unfair Prejudice to Determine the Admissibility of Other Unexplained Deaths as Proof of the Corpus Delicti and the Perpetrator's Identity:* United States v. Woods, *484 F.2d 127 (4th Cir. 1973)*, 6 RUT.-CAM. L.J. 173, 177 (1974) (footnotes omitted)).

Such claims of incomparability should be distinguished from the valid recognition that probative value and prejudice are not inherently reciprocal. *See, e.g.*, Note, *Other Crimes*

If Rule 403 required a balancing of incomparables it would provide an irrational basis for decisions on the admissibility of evidence. However, Victor Gold has convincingly refuted that idea in an article which demonstrates that a shared theoretical basis for evaluating the several factors addressed by the rule does exist and that the common ground for the evaluation and balancing of probative value and unfair prejudice is the interest in reliable factfinding.[98] In fact, Professor Gold's analysis demonstrates that the three unfairly prejudicial dangers addressed by the rule can be meaningfully balanced against probative value only when evaluated in terms of their impact on the reliability of factfinding.

As Gold notes:

> Courts and commentators have assumed that [probative value and the danger of unfair prejudice] refer to two distinct characteristics of evidence that should be evaluated in two very different ways. . . . [T]hese assumptions are unsupported by the . . . principles underlying Rule 403. Moreover, such assumptions provide no apparent basis for comparing unfair prejudice and probative value, making the required weighing of the two values a contest between apples and oranges in which it is impossible to pick a winner.[99]

Gold has examined the policies underlying Rule 403, finding the rule "like a statement of principle: concern for truth and fairness may override specific rules of admissibility."[100] Analyzing "truth" and "fairness" in the context of decisions on the admission of evidence at trial, he concludes that "both truth and fairness share a similar meaning[:] . . . rendition of verdicts by an unbiased jury based upon the logical implications of the evidence."[101] Thus, he finds, "the policies of fairness and accuracy underlying Rule 403 can be promoted if the court exercises its power to exclude evidence by considering the effect of evidence on the reliability of the jury's inferential processes."[102]

In Gold's view, "[i]f probative value refers to the capacity of evidence to produce a judgment based on accurate factfinding, unfair

Evidence at Trial: Of Balancing and Other Matters, 70 YALE L.J. 763, 773 (1961) ("There is no necessary correlation between prejudicial impact and probative worth. Prior sexual offenses and other heinous crimes can be extremely damning, even though their logical relation to the crime charged may be tenuous." (footnote omitted)).

98. Gold, *Limiting Discretion*, *supra* note 11. That article is in part a development of ideas advanced by Professor Gold in an earlier article, Gold, *Observations*, *supra* note 11.

99. Gold, *Limiting Discretion*, *supra* note 11, at 73 (footnote omitted).

100. *Id.* at 66.

101. *Id.* at 67.

102. *Id.* at 72.

prejudice must refer to the capacity of evidence to subvert this objective."[103] He concludes that

> [B]oth probative value and unfair prejudice should be interpreted as referring to the effect of evidence on the jury's inferential processes. Under this interpretation, evidence has probative value if it enhances the accuracy of jury factfinding. Accurate factfinding is enhanced when evidence logically increases the certainty of a fact in issue and the jury correctly perceives both the fact affected, and the extent to which its certainty is logically established. On the other hand, evidence is unfairly prejudicial when it detracts from the accuracy of factfinding by inducing the jury to commit an inferential error. Inferential errors occur when the jury perceives evidence to be logically probative of a fact when it is not, perceives the evidence to be more probative of a fact than it logically is, or bases its decision on improper bias. This interpretation makes the language of Rule 403 consistent with its underlying policies and provides a common theoretical basis for comparing probative value with unfair prejudice.[104]

As Gold acknowledges, "inferential errors" are not the only reliability-impairing concerns addressed in Rule 403; the potential appeal of evidence to emotion can also give rise to unfair prejudice.[105] In addi-

103. *Id.* at 79.

104. *Id.* at 73 (footnotes omitted).

105. *Id.* at 79. However, Professor Gold contends that even emotion-based prejudice ultimately derives its prejudicial impact from "inferential errors" of reasoning, rather than from the emotion itself. He notes, for example:

> When a jury concludes that the seriousness of plaintiff's injuries suggests defendant must have been negligent, the evidence of damage has been prejudicial. Prejudice arises not because of the jury's emotional reaction to the evidence, but because the evidence has induced an inferential error. . . . The prejudicial impact of photographs of a victim's gory remains derives from the potential of such vivid evidence to dominate the minds of jurors. The fact that such evidence evokes an emotional reaction from the jury does not necessarily make it prejudicial. There may be nothing wrong with shocking a jury with the repulsiveness of a wound, provided the impression created by the evidence is commensurate with its objective worth.

Id. at 82 (footnote omitted). Gold notes the findings of Kalven and Zeisel, that

> [J]uries . . . unconsciously yield to emotion when the meaning of the evidence or the proper inferences to be drawn therefrom are doubtful. Juries then begin unconsciously to rely on emotion to resolve their doubts, enabling them to draw an inference or reach a verdict. In this way emotion liberates the jury from the purely logical implications of the evidence.

Id. at 83 (citing H. KALVEN & H. ZEISEL, THE AMERICAN JURY 164–65 (1966)). Gold concludes:

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

Id. at 83.

tion, evidence can threaten the integrity of the decisionmaking process itself. For example, it can induce jurors to alter their calculus of the guilt-determination standard in a manner adverse to the defendant,[106] mislead them as to the legitimate issues in the case,[107] or confuse them in a way that substantially interferes with their ability to make a rational decision.[108]

Professor Gold's analysis presents a useful basis for evaluating the balancing test of Rule 403, because it demonstrates that probative value and prejudice are not "apples and oranges" but rather "apples and anti-apples," positive and negative contributors to the search for reliability in factfinding. This analysis provides an equivalent basis by which the factors addressed in the rule can be judged.[109]

The drafters of Rule 403 recognized that a contextual assessment of unfair prejudice is required and that this assessment should be made in

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106. *See infra* notes 138–40 and accompanying text (discussion of impacts of uncharged misconduct evidence on alterations of guilt-determination standard); *see also* 22 C. WRIGHT & K. GRAHAM, *supra* note 4, § 5215, at 278 ("[T]he Wigmorean definition of 'prejudice' is reminiscent of the test for determining the fitness of jurors to serve. This is hardly coincidental; one measure of the illegitimacy of a proposed line of proof is the degree to which it will lead the jurors to depart from the ideal conception of their function as fact-finders.").

107. See, e.g., Professor Graham's definition of the "misleading" danger, in terms that are clearly reliability-related and just as clearly within Professor Gold's concept of "inferential errors":

> While Rule 403 speaks in terms of both confusion of the issues and misleading of the jury, the distinction between such terms is unclear in the literature and in the cases. . . . While of course a jury confused [by evidence that causes it to lose sight of the main issue] can also be said to have been misled, it is suggested that the concept of misleading the jury refers primarily to the possibility of the jury overvaluing the probative value of a particular item of evidence for any reason other than the emotional reaction associated with unfair prejudice.

M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 403.1, at 184–85 (2d ed. 1986) (footnotes omitted).

108. The possible impact of the "confusion" danger on reliability should be obvious, if the risk of "confusion" is recognized as the risk that the factfinder may lose track of the real issues in a case and treat peripheral or inconsequential issues as controlling. The two factors, *misleading* and *confusion*, are specifically identified along with *unfair prejudice* in Rule 403 as "dangers" and thus are distinguished in kind—but not in treatment—from the time-wasting "considerations" in Rule 403. Professor Gold recognizes both as threats to reliable factfinding. *See* Gold, *Limiting Discretion*, *supra* note 11, at 65.

109. Although some commentators have questioned the existence of a logical relationship between probative value and prejudice, others have recognized the reliability-based relationship Professor Gold has described. *See, e.g.*, 1 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 402[02], at 402-11 ("A line of proof directed to one proposition may cause confusion or prejudice concerning another. A certain type of proof may be inherently lacking in trustworthiness so that its admission would hamper rather than advance the search for truth."); *see also* Dolan, *supra* note 7, at 226–27; Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1032–41 (1977).

The theses of this Article rely on the validity of Professor Gold's observation that probative value and unfair prejudice are fundamentally reliability-related concepts. The reader who harbors doubts about the validity of the observation or desires a more extensive explanation is encouraged to consider Gold's articles in full.

light of the circumstances of a particular case and after accounting for any possible reduction of prejudice that can be obtained through the use of protective measures.[110] An assessment of probative value also should be contextual. To the extent other evidence has convincingly established the fact in question, the incremental probative value of the evidence in question to prove the same point may be substantially reduced from what it would have been if viewed in isolation.[111] In other words, estimations of *both* probative value and prejudice should be contextual predictions of the probable impact of the evidence on the reliability of decisionmaking.[112]

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110. The advisory committee's note to Rule 403 clearly contemplates that assessments of unfair prejudice will be contextual. The committee stated that

> Situations in this area call for balancing the probative value of and need for the evidence against the harm *likely to result from its admission*. . . . In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.

FED. R. EVID. 403 advisory committee's note (emphasis added). Other measures may also be available to reduce prejudice dangers, and appropriately would be considered in a prediction of likely prejudice. *See, e.g., infra* notes 195–98 and accompanying text (discussing advance notice of the intent to offer evidence, required withholding of the evidence until rebuttal, acceptance of stipulations, and articulation of theories of admissibility).

111. The advisory committee's note to Rule 403 states that "[t]he availability of other means of proof may . . . be an appropriate factor" to be considered in reaching a decision whether to exclude on the ground of unfair prejudice. FED. R. EVID. 403 advisory committee's note.

In an article applying probability theory to legal relevance questions, Professor Richard Lempert has also concluded that the relevance of an item of proof on an issue is interdependent with the relevance of other proof offered on the same issue. *See* Lempert, *supra* note 109, at 1042–46.

112. Some courts and commentators have advocated an application of Rule 403 that would have the trial court measure the probative value of evidence by the maximum logical force it could justify, while discounting the risk of unfair prejudice by the application of some form of conservative bias to its measurement. For example, Judge Weinstein and Professor Berger have stated that the usual approach of courts conducting Rule 403 balancing is to "give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." 1 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 403[03], at 403-47. Stephen Saltzburg and Kenneth Redden have argued instead that "the proper equation places on one side the maximum reasonable probative force of the offered evidence . . . [against] the *likely* prejudicial impact of the evidence," because juries are allowed to make all reasonable inferences from the proof, justifying an allocation of maximum probative force, but "there is no reason to assume that they will act as imperfectly as possible," thus justifying an allocation of only *likely* prejudicial effect. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 139 (4th ed. 1986) (emphasis original).

Such recommendations miss a fundamental point. In a jury trial, the probative value that counts is the assistance the offered evidence will provide the jury toward reaching a more correct determination of what happened during the events in issue. This will depend in part on the incremental value of the evidence in question—what the evidence adds to the basis the jury already has for making that determination—and in part on the jury's ability to comprehend the legitimate force of the evidence as an indicator of historical reality. Evidence that might be powerfully persuasive to a nuclear physicist would be of no probative value to a jury that found it

It is important to recognize that prejudice-reducing measures, even if effective, serve only to reduce the risk of prejudice *before* the Rule 403 balancing test is applied. The fact that the danger of prejudice is weighed and balanced *after* prejudice-reducing measures are taken into account is important to an evaluation of the constitutionality of the Rule 403 allocation of burdens. It means that such measures, while significant in a prebalancing assessment of the likelihood of prejudice, cannot be regarded as a cure for any tendency toward error produced by the balancing test itself.[113]

Thus, the three "dangers" addressed by the rule, *unfair prejudice, confusion of the issues,* and *misleading the jury,* concern predictions that the admission of evidence will produce normative error by inviting impermissible grounds for a decision, or factual error by inviting misestimation of the fair weight of the evidence by the jury or by misdirecting the jury from the legitimate issues in the case.[114] If the probative value of evidence offered by the prosecution is its expected tendency to lead the jury to a correct decision, unfair prejudice means its tendency to lead the jury to normative or factual error. The Rule 403 balancing test for criminal cases therefore can be paraphrased to

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incomprehensible. In addition, often there will be considerable room for difference of opinion among judges and lawyers about what the probative force of a given item of evidence might be.

Professor Gold concludes that

> [P]robative value under Rule 403 can and should be accurately measured by considering both the degree to which the evidence increases the certainty of the existence of a fact in issue, given the other evidence in the case, as well as the probability the jury will correctly perceive the degree of certainty and the fact affected.

Gold, *Limiting Discretion, supra* note 11, at 79.

Thus, fair assessments of both probative value and prejudicial potential must take into account uncertainties about the actual impact of the evidence on a jury and can be, at best, no more than estimations of the probable benefits and costs of admission.

113. "Unfair prejudice" in a Rule 403 equation is therefore a measure of the judicially-predetermined likelihood of erroneous decisionmaking that would be induced by admission of the evidence. In Francis v. Franklin, 471 U.S. 307 (1985), the Supreme Court found potential for a violation of *Winship* whenever there is a reasonable possibility of adverse impact on a factfinder's application of the reasonable doubt standard. *See supra* notes 39–43 and accompanying text. A trial court facing an admissibility determination under Rule 403 thus confronts risks of constitutional dimension, in *Franklin* terms, whenever the court sees *any* significant danger of unfair prejudice that could affect the factfinder's application of the reasonable doubt standard to the proof or the substantive reliability of its determination of guilt.

114. The Rule's list of negative values lumps together, as equivalents for balancing purposes, two categories of evidence that implicate vastly different values: First, concerns of importance to the *reliability* of the trial process—the prejudice, misleading, and confusion dangers—and second, time-wasting considerations of inconceivable impact on fundamental interests except when used to exclude evidence offered by an accused.

This undifferentiated treatment of two matters, one of potential adverse impact on the most fundamental of process values and the other of mundane significance, is reason in itself to question the integrity of the Rule's balancing equation.

read, "Evidence offered by the prosecution shall not be excluded because it may lead to an erroneous conviction unless that risk is substantially greater than the possibility that it will lead to a correct conviction."

2. *The Impacts of Prejudicial Evidence on Reliable Decisionmaking*

The mechanisms by which prejudicial evidence influences decisionmaking processes are only imperfectly understood,[115] but courts and scholars have long believed that some kinds of evidence can have profound reliability-threatening impacts on the outcome of trials. Accordingly, judicial control of the use of potentially prejudicial evidence has been in existence for over three hundred years.[116]

Dangers of unfair prejudice can arise in a number of ways. For example, evidence may demonstrate a defendant's unsavory or immoral character,[117] or unpopular or contemptible associations[118] or beliefs[119] that could arouse juror antagonism; it may vividly portray gruesome[120] or offensive[121] aspects of the charged crime or otherwise overemphasize negative connotations,[122] inciting a jury's vindictive-

115. Common sense and intuition have provided the primary bases for traditional assumptions about the need for judicial control of potentially prejudicial evidence. Recently, however, empiricists and cognitive psychologists have produced support for many of these assumptions. *See infra* notes 142–48 and accompanying text (empirical support for reliability concerns).

116. *See* Reed, *supra* note 12, at 717 (providing an extensive review of the historical development of doctrine for the exclusion of uncharged misconduct evidence).

117. *See, e.g.,* United States v. Barletta, 652 F.2d 218, 220 (1st Cir. 1981) (defendant's vulgar conversation with government informant, an admitted criminal, "suffused with an aura of non-specific criminality").

118. *See, e.g.,* United States v. Abel, 469 U.S. 45 (1984) (membership in secret prison organization, whose members were required to lie, cheat, steal and kill to protect each other); United States v. Turoff, 291 F.2d 864 (2d Cir. 1961) (defendant's active participation in Communist Party); United States v. Rosenberg, 195 F.2d 583 (2d Cir.) (membership in Communist Party), *cert. denied,* 344 U.S. 838 (1952); *see also infra* note 223 (discussion of article finding constitutional demand for caution in admission of prejudicial evidence of speech or association).

119. *See, e.g.,* United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986) (in civil rights prosecution, defendant's alleged racist remarks eight years prior); United States v. Moon, 718 F.2d 1210 (2d Cir. 1983), *cert. denied,* 466 U.S. 971 (1984); United States v. Sickles, 524 F. Supp. 506 (E.D. Pa. 1981), *aff'd,* 688 F.2d 827 (3d Cir. 1982).

120. *See, e.g.,* United States v. Bowers, 660 F.2d 527 (5th Cir. 1981) (in child abuse prosecution, color photograph of child's lacerated heart); Papp v. Jago, 656 F.2d 221 (6th Cir.) (autopsy slides of rape victim's genital area), *cert. denied,* 454 U.S. 1035 (1981).

121. United States v. Borello, 766 F.2d 46 (2d Cir. 1985) (in prosecution for importing goods by use of false statements, list of actual titles and sexually explicit brochure).

122. *See, e.g.,* United States v. Anderson, 584 F.2d 849 (6th Cir. 1978) (in drug prosecution, expert testimony about effects of drug); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978) (in prosecution for sale of guns without paying tax, testimony describing weapons as gangster weapons and antipersonnel devices).

ness; it may invite unwarranted conclusions or lead to confusion of the issues,[123] generating a risk of factfinding mistake; or it may unreasonably appeal to a jury's emotions[124] or prejudices.[125]

One form of potentially prejudicial evidence, evidence of uncharged misconduct by the accused,[126] is routinely involved in criminal trials[127] and has generated what has been called a "staggering" body of commentary.[128] With rare exception, courts and commentators have agreed that uncharged misconduct evidence can have decisive influence on criminal trials as a result of unreliable, emotional, or irrational impacts on the jury's factfinding process.[129]

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123. *See, e.g.,* Holland v. United States, 348 U.S. 121 (1954) (use of "net worth" accounting approach in tax evasion prosecutions); United States v. Massey, 594 F.2d 676 (8th Cir. 1979) (mathematical probability proof); United States v. Morrow, 537 F.2d 120 (5th Cir. 1976) (written transcripts of previous testimony as exhibits; risk of undue weight), *cert. denied,* 430 U.S. 956 (1977); United States v. Stabler, 490 F.2d 345 (8th Cir. 1974) (photograph of defendant's clothing showing unexplained bloodstain); United States v. Traficant, 566 F. Supp. 1046 (N.D. Ohio 1983) (voice stress lie detection tests; risk jury might substitute results for required fact findings).

124. United States v. Layton, 767 F.2d 549 (9th Cir. 1985) (in prosecution for murder of U.S. Congressman at Jonestown, Guyana, tape recording made during mass suicide with background sounds of crying, presumably dying, children).

125. *See, e.g.,* United States v. Millen, 594 F.2d 1085 (6th Cir. 1979) (defendant's homosexual relationship with victim), *cert. denied,* 444 U.S. 829 (1979).

126. "Uncharged misconduct" is the label for this evidence used by Professor Imwinkelried, who has written extensively on the topic. *See, e.g.,* E. IMWINKELRIED, *supra* note 12. This type of evidence, involving proof of criminal or otherwise reprehensible conduct by an accused other than the acts with which the accused is charged, is variously described in the literature as "bad acts," "specific acts," "extrinsic acts," "character evidence," "propensity evidence," or "prior crimes evidence," and, in FED. R. EVID. 404(b), as "evidence of other crimes, wrongs, or acts."

127. *See* E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, COURTROOM CRIMINAL EVIDENCE 235 (1987) (Rule 404(b) has "generated more published opinions than any other subsection of the rules"); *see also* 2 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 404[08], at 404-56.

128. E. IMWINKELRIED, *supra* note 12, § 1:04, at 8. For partial catalogues of the literature on the topic, see *id.* at n.9, and 2 J. WEINSTEIN & M. BERGER, *supra* note 4, at 404-9 to 404-11.

129. *See, e.g.,* E. IMWINKELRIED, *supra* note 12, § 1:02 ("Evidence of uncharged misconduct strips the defendant of the presumption of innocence." (footnote omitted)); Dolan, *supra* note 7, at 226–27; Kuhns, *supra* note 12, at 803 ("[The principle] that specific acts are inadmissible to prove character to show action in conformity with character rests on the premise 'that extrinsic acts evidence is fraught with dangers of prejudice—extraordinary dangers not presented by other types of evidence.' ") (quoting United States v. Beechum, 582 F.2d 898, 920 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting), *cert. denied,* 440 U.S. 920 (1979)); Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b),* 70 IOWA L. REV. 579, 581 (1985) ("Arguably no other item of evidence, except perhaps testimony based on personal perception of the operative facts, possesses such enormous potential to affect the outcome of a criminal case."); *see also infra* notes 142–48 and accompanying text (discussion of the empirical evidence substantiating these impacts).

In a decision made before the Federal Rules of Evidence were adopted, the Tenth Circuit described the practical impact of uncharged misconduct evidence in categoric terms: "[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes,

Federal Rule of Evidence 404 codified the common law provisions governing the admissibility of evidence of a person's uncharged misconduct.[130] Rule 404(a) represents the "propensity" or "character" evidence ban recognized at common law. The common-law rule prohibited the admission of evidence of uncharged misconduct when offered to support the inference that a person acted in a certain way from a general disposition to do so, because of the belief that the evidence would be dangerously prejudicial when used for this purpose. Subsection (b) of Rule 404 adopted the "inclusionary" approach to evidence of uncharged misconduct, under which evidence of "other crimes, wrongs, or acts" is admissible, despite the propensity evidence prohibition, so long as it is offered for any purpose other than proving

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completed and the guilty outcome follows as a mere formality. This is true regardless of the care and caution employed by the court in instructing the jury." United States v. Burkhart, 458 F.2d 201, 204 (1972).

For one example of a contrary view, see Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom,* 130 U. PA. L. REV. 845 (1982), stating:

> If we hope to achieve rules that make sense, and if we hope to write rules to enhance the accuracy of the fact-finding process, we should abandon our frayed pretense concerning the value of character evidence. A trait of character is, almost by definition, a predisposition to characteristic conduct under appropriate circumstances.... If the evidence is such that the jury may infer a disposition to perform the conduct in issue, we should permit rather than prohibit them from doing so.

Id. at 883. In fairness to Professor Uviller, it should be noted that his position was premised on a requirement that the character evidence share substantial similarities with the charged acts, a situation in which some empirical evidence suggests that the validity of a propensity inference is highest. This is also, however, a situation where the risks of jury misuse of the evidence may be highest. *See infra* note 182.

130. FED. R. EVID. 404 provides as follows:

> RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT: EXCEPTIONS; OTHER CRIMES
>
> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

a person's propensity.[131] Such uses are controlled by the application of Rule 403, to balance the claimed "other purpose" relevance of the evidence against the danger that a jury might also be unreasonably influenced by it.[132]

Most of the scholarly attention to unfairly prejudicial evidence has centered on the impacts of uncharged misconduct evidence. Commentators have identified a number of ways uncharged misconduct evidence may give rise to unfair prejudice through invitation of factfinding error and through potential alteration of the guilt-determination standard. There is substantial empirical support for the concerns raised in that commentary.

a. Factfinding Errors

Perhaps the most easily recognized prejudice risk from uncharged misconduct evidence is the risk of factfinding error through overvaluation of the probative force of a past conduct-present conduct connection. The premise is that jurors will be likely to find a substantially greater probability connection between a person's past misconduct and present culpability than the connection deserves.[133] There is additional concern that jurors may unreasonably discount or disregard evidence offered by an accused who has been shown to be deserving of contempt.[134] Jurors also may be led to error by confusion of questions

131. The "exclusionary" approach followed in some jurisdictions at common law prohibited the use of uncharged misconduct evidence unless it fit within certain recognized exceptions. *See* Imwinkelried, *supra* note 6, at 1467–68 (discussion of inclusionary and exclusionary approaches).

132. The Rule 403 balancing test, which places the burden on the opponent of prejudicial evidence to show that the unfair prejudice "substantially outweighs" its probative value, turns on its head the predominant common law test for the admissibility of uncharged misconduct evidence. *See id.* at 1469–79; *see also* E. IMWINKELRIED, *supra* note 12, § 8:27, at 56 ("At common law, the virtually unanimous view is that the proponent of the uncharged misconduct evidence has the burden [of persuading the trial judge that the proponent's need for the evidence outweighs its prejudicial character]." (footnote omitted)). Accordingly, a number of commentators have suggested interpretations of Rule 404(b) that would either remove it from the coverage of Rule 403, preserving the common law burden, or would only partially incorporate Rule 403, applying it as an indication of the considerations to be made in an admission decision under Rule 404(b) but retaining the common law burden. *See* Imwinkelried, *supra* note 6, at 1479, 1481.

Recently, however, the United States Supreme Court held that Rule 403 applies to the admission of uncharged misconduct evidence. *See* Huddleston v. United States, 108 S. Ct. 1496 (1988).

133. *See, e.g.*, 2 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 404[04], at 404-29; R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 213 (1977); Lempert, *supra* note 109, at 1027–30; Weissenberger, *supra* note 129, at 602–04; Note, *supra* note 97, at 763–64.

134. *See, e.g.*, Note, *supra* note 97, at 764.

about the defendant's commission of uncharged bad acts with the question of guilt of the charged crime.[135]

A defendant may be surprised by evidence of uncharged misconduct, and thus unprepared to rebut such proof.[136] This could lead to inferential error because the jury might thereby be misinformed as to the true facts surrounding the prior conduct. Although a similar risk might be present for any prosecution proof of which a defendant has no notice, the problem can be particularly acute for uncharged misconduct evidence because the evidence may have a powerful impact on the jury and because proof of the misconduct could resemble a mini-trial for the uncharged acts on an issue collateral to the proceedings.

Richard Lempert has described a potential for prejudice from "double counting" of uncharged misconduct evidence, based on the conclusion, supported by empirical evidence, that a jury presumes to some measure that a defendant is guilty because the government has chosen to charge the defendant with a crime. Thus, Lempert argues, if a defendant's uncharged misconduct is in fact of some relevance to guilt, that relevance is already factored by the jury's initial skepticism about the defendant's innocence. In this situation, allowing further proof of those past acts may produce a "double counting" of any legitimate relevance the acts have.[137]

b. Alteration of the Guilt-Determination Standard

The following concerns differ from those outlined above in that they predict adverse impacts on a factfinder's application of the expected standard for determining guilt or innocence, rather than impacts on the underlying factual determinations.

Several commentators have recognized that evidence of uncharged misconduct can lead a jury to convict an accused, even if guilt of the charged offense has not been clearly demonstrated, because the accused has been shown either to be a person deserving of punishment for bad character or to be guilty of other sins for which the accused has never been punished.[138]

135. *See, e.g.,* R. LEMPERT & S. SALTZBURG, *supra* note 133, at 213.

136. *See, e.g., id.*; Kuhns, *supra* note 12, at 778 n.4.

137. *See* Lempert, *supra* note 109, at 1051–52. Professor Lempert cautions that "[s]ince it is not clear how much double counting has occurred or which evidence is most likely to be redundant, controlling for this possibility is difficult, if not impossible." *Id.* at 1051.

138. *See, e.g.,* E. IMWINKELRIED, *supra* note 12, § 1:03; R. LEMPERT & S. SALTZBURG, *supra* note 133, at 212; Kuhns, *supra* note 12, at 777–78 (1981); Note, *supra* note 97, at 763. Although uncharged misconduct evidence is the most frequently mentioned source of this concern, the same risk could be generated by evidence of a defendant's unpopular beliefs or associations.

In addition, Lempert and Stephen Saltzburg have posited a factfinder's diminished regret about possible error in a determination of guilt when the factfinder learns that the accused is an "evil person."[139] In effect, Lempert and Saltzburg have described the possibility that such evidence could alter a factfinder's calculus of the acceptable level of doubt about a defendant's guilt, producing an increased tolerance of potential error in a conviction.[140]

Each of the foregoing risks of prejudice threatens the reliability of a determination of guilt, either by inducement of factfinding error or alteration of the jury's calculus of guilt. Although a number of those risks have been articulated only in more recent writings, the reliability concerns they express formed the basis for the common law prohibition of propensity evidence.[141]

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139. R. LEMPERT & S. SALTZBURG, *supra* note 133, at 151–53; *see also* Lempert, *supra* note 109, at 1032–41. The authors explain the risk as follows:

> The behavioral hypothesis implicit here is that if the jurors think the defendant may be guilty of only one crime, they will not feel that the mistake of acquitting necessarily frees a basically evil person, one committed to a life of crime or one who has already done sufficient social harm to justify severe retribution. Where they know that defendant, if guilty, has committed a number of crimes, the jury will probably evaluate the above factors quite differently and their regret at acquitting a guilty defendant will rise substantially.

R. LEMBERT & S. SALTZBURG, *supra* note 133, at 219 n.78.

140. *See* H. KALVEN & H. ZEISEL, *supra* note 105, at 179 (concluding, based on findings of the Chicago Jury Project, that the presumption of innocence does not in actual fact operate for persons with criminal records and that if the jury learns of uncharged misconduct by the defendant it will probably use a "different . . . calculus of probabilities" in determining guilt); *see also* Weissenberger, *supra* note 129, at 608 n.87 (suggesting that uncharged misconduct evidence "may have such a persuasive influence on the jury that the prosecution is not forced to prove the accused's guilt in regard to the operative facts. . . . [T]he admission of this evidence may conflict functionally with the presumption of innocence which protects the criminal defendant.").

These described effects on normative standards could arise as well from other sources of prejudice, such as evidence of a defendant's unpopular beliefs, associations, or noncriminal but immoral character, or jury vindictiveness aroused by inflammatory proof.

141. For an early example of United States Supreme Court recognition of the prejudicial potential of such evidence, one which recognizes no fewer than five of these concerns (surprise, misestimation, confusion of the issues, arousal of punitive instincts, and interference with the guilt determination standard), see Boyd v. United States, 142 U.S. 450 (1892). There, in a felony murder trial for killings during a robbery, evidence was admitted of a number of prior robberies committed by the defendants during the month prior to the charged crime. The judge had instructed the jury that the evidence was to be considered only on the issue of the identity of the felony murderers. *Id.* at 456–57. The Supreme Court reversed:

> No notice was given by the indictment of the purpose of the government to introduce proof of [the prior robberies]. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder . . . in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. . . .

c. Empirical Support for Reliability Concerns

The extensive history of judicial and scholarly recognition of these problems is, standing alone, weighty support for the belief that unfairly prejudicial evidence can threaten the reliability of convictions. There is, in addition, abundant empirical evidence substantiating the conclusion that some kinds of evidence can have powerful negative impacts on reliability.

Professor Miguel Mendez has concluded, from an extensive review of empirical evidence relating to the impacts of uncharged misconduct evidence, that "the research casts serious doubts on the assumed probative value of character evidence and appears to confirm the law's concern that such evidence carries undeserved weight."[142] Mendez has described a variety of decisionmaking phenomena demonstrated by empirical research, including the guilt-implicating setting of a criminal trial[143] and the tendencies of jurors to give greater weight to evidence of misconduct and dishonesty than to equivalent favorable evidence,[144] to overestimate the value of character or uncharged misconduct evidence as predictive of behavior,[145] to irrationally discount the validity of evidence offered by an accused who is presented in a disagreeable light,[146] and to form simplifying assumptions about situations based on character inferences and to resist information inconsistent with those assumptions.[147] Other empiricists and legal scholars have reached similar conclusions.[148]

> However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged.

Id. at 458.

142. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies,* 31 U.C.L.A. L. REV. 1003, 1059 (1984).

143. *See id.* at 1044–45.

144. *See id.* at 1045–46.

145. *See id.* at 1047–54.

146. *See id.* at 1046–47.

147. *See id.* at 1053–54.

148. *See* Rhode, *Moral Character as a Professional Credential,* 94 YALE L.J. 491, 556–62 (1985) (drawing similar conclusions and citing numerous supporting authorities).

Professor Gold also has investigated the implications principles of cognitive psychology hold for the Rule 403 balancing process. *See* Gold, *Observations, supra* note 11, at 510–24. Gold similarly has concluded that "there is abundant evidence that in particular decisionmaking contexts relevant to the trial of lawsuits [jurors' cognitive tools] may distort rather than reveal the truth." *Id.* at 510. Gold describes heuristics and knowledge structures which can generate inaccurate inferences about events and their significance, discusses their potential role in an evaluation of probative value and prejudice under Rule 403, and concludes that "[e]vidence of other crimes or acts of a party, particularly a defendant in a criminal prosecution, has great potential to induce inferential error." *Id.* at 523–30; *see also* Imwinkelried, *supra* note 6, at 1490 ("empirical research indicates . . . that evidence of uncharged misconduct poses a grave

B. *The Impact of Rule 403 on Reliable Decisionmaking*

1. *The Impact of Rule 403 Balancing on Outcomes*

An evaluation of the impact of Rule 403 on the constitutional rights of criminal defendants should consider only those circumstances where application of the rule makes a difference and need not concern the impact of the rule when it does not bear on the outcome of a case. If a conviction would have resulted regardless of the admission of unfairly prejudicial evidence, the decision on admissibility was meaningless to the outcome and any error in the decision was harmless to the defendant.[149]

Rule 403 was not written to govern inconsequential evidence. Its purpose is to control the admission of evidence that is expected to affect outcomes. Therefore, discussion of the impact of Rule 403 is worthwhile only when confined to the rule's impact in close cases where the admission of the evidence in question may prove decisive of the outcome.

There are only two situations in which a decision on the admissibility of unfairly prejudicial evidence may affect the outcome of a criminal trial and thus where inquiry into its validity is justified.[150] The first exists when a factfinder will not convict without the evidence but will convict on consideration of the legitimate probative value of the evidence and will do so regardless of its potential for unfair prejudice. Here the proof of guilt will rationally justify a conviction apart from any unfair impact of the evidence. In this situation, exclusion of the evidence will result in an acquittal when a just conviction would have

likelihood of prejudice"); Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 766–89 (1975) (reaching similar conclusions about the impacts of misconduct evidence when offered to challenge a defendant's credibility).

149. *Cf.* Lempert, *supra* note 109, at 1048 n.63. Lempert writes:

> If the evidence is cumulative (in the sense that it is further proof of something that has been indisputably established) on the ultimate issue in the case (*e.g.*, guilt) rather than on some constituent fact, a mistaken decision to admit prejudicial evidence should be harmless error, since even without the evidence a reasonable jury would not have reached a different conclusion.

Id.

150. As a device governing the admission of evidence at trial, the rule's only direct impact is on the trial stage of a criminal prosecution. Clearly, however, a defendant's plea bargaining decisions may be affected by expectations about the likelihood of potentially prejudicial evidence being admitted at trial. This might mean, for example, that an innocent defendant who can anticipate that unfairly prejudicial evidence will be admitted at trial will have increased reason to plead guilty to a reduced charge to avoid an erroneous conviction of a more serious offense, or to avoid the risk of a harsher sentence following a trial conviction rendered more likely because of the prejudicial evidence. Thus, the rule may affect a defendant's interests regardless of whether evidence is admitted under the rule at trial.

been obtained through its admission; in other words, exclusion will result in the erroneous acquittal of a guilty defendant.

The second situation exists when the factfinder would not convict if it considered only the legitimate probative value of the evidence but will convict because of unfair prejudice from the evidence. In this situation admission of the evidence will produce an erroneous conviction, where in fact the jury would have had reasonable doubt about the defendant's guilt if it had considered only the legitimate force of the government's proof.

In the real world the trial judge does not know, at the time of a ruling on the admission of the evidence, whether the evidence will prove decisive to a conviction. The jury's appraisal of other evidence in the case and its group judgment about the certainty of proof necessary to convict in the particular case, factors beyond the judge's ken, will determine how close to a conviction the jury would be without the evidence. Nor can the judge know, if the evidence proves decisive, whether the legitimate probative force of the evidence is sufficient to convince the jury of guilt or whether instead it will be the prejudicial effect that carries the jury to the point of a conviction. The only information the court can know with certainty is the court's assessment of the probative value and danger of unfair prejudice presented by the evidence. What the court can do is estimate the legitimate probative value of the evidence (the extent to which the evidence could move the jury toward a legitimate conviction) and its prejudicial potential (the extent to which it could move the jury toward error). The court must base its admission decision on the potential impact of the evidence on the outcome—on the comparative potential of the evidence for producing a correct or an erroneous conviction.

A rule governing the admission of the evidence, therefore, must assume that the evidence could have decisive impact, and the implications of that impact must be judged by the comparative extent to which the probative value and unfair prejudice from the evidence may induce a conviction. If, for example, a court admits evidence that has equivalent probative value and danger of prejudice, in the close cases where the evidence proves decisive the effect of its admission will be to make an erroneous conviction and a correct one equally probable.[151]

151. The foregoing analysis perhaps ignores another possible result, that the prejudicial impact of the evidence would in fact be the decisive factor in producing a conviction of a factually guilty defendant whom the jury erroneously would have acquitted based solely on the legitimate probative value of the evidence in question and the prosecution's other proof in the

In the context of a civil case, a balancing test weighted in favor of the admission of probative but prejudicial evidence may be reasonable because an inaccurate result favoring a plaintiff is no more or less odious than one favoring a defendant.[152] Moreover, in a civil case concern about prejudice is essentially party-neutral, since prejudicial evidence is as likely to be offered by or against one party as the other. Thus, the reasonable measure of the merit of a rule governing the receipt of evidence in civil cases should be whether the rule promotes factually correct outcomes more often than incorrect outcomes.[153] Here any balance in favor of historically accurate determinations in the run of cases is a positive balance; the goals of the judicial system are served by any device that more often than not promotes a historically correct decision.

In contrast, basic precepts of criminal justice favor the accused. These precepts demand a substantial bias in the controls on decision-making, in favor of extraordinary care to avoid erroneous convictions.

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case. In other words, the analysis perhaps too readily concludes that a conviction resulting from the prejudicial impact is an erroneous conviction.

There are at least two reasons to reject this objection. First, any rule that encourages the admission of additional evidence having a tendency to convict will result in a greater number of convictions, and some portion of the additional defendants thereby convicted will be factually guilty. For example, this would be true of a rule that permitted the introduction of evidence of purely prejudicial content having no probative value, or, to cite the most extreme example, of a procedural rule that simply convicted everyone charged with crime without a trial. Neither of those rules could be justified by the increased number of correct convictions they would produce. Instead, the legitimate inquiry has to be whether the corresponding risk of convicting innocents generated by such a rule is consistent with expectations of accuracy in criminal procedure.

Second, the objection cuts both ways, and in essence it does no more than point out the inherent fallibility of the factfinding process. Thus, it is equally true that in the close cases in which the admission of the evidence proves decisive, some of those defendants whom the jury would convict despite the prejudicial impact of the evidence will be factually innocent. But given the inherent limitations on our ability to know historical truth, the "guilt" or "innocence" of a defendant and the "accuracy" or "inaccuracy" of a conviction can only be judged by the decision of a rational factfinder making fair use of the proof, applying an appropriate standard of certainty, and therefore we must accept such mistakes as correct decisions.

152. *See In re* Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) ("In a civil suit between two private parties for money damages . . . we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor . . . ."); Addington v. Texas, 441 U.S. 418, 423 (1979) (the preponderance of the evidence standard in civil cases represents a judgment that the litigants should "share the risk of error in roughly equal fashion").

153. A rule may attempt to promote policies or values other than the interest in reliable determination of the issues, as, for example, FED. R. EVID. 407 (evidence of subsequent remedial measures), FED. R. EVID. 408 (evidence of compromise and offers to compromise), or any of the evidentiary privileges. In those situations reliability concerns may yield to other concerns deemed of overriding importance. However, there is no such extraneous policy or value served by the admission of relevant but potentially prejudicial evidence. Its value lies solely in the probative force it may have—its contribution to a more reliable determination of the issues.

Here accuracy in the run of cases can no longer be the focus. An evidentiary procedure that operates to promote historically accurate results in fifty-one of one hundred cases and error in the remaining forty-nine will have increased the possibility of an accurate conviction in a majority of cases, but also will have generated the risk of an erroneous conviction in a near-equal number, a result antithetical to the fundamental value judgment that the unjust conviction of an innocent person is of far greater concern than the erroneous acquittal of a guilty one.[154]

The impact of the Rule 403 balancing test on expectations of reliable decisionmaking should now be obvious. The rule directs the admission of probative but unfairly prejudicial evidence when its impact may be to produce erroneous convictions in a substantial number of the cases in which the evidence proves important to the outcome. Indeed, the rule directs admission even where it is more likely to induce error—where the probative value of the evidence is outweighed, but not "substantially," by the danger of unfair prejudice. If we assume a case in which the outcome hangs in the balance on the admission decision, as indeed we must if the decision is to matter, the effect of the decision under the present Rule 403 may well have been to make an erroneous conviction as likely or more likely than a correct

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154. Professor Weissenberger rejected the utility of the concept of "accuracy" as a basis for judging the validity of evidentiary rules:

> [A]ccuracy is analytically suspect as a value for gauging the validity of evidentiary rules in individual cases. On the other hand, to the extent accuracy has meaning in the context of evidentiary discussions (for example, in positing probative value in the aggregate of cases), it is in tension with recognized fairness values.

Weissenberger, *supra* note 129, at 588.

Professor Weissenberger was half right. If by "accuracy" he meant an actual reconstruction of historical truth in individual cases, Weissenberger correctly observed that "historical truth is a useless control for testing accuracy in individual cases because it creates an illusory promise of empirical testability that can never be realized." *Id.* at 586. And if instead by "accuracy" he meant a preponderant accuracy in a majority of criminal cases, Weissenberger correctly concluded that such "statistical accuracy is fundamentally at odds with the value in our legal system of justice or fairness to individual litigants." *Id.* at 587 (footnote omitted).

However, because objective historical truth is unavailable, a rule designed to control the reliability impacts of evidence can be aimed only at producing some measure of accuracy for the run of cases. Moreover, and more importantly, a rule aimed at a statistical accuracy for the run of cases can meaningfully protect the interests of individual litigants if the rule reflects an allocation of the risks of inaccuracy that properly accounts for the interests of individuals.

In other words, Professor Weissenberger's criticism was misplaced because it presumed an accuracy balance that was not weighted to account for individual liberty interests, and it failed to anticipate how those interests could be accounted for. Nonetheless, despite his general criticism, Professor Weissenberger did recognize that "accuracy," in the sense used in this Article, *is* the issue, when he stated that "of course, accuracy in the aggregate is distinct from accuracy in individual cases, and the question is whether we are willing to tolerate the inaccurate guilty verdicts that are inevitably swept within the maximization of aggregate accuracy." *Id.* at 607.

one. For such close cases the rule has unmistakably allocated a major and perhaps predominant share of the risk of factfinding error to the accused.

2. The Impact of Rule 403 on Innocents

The foregoing discussion demonstrates that Rule 403 in its present form magnifies the risk of conviction for defendants as to whom the government's legitimate proof leaves reasonable doubt of guilt.

Nevertheless, concern about this risk may be tempered by practical skepticism about the actual impacts of Rule 403 on the rights of innocents, the product of a common sense recognition that the great majority of persons charged with crime are in fact guilty and that the existence of reasonable doubt as to a person's guilt does not translate into the factual innocence of that person.[155]

However, this skeptic's view would squarely contradict the presumption of innocence, a presumption *Winship* recognized as "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' "[156] Under that presumption, when the prosecution lacks legitimate proof of guilt beyond a reasonable doubt, a defendant is innocent so far as the criminal justice system is concerned. Although jurisprudentially conclusive, that may still be a less than satisfactory answer to those who nonetheless doubt that truly innocent people are adversely affected by Rule 403 decisions. For them, common sense may still argue that the presumption of innocence is an admirable statement of principle as long as one remembers it is usually applied to the guilty.[157]

155. Compare Judge Learned Hand's comment, in 1923, that

> our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

United States v. Garsson, 291 F. 646, 649 (2d Cir. 1923).

156. *In re* Winship, 397 U.S. 358, 363 (1970) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

157. Thus, some might argue, even if Rule 403 operates as described it does not necessarily follow that it has worked injustice, and its impacts on actually innocent people may be negligible. In essence, this view would contend that the only legitimate concern for criminal trial procedures is with their impact on defendants who are factually innocent of the charges against them. By this view, the defendant who in fact has committed the crime charged would have no legitimate basis for complaining about any procedure by which the conviction was obtained—or, at least, those who critique the procedures should not be too concerned with the procedural interests of the guilty.

There are fundamental difficulties with such a view. As previously noted, we can never reach the point of absolute certainty in judicial fact determinations and can never say with infallible

However, this common sense would be shortsighted. There are several considerations which strongly suggest that Rule 403 operates against the interests of a substantial number of defendants who are innocent in fact of the charges against them, that the inaccuracy-promoting characteristics of the rule are of more than hypothetical consequence, and that Rule 403 presents an actual threat to the rights of innocents. A number of factors lead to this increased risk, in addition to the reliability-threatening impacts of unfair prejudice already described. These include practical reasons suggesting that unfairly prejudicial evidence will be offered against a significant number of innocents, a highly deferential appellate review, and, paradoxically, court-created guidelines for the use of the evidence which, although intended to protect against error, in fact appear to significantly increase the risk of mistaken convictions.

a. Filtering Innocents

Government investigatory, charging, and prosecutorial practices may combine to magnify the risk that persons with criminal records, who are particularly exposed to risks of prejudice when evidence of their past misconduct is admitted at trial, will be tried for crimes they did not commit.

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precision which persons charged with crime are factually guilty and which are not. Accordingly, one cannot credit a criminal procedure without acknowledging the inevitability of its application to innocents and the impossibility of knowing exactly when that will happen.

In addition, there are other values involved in a criminal justice system that support concern for the factually guilty defendants as well. For example, concern for the integrity of the criminal adjudication process could justify concern for those who, though factually guilty, are convicted by procedures that shake our confidence in the reliability of the conviction. Moreover, even if that confidence is unaffected, we might justifiably reject convictions of guilty persons because the process afforded them was unfair, because uncivilized or barbaric governmental conduct led to the conviction, or because the prosecution infringed on other values important to a free society. *See, e.g.,* Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process,* 84 HARV. L. REV. 1329 (1971). Professor Tribe writes:

> [T]he acceptability of a process is not simply a function of the number of correct or erroneous convictions or acquittals it yields.... [O]ur preferences... attach not to the bare consequences of correct or erroneous conviction or acquittal. They attach instead, and properly so, to the consequences... of the defendant's correct or erroneous conviction or acquittal after a given sort of trial, operating with a particular set of rules and biases, and governed by a specific standard of proof.

Id. at 1382 (footnote omitted).

But the problems engendered by the current treatment of evidence of other wrongs are evident even if we disregard the process interests of factually guilty defendants and consider only the impact of this treatment on persons who are factually innocent. The arguments advanced in this Article are largely directed at the impact of Rule 403 on the factually innocent defendant without regard to the process values that concern factually guilty defendants as well.

First, the possibility of mistaken charges would appear greater for those with criminal records. Lempert and Saltzburg have noted that

> [P]olice work is organized so that persons mistakenly charged are likely to have criminal records. This is most obvious where the decision to charge results from mistaken eyewitness identification . . . [which] very often begins with the presentation to witnesses of pictures from the police files. One does not get his picture in those files unless he has been in trouble with the law. It is also true when police concentrate their attention on a group of "usual suspects." One is not a "usual suspect" without a history of past crimes.[158]

In addition, there is good reason to believe (and to hope) that persons erroneously charged with crimes will be substantially more likely than those who are guilty to insist on a trial, rather than enter a plea bargain. Lempert and Saltzburg have predicted this impact:

> For a variety of reasons, . . . an individual with a past record is severely disadvantaged if he chooses to go to trial. Thus we can expect that guilty individuals with past records are disproportionately likely to take advantage of any leniency associated with pretrial guilty pleas. This would be because the person with a record would estimate a lower chance of being found not guilty than a person without a record and would thus perceive the likely risk of going to trial, with the generally more severe sentences that follow conviction, as greater. . . . However, the innocent with past records are probably more likely to stand trial, since there are issues of principle and basic justice involved and since the fact of innocence suggests the prosecutor's case will be weak.[159]

Although these comments were intended to demonstrate the weakness of a "propensity" relevance argument, they are equally cogent for their suggestions that, first, prosecutorial practices are likely to focus on persons with criminal records, whether guilty or innocent, and sec-

158. R. LEMPERT & S. SALTZBURG, *supra* note 133, at 211–12 (footnote omitted). A substantial body of empirical research indicates the potential for highly confident, but mistaken, eyewitness identifications. *See generally* E. ARNOLDS, W. CARROLL, M. LEWIS & M. SENG, EYEWITNESS TESTIMONY STRATEGIES AND TACTICS (1984); L. TAYLOR, EYEWITNESS IDENTIFICATION (1982); G. WELLS & E. LOFTUS, EYEWITNESS TESTIMONY (1984).

Concentrating investigations on persons with criminal records may be a useful investigative approach and may enhance the accuracy of charges. However, it also might divert attention from the real culprit or lead investigators to overlook evidence pointing to a different suspect. More significantly, prosecutorial authorities probably are not immune to the incriminating but unreliable inferences that knowledge of a person's criminal record has been shown to raise in decisionmakers in other contexts, and there is evidence that that knowledge is in fact influential in prosecutorial decisions. *See infra* note 163 (effect of criminal record on prosecutors' plea bargaining decisions). Accordingly, persons with criminal records are peculiarly vulnerable to mistaken charges.

159. R. LEMPERT & S. SALTZBURG, *supra* note 133, at 211 (footnote incorporated into quoted text).

ond, that of all persons charged with crime, innocents are more likely actually to stand trial. The comments describe a "filtering" process by which defendants actually tried, and thus subjected to the operation of Rule 403, will include a disproportionately large number of factually innocent persons, of whom many will have criminal records. The population of criminal defendants actually tried on charges can thus be expected to consist of a relatively small percentage of the overall population of factually guilty persons and a much larger percentage of factually innocent ones. This suggests that because innocents are more likely to stand on their rights they are disproportionately likely, if they have a criminal record, to confront prejudice risks at trial from evidence of their past misconduct, and, whether or not they have a criminal record, to be subjected to the danger of unfair prejudice from other forms of potentially prejudicial evidence as well.

The possible impacts of this "filtering" process on the criminal trial process could be dramatic. Assume a prosecutorial system which is ninety percent reliable; that is, nine out of every ten persons against whom charges are filed are actually guilty of the crimes charged, and one is actually innocent.[160] Assume further that half of the innocents persuade the prosecutor to drop charges or reduce the charges to crimes they did commit, or plead guilty to crimes they did not commit.[161] For every one hundred criminal charges filed we would find five innocent persons standing trial. Experience suggests that a great majority—perhaps as many as ninety percent—of the persons initially charged will avoid trial by entering a plea.[162] Under these assump-

160. Objective support for this assumption of 90% reliability is, of course, unavailable. However, according to one writer who has conducted an extensive study of plea bargaining, this 90% estimate is "given by almost all experienced defense attorneys." M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 58 (1978).

161. Indeed, the fact that Rule 403 makes the admission of unfairly prejudicial evidence likely may have the effect of inducing factually innocent defendants against whom such evidence will be offered at trial to plead guilty to crimes they did not commit. *See supra* note 150.

The social costs and benefits of the plea bargaining system have been the subject of a substantial and growing body of scholarly inquiry. For one view that sees significant risks of guilty pleas by innocent defendants, from a scholar who has written extensively in the area, *see* Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 713–16 (1981).

162. The 90% plea bargain figure was advanced by then-Chief Justice Burger in his comments in *State of the Judiciary*, 56 A.B.A. J. 929, 931 (1970), and has gained popular acceptance. In fact, some statistics indicate that there is considerable variation in plea bargaining rates among and within jurisdictions. *See, e.g.*, H. MILLER, W. MCDONALD & J. CRAMER, PLEA BARGAINING IN THE UNITED STATES 21, Table 11 (1978) (describing variations in rates among court jurisdictions within single states, including in one example a range from a low of 11.9% to a high of 98.2%).

For criminal charges in the federal courts, the percentage of guilty pleas appears to be smaller. For the fiscal year 1985 the reported figures showed that of 29,706 defendants for whom a

tions, if trials are held in the remaining ten cases of the one hundred filed, we could expect half of the defendants standing trial to be factually innocent, including many with criminal records.[163]

Thus, to the extent there is room for error in the system's mechanisms for pretrial determination of guilt, the error is likely to be magnified in terms of the proportion of innocent persons made to stand trial. When Rule 403 permits the introduction of unfairly prejudicial evidence in criminal trials it does so for this disproportionate number

judgment of guilt or innocence was entered in U.S. district courts, 24,792 entered guilty pleas and 4914 were tried by a court or jury. *See* U.S. DEP'T OF JUSTICE, STATISTICAL REPORT: UNITED STATES ATTORNEY'S OFFICE FISCAL YEAR 1985, Report 1-21, at 1 (1986). However, a more accurate picture also might take into account the substantial number of additional matters dismissed before they reached the district courts or dismissed by the district courts before judgment. For the same period, these included complaints against 32,592 persons as to whom prosecution was immediately declined, an additional 19,582 persons as to whom prosecution was declined after investigation, another 8233 complaints closed at the magistrate level, and charges against 3599 defendants dismissed by the district courts. *Id.* at 4, 28.

In one respect these figures may contradict the filtering hypothesis advanced in the text. The substantial majority of criminal complaints either were not pursued or were dismissed before they reached judgment in the district courts. These dispositions might apply to a substantial number of innocents against whom complaints were filed and against whom the prosecution's case probably was weak. Thus, the system probably provides a significant screen against unjust convictions before charges are pressed to judgment.

On the other hand, any confidence provided by that conclusion should be guarded. As discussed elsewhere, there are substantial reasons to believe many "weak" cases nonetheless will be pursued, particularly those in which the defendants are most likely to confront prejudicial evidence, and that even where a prosecutor's case is weak defendants may have special reasons to plead guilty to crimes they did not commit. *See supra* note 150; *infra* note 163. Unless this dismissal process is nearly perfect in its protection of innocents, those innocents who are bypassed by the dismissal process will be subject to all of the filtering effects described and, more importantly, to the reliability-threatening operation of Rule 403.

163. The assumptions on which this hypothesis is based are admittedly speculative, and the interplay of the assumptions is complex. The analysis here has not exhausted the factors which might possibly affect a filtering process. For example, the exercise of prosecutorial discretion probably would result in charges being dropped against a significantly larger percentage of innocent defendants than guilty ones, reducing negative impacts of the trial process on innocents. Conversely, in a close or doubtful case a prosecutor's knowledge that powerful probative but prejudicial evidence is likely to be admitted at trial might discourage what otherwise would be a decision to drop charges against an innocent person. Thus, a prosecutor's knowledge of a defendant's criminal record or otherwise unsavory character may encourage trial of a weak case that otherwise would be dismissed, either because the prosecutor believes the defendant is more deserving of punishment or because the criminal record may help in obtaining a conviction. *See, e.g.*, R. LEMPERT & S. SALTZBURG, *supra* note 133, at 212 ("the advantage which past crimes evidence gives the prosecutor at trial means that a weak case is less likely to be dropped with a repeat offender than with one accused for the first time").

The latter proposition finds support in the conclusions of a major research project funded by a National Institute of Justice grant to investigate plea bargaining practices. *See* W. MCDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 80 (1985) (reporting a finding that prosecutors are more likely to dismiss weak cases only if the defendant has a minor prior record).

of innocents as well as the guilty. This conclusion is more ominous when it is considered in light of the likelihood that the prosecution's case against an innocent defendant will be "weak" or, at least, circumstantial on key points.[164] It follows that an even greater number of innocents will be included in the trials of close cases, precisely the situation where the danger of unfair prejudice from evidence admitted under Rule 403 is most likely to affect the outcome.[165]

b. The Necessity Doctrine and Its Impact on Innocents

In an effort to minimize prejudicial impacts from the admission of uncharged misconduct evidence, courts have frequently applied a "necessity" test to the prosecution's offered evidence. Under this test, a court's willingness to admit potentially prejudicial evidence will increase as the prosecution's need of the evidence to prove the issue on which it is offered increases. The advisory committee's notes to Rule 403 indicate that the committee contemplated a similar evaluation.[166]

The motivation behind this "necessity" doctrine is commendable. If the point in question is already established, the addition of the unfairly prejudicial proof will serve no purpose other than to increase the risk of prejudice to the defendant. Paradoxically, however, the doctrine provides the greatest protection against admission of unfairly prejudicial evidence in situations where the prosecution's case is clear and the defendant's guilt is highly probable, because there the prosecution's need for the additional proof is most likely to be minimal.[167]

164. Criminal cases brought to trial may largely fall into two categories: those in which the proof of guilt is so overwhelming that the prosecution was unwilling to offer a "good bargain" and a guilty defendant saw little to lose by standing trial, and those in which the proof of guilt is close or doubtful—cases where the defendant either is factually innocent or is factually guilty but hopeful of an erroneous acquittal. The former category is of little concern from the standpoint of Rule 403; if the evidence of guilt is indeed overwhelming the effects of prejudicial evidence on the outcome are likely to be insignificant. One cannot safely conclude, however, that cases where the proof of guilt is "overwhelming" will always involve guilty defendants. For example, prosecutions based on confident but mistaken eyewitness identifications might appear "overwhelming." *See supra* note 158 (citing authorities concerning frequency of error in eyewitness identifications).

165. *See supra* notes 150–51 and accompanying text (illustrating the effect of Rule 403 in cases where the outcome will turn on the impacts of potentially prejudicial evidence).

166. *See* FED. R. EVID. 403, advisory committee's note ("Situations [under Rule 403] call for balancing the probative value of *and need for the evidence* against the harm likely to result from its admission." (emphasis added)).

167. See, for example, United States v. Nichols, 781 F.2d 483 (5th Cir. 1986), where the court reversed a conviction because of the admission of prejudicial evidence, indicating that the error was of sufficient magnitude to justify reversal because "[t]his was not a close case. Indeed, the government asserts the evidence of Nichols' guilt was so overwhelming that the record contained no evidence to the contrary." *Id.* at 485.

Conversely, the necessity doctrine increases the likelihood that the situations in which prejudicial evidence is admitted will involve innocent defendants. A determination that the prosecution is in substantial need of unfairly prejudicial evidence on an issue is necessarily a determination that the other proof on the issue admits of doubt. This would be the expected state of the evidence when a defendant is innocent. Of course, the question often is not so simple when prejudicial evidence is offered. The prosecution might contend that its proof on the issue will not be doubtful when the added probative value from the prejudicial proof is considered. Thus, the prosecution's argument may be, "If this probative but prejudicial proof did not exist we might have an innocent defendant before us, but the knowledge we can gain from this proof shows that the defendant is guilty."

This argument would accurately describe the importance of the potentially prejudicial evidence in some cases. For example, one can easily imagine cases where proof of prior crimes or bad conduct by the defendant would demonstrate a *modus operandi* so unique, a motive so compelling, or coincidence with the charged crime so improbable that the evidence is the most legitimately persuasive evidence of guilt in the prosecution's case. Those would also be cases in which the evidence would be likely to satisfy the most demanding of balancing tests for admission. But for the more common situation, where the probative force of the evidence is not great, the determination of prosecutorial need will be made for a case that is doubtful without the evidence and doubtful even when the additional probative value is considered. These are the cases in which any prejudicial impact will be most likely to play a part in the outcome, and in which the necessity doctrine will be most likely to justify the use of prejudicial evidence.

A Fifth Circuit Court of Appeals decision applying the necessity doctrine to approve the admission of uncharged misconduct evidence illustrates the point. In *United States v. McMahon*[168] the defendant was convicted of conspiracy to transport illegal aliens within the United States. The evidence in question was the defendant's conviction of a similar but unrelated charge three years earlier. The prosecution's case consisted of the testimony of two alleged coconspirators turned government witnesses,[169] the testimony of the girlfriend of one of them,[170] and maps allegedly drawn by the defendant for use in the

168. 592 F.2d 871 (5th Cir.), *cert. denied*, 442 U.S. 921 (1979).

169. *Id.* at 872, 874.

170. *Id.* at 874.

transportation of the illegal aliens.[171] As the court sized up the state of the prosecution's case,

> The government's case was in substantial need of objective facts tending to prove [the defendant's] intent to become involved in the conspiracy. . . . The maps allegedly drawn by [the defendant] constituted the only objective evidence of his involvement in the conspiracy, yet the persuasive value of this evidence was significantly undermined by the lack of any convincing proof as to authenticity. . . .
>
> Without the evidence of [defendant's] prior conviction, the government's entire case . . . boiled down to a credibility choice between [the two alleged coconspirators and the girlfriend] on the one hand and [defendant] and his estranged wife on the other. [Defendant's] prior misdemeanor conviction provided objective, undisputed and highly probative evidence of [defendant's] intent and involvement in the conspiracy.[172]

The court described the balancing test governing the admission of the evidence: "Before the district judge may exclude extrinsic offense evidence, he must find that the danger of unfair prejudice *substantially outweighs* the incremental probative value of the evidence."[173] Applying the balancing test, the court concluded, "The lack of convincing evidence in the government's case pertaining to intent and the close resemblance between the extrinsic and charged offenses convinces us that probative value outweighs potential prejudice in this case."[174]

McMahon illustrates the manner in which the "necessity" doctrine can operate in doubtful cases: because the prosecution's case was objectively weak,[175] the probative value of evidence that otherwise might have been considered marginally relevant was significantly increased.

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171. *Id.*
172. *Id.* at 875.
173. *Id.* at 873 (emphasis original).
174. *Id.* at 874.
175. Other circumstances in *McMahon* give further reason to doubt the strength of the government's case, or at least indicate the ambiguous circumstantial evidence on which it was based. For example, the title to the van used by the government witnesses to transport the aliens was registered in the name of one and signed over to the other. The government witnesses claimed the defendant had forged the one's name in signing the van over to the other in payment for services in transporting the illegal aliens. *Id.* One of the government witnesses testified to a key meeting between himself and the defendant in the office of a lounge; but the defendant testified, apparently without contradiction, that he did not assume management of that lounge until six months later than the date of the alleged meeting and thus had neither reason to be present at that time nor access to the office. *Id.* at 874–75. Moreover, the defendant's estranged wife—the sister of one of the government witnesses—corroborated the defendant's version of the facts. *Id.* at 874. A full reading of the opinion in *McMahon* suggests that every important fact in the government's case was contradicted.

In addition, *McMahon* illustrates a judicial willingness to discount or ignore the dangers of propensity reasoning when the court finds the prosecution's need for incriminating evidence substantial. The court's placement of the evidence within the "intent" category of Rule 404(b) "other purposes" obscures the propensity reasoning that must underlie any claimed relevance. The defendant in *McMahon* did not admit his commission of the charged acts but deny criminal intent; he denied any involvement whatsoever. Had the court fully explained its "intent" reasoning in *McMahon* it necessarily would have said, "The defendant's involvement in the charged conspiracy was in serious question. The prosecution's case was questionable and relied solely on impeachable evidence. The defendant's prior conviction was relevant because it showed that defendant was willing to engage in the transportation of illegal aliens, and is therefore more likely to have done so, as the prosecution claims."[176]

McMahon also should be disturbing for its indication that appellate courts may have established a new, acceptable class of propensity evidence.[177] The *McMahon* court regarded the Fifth Circuit decision in

176. At least one court has openly recognized the nature of this propensity-based justification for admission. *See* United States v. DeCastris, 798 F.2d 261 (7th Cir. 1986). In that case the court stated:

> The "bad character" inference is inseparable from the "bad intent" inference. We do not pretend that a jury can keep one inference in mind without thinking about the other. An instruction told the jury to do this, but this is like telling someone not to think about a hippopotamus. To tell someone not to think about the beast is to assure at least a fleeting mental image. So it is here. Each juror must have had both the legitimate and the forbidden considerations somewhere in mind, if only in the subconscious.
>
> Yet this unwelcome consequence of using "other wrong" evidence does not make the evidence inadmissible. It is relevant to the outcome of the case. The risks of error are not one-sided.

Id. at 264–65.

177. *McMahon* is hardly exceptional. Similar reasoning now abounds in appellate opinions when intent or conspiracy is in issue. *See, e.g.,* United States v. Hicks, 798 F.2d 446 (11th Cir. 1986) (intent, cocaine-related charges), *cert. denied,* 107 S. Ct. 886 (1987); United States v. Liefer, 778 F.2d 1236 (7th Cir. 1985) (possession with intent to distribute marijuana, conspiracy); United States v. Lacayo, 758 F.2d 1559, 1564 (11th Cir.) (prior attempted drug dealings admitted in kidnapping trial to show "motive and willingness to become involved in criminal activity because of [defendant's] desperate financial condition"), *cert. denied,* 474 U.S. 1019 (1985); United States v. Parr, 716 F.2d 796, 804 (11th Cir. 1983) (in counterfeiting trial, prior use of credit cards without paying bills admissible on "intent to create an illusion of value thereby obtaining something for nothing"); United States v. Dabish, 708 F.2d 240, 241–42 (6th Cir. 1983) (in extortion trial of gym owner for threatening competitor, threats to another health studio owner and damage to business admitted to show "anticompetitive intent"); United States v. Dolliole, 597 F.2d 102 (7th Cir.) (intent, bank robbery), *cert. denied,* 442 U.S. 946 (1979); United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978) (intent, conspiracy to smuggle drugs); United States v. Espinoza, 578 F.2d 224 (9th Cir.) (conspiracy to transport illegal aliens), *cert. denied,* 439 U.S. 849 (1978); United States v. Williams, 577 F.2d 188 (2d Cir.) (conspiracy to

United States v. Beechum[178] as controlling.[179] The *McMahon* court said that *Beechum* established a two-tier test.

> First, the trial court must determine that " 'the extrinsic offense requires the same intent as the charged offense and that the jury could find that the defendant committed the extrinsic offense.' " Second, the court must find that the incremental probative value of the extrinsic offense evidence is not " 'substantially outweighed by the danger of unfair prejudice' " to the defendant.[180]

The court's application of this "two-tier test" makes clear that the purported "intent" rationale in fact describes propensity evidence. The court held:

> The first prong of the *Beechum* test is clearly satisfied in this case. The similarity in intent required between the extrinsic and charged offenses only means that the defendant "indulg[e] himself in the same state of mind in the perpetration of both . . . offenses." Appellant's extrinsic offense was a misdemeanor conviction for aiding and abetting an alien to elude examination, a reduced charge of transporting illegal aliens. Engaging in the transportation of illegal aliens requires the defendant to possess the same "state of mind" as agreeing with others to do the same thing.[181]

Thus, the *Beechum* test for permissible "other purposes" relevance is satisfied whenever the same kind of intent was involved in the commission of an earlier act as is required for the charged crime. This test will, of course, be met whenever there is a substantial similarity between the charged crime and another uncharged act, exactly the situation in which the risk of forbidden propensity inferences is greatest.[182]

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commit bank larceny), *cert. denied,* 439 U.S. 868 (1978); United States v. Holley, 493 F.2d 581 (9th Cir.) (intent, transportation of illegal aliens), *cert. denied,* 419 U.S. 861 (1974).

178. 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 920 (1979).

179. *McMahon,* 592 F.2d at 873.

180. *Id.* (quoting *Beechum,* 582 F.2d at 913, 914).

181. *McMahon,* 592 F.2d at 873 (quoting *Beechum,* 582 F.2d at 911 (footnote omitted)).

182. This direct correlation between the similarity of a past bad act with the charged crime and the attendant risks of prejudice is well-recognized with respect to evidence of convictions offered for impeachment. *See, e.g.,* United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985) ("To allow evidence of a prior conviction for the very crime for which a defendant is on trial may be devastating in its potential impact on a jury"), *cert. denied,* 475 U.S. 1023 (1986); Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) ("Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.' "), *cert. denied,* 390 U.S. 1029 (1968); McCormick, Evidence § 43, at 94–95 n.9 (3d ed. 1984).

The correlation is also recognized when the evidence is offered under Rule 404(b) as relevant to a nonpropensity purpose, although there the courts regard the risks of prejudice with less

Moreover, there is reason to believe that prosecutors may relax usual demands for certainty about the guilt of persons charged when deciding whether to add additional defendants to those already charged whom the prosecutor believes to be clearly guilty.[183] Accordingly, to the extent prosecutorial discretion normally serves as an important protection against prosecution of innocents, in conspiracy and other multiple defendant prosecutions there may be increased risk of mistaken charges. Nonetheless, courts have seen special justification for the admission of uncharged misconduct evidence against alleged peripheral members of a conspiracy as to whom the evidence of involvement in the crime is weak.[184]

This increasingly lenient attitude toward the admission of propensity evidence[185] may be traceable to the admission-presumptive balancing test of Rule 403.[186] If in fact the rule is behind this direction in the development of judicial controls over such evidence, similar future

concern. *See, e.g.*, United States v. Francesco, 725 F.2d 817, 822 (1st Cir. 1984) (in prosecution for possession of cocaine with intent to deliver, admission of evidence of defendant's prior conviction for sale of cocaine affirmed, with the court stating, "[w]hile evidence of a prior conviction for a similar offense is always prejudicial, the prejudice is frequently outweighed by the relevancy of the evidence when a defendant's knowledge or intent is a contested issue in the case").

183. *See* Kaplan, *The Prosecutorial Discretion—A Comment*, 60 Nw. U.L. Rev. 174, 179–80 (1965).

184. *See, e.g.*, United States v. Barnes, 586 F.2d 1052, 1057 (5th Cir. 1978) ("In a conspiracy case where the defendant is a passive participant, proof of the defendant's knowledge of and intent to participate in the substantive crime is a primary method of proving his guilt. The passive participant's otherwise innocuous and lawful acts shed no light on his state of mind.").

185. Questionable decisions to allow the admission of evidence of uncharged misconduct, under claims that it serves "another purpose," are not unique to Rule 403 jurisprudence. Courts have long struggled with the application of the propensity evidence prohibition. *See* Note, *supra* note 97, at 767–69 (describing instances of misapplications and nonanalytic applications of propensity evidence prohibition). What appears to be new about *Beechum*, *McMahon*, and similar cases is their formal recognition of the acceptability of such evidence.

This change in judicial attitude is demonstrated by a comparison of the attitude expressed in the Court's 1892 opinion in Boyd v. United States, 142 U.S. 450, quoted *supra* note 141, with that shown in *McMahon*. Under the *McMahon* approach, the *Boyd* defendants' robberies during the month prior to the robbery-murder in question could have been called "objective, highly relevant evidence of their intent to become involved and their involvement in the robbery-murder conspiracy," and thus deemed admissible. This apparent new tolerance of uncharged misconduct evidence suggests a major retrenchment of prejudice concerns over the last 100 years.

186. *See* United States v. Czarnecki, 552 F.2d 698, 702 (6th Cir.), *cert. denied*, 431 U.S. 939 (1977). The court in *Czarnecki* noted a restrictive pre-Rules standard for the admission of other-crimes evidence and, as justification for a more lenient approach to admissibility, an emphasis in Rule 403 on greater admissibility of evidence in general. The court cited a number of post-rules decisions from other circuits permitting the admission of the evidence for propensity-type inferences.

For an extensive review of post-Rules decisions on the admissibility of uncharged misconduct evidence, see Reed, *Admission After Rules*, *supra* note 12, at 116–63. Reed concludes that for several circuits the Federal Rules of Evidence have

developments may compound the reliability-threatening risks already present in the rule.[187]

One other potential byproduct of the necessity doctrine merits concern. The doctrine rewards the prosecutor who fails to develop other, less prejudicial, ways to prove a point. It does not take a great deal of cynicism to suggest that for many prosecutors this could encourage a decision to ignore possible alternative methods of proof, or for unscrupulous ones, to fail to disclose such possibilities.[188]

3. *The Empty Promise of Appellate Correction*

The defendant aggrieved by the admission of unfairly prejudicial evidence has, of course, the right to appeal the ruling. However, the chance of success on the issue is remote.[189] Appellate courts apply a deferential standard of review to trial court evidentiary rulings in general and regard rulings under Rule 403 as particularly deserving of

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> been the source of a substantial change in the jurisprudence [that has] expanded the admissibility of prior acts evidence to such an extent that a serious constitutional issue now exists. Analysis of the decisional law [since the Rules] demonstrates that this increase in prosecutorial use of evidence of prior criminal activity may deprive defendants of their right to a fair trial and render them incapable of making a proper defense to the charges brought against them.

Id. at 115.

187. The admission-presumptive test of Rule 403 and the apparently increasing judicial tolerance of prejudice risks to defendants reflect an indifference to the liberty interests of those accused of crimes, and a prosecutorial bent. In contrast, consider Rule 412(c)(3), which controls the admission of evidence of a victim's past sexual behavior when offered by an accused in a rape case. That rule provides in part as follows:

> If the court determines . . . that the evidence which the accused seeks to offer is relevant and that *the probative value of such evidence outweighs the danger of unfair prejudice*, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

FED. R. EVID. 412(c)(3) (emphasis added). In the context of Rule 412, "unfair prejudice" primarily refers to prejudice to the victim from inquiry into past sexual conduct. This protection for victims and the need for a rule to address past abuses in this area are important, but hardly more important than protection of innocents from erroneous convictions. Nonetheless, Rule 412 provides substantially greater protection for the interests of a rape victim in avoiding undue personal exposure than Rule 403 provides a criminal defendant in avoiding an unjust conviction.

188. *Cf.* Note, *supra* note 97, at 772 n.59 ("Not only is the defendant with the weakest case protected; the prosecutor who makes the least effort to secure evidence directly related to a material issue has the best chance to get information of prior crimes admitted. This result directly undermines the rationale of the necessity doctrine.").

While examples of prosecutorial overreaching are not legion, they are sufficiently numerous to support concern for this additional invitation to "conviction at all costs" conduct.

189. *See* 1 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 404[02], at 404-21 ("the trial judge's judgment of [the Rule 403] balance is rarely overturned on appeal").

deference.[190] This tolerance is attributed to a variety of the usual reasons for deference, including the discretionary or subjective nature of the determinations required by Rule 403,[191] the trial court's superior position for evaluating the evidence in the context of the trial or judging its potential impact on the factfinder,[192] and an inference of broad discretion found in the language of Rule 403.[193] In addition, at least some appellate courts believe that error in the admission of prejudicial evidence deserves the least protective form of "harmless error" review because these courts perceive no possible constitutional error in its admission.[194]

Moreover, appellate courts generally have been reluctant to insist on the use of measures that may reduce the danger of prejudice, such as a

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190. *See, e.g.,* United States v. Baskes, 649 F.2d 471, 481 (7th Cir. 1980) (appellate courts are obligated to give "great deference" to trial court balancing rulings), *cert. denied,* 450 U.S. 1000 (1981); United States v. Robinson, 560 F.2d 507, 515 (2d Cir. 1977) (en banc) (appellate courts reluctant to reverse unless convinced trial court acted "arbitrarily or irrationally"), *cert. denied,* 435 U.S. 905 (1978); United States v. Davis, 546 F.2d 583, 592 (5th Cir.) (trial court rulings under balancing test reversed "[r]arely and only after a clear showing of prejudicial abuse of discretion"), *cert. denied,* 431 U.S. 906 (1977); United States v. Long, 574 F.2d 761, 767 (3d Cir.) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."), *cert. denied,* 439 U.S. 985 (1978).

191. *See Long,* 574 F.2d at 767.

192. *See, e.g., id.*; *Robinson,* 560 F.2d at 514 (broad discretion accorded trial judge "for the reason that he is in a superior position to evaluate the impact of the evidence, since he sees the witnesses, defendant, jurors, and counsel, and their mannerisms and reactions").

193. *See, e.g., Long,* 574 F.2d at 767 (use of "may" and "substantially" in Rule 403 strengthens an inference of broad discretion in the trial court).

194. See, for example, United States v. Huddleston, 811 F.2d 974, 977 (6th Cir. 1987), *rev'g on reh'g,* 802 F.2d 874 (6th Cir. 1986), *aff'd on other grounds,* 108 S. Ct. 1496 (1988) reversing the court's earlier decision, which had applied the "harmless beyond a reasonable doubt" constitutional error standard of Chapman v. California, 386 U.S. 18 (1967), to error in the admission of uncharged misconduct evidence. In *Huddleston,* the court instead applied the test of Kotteakos v. United States, 328 U.S. 750, 765 (1946) (error harmless if judgment was "not substantially swayed by the error"). *Cf.* United States v. Bettencourt, 614 F.2d 214, 218 (9th Cir. 1980) (harmless error in admission of uncharged misconduct evidence judged by test of whether it was more probable than not that the erroneous admission of the evidence materially affected the verdict).

The courts are not, however, in complete agreement on the required standard. *See, e.g.,* United States v. Schwartz, 790 F.2d 1059, 1062 (3d Cir. 1986) (harmless error test for admission of uncharged misconduct evidence is whether it is "highly probable that the evidence . . . did not contribute to the jury's judgment of conviction" (quoting Virgin Islands v. Toto, 529 F.2d 278, 284 (3d Cir. 1976))). Indeed, the *Kotteakos* test applied in *Huddleston* appears to have generated a substantially more restrictive review when applied by the Seventh Circuit in United States v. Shackleford, 738 F.2d 776 (7th Cir. 1984). There, the court purported to apply the *Kotteakos* test but found error because it could not "say that the introduction of [the uncharged misconduct evidence] did not reasonably have a substantial influence of [sic] the minds of the jurors." *Shackleford,* 738 F.2d at 783. A test that finds harmful error when the court cannot say that the error did not have a substantial influence on the jury's decision sounds much like a "harmless beyond a reasonable doubt" review.

requirement of advance notice by the prosecution of its intent to offer potentially prejudicial evidence,[195] withholding of the evidence until rebuttal when its need and probative value can be best assessed,[196] mandatory acceptance of defense offers to stipulate to the issues for which the evidence is offered,[197] and even a requirement that the government or the trial court identify the theory of relevance on which the offer is based.[198]

Appellate courts may be more insistent on the use of limiting instructions. For example, they frequently note the giving of such

195. One commentator has argued that such notice is required by the sixth amendment. *See* Reed, *Admission After Rules, supra* note 12, at 167; *see also* E. IMWINKELRIED, *supra* note 12, § 9:09, at 22 (requirement of notice "seems both justifiable and salutary"). Some state court decisions or rules require notice, but the federal courts have generally rejected such a requirement under the Federal Rules of Evidence. *See id.* at 20–21. *Compare* United States v. Anderson, 799 F.2d 1438, 1440 (11th Cir. 1986) (government's filing of notice in response to magistrate's order granting defense motion for notice was "voluntary discovery," since no notice is required by Rules), *cert. denied,* 107 S. Ct. 1567 (1987) *with* United States v. Foskey, 636 F.2d 517, 526 n.8 (D.C. Cir. 1980) (court "suggests" government should give such notice in the future).

196. Some courts have recognized the importance of a contextual assessment of the probative value of the evidence and the existence of a real dispute over the issue on which it is offered, preferring the reservation of uncharged misconduct evidence until the prosecution's rebuttal. *See, e.g.,* United States v. Figueroa, 618 F.2d 934, 939 (2d Cir. 1980); United States v. Crawford, 438 F.2d 441, 448 (8th Cir. 1971) (policy of reserving evidence deserves serious consideration). This preference has proved tenuous, at least for some issues. Thus, courts acknowledging the preference have found it sufficiently countered by circumstances making clear that the defense will be lack of knowledge or intent, or merely by the entry of a not guilty plea in a conspiracy case. *See, e.g.,* United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986); United States v. Estabrook, 774 F.2d 284, 288 (8th Cir. 1985); United States v. Kopituk, 690 F.2d 1289, 1334–35 (11th Cir. 1982), *cert. denied,* 461 U.S. 928 (1983); United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980).

197. Occasionally, courts have indicated that such offers should operate to bar use of the evidence. *See, e.g., Roberts,* 619 F.2d at 383 n.2 (evidence barred where defendant stipulates the charged acts prove intent if he is found to have committed them); United States v. Manafzadeh, 592 F.2d 81, 87 (2d Cir. 1979). However, there is disagreement among the circuits on the wisdom of required acceptance of such stipulations. *See, e.g.,* United States v. Chaimson, 760 F.2d 798, 805 (7th Cir. 1985) (rejecting approach of other circuits that require acceptance "because, in effect, it allows defendant to remove intent as an element of the crime charged" when specific intent is an element); *see also* United States v. Ellison, 793 F.2d 942, 949 (8th Cir.) (affirming trial court's refusal to require government to accept defense stipulation, stating, "[g]enerally, the government is not bound by a defendant's offer to stipulate to an element of a crime"), *cert. denied,* 479 U.S. 937 (1986).

198. *See, e.g.,* United States v. Gallo, 782 F.2d 1191, 1193–94 (4th Cir. 1986). Other appellate decisions demand identification of the basis of the offer. *See, e.g.,* United States v. Schwartz, 790 F.2d 1059, 1061–62 (3d Cir. 1986) (indicating failure to specify purpose of offer contributed to error); United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982) (noting requirement in the Ninth Circuit that government "articulate precisely" the theory of admission). However, even where a court has approved such a requirement the failure to comply may be of little consequence. *See, e.g.,* United States v. Shackleford, 738 F.2d 776, 779–83 (7th Cir. 1984) (criticizing failure to specify purpose, nonetheless searching for possible basis for admission).

instructions as a basis for concluding that evidence satisfied the Rule 403 test. It is, however, difficult to locate decisions which find the failure to give limiting instructions reversible error—perhaps because of the infrequency of such an occurrence.[199] Unfortunately, despite wishful thinking to the contrary,[200] there seems to be little reason to place much confidence in the limiting instruction as a protection against the reliability risks presented by unfairly prejudicial evidence.[201]

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199. For a decision holding that a limiting instruction must be given when requested, see United States v. Levy, 731 F.2d 997, 1002 (2d Cir. 1984). For two Sixth Circuit decisions finding reversible error in the trial court's failure to give a limiting instruction *sua sponte*, see United States v. Ailstock, 546 F.2d 1285 (6th Cir. 1976), and United States v. Poston, 430 F.2d 706 (6th Cir. 1970). *But cf.* United States v. Cooper, 577 F.2d 1079, 1088–89 (6th Cir.) (distinguishing *Ailstock* and *Poston* as involving evidence which was inadmissible for *any* purpose, noting that in all circuits except perhaps the District of Columbia such a failure is not plain error, and holding that such a failure generally will not be plain error in the Sixth Circuit if the evidence has probative value), *cert. denied*, 439 U.S. 868 (1978).

200. See, for example, Justice Rehnquist's insistence, in the majority opinion in Parker v. Randolph, 442 U.S. 62 (1979), that

> A crucial assumption underlying [the jury trial system] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.

Id. at 73; *see also* Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) (Rehnquist, J., quoting and relying on the above passage from *Parker*).

Whatever the merit of this "crucial assumption" as justification for the instruction process in general, it hardly justifies a conclusion that limiting instructions are a *sufficient* procedural safeguard against the dangers of unfairly prejudicial evidence. More importantly, the unfair prejudice risk subjected to Rule 403 balancing is that which a trial court finds threatened *despite* the impact of any limiting instructions.

201. *See* Lawson, *supra* note 148.

> [I]t can be predicted with perfect confidence that information about a defendant's character, including evidence of prior misconduct, will be used by jurors to construct a complete, integrated image of his personality. It appears certain that when the law requests jurors to give character evidence a restricted use, it demands "a mental gymnastic which is beyond, not only the jury's power, but anybody else's."

Id. at 774 (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932)).

For a review of pertinent studies of the effectiveness of limiting instructions, see Wissler & Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 38–39, 43–46 (1985). The authors conclude that "on the basis of the available data, . . . the presentation of the defendant's criminal record does not affect the defendant's credibility, but does increase the likelihood of conviction, and . . . the judge's limiting instructions do not appear to correct that error." *Id.* at 47.

For other reports of studies demonstrating the ineffectiveness of limiting instructions, see S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 44–48 (4th ed. 1983) (instruction limiting use of prior conviction to issue of credibility); Brooks & Doob, *Justice and the Jury*, 31 J. SOC. ISSUES 171, 176–77 (1975) (instruction to use evidence of prior conviction only to impeach credibility); Greene & Loftus, *When Crimes Are Joined At Trial*, 9 LAW & HUM. BEHAV. 193 (1985) (multiple offenses instruction); Sue, Smith & Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOLOGY 345 (1973) (limiting instruction to disregard confession); Tanford & Penrod,

Reversals for error in Rule 403 rulings are the unusual exception rather than the rule. The infrequent reversals that do occur usually are found in cases of egregious error, as when evidence with great potential for prejudice is admitted on an issue beyond dispute[202] or the trial court simply has missed the boat by accepting an untenable prosecution argument of relevance.[203]

There is substantial potential for trial court misjudgment in the assessment of probative value and unfair prejudice, given the subjectivity of these factors and the difficulties inherent in an effort to predict their probable impact on a jury.[204] Indeed, judges may themselves be open to the intuitive attractiveness of a forbidden "propensity" inference or to the emotional appeal of evidence, raising further possibility

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Social Inference In Juror Judgments of Multiple-Offense Trials, 47 J. PERS. & SOC. PSYCHOLOGY 749 (1984) (multiple offenses instruction); Thompson, Fong & Rosenhan, *Inadmissible Evidence and Jury Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOLOGY 453, 461 (1981) (instruction to disregard inadmissible evidence). *But cf.* S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra*, at 45 (cautioning that such studies are "at best problematical because the experimental method cannot be applied directly to actual juries deciding actual cases"); Tanford, Penrod & Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 LAW & HUM. BEHAV. 319 (1985). The Tanford article reported on a study in which use of a limiting instruction was found to have a significant effect in reducing conviction rates in mock trials where similar criminal charges were joined. However, the instruction used was not standard but rather an "elaborated and strengthened version" of a typical instruction. *Id.* at 326. Although the instruction reduced the conviction-biasing influence of joinder, conviction rates were still substantially higher in most instances than where charges were tried singly. *Id.* at 329. Mock jurors used in the study were undergraduate students who did not deliberate verdicts, and the same instruction had failed to have any significant limiting effect in an earlier study by the authors using nonstudent "representative jurors" who deliberated verdicts. *Id.* at 324, 333–34.

202. *See, e.g.*, United States v. Mohel, 604 F.2d 748 (2d Cir. 1979) (in prosecution for sale of cocaine, government improperly introduced evidence of prior cocaine use where defendant offered unequivocal stipulation on issue of intent); United States v. Hansen, 583 F.2d 325 (7th Cir.) (reversing perjury conviction where foreman of grand jury that had indicted defendant called as witness on issue not in material dispute), *cert. denied*, 439 U.S. 912 (1978).

203. *See, e.g.*, United States v. Blankenship, 775 F.2d 735 (6th Cir. 1985); United States v. Alfonso, 759 F.2d 728 (9th Cir. 1985); United States v. Shackleford, 738 F.2d 776 (7th Cir. 1984).

204. There is some empirical support for skepticism about the ability of courts to accurately predict the impact of potentially prejudicial evidence on jurors. *See* 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 (suggesting that potentially prejudicial evidence has widely varying impact on different jurors, that judges may be equally divergent in their assessments of the impact, and that judges are incapable of accurately predicting the impacts on jurors). *But see* Gold, *Limiting Discretion*, *supra* note 11, at 60–61 n.5 (criticizing the findings as misdirected and contending the lack of consensus about prejudice is a product of a failure to "give the concept of prejudice intrinsic content by reference to the policies underlying Rule 403"); Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U.L. REV. 1097, 1110 n.72 (1985) (describing those findings as based on "somewhat suspect empirical data").

of error in court rulings. Other factors, such as the necessity doctrine and the filtering effect, increase the risk that judicial error could affect an innocent defendant. Given the potentially powerful impact of prejudicial evidence on the reliability of a decision, there is thus significant risk that a trial court will overassess probative value or underassess the potential for unfair prejudice in circumstances where the prejudicial impact of the evidence is decisive in the conviction of an innocent defendant.

A balancing test weighted in favor of the admissibility of such evidence in close cases will encourage these errors; indeed, it can be expected to most strongly encourage error in those cases where the price of error is most likely to be the conviction of an innocent. Moreover, the great deference accorded these balancing decisions because they involve subjective evaluations also means that error in those evaluations is unlikely to be corrected.

C. Summary: The Unconstitutionality of Rule 403

Unfairly prejudicial evidence can have a decisive influence on factfinder decisionmaking, and the greatest potential for decisive impact is in close cases where there is increased possibility that the defendant is innocent. The possible impacts of prejudice are inadequately addressed by available curative measures. Moreover, appellate courts have been reluctant to insist on the use of such measures.

For some kinds of unfairly prejudicial evidence there is a further risk of de facto alteration of the factfinder's "reasonable doubt" calculus itself. A jury presented with evidence of a defendant's reprehensible conduct, character, or beliefs, or a jury whose indignation or punitive instinct is otherwise aroused may alter its sense of caution about making a mistake in finding the defendant guilty—in other words, expand the amount of doubt it finds acceptable for conviction. A direct alteration of the standard of proof of that kind can be no less offensive to the holdings in *Ulster County Court v. Allen* and *Francis v. Franklin* than the more indirect effects potentially permitted by the jury instructions those cases disapproved.[205]

Rule 403 provides a balancing test for the admission of evidence in criminal cases that is significantly biased in favor of the admission of probative but unfairly prejudicial evidence. It places the burden on the accused to demonstrate that the prejudicial danger posed by the evidence significantly outweighs its possible probative value and

205. *See supra* notes 30–35 & 39–43 and accompanying text (discussion of *Ulster* and *Franklin*).

directs the admission of the evidence when the balance is close or uncertain. In situations where Rule 403 makes a difference, the effect of the rule may be to increase significantly the risk of an erroneous conviction over that which existed without the admission of the evidence, or even to make an erroneous conviction probable.

Winship and related Supreme Court decisions require that procedural controls over the decisionmaking process in criminal cases preserve the integrity of the reasonable doubt standard and ensure minimal risk of an erroneous conviction. The Supreme Court has not yet applied that requirement to controls over the admission of evidence, but adherence to *Winship* principles demands the application of *Winship* to judicial controls on the admission of evidence that threatens the reliability of criminal convictions.

The nature of the constitutional safeguards required for such evidence is found in current constitutional doctrine governing the admission of hearsay evidence against an accused. The admission of hearsay and the admission of unfairly prejudicial evidence raise parallel concerns. The government's interest in gaining admission of hearsay, as with probative but prejudicial evidence, lies in the greater number of correct convictions that may result from the probative force of the evidence. For hearsay, the predominant competing interest is found in the reliability risks produced by the use of out-of-court statements, akin to the factfinding dangers posed by prejudicial evidence.

However, hearsay evidence normally presents a less troublesome threat to the reliability of a conviction than unfairly prejudicial evidence because the circumstances generating the unreliability of the hearsay will be evaluated by a presumptively rational factfinder who will properly apply the reasonable doubt standard to the final determination of guilt. In contrast, evidence is unfairly prejudicial precisely because it threatens normal assumptions of accurate or normative decisionmaking. An assessment of the "danger of unfair prejudice" under Rule 403 is an assessment of risks of unreliable factfinding or normative error after error-reducing measures have been applied. Logic therefore demands a more stringent protection against reliability risks from unfairly prejudicial evidence than for ordinary hearsay, where the risks are tempered by the expectation that a reasonable factfinder will evaluate the proof in light of its shortcomings. Nevertheless, the admission-presumptive test of Rule 403 provides an accused significantly less protection from the reliability risks of unfairly prejudicial evidence than the protection that the Court has found constitutionally required for the admission of ordinary hearsay.

The Court's confrontation clause treatment of uncross-examined accomplice confessions provides constitutional doctrine for a situation analogous to that presented by unfairly prejudicial evidence.[206] For that type of hearsay, which carries special risks of inaccurate factfinding, *Lee* holds that the prosecution has the burden of rebutting a "weighty presumption" against the admission of the evidence.[207] This constitutionally required balance is the opposite of that now prescribed for unfairly prejudicial evidence by Rule 403.

When a balancing test necessarily calls for a subjective evaluation that invites error, where that error could adversely affect the constitutional demand for reliability of criminal convictions, and where appellate review offers little hope of correction, due process requires a balance that allocates the major risk of a mistaken evaluation to the government rather than to the person accused of crime. Rule 403 fails that test.

IV. STRIKING A CONSTITUTIONAL BALANCE FOR THE ADMISSION OF UNFAIRLY PREJUDICIAL EVIDENCE IN CRIMINAL CASES

A. *The Propriety of Balancing*

A constitutionally proper allocation of error risks would permit the admission of unfairly prejudicial evidence only when to do so would not increase the risk of an erroneous conviction over that countenanced by the reasonable doubt standard. This suggests that constitutional demands could be met if a balancing test required that risks of error from unfair prejudice be offset by a comparatively weighty probative value—to strike a net balance that would favor substantial certainty about the correctness of convictions.

The balancing approach to the protection of constitutional interests has been criticized for deflating the constitutional values subjected to balancing and for generating ambiguity in the identification of the balancing factors.[208] However, the constitutional principle at risk here—

206. *See* Lee v. Illinois, 106 S. Ct. 2056, 2065 (1986); *see also supra* notes 84–88 and accompanying text (discussion of *Bruton, Lee,* and uncross-examined accomplice confessions).

207. 106 S. Ct. at 2065.

208. *See* Aleinikoff, *Constitutional Law in the Age of Balancing,* 96 YALE L.J. 943 (1987).

> For the balancer, constitutional law is comprised of principles discovered by weighing interests relevant to resolution of a particular constitutional problem. . . . Although this conception of law may have brought realism to the common law, it threatens to do real damage to constitutional law. . . . Balancing is undermining our usual understanding of constitutional law as an interpretive enterprise. . . . Ultimately, the notion of constitutional supremacy hangs in the balance. For under a regime of balancing, a constitutional

the demand for reliability of criminal convictions, embodied in the reasonable doubt standard—itself provides the identification and balance of the societal and individual interests with which the Constitution is concerned. Indeed, in this situation balancing is a necessity.[209]

The Supreme Court has not used a balancing approach in its *Winship*-based decisions, although it has suggested that balancing could be required.[210] As already seen, constitutional doctrine for the admission of hearsay evidence against a criminal defendant utilizes a balancing

> judgment no longer looks like a trump. It seems merely to be a card of a higher value in the same suit.

Id. at 986–87, 992.

209. Professor Alexander Aleinikoff, the author of the criticisms of balancing described *supra* note 208, recognizes that balancing may be the most appropriate approach to resolution of some constitutional questions:

> There may not always be a preferable alternative to balancing. One must approach cases and constitutional provisions one at a time. One must ask at each point whether there are other ways of describing and analyzing this constitutional question that do not raise the problems occasioned by balancing and that do not pose the additional troubling problems that balancing avoids.

Id. at 1003. A balancing test premised on a unitary interest in the reliability of criminal convictions, calculated to reflect the reasonable doubt standard, would pose none of the problems Aleinikoff identified in an "internal critique" of balancing methodology, which without exception derive from difficulties in identifying and/or assigning appropriate weights to the constitutional interests to be balanced. *See id.* at 977–83. Moreover, such a balancing test would not support the objections raised in his "external critique." That critique contends that courts may usurp legislative prerogatives in balancing tests which supplant legislative actions by assigning judicially-preferred weights to the competing social interests in the subject of the legislation, that doctrinally-based constitutional interpretation is denigrated through ad hoc judgments that create new, unpredictable controlling factors, and that there may be loss of touch with underlying principle when these factors are tossed on a balancing scale. *Id.* at 994–95.

210. In Francis v. Franklin, 471 U.S. 307 (1985) (discussed *supra* notes 39–43 and accompanying text) the Court indicated that an evidentiary device is unconstitutional whenever it generates a reasonable possibility of interference with the factfinder's legitimate application of the reasonable doubt standard. Nowhere in its opinion did the Court indicate that this possibility should be balanced against the government's competing interest in the use of presumptions as guidance for a jury's correct decision in a case.

However, in Ulster County Court v. Allen, 442 U.S. 140 (1979), the Court introduced its constitutional test with language that smells strongly of balancing:

> "[T]he value of these evidentiary devices, and their validity under the due process clause, vary from case to case . . . depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently."

Id. at 156. This interdependence of values, constitutional validity, "strength," and "degree" indicates the existence of an underlying balance of interests on which the constitutional judgment is to be based. The "permissible inference" at issue in *Ulster* was upheld because it was regarded as posing no risk of inducing the factfinder to make an error. *See supra* text accompanying note 35. Under that interpretation, the Court's approval of the inference would involve no balancing of interests because there would be no risk to the defendant from its use. Therefore, although *Ulster* does not indicate exactly how the balance of reliability affects the constitutionality of a presumption or inference, it recognizes that a balance may be appropriate.

approach that imposes on the prosecution the burden of demonstrating substantial guarantees of the reliability of the evidence to offset error risks from the evidence. When the nature of hearsay is such that it presents a special threat of inaccurate factfinding, the prosecution faces a "weighty presumption" that the evidence is inadmissible. That standard is wholly consistent with the conclusions already drawn in this Article and demands that the prosecution bear a substantial burden to justify the admission of unfairly prejudicial evidence.

B. Restating Rule 403 to Strike a Constitutional Balance in Criminal Cases

1. A Proposed Revision of Rule 403

The constitutionally required allocation of error risks can be accomplished by a reversal of the balancing test in the existing rule, to provide that evidence offered against the accused and determined by the court to present a danger of unfair prejudice must be excluded unless the prosecution satisfies the court that the probative value substantially outweighs the danger. As revised to accomplish that end, the rule might read as follows:

> RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.
>
> (a) *In a civil action or proceeding or in a criminal action or proceeding when offered by an accused,* 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.
>
> (b) *In a criminal action or proceeding, relevant evidence offered against an accused shall be excluded unless the court determines that its probative value substantially outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury, and may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.*[211]

This revision commands the exclusion[212] of unfairly prejudicial evidence that fails an exclusion-presumptive balancing test, when offered against an accused. The proposed revision retains the existing balancing test for civil cases regardless of the objection, for criminal cases

211. Additions or changes to the existing Rule 403 are italicized.

212. The proposed revision provides that evidence "shall be excluded," rather than "may be excluded" as in the present rule. As originally drafted, Rule 403 provided for mandatory exclusion of unfairly prejudicial evidence that failed the balancing test. *See supra* note 8 (discussion of drafting changes in Rule 403).

regardless of who offers the evidence when objection is made on time-wasting grounds, and for criminal cases when evidence is offered by the accused and objection is made on unfair prejudice grounds. The justification for the differing treatment of evidence offered *by* and *against* an accused is that the constitutional concerns raised by the present rule arise only when evidence is offered against the accused.[213]

The wording for the balancing test proposed here is adapted from that now used in Rule 609(b),[214] which imposes a similarly exclusion-

213. An unscientific conclusion drawn from numerous decisions rejecting, under Rule 403, evidence offered by criminal defendants is that the courts generally have shown no favoritism for the admission of potentially prejudicial evidence when offered by defendants. *See, e.g.*, United States v. Cameron, 814 F.2d 403, 406–07 (7th Cir. 1987) (no error in exclusion of defense evidence that alleged coconspirator fled country after his arrest; probative value was limited, and evidence would have created unjustified complexity and delay); United States v. Blade, 811 F.2d 461, 464–65 (8th Cir. 1987) (exclusion of defendant's proferred expert testimony on unreliability of eyewitness identifications sustained; evidence was generalized, prosecution's case did not rest exclusively on eyewitness testimony, and trial court has broad discretion in such rulings); United States v. Dorman, 752 F.2d 595, 599 (11th Cir.) (trial court did not abuse discretion in excluding defense offer of evidence that main prosecution witness had threatened main defense witness; probative value was substantially outweighed by danger of unfair prejudice, no showing of "clear abuse of discretion"), *cert. denied*, 474 U.S. 834 (1985).

However, at least one court has recognized the different interests involved when potentially prejudicial evidence is offered by an accused. *See* United States v. Aboumoussallem, 726 F.2d 906, 911 (2d Cir. 1984) ("We believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword.").

The constitutional requirement that the allocation of risk of factfinding error be struck in favor of the accused should apply to evidence offered by the accused as well as to evidence offered by the prosecution. Thus, the pro-admission balance of the existing Rule 403 makes sense when the evidence in question is potentially exculpatory evidence offered by the accused. There, the interest in acquitting innocents demands that evidence probative of innocence should be admitted unless the probative value is insignificant in comparison with the attendant risks of prejudice.

The proposed Rule 403 does not change the existing test for civil actions. An analysis of the propriety of the existing test for civil actions is beyond the scope of this Article. The existing test promotes an imbalance of inaccurate decisions over accurate ones, a result inappropriate for civil as well as criminal actions. That result is, however, less troubling in civil actions because there it does not threaten a constitutional preference for the allocation of risks of error. Nonetheless, a number of the premises offered in this Article would support a revision of the Rule 403 balancing test for civil cases to provide that potentially prejudicial evidence will be excluded unless its probative value outweighs the danger of prejudice.

214. FED. R. EVID. 609(b) reads as follows:

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

. . . .

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, *unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.* However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice

presumptive test for use of convictions more than ten years old for impeachment purposes, and the wording is substantively similar to that contained in a revision of Federal Rule of Evidence 404 recently proposed in the report of the Evidence Revision Project of the American Bar Association Criminal Justice Section.[215]

2. *The Conformity of the Proposed Rule with Constitutional Reliability Demands*

A principal thesis of this Article is that the legitimacy of the proposed revision of Rule 403 must be judged by whether it complies with the *Winship*-demanded allocation of risks of error. Compliance will depend on whether the requirement in the proposed subsection (b) that probative value "substantially outweigh" the danger of unfair prejudice would strike a balance sufficiently protective against erroneous convictions to support the confidence in the correctness of outcomes demanded by *Winship.*

The response of courts applying the identical test in rulings on the admission of plus-ten year old convictions under Rule 609(b) suggests it will. Courts have viewed the Rule 609(b) test as creating a presumption against the admissibility of such evidence.[216] Courts also believe that the test requires a far more cautious approach to the admission question than is now routinely provided rulings under Rule 403 and demands a "more explicit proceeding with full findings setting forth the quality and nature of any possible prejudice to the defendant,"[217] a

of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(emphasis added).

215. *See* Rothstein, *supra* note 12, and related discussion at note 12.

It is difficult, if not impossible, to construct a sensible wording of Rule 403 that incorporates the words, "Beyond a reasonable doubt." That difficulty probably arises from an inherent difficulty in transmuting the concept of "beyond a reasonable doubt"—a standard that makes sense in the context of a factfinder's ultimate disposition of a case—into terminology appropriate in the fundamentally different context of a judge's evaluation of the possible impact of evidence on reliable decisionmaking. It is the factfinder's certainty about guilt that matters, not the court's. The most a court can do is control the factors that may affect the integrity of the factfinder's judgment, to guard against error in a finding of guilt. Thus, the most that can be done with a reconstruction of Rule 403 is state the balance in terms that will impress on courts making the admission decision the comparative importance of the interests involved.

216. *See, e.g.,* United States v. Beahm, 664 F.2d 414, 417–18 (4th Cir. 1981); United States v. Singer, 660 F.2d 1295, 1301 (8th Cir. 1981), *cert. denied,* 454 U.S. 1156 (1982); United States v. Portillo, 633 F.2d 1313, 1323 (9th Cir. 1980), *cert. denied,* 450 U.S. 1043 (1981); United States v. Sims, 588 F.2d 1145, 1150 (6th Cir. 1978).

217. United States v. Cohen, 544 F.2d 781, 785–86 (5th Cir.), *cert. denied,* 431 U.S. 914 (1977); *see also Beahm,* 664 F.2d at 417–18 (rule requires articulation of basis for admission by both prosecution and court); *accord* United States v. Portillo, 633 F.2d 1313, 1323 (9th Cir.

procedure contemplated by the Senate Judiciary Committee when it proposed the test.[218] The Senate further contemplated that a consequence of the more stringent balancing test would be to authorize admission of the evidence "very rarely and only in exceptional circumstances,"[219] although in practice its impact has been less dramatic.[220] Moreover, appellate courts appear to be more willing to reverse trial court judgments under Rule 609(b) than under Rule 403.[221]

Admittedly, this proposed balance would not eliminate all possibility of an erroneous conviction attributable to the admission of unfairly prejudicial evidence, but the reasonable doubt standard is a measure of proportion rather than a demand for absolute certainty.[222] The proposed test allocates the major risk of an erroneous decision to the prosecution, where *Winship* demands that it be.[223]

1980), *cert. denied,* 450 U.S. 1043 (1981). *Cf. supra* note 198 (failure to require articulation under Rule 403).

218. "The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact." SENATE COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, S. REP. No. 1277, 93d Cong., 2d Sess. 15 (1974).

219. *Id.*

220. *See infra* note 237 and accompanying text (apparent impact of Rule 609(b) test on reversals).

221. Reversals of Rule 403 trial court decisions are unusual. *See* 2 J. WEINSTEIN & M. BERGER, *supra* note 14, ¶ 404[02], at 404-21 ("the trial judge's judgment of [the Rule 403] balance is rarely overturned on appeal"). It appears that reversals occur far more frequently on review of Rule 609(b) rulings. *See infra* note 237 (describing reversal rates in appeals from Rule 609(b) rulings).

222. *See In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). Justice Harlan wrote:

> [I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened. . . . [A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

Id.

223. For a similar conclusion that the protection of fundamental constitutional interests can demand stringent controls on the admission of prejudicial evidence, see Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of* United States v. Rosenberg, 86 YALE L.J. 1622 (1977). There Professor Quint has evaluated the first amendment implications, in the notorious prosecution of Julius and Ethel Rosenberg for conspiracy to commit atomic espionage, of the admission of evidence that the defendants were members of the Communist Party and preferred a Soviet form of government to that of the United States. Professor Quint finds three reasons to believe the admission of evidence of a defendant's unpopular political speech or association can work unconstitutional results: A jury may convict to retaliate for the speech, it may draw an unduly strong inference of guilt from the evidence, and the admission of the evidence may have a chilling effect on future speech. *Id.* at 1641. Significantly, the first two of these reasons correspond to those advanced in this Article as

3. *The Practical Consequences of the Proposed Revision*

For some potentially prejudicial evidence now commonly admitted, the proposed revision would work significant change. The pro-admission bias of the present Rule 403 frequently accounts for decisions permitting use of evidence when its relevance is tenuous or its potential for prejudice difficult to calculate, and the bias appears to have fostered a casual judicial attitude toward claims of prejudice from the admission of evidence. For example, courts may fail to conduct any Rule 403 balancing once they have found that evidence has probative value, in apparent response to the heavy bias toward admission established by the rule,[224] or they may justify the admission of uncharged misconduct evidence, against claims of prejudice, by reiterating a laundry list of the "other purposes" described in Rule 404(b) without any significant attempt to assess their applicability to the case at hand.[225] A reversal of the allocation of error risks like that proposed here should produce a more cautious and conscientious approach, less willingness to accept tenuous arguments of relevance, and greater sensitivity to the possible adverse effects of the evidence in close cases.

The proposed revision should eliminate the most disturbing instances of casual or thoughtless admission of prejudicial evidence that occur under the present rule. It also should encourage a change in judicial attitudes toward prejudicial evidence of no small importance—a recognition that the consequence of prejudice to the accused in a criminal case is fundamentally different than its consequence to a

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grounds for a constitutionally-sensitive balancing test in Rule 403. Professor Quint concludes that protection of defendants' first amendment interests demands a revision of the balancing test for the admission of evidence of a defendant's protected speech or association to require that the evidence be excluded unless its probative value substantially outweighs its prejudicial dangers, identical to the test proposed for Rule 403 in this Article. *See id.* at 1661–62.

First amendment interests are, of course, fundamental. However, they are no more fundamental than the liberty interests of a criminal defendant. *See* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (discussing judicial limitations on press coverage of criminal trials: "Due process requires that the accused receive a trial by an impartial jury free from outside influences. . . . [T]he trial courts must take strong measures to ensure that the balance is never weighed against the accused."). Indeed, first amendment interests occasionally must give way to such liberty interests. *See, e.g.,* Estes v. Texas, 381 U.S. 532 (1965). Thus, much of Professor Quint's argument would apply as well to rules of evidence that threaten liberty interests alone.

224. *See, e.g.,* Gold, *Limiting Discretion, supra* note 11, at 61–63 nn.6–11 and accompanying text (courts either ignore the weighing process or state results without articulating reasons; appellate courts routinely overlook such actions). *But see supra* note 198 (efforts of some appellate courts to encourage articulation).

225. *See* 2 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 404[08], at 404-55 to 404-56 ("[A] reading of the huge volume of cases decided pursuant to Rule 404(b) . . . compels the conclusion that in numerous instances . . . the courts recite the list of permissible uses specified in the rule and admit without any analysis of the proffered evidence." (footnotes omitted)).

party in a civil case, and a correspondingly heightened awareness of the individual liberty interests at risk.[226]

In addition, the proposed revision should generate increased effort by both prosecutors and courts to identify and use means for reducing the prejudicial potential of evidence offered against the accused. Although expressed doctrine under the current rule purports to encourage such efforts and there is evidence that courts occasionally insist upon them,[227] the rule itself creates no prejudice-reducing incentive and there is little indication that courts conscientiously explore the availability of such measures or demand that prosecutors do so.[228]

In current practice, the limiting instruction probably is the most commonly used prejudice-reducing measure. Even disregarding the serious questions about the effectiveness of limiting instructions in eliminating prejudice,[229] courts should insist on a thorough investigation of the use of other measures as well. Nonetheless, current doctrine discourages acceptance of stipulations offered to avoid prejudice, and there are few examples of court-ordered redaction of proof to minimize prejudice. Indeed, the ease with which prosecutors can now obtain admission of potentially prejudicial evidence would seem to discourage prosecution efforts to discover or offer less prejudicial sources of proof.

The proposed revision shifts to the prosecution the burden of justifying the creation of a potential for unfair prejudice and the incentive to offer the least prejudicial proof on an issue. Under such a rule we might expect to find prosecutors tendering stipulations to the defense as alternatives to more prejudicial evidence on an issue, with a defend-

226. The decision in United States v. DeParias, 805 F.2d 1447 (11th Cir. 1986), *cert. denied,* 107 S. Ct. 3189 (1987) illustrates the influence that the generic approach of Rule 403 may have on judicial attitudes. There, in a murder case, the court approved the admission of photographs of the victim's badly decomposed body even though it acknowledged that the probative value of the photographs was cumulative of a coroner's testimony. The court found justification in the principle that "Rule 403 is to be very sparingly used" to exclude relevant evidence, but relied on the court's own earlier decision in a *civil* case for that test. *Id.* at 1454 (quoting Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716, 722 (11th Cir. 1982), *cert. denied,* 460 U.S. 1083 (1983)). Surely something is amiss when a criminal defendant's challenges to due process-threatening events are determined by procedural doctrine established in civil cases.

227. *See, e.g.,* United States v. McManaman, 606 F.2d 919, 926 (10th Cir. 1979) (reversing conviction, noting that trial judge had failed to excise prejudicial portions of lengthy conversation offered for impeachment, "as can be done to avoid . . . dangers of prejudice").

228. *See, e.g.,* United States v. Dixon, 698 F.2d 445, 446 (11th Cir. 1983) ("While [the government's chosen] method of proof perhaps exposed [defendant] to greater prejudice than other available methods, there is no requirement that the government choose the least prejudicial method of proving its case. *See* Fed. R. Evid. 403 . . . ."); *see also supra* notes 195–98 (lack of court insistence on use of prejudice-reducing measures).

229. *See supra* note 201 (citing authorities questioning efficacy of limiting instructions).

ant's refusal to stipulate considered in the trial court's evaluation of how "unfair" any resulting prejudice may be. We also should find prosecutors and trial courts actively searching for effective prejudice-reducing measures as a means of preserving the use of probative evidence, rather than the current approach in which the accused fights an uphill battle in the effort to avoid an unfair trial.

The proposed revision undoubtedly would raise concern that it will hamper legitimate prosecutions in a system that is already popularly viewed as "too easy on crime." In close cases the prosecution may be unable to introduce evidence necessary for a conviction and, indeed, some portion of the resulting acquittals would be of factually guilty persons. But that result, while not insignificant, is sufferable if the present rule unduly threatens the innocent. Moreover, previous discussion has noted several reasons to believe that close cases, where a change in the balancing test would have its greatest impact, are likely to involve a substantial number of factually innocent persons.[230]

There are other reasons the spectre of hamstrung prosecutions is more phantom than substance. In the first place, evidence that is highly probative and truly essential to the prosecution's case is likely to be admitted even under this restrictive test unless the potential for prejudice is undeniably substantial. A foreshadow of this result is the frequency with which courts have found that evidence offered under the present Rule 403 would satisfy more demanding requirements for admission.[231]

In addition, for some kinds of potentially prejudicial evidence the proposed revision might have limited practical impact. For example, when a defendant claims entrapment as a defense, evidence of the defendant's prior involvement in similar criminal activity is routinely

230. *See supra* notes 158–65 and accompanying text.

231. It is commonplace for courts to state that the probative value of evidence challenged under the present Rule 403 *outweighed* its potential for prejudice, even though the rule is less demanding. Less commonly, but not infrequently, courts have justified the admission of the evidence on terms that would meet the requirements of the revision proposed here. *See, e.g.*, United States v. Heinemann, 801 F.2d 86, 95 (2d Cir. 1986) (probative value "easily outweighed" any possible prejudice), *cert. denied*, 479 U.S. 1094 (1987); United States v. Fortna, 796 F.2d 724, 736–37 (5th Cir.) (although prejudicial, misuse unlikely; evidence "highly probative"), *cert. denied*, 479 U.S. 950 (1986); United States v. Eirin, 778 F.2d 722, 731–732 (11th Cir. 1985) (relevance "undeniable," possibility of prejudice "minimal" or "slight"); United States v. Stump, 735 F.2d 273, 275 (7th Cir.) (probative value "clearly outweighs any conceivable prejudice"), *cert. denied*, 469 U.S. 864 (1984); United States v. Poston, 727 F.2d 734, 740 (8th Cir.) (probative value "clearly outweighs any possible prejudicial effect"), *cert. denied*, 466 U.S. 962 (1984); United States v. Day, 591 F.2d 861, 877–79 (D.C. Cir. 1978) (reversing trial court exclusion of evidence; highly probative, no conceivable prejudice); United States v. Buck, 548 F.2d 871, 876 (9th Cir.) (any "slight prejudicial element" clearly outweighed by probative value), *cert. denied*, 434 U.S. 890 (1977).

opened to proof by the prosecution.[232] In this situation, the defendant's "propensity" to commit the crime charged, ordinarily a source of prejudice, becomes a legitimate inquiry for the jury because the defense has chosen to make propensity an issue. Similar reasoning may apply to uncharged misconduct evidence when offered on the issue of "knowledge" to rebut a defendant's affirmative denial of possession of critical information, as, for example, when a defendant's prior use of drugs is offered to refute the defendant's affirmative claim of unfamiliarity with drugs.[233] Here, too, the usually unfair inferences from the uncharged misconduct evidence become directly relevant to a matter raised by the defendant, and a jury's inference of criminal knowledge or propensity may no longer be unfair under the circumstances of the case.[234]

When uncharged misconduct evidence properly satisfies such relevance requirements there often will be a minimal risk of prejudice to the defendant of the kind that warrants constitutional protection. Undoubtedly the incriminating inferences from such evidence may be powerful. But the constitutional concern is not based on the risk that evidence may tend to convict; it is based instead on the risk that evidence will tend to convict for the wrong reasons. If the tendency to convict is the product of a legitimate and reasonable inference of guilt, the defendant has no justifiable basis for complaint.

Apart from its impact on the admission of uncharged misconduct evidence, the proposed revision may have a moderate effect on the admissibility of other kinds of potentially prejudicial evidence significant to a prosecution. In the case of gruesome photographs or physical evidence, for example, challenge is frequently based on alleged "inflammatory" potential. Here, typically, the reasoning is that a jury will be vindictively aroused by an emotional response to the horribleness of a crime, venting that emotion by convicting a convenient target, the defendant at hand. There may well be truth to this intuition, and in some cases that risk may be so substantial that complete exclusion of the evidence would be warranted. However, in many of these situations the danger of prejudice may be ameliorated by the fact that the prejudicial content of the evidence is only tangentially directed at the accused. Unlike uncharged misconduct evidence, which invites a jury to draw direct inferences about the likelihood that an accused

232. *See, e.g.*, United States v. Parrish, 736 F.2d 152, 155 (5th Cir. 1984); United States v. Faymore, 736 F.2d 328, 335 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984).

233. *See, e.g.*, United States v. Eaton, 808 F.2d 72, 75–76 (D.C. Cir. 1987).

234. For further discussion of uses of uncharged misconduct evidence that are not prejudicial, see Kuhns, *supra* note 12, at 789–91.

committed a charged crime, "inflammatory" evidence may arouse hostility toward whoever committed the crime but does not directly single out the defendant. Accordingly, to the extent the potentially inflammatory proof offers significant probative value it might well satisfy a more demanding balancing test because of reduced danger of prejudice. Here, the expected change would more likely be found in a greater resistance to prosecution offers of gruesome evidence to prove issues either stipulated by the defense, already established by less dramatic proof, or subject to proof by more subdued means. Thus we might expect to find a prosecutor limited to use of the least gruesome photos available on an issue, in contrast to current practice where courts often refuse to dictate such choices of proof.

The decisions applying the identical balancing test of Federal Rule of Evidence 609(b) best indicate the likely judicial approach under the proposed revision. Clearly, this more demanding test has affected the ease with which the government can make use of plus-ten year old convictions.[235] However, this test has not proved an insurmountable barrier to admission. Courts have had no difficulty justifying the admission of evidence under Rule 609(b) when the evidence is of clear probative value on the issue of credibility, even though it also carries potential for prejudice. In fact, if appellate decisions can be taken as an indication of the direction of trial court rulings under Rule 609(b),[236] the prosecution has a substantial possibility of gaining admission of plus-ten year old conviction evidence when it is of demonstrable significance to a case.[237]

235. *See supra* notes 216–21 and accompanying text (application of Rule 609(b)).

236. There are some difficulties with such an assumption. For example, the appellate decisions will not reflect the cases where a prosecutor has chosen not to offer evidence of a plus-ten year old conviction because of anticipated difficulty in satisfying the rule's test. Such decisions clearly would be one consequence of the more demanding balancing test—a salutary one, under the thesis of this Article. Nor are appellate decisions likely to reflect impacts of the test on trial court rejections of such evidence when offered by the prosecution, because of the infrequency of appeals from such rulings.

237. *See* M. GRAHAM, *supra* note 107, § 609.5, at 489 ("Reported decisions . . . indicate that while prior convictions over ten years old are not usually admitted, instances of admissibility appear to occur with more frequency than 'very rarely.' " (footnotes omitted)). An indication of the willingness of courts to accept evidence under this more demanding test may be found in the number of appellate decisions approving admission of plus-ten year old convictions compared with those that either have approved trial court rejections of the evidence or found a trial court's admission of the evidence to be error. Of the decisions annotated through May 1987 in 3 J. WEINSTEIN & M. BERGER, *supra* note 4, ¶ 609[07] that fit those categories, nearly half approved admission and slightly more than half found error in admission of the evidence or approved rejection of it when offered by a defendant. *Compare* FED. R. EVID. DIG. 609 b.1 (of cases annotated through 1987 supplement, 13 approved admission and 7 found error in admission or approved exclusion).

Moreover, the proposed revision should have no impact at the appellate level on those cases, now numerous, in which error in a trial court's evidentiary ruling is found harmless because of overwhelming proof of guilt. If the evidence of a defendant's guilt is overwhelming, it will be so regardless of the balancing standard the trial court may have violated.

The foregoing analysis may prove only that the proposed revision will permit the use of potentially prejudicial evidence in "easy cases," where all could agree with the relevance reasoning and where the prejudice risks to the defendant are tolerable. One might object that the real impact of the proposed rule will be in "hard cases," where trial courts already struggle with these issues. Exactly so. "Hard cases" in this context is a euphemism for doubtful, unsettling, or disturbing questions—the kind that leave the observer wondering about the legitimacy of the relevance rationale, the actual impact of the evidence on the jury, or the factual guilt of the convicted defendant. They are thus the cases where it is most important that doubts be resolved in favor of the defendant and against the prosecution to minimize the risk of convicting an innocent.

4. Retroactivity

The foregoing discussion predicts the impacts of the proposed revision on future cases. Current retroactivity doctrine may require retroactive application of the revision. The major purpose of the revision would be to "overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials," a purpose that demands complete retroactive effect.[238] For new constitutional doctrine that addresses such concerns, "[n]either good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application."[239]

Thus, an additional and significant practical consequence of the proposed revision could be an invitation for habeas review of past convictions that arguably rest on the admission of prejudicial evidence excludible under the revised Rule 403. The admission of potentially prejudicial evidence—notably, uncharged misconduct evidence—may

238. *See* Williams v. United States, 401 U.S. 646, 653 (1971) (White, J., plurality opinion).

239. *Id.; see also* Yates v. Aiken, 108 S. Ct. 534 (1988) (*Franklin* does not announce a new rule but merely follows *Sandstrom*; state therefore may not refuse to give retroactive effect to *Franklin*); Ivan v. City of New York, 407 U.S. 203 (1972) (*Winship* fully retroactive).

be commonplace in criminal trials, and the number of these habeas proceedings might be substantial.[240] The impact in terms of reversals would, however, be softened by the application of "harmless constitutional error" review to these cases.[241] Moreover, as noted earlier, in many situations evidence admitted under the existing Rule 403 would qualify for admission under the proposed revision as well.[242] Successful habeas review would therefore require a petitioner to show both the inadmissibility of the evidence under the revision and its potentially decisive impact on the outcome of the prior proceedings. While the number of cases meeting this test might still be large, they also would be those where the risk that an innocent has been convicted is substantial.

V. CONCLUSION

Federal Rule of Evidence 403 fails to account for constitutionally protected interests of defendants in criminal trials. In its present form it invites decisions on the admissibility of potentially prejudicial evidence that jeopardize the trustworthiness of determinations of guilt. Appellate review offers little more than a placebo for the risks of error created by the rule.

The problem with Rule 403 is fundamental: the rule and its current jurisprudence conflict with the presumption of innocence and the most basic precepts of criminal justice in an accusatorial system. The cure must come from a revision of the rule that will reorder trial and appellate court priorities to account for the individual and societal interest in reasonable certainty about the accuracy of convictions.

A call for that cure undoubtedly will find disfavor in an era of judicial sensitivity to a publicly perceived overindulgence of those charged with crime. Nonetheless, the concept of criminal justice reflected in the reasonable doubt standard and the constitutional doctrine established by *Winship* demand a revision of Rule 403 to reallocate the risks of factfinder error in criminal cases. The revision proposed in this Article would shift to the prosecution the burden of justifying the creation of a potential for unfair prejudice and the incentive to offer the

240. *See supra* note 127 and accompanying text (frequency of appellate decisions concerning uncharged misconduct evidence).

241. The Supreme Court has held that convictions based on intent instructions violative of Sandstrom v. Montana, 442 U.S. 510 (1979), are subject to harmless error review. Rose v. Clark, 478 U.S. 570 (1986). Because *Sandstrom* was premised on *Winship* principles identical to those that would underlie the proposed revision, the same result should follow for errors under the proposed revision.

242. *See supra* notes 231–37 and accompanying text.

least prejudicial proof on an issue. It also would heighten judicial awareness of the fundamental interests placed at risk by the use of prejudicial evidence in criminal cases and would place the greater share of the risks of factfinding error on the prosecution, where it belongs.

The price of the revision would be—indeed, would be calculated to be—the acquittal of some persons who would have been convicted under the present Rule 403. Some portion of this increase in acquittals will include defendants who in fact are guilty of the crimes with which they were charged. But a significant portion of these additional acquittals will be of defendants who are in fact innocent but who would have been convicted under the present rule because of its error-inducing structure. If our professed interest in reasonable certainty about the guilt of persons convicted of crimes is genuine, we should readily pay the price of the revision.