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OLD CHIEF, CROWDER, AND TRIALS BY STIPULATION

David Robinson, Jr.

In this Article, Professor Robinson argues that the meaning of "unfair prejudice" and the scope of trial judges' discretion in employing Rule 403 of the Federal Rules of Evidence is still uncertain following the Supreme Court's recent decision in United States v. Old Chief and its vacation and remand of United States v. Crowder and United States v. Davis. Robinson evaluates the evidentiary implications of the Supreme Court's recent decisions by discussing each case and analyzing the implications of the three cases read together.

Professor Robinson examines the possible effects of stipulations and admissions on the Rule 403 balancing test for exclusion of relevant evidence, highlighting the distinctions of the stipulations in Old Chief as compared to those in Crowder and Davis. In addition, he discusses the appropriate role of emotionally laden evidence in trial processes. He also ponders the scope of trial judges' discretion to exclude evidence under Rule 403 after Old Chief, Crowder, and Davis. Finally, Professor Robinson analyzes the possible interpretations of Old Chief, from a very narrow reading to a very broad one, to conclude that read with Crowder and Davis, the ruling in Old Chief was relatively conservative and will likely be limited by the Court in future decisions to its specific facts or to other cases involving legal status issues. As such, traditional practices remain largely undisturbed.

Robinson notes that the Court articulated a cautious rationale for reversing the conviction in Old Chief and explains that far more sweeping
change could have been effected if the court had applied differently the definition of relevancy in Rule 401 or, alternatively, the balancing test of Rule 403. Robinson concludes that Old Chief clearly means that trial judges do not have unlimited discretion to decline to exclude evidence under Rule 403 but that the extent of this limitation must await the clarification of further decisions.

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I. INTRODUCTION

As a theoretical matter, a rational evidence code could consist of a definition of relevant evidence and a declaration that all relevant evidence should be admitted unless its probative value is outweighed by its various costs. All other provisions, with the exception of those relating to privileges, could be regarded as merely illustrative of this general principle or even eliminated. The Federal Rules of Evidence are partly constructed on this model: The heart of the Rules is contained in the three general relevancy provisions.1 The problems that would be encountered

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1 “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. “All relevant evidence is admissible, except as otherwise provided . . . . Evidence which is not relevant is not admissible.” FED. R. EVID. 402. “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
if the Rules were thus limited are related primarily to indeterminacy; courts need more guidance than is provided by mere instructions to balance benefits against costs. The Rules therefore include provisions addressing conventional subsets of evidence law, such as hearsay, opinion, impeachment of witnesses, authentication of documents, and the like. Even the general balancing provision of the relevancy rules is supplemented by more specific directives in a number of frequently recurring contexts, such as the use of character evidence, compromise offers, and liability insurance; yet, in general, the command that relevant evidence should be admitted unless its benefit is clearly outweighed by its disadvantages remains the underlying philosophy of the Rules. The question then arises as to what is meant by the terms "probative value," "unfair prejudice," and "substantially outweighed." What are the respective roles of trial and appellate courts in applying the Rules?

Broad discretion in the employment of Rule 403 by trial judges seems both inevitable and desirable as indicated by its pervasive potential applicability, the indeterminacy of the balancing process authorized by it and of the meaning of Rule 403's key terms, and its permissive rather than mandatory text; yet the meaning of "unfair prejudice" and the scope of that discretion have been placed in serious uncertainty following the Supreme Court's recent decision in Old Chief v. United States and its vacating of United States v. Crowder and United States v. Davis. Despite the more sweeping possible implications of these decisions, the delay, waste of time, or needless presentation of cumulative evidence."

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2 See FED. R. EVID. 801-805.
3 See id. 701-705.
4 See id. 607-610, 613.
5 See id. 901-902.
6 See id. 404.
7 See id. 408.
8 See id. 411.
9 An exception is Rule 609, which contains detailed provisions covering the impeachment of witnesses by evidence of conviction of a crime. The rule details instances when such evidence may be used, and excludes supplemental Rule 403 balancing in this context. See United States v. Wong, 703 F.2d 65 (3d Cir. 1983) (holding that district courts have no discretion to weigh the probative value of some crimes against their prejudicial effect).
10 See FED. R. EVID. 403.
13 Id.
Court has acted with such sensitivity and caution that traditional practices remain largely undisturbed.

II. OLD CHIEF

Johnny Lynn Old Chief was involved in a drunken fracas on the Blackfeet Indian Reservation in Montana in which he fired a weapon at Anthony Calf Looking.\(^{14}\) Because Old Chief had been convicted several years earlier of a felonious assault causing serious bodily injury, he was charged with being a convicted felon in possession of a firearm,\(^ {15}\) as well as with new aggravated assault counts.\(^ {16}\) Before trial, Old Chief offered to stipulate that he previously had been convicted of a crime punishable by imprisonment for a term exceeding one year and moved that the government be precluded from offering any evidence disclosing the name and character of the crime.\(^ {17}\) The prosecutor declined to accept the stipulation.\(^ {18}\) The trial judge honored the prosecutor's decision\(^ {19}\) and the written judgment of conviction, showing the nature of the crime and the penalty of imprisonment for five years, was received in evidence at trial.\(^ {20}\) Old Chief did not testify in his own defense.\(^ {21}\) The Court of Appeals for the Ninth Circuit upheld Old Chief's conviction without issuing a published opinion.\(^ {22}\) The Supreme Court nonetheless quoted

\(^{14}\) See Old Chief, 117 S. Ct. at 647.

\(^{15}\) "It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm . . . ." 18 U.S.C. § 922(g) (1994). This prohibition extends beyond persons who have been convicted of felonies to other classes of individuals, including addicts, illegal aliens, persons convicted of misdemeanors of domestic violence, and others. For simplicity, this Article will refer to this prohibition in the context of the ex-felon component.

Antitrust violations, unfair trade practices, restraints of trade, and other similar crimes relating to the regulation of business practices are excluded from the definition of crimes punishable by imprisonment for a term exceeding one year, for the purposes of the prohibition. See id. § 921(a)(20) (1994).

\(^{16}\) See Old Chief, 117 S. Ct. at 647.

\(^{17}\) See id. at 647-48.

\(^{18}\) See id. at 648.

\(^{19}\) See id.

\(^{20}\) See id.

\(^{21}\) See id. at 648 n.2.

\(^{22}\) See United States v. Old Chief, 56 F.3d 75 (9th Cir. 1995), rev'd and remanded, 117 S. Ct. 644 (1997). The unpublished opinion is available in 1995 WL 325745 and was ordered published as an attachment to an order remanding the case to the district court following the decision of the Supreme Court. See United States v. Old Chief, 121 F.3d 448 (9th Cir. 1997).
the Court of Appeals as follows: “Regardless of the defendant’s offer to stipulate, the government is entitled to prove a prior felony offense through introduction of probative evidence. . . . Under Ninth Circuit law, a stipulation is not proof, and, thus, it has no place in the FRE 403 balancing process.”23 In United States v. Breitkreutz, 24 the Ninth Circuit Court of Appeals had stated:

The unwillingness of courts to force the prosecutor to accept a criminal defendant’s stipulation is based on the longstanding rule that “the criminal accused cannot ‘plead out’ an element of the charged offense by offering to stipulate to that element.”

. . . . A stipulation is not proof. As we explained above, it’s a partial amendment to the defendant’s plea, a means of precluding any and all proof on a particular issue. . . . A stipulation thus has no place in the Rule 403 balancing process. 25

In a five-to-four decision, the Supreme Court reversed Old Chief’s conviction and remanded the case for further proceedings. 26

First, the Supreme Court rejected Old Chief’s argument that the offer to stipulate made the judgment of conviction irrelevant because the element of his status as a convicted felon was no longer in issue. 27 Relying on the 1972 Advisory Committee’s Note to Rule 401, the Court stated that to be relevant,

[the fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclu-

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23 Old Chief, 117 S. Ct. at 649 (quoting United States v. Breitkreutz, 8 F.3d 688, 690-92 (9th Cir. 1993) (recognizing the government’s right to refuse an offered stipulation and to offer evidence of a prior offense)).
24 8 F.3d 688 (9th Cir. 1993).
25 Id. at 690-92 (quoting Edward J. Imwinkelreid, The Right to “Plead Out” Issues and Block the Administration of Prejudicial Evidence, 40 EMORY L.J. 341, 357 (1991)). The sentence rejecting the application of Rule 403 surely constitutes a striking non sequitur. A concurring opinion also rejected the applicability of Rule 403 balancing, but on the alternative theory that the offer to stipulate made the government’s proof of the status of the defendant as a convicted felon totally irrelevant, drawing a distinction between offers to stipulate as to the defendant’s status and an offer to stipulate with respect to the other elements of the crime charged. See id. at 693-95 (Norris, J., concurring).
26 See Old Chief, 117 S. Ct. at 656.
27 See id. at 649.
sion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute.28

In addition, the Court stated that the conviction was relevant insofar as it placed the defendant "within a particular sub-class of offenders for whom firearms possession is outlawed by § 922(g)(1)."29 The Court then turned to the question of whether receipt of the written judgment of conviction violated Rule 403 by creating unfair prejudice against the defendant.30 In holding that it did, the Court drew on the common law tradition, federally codified in Rule 404(b),31 against proving a defendant's guilt by evidence of his propensity to commit the crime charged.32 The danger that such evidence will be used for this purpose is most acute when the prior offense is similar to the one with which the defendant is charged, as it was in Old Chief. In accordance with the Advisory Committee's Notes, a trial court should conduct Rule 403 balancing in the light of alternative avenues of proof available to the prosecution. "[S]ound judicial discretion" would discount the probative value of the written record of conviction because of the availability of the stipulation, which presents less danger of jury misuse.33 Even though the stipulation offer was not accepted by the government at trial, it constituted an offer of an admission that would have been "not merely relevant but seemingly conclusive evidence of the element."34

Significantly, the Court then proceeded to importantly qualify the foregoing by recognizing that, in general, a defendant is not entitled to "stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it,"35 and that

making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a color-

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28 Id. at 649-50 (quoting FED. R. EVID. 401 Advisory Committee's Note).
29 Id. at 649.
30 See id.
31 "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 . . . ." FED. R. EVID. 404(b).
32 See Old Chief, 117 S. Ct. at 651.
33 Id.
34 Id. at 653.
35 Id.
ful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.36

The Court further reasoned that there was a need for the trial to satisfy the jurors' expectations that a case involving a charge of gun use ordinarily would include the introduction of the gun or an explanation of the failure to do so.37 A stipulation or admission in lieu of such proof may have led to a negative inference adverse to the government.38

In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no

36 Id. at 653-54.
37 See id. at 654.
38 See id.
match for the robust evidence that would be used to prove it. . . . [J]urors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.39

The Court, however, stated that these arguments for narrative completeness and evidentiary robustness have no applicability to the status of the accused, because Congress in enacting the prohibition generally applied it to almost all convicted felons, and the sequence of events of the crime charged would not be made partial or incomprehensible by not identifying the crime of which the accused had been convicted.40 The only choice was between the risk of prejudice attendant upon receipt of the written judgment of conviction and its complete absence in utilizing the stipulation;41 therefore, “the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.”42 The Court reversed the judgment of conviction and remanded the case for determination of whether the error was harmless.43

Justice O’Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, dissented. The dissenting Justices suggested that the prejudice to Old Chief created by identifying the nature of his prior conviction was not “unfair,” because the government was required to prove the defendant’s status beyond a reasonable doubt, a burden that was not removed by the stipulation.44 This was doubly true in Old Chief, both because the government did not join in the stipulation and because, even had it done so, the jury could not have been required to accept it.45 Fundamentally, the dissenters argued, the majority had created a partial plea of guilty and the

39 Id.
40 See id. at 655. The Court also expressly limited its holding to cases involving proof of felon status. See id. at 651 n.7.
41 See id. at 655.
42 Id.
43 See id. at 656 n.11. The Court of Appeals in turn remanded the case to the district court for a determination of whether the error was harmless. See United States v. Old Chief, 121 F.3d 448, 448 (9th Cir. 1997). On September 24, 1997, the district court found the error not harmless and ordered a new trial. United States v. Old Chief, D.C. No. Cr-94-03-GF-DWM (D. Mont. Sept. 24, 1997).
44 See Old Chief, 117 S. Ct. at 659-60 (O’Connor, J., dissenting).
45 See id. at 659 (O’Connor, J., dissenting).
waiver of a right to a jury trial in violation of the Federal Rules of Criminal Procedure. Furthermore, the need of the government to present a case with narrative completeness included a need to explain to the jury the nature of the prior offense. In the eyes of the dissenters, the majority had retreated from the “fundamental principle that in a criminal prosecution the Government may prove its case as it sees fit,” and the defendant’s remedy should be an instruction limiting the jury’s use of the evidence to an appropriate one, as was given in this case.

III. United States v. Crowder and United States v. Davis

Two weeks following its reversal of the conviction in Old Chief, the Supreme Court in United States v. Crowder granted certiorari, vacated the judgment upsetting the conviction of the defendant, and remanded the case for further consideration in light of Old Chief. Crowder was charged with possession of drugs with intent to distribute. Police officers observed Crowder exchanging a small object with a man for cash. Upon seeing the officers, Crowder fled, dropping a paper bag with ninety-three bags of crack cocaine and thirty-eight packets of heroin. He was quickly apprehended and found to be in possession of $988 in cash and a beeper. The defense argued that Crowder had not possessed the drugs and that the police framed him for refusing to cooperate in a murder investigation. The government offered evidence that Crowder had sold drugs to an undercover officer on another occasion. Crowder objected and offered to concede every element of the crime except his possession of drugs on the date charged. The district court nonetheless admitted the evidence to show intent to distribute and “knowledge of drug dealing.” The court of appeals reviewed the sharply

46 The opinion refers to Rule 23(a) of the Federal Rules of Criminal Procedure, which requires government consent to the waiver of a jury trial. See id. at 660 (O'Connor, J., dissenting); FED. R. CRIM. P. 23(a). That provision, however, is clearly directed at total waiver. The dissent might more appropriately also have cited Rule 12 of the Federal Rules of Criminal Procedure, which limits defensive pleas to not guilty, guilty, and nolo contendere, and explicitly abolishes all other pleas. See FED. R. CRIM. P. 12.
47 See Old Chief, 117 S. Ct. at 659 (O'Connor, J., dissenting).
48 Id. at 658.
51 See id.
52 See id.
53 See id.
54 See id.
55 See id.
56 See id.
57 Id. at 1409. Crowder’s stipulation did not include the latter, which is not an ele-
conflicting decisions of nine other circuits. It concluded that those decisions fell into three different categories: four circuits leave substantial discretion in the district courts to find that the probative value is not substantially outweighed by danger of prejudice, notwithstanding the defendants’ offer to stipulate; two circuits find that such an offer “generally” makes other evidence of intent and knowledge inadmissible; and three circuits give defendants the right to remove such elements from the case. The District Court of Columbia Circuit Court of Appeals in Crowder decided to follow the Second Circuit by holding that a concession of the elements of knowledge of the drugs and intent to distribute, together with the offer of an explicit jury instruction that the government need not prove these elements, removed these issues from the case, even without a formal offer to stipulate. The court held that proof of other crimes to show intent only tends to show propensity to commit the crime charged, and therefore is prohibited by Rule 404(b), and is error. The court vacated the conviction and remanded the case to the district court to determine whether the other crime evidence was admissible to show knowledge of drug dealing and therefore possession, strongly intimating that its probative value on this theory was substantially outweighed by its tendency to prejudice and that therefore a new trial should be conducted without such evidence.

In United States v. Davis, consolidated on appeal with Crowder, the defendant was also charged with possession of crack cocaine with intent to distribute. He claimed mistaken identity by an undercover officer and offered to stipulate to both knowledge and intent by the actual offender (not himself). The court of appeals held that the admission of evidence of other drug sales by Davis was reversible error and remanded the case for a new trial. The Supreme Court vacated this decision, along with that in Crowder, and remanded the case to the court of appeals to further consider it in light of Old Chief.

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58 See id.
59 See id. at 1409-10.
60 See United States v. Mohel, 604 F.2d 748, 751-54 (2d Cir. 1979) (holding that the government may not refuse an unequivocal offer to stipulate to a defendant’s intent and knowledge, and then introduce evidence of other crimes).
61 See Crowder, 87 F.3d at 1410.
62 See id.
63 See id. at 1413-14.
64 87 F.3d 1405 (D.C. Cir. 1996).
65 See id. at 1408.
66 See id. at 1416.
IV. THE SIGNIFICANCE OF THE VACATION OF THE CONVICTIONS IN CROWDER AND DAVIS

Supreme Court vacation orders are subject to varying interpretations. On the one hand, in vacating Crowder and Davis, the Court did not explicitly disapprove of the decisions of the court of appeals, as might have been accomplished by writing at least a memorandum opinion, explaining its reasoning, or even by summary reversals of the court of appeals. On the other hand, unlike a denial of certiorari, the vacation and remand for reconsideration of the cases represent a decision, by a majority of the Justices, that the intervening authority might properly have led, if it had been available, to a different result in the appeals.

In Henry v. City of Rock Hill, the defendants were convicted of a breach of the peace in South Carolina. The convictions were affirmed on appeal. The United States Supreme Court granted certiorari, vacated the convictions, and remanded the cases for further consideration in the light of another Supreme Court decision that term. The South Carolina Supreme Court distinguished the case and upheld the conviction. The United States Supreme Court again granted certiorari and reversed the convictions, stating:

The South Carolina Supreme Court correctly concluded that our earlier remand did not amount to a final determination on the merits. That order did, however, indicate that we found [the intervening case] sufficiently analogous and, perhaps, decisive to compel re-examination of the case.

We now think [the intervening cases] control the result here.

While the vacation of Crowder and Davis for reconsideration inevitably is ambiguous, it becomes less so when examined in light of the Court's narrow holding in Old Chief. In Old Chief, the Court confined its ruling to the admission of a status element of a crime and provided elaborate defer-
ence to the government's legitimate interest in evidentiary depth and narrative completeness, rather than abstract logic. Furthermore, the concessions of the defense in *Crowder* and *Davis* were especially artificial: "I did not possess the drugs, but I nevertheless agree that whomever did so, knew the nature of what was possessed and had an intent to distribute them." To truncate the government's case upon waiving such a hypothetical and speculative magic wand of admissions seems to be an abandonment of the "accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." Had the Court felt otherwise, presumably it would have either affirmed the judgments of the court of appeals or denied certiorari in *Crowder* and *Davis*, rather than granting, vacating, and remanding.

After the vacation and remand of *Crowder* and *Davis*, the United States Court of Appeals for the District of Columbia Circuit repudiated its previous positions and affirmed the convictions of the defendants. It noted that in *Old Chief*, the Supreme Court had limited its decision to status elements of an offense, and the Court of Appeals held that with respect to other elements, such as knowledge and intent, the government is not precluded from rejecting a defense offer to stipulate and instead introducing evidence of bad acts to prove intent.

V. THE APPROPRIATE USE OF EVIDENCE OF THE ACCUSED'S BAD CHARACTER

The black-letter law of evidence has long denied the prosecution the use of evidence of the accused's criminal propensity solely to prove the crime charged, unless the accused has opened the door to the inquiry by introducing evidence of good character. Such evidence commonly is thought to present a paradigmatic example of probative value being outweighed by dangers of undue prejudice, confusion of issues, excessive consumption of time, and unfair surprise. Often, as expressed by Justice Jackson in his

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72 *Old Chief*, 117 S. Ct. at 654. Indeed, a jury may conclude that such a concession of the defense is attributable to the incompetence or disloyalty of defense counsel. See Herbert J. Stern, *Trying Cases to Win* 48-49 (1991).

73 On the basis of an empirical study of all summary reconsideration orders entered during three Supreme Court terms in the late 1970s, Professor Hellman concluded that "when the lower court's judgment appeared on the surface to be consistent with the new precedent, the Court almost invariably denied review rather than remanding." Hellman, supra, note 67, at 16.


75 See Fed. R. Evid. 404(b). The leading case is *Michelson v. United States*, 335 U.S. 469 (1948), which was quoted with approval in *Old Chief*, 117 S. Ct. at 650-51.

76 See Fed. R. Evid. 404(b); *Michelson*, 335 U.S. at 475-76; see also 1 McCormick
wonderfully lucid opinion in *Michelson v. United States*, the stated rationale focuses on a fear that jurors will overvalue such evidence.\(^7\) In addition, there is concern that the disclosure of bad character may reduce the prosecution's burden of persuasion, as the trier of fact may conclude that the accused should be convicted irrespective of his guilt, or at least, that the trier of fact should not much regret (and therefore discount) the danger that the accused is not guilty of the crime charged.\(^8\)

Notwithstanding the ostensible verbal consensus on the propensity rule, the application of the rule in practice is far more ambiguous. First, the prohibition is inapplicable when evidence is offered for a purpose other than that of showing character or propensity. As stated in Federal Rule 404(b),

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 . . . . \(^9\)

These numerous permissible purposes, which are illustrative and not exhaustive, frequently provide an opportunity for the trier of fact to obtain spill-over propensity evidence.\(^8\) \(^0\) *Old Chief* itself provides an example. The joining of an ex-felon in possession of a firearm count to a felonious assault count resulted in the jury being informed that Old Chief was a convicted felon.\(^8\) "Intent," to take another example, is almost invariably an element of a crime.\(^8\) To routinely permit use of evidence of other crimes to prove

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\(^7\) See *Michelson*, 335 U.S. at 469; see also Richard O. Lempert, *Modeling Relevance*, 75 Mich. L. Rev. 1021, 1027 (1977) (noting the “estimation problem” of jurors according evidence more weight than it deserves).


\(^9\) Fed. R. Evid. 404(b).

\(^8\) See Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 3.8(a) (1986).
intent would largely eviscerate the character evidence prohibition.

A second permissible method of avoiding the propensity rule is offering evidence of other crimes for impeachment of the accused if he elects to take the witness stand.\textsuperscript{83} Although the accused is entitled to an instruction that such evidence is to be considered only in terms of assessing his credibility as a witness, a more realistic rationale for the applicable rules may be an assumed frequent perjury by defendants in criminal cases and a need to “fight fire with fire” by allowing the prosecution to respond with evidence that is likely to be considered by the jury on a propensity basis.\textsuperscript{84} A guilty defendant in a felony case has a strong incentive to take the witness stand and attempt to gain an acquittal by perjuring himself.\textsuperscript{85} It is doubtful whether offering prior convictions into evidence substantially aids in impeaching a defendant, other than by suggesting criminal propensity, guilt, and, therefore, perjury.\textsuperscript{86} While juries are instructed not to consider convictions received in evidence for impeachment as evidence of a defendant’s predisposition to commit the crime charged, the efficacy of such a direction commonly is doubted.\textsuperscript{87} Professor Michael Graham, for example, has concluded that “it is rarely seriously asserted that the trier of fact is fully capable much less interested in making such a distinction.”

A third area in which the law often tolerates evidence of character to prove criminal conduct is that of sex crimes. McCormick states the traditional doctrine as follows:

\begin{quote}
\textit{[E]xamination is in order of the principle purposes for which the prosecution may introduce evidence of a defendant’s bad character . . . . The permissible purposes include:}

\begin{itemize}
  \item (4) To show a passion or propensity for unusual and abnormal sexual relations.
\end{itemize}
\end{quote}

(explaining that even in the absence of specific language indicating that fault is a necessary element, the courts often impose an intent requirement).

\textsuperscript{83} See Fed. R. Evid. 608, 609.

\textsuperscript{84} See HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 160 (1966) (reporting a statistical study indicating the strong effect that evidence of prior convictions has on juries’ decisions to convict); Richard Friedman, Character Impeachment Evidence: PsychoBayesian Analysis and a Proposed Overhaul, 38 UCLA L. REV. 637, 644 (1991) (identifying the need for a better method of character impeachment).

\textsuperscript{85} See Friedman, supra note 84, at 658.

\textsuperscript{86} See id.; but cf. United States v. Smith, 131 F.3d 685 (7th Cir. 1997) (holding that the decision by the Supreme Court in Old Chief was inapplicable to evidence of crimes received for impeachment purposes, even where the defendant’s prior offenses were assaultive ones similar to the crimes charged).

\textsuperscript{87} See MICHAEL H. GRAHAM, 1 HANDBOOK OF FEDERAL EVIDENCE 759-60 (1996).

\textsuperscript{88} Id. at 760.
always was confined to offenses involving the same parties, but a number of jurisdictions now admit other sex offenses with other persons, at least as to offenses involving sexual aberrations.\textsuperscript{89}

This permissible use of propensity evidence apparently has been expanded greatly on the federal level under the Violent Crime Control and Law Enforcement Act of 1994,\textsuperscript{90} now codified in Rules 413 to 415 of the Federal Rules of Evidence.\textsuperscript{91} Under these rules, evidence of other crimes of sexual assault or child molestation in civil or criminal cases “is admissible, and may be considered for its bearing on any matter to which it is relevant.”\textsuperscript{92}

Examples such as the foregoing indicate that the law of evidence tolerates a considerable amount of bad character evidence to show new misconduct, notwithstanding its hesitation to do so when bad character evidence is offered \textit{only} for the purpose of proving new bad action.

\section*{VI. ON THE MEANING OF “UNFAIR PREJUDICE”}

Of course, “unfair prejudice” cannot properly be interpreted to refer to all evidence that is harmful to the case of a party; such a construction would be inconsistent with the requirement that evidence be relevant. Rule 403 requires the balancing of probative value against prejudice only if the latter is “unfair.”\textsuperscript{93} Rule 403 was approved by Congress without change, and it has not been amended since its initial approval.\textsuperscript{94} The Advisory Committee’s Note gives only slight assistance to its interpretation. A single sentence is devoted to defining “unfair prejudice”: “‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper

\textsuperscript{89} 1 \textsc{McCormick} on \textit{Evidence}, \textit{supra} note 76, § 190, at 799, 803-04 (footnotes omitted).

\textsuperscript{90} Pub. L. No. 103-322, 108 Stat. 1796, 2135-37 (1994). On the one hand, these new rules apparently are subject to Rule 403 balancing. This arguably may result in their being rarely employed, as similar calculations underlay the common law doctrine that they ostensibly displace. On the other hand, a Second Circuit Court of Appeals panel, relying on the statements of congressional sponsors, interpreted Rule 414 as representing a congressional conclusion that the probative value of such evidence typically is not substantially outweighed by its tendency to prejudice. \textit{See} United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997).

\textsuperscript{91} \textit{See} \textsc{Fed. R. Evid.} 413-15.

\textsuperscript{92} \textsc{Fed. R. Evid.} 413(a), 414(a).

\textsuperscript{93} \textsc{Fed. R. Evid.} 403.

\textsuperscript{94} \textit{See id.} 403; \textit{see also} 2 \textsc{Jack B. Weinstein} \& \textsc{Margaret A. Berger}, \textsc{Weinstein’s Federal Evidence} § 403 App.01[3], at 2 (Joseph M. McLaughlin ed., 2d ed. 1997).
basis, commonly, though not necessarily, an emotional one." At least three categories of appropriate concern are apparent. First, unfair prejudice may be created by evidence that is so likely to elicit an intense emotional response (such as anger, horror, or disgust) as to detract from the truth-seeking function of the trial. Second, such prejudice may result from evidence that seems likely to encourage a decision on an incorrect basis (such as the conclusion that the accused is a dangerous person and should be put away irrespective of his guilt of the crime charged). Third, unfair prejudice may be created by evidence likely to be overvalued by the trier of fact in assessing its probative force.

95 56 F.R.D. 183, 218 (1972) (Advisory Committee’s Note).

96 See, for example, United States v. Blackstone, 56 F.3d 1143 (9th Cir. 1995), in which evidence of possession of metamphetamine recipes, together with expert testimony linking possession of firearms with the manufacture of methamphetamine, was held unduly prejudicial in a prosecution for possession of a firearm by a felon. The court found this evidence particularly prejudicial because it connected the defendant with the "highly charged public issue" of narcotics. Id. at 1146 (citation omitted). But see United States v. Garot, 801 F.2d 1241, 1247 (10th Cir. 1986) (affirming a conviction in a prosecution for activities relating to the sexual exploitation of minors, in which there was admitted into evidence hard-core child pornography films and a similar brochure, despite a stipulation of the parties that this was the character of the films and brochure and the possibility that such items would have a highly negative effect on the jury). A memorable state court case is People v. Cavanaugh, 282 P.2d 53 (Cal. 1955), cert. denied, 350 U.S. 950 (1956), a capital murder case in which three fingers, prints of which had been used by the pathologist to identify the deceased, were severed from the body and introduced in evidence at trial. The California Supreme Court, over the dissents of Justices Traynor and Carter, declared this erroneous because it was unnecessary and prejudicial, but held that there was no reversible error. See id. at 62.

97 The evidence identifying Old Chief as guilty of a prior felonious assault provides an example. See Old Chief v. United States, 117 S. Ct. 644 (1997). In United States v. Church, 955 F.2d 688 (11th Cir. 1992), cert. denied sub nom., Coppola v. United States, 506 U.S. 881 (1992), RICO and RICO-conspiracy convictions were upheld despite the admission in evidence of a taped conversation of one defendant concerning how to find a person to kill a prosecutor. The Eleventh Circuit Court of Appeals found that the district court abused its discretion by allowing the taped conversation in evidence, notwithstanding the government’s argument that it was relevant to show “willingness to use violence.” Id. at 702-03. The court, however, found the admission of the evidence to be harmless error. See id. at 703.

98 The classic statement is that of Justice Jackson in Michelson v. United States, 335 U.S. 469, 475-76 (1948) (footnotes omitted):

The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Professors Lempert and Saltzburg have gone further and make an unusual conten-
Unfair prejudice cannot properly be interpreted to rule out all evidence that carries a likelihood of an emotional response by the trier of fact. As the Court in *Old Chief* recognized, jurors must make difficult moral judgments, not merely logical ones.

Although this is rather elaborately conceded by the Court in *Old Chief*, the majority opinion nevertheless proceeds, in part, in a narrowly logical manner to decide that the receipt of the judgment of felony conviction was error.

There is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other. In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.

Of course, an admission by the defense does permit a court to properly "discount" the probative value of additional evidence directed to the same point. The problem, however, is not solely one of formal logic; it also is one of satisfying a jury. A defendant's ex-felon status is so central to a federal firearm possession charge that a jury understandably may expect to receive more than an abstract statement by the judge that there has been an admission: Noting the tendency of police to investigate and charge those who already have criminal records, and the greater likelihood of defendants who are innocent to stand trial rather than plead guilty, they conclude that "the existence of a record may have no association, or indeed a negative association with the probability of guilt." LEMPERT & SALTZBURG, *supra* note 78, at 216-17.

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99 *See Old Chief*, 117 S. Ct. at 653-54.
100 *See id.* at 644; *see also supra* text accompanying notes 33-42. Compare the observation of Justice Cardozo, writing for the majority in a previous decision of the Court: "It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic." Shepard v. United States, 290 U.S. 96, 104 (1933).
101 *See Old Chief*, 117 S. Ct. at 655.
102 *Id.*
sion of the point. Despite an accompanying instruction, a jury still might be left with confusion and doubt as to the justice of the prosecution’s case.  

In conducting Rule 403 balancing, courts must make quick, conjectural estimations of the impact of items of evidence, their probative value, and their tendency to result in unfair prejudice. Furthermore, little opportunity exists for empirical confirmations of judicial hunches. Judges are not permitted to invade the privacy of jury rooms to attempt to determine what influences jurors’ decisions and in what way. An available empirical study does not inspire confidence in judges’ ability to accurately evaluate the effect of particular pieces of evidence upon the decisions of juries, a difficulty that doubtlessly continues to be magnified by the increasing diversity of jury members.  

Although they arose in the context of the cruel and unusual punishment proscription of the Eighth Amendment to the Constitution, the victim impact cases involving the death penalty present strikingly similar considerations. In 1987, in a case involving execution-type double murders of an elderly cou-

103 See Lempert, supra note 77, at 1046-48. Lempert identifies two types of cases in which redundant evidence might be appropriate: First, “where it is possible that the jury does not appreciate fully the information conveyed by the first item of evidence,” id. at 1046, and second, “where the jury expects that the evidence will be produced if it exists,” id. at 1047.

104 See Lee E. Teitelbaum et al., Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?, 1983 Wis. L. Rev. 1147 (discussing a statistical analysis testing the validity of the notion that judges can predict how evidence will affect a jury).

105 Mark Cammack reported that empirical studies indicate the powerful effect of prior experiences of jurors in their construction of what took place in a litigated event. See Mark Cammack, In Search of the Post-Positivist Jury, 70 IND. L.J. 405, 463-84 (1995). One such example is that white and nonwhite people tend to vary sharply in their willingness to believe police testimony. See id.; see also David Robinson, Jr., The Shift of Balance of Advantage in Criminal Litigation: The Case of Mr. Simpson, 30 AKRON L. REV. 1, 7-10 (1996) (noting that pretrial polling data revealed widely different initial predispositions of classes of potential jurors, depending on race and sex, a difference indicated in the differing verdicts in the O.J. Simpson criminal and civil cases); Jeffrey Rosen, One Angry Woman, NEW YORKER, Feb. 24, 1997, at 54, 55 (concluding that an increasing number of District of Columbia criminal trials are resulting in hung juries because of black female contrarians: “Some of these women have had especially searing experiences with the police; some are eccentric or disengaged; some are overcome by religious beliefs; some are incapable of understanding the evidence; some refuse to send another young black man to jail”); cf. 22 WRIGHT & GRAHAM, supra note 80 § 5215 (“A jury of gunowners is less likely to be prejudiced by the evidence that the defendant possessed a weapon than is a jury of persons who do not keep guns in their homes.”). But cf. Roger Parloff, Race and Juries: If It Ain’t Broke ..., 19 AM. L. REV., June 1997, at 5 (concluding that the best statistical evidence shows merely that jurors of different races and backgrounds may weigh evidence differently, which may affect acquittal rates but does not necessarily reflect jury nullification).
ple in their home, the Court held that reception of the victims’ family’s characterizations of the crimes and of their devastating effect on the family was impermissible, because it was prejudicial and irrelevant to the defendant’s personal culpability. ¹⁰⁶

One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. As we have noted, any decision to impose the death sentence must “be, and appear to be, based on reason rather than caprice or emotion.” The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases. ¹⁰⁷

Four years later, this decision was overruled. ¹⁰⁸

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. . . . Booth deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder. ¹⁰⁹

¹⁰⁶ See Booth v. Maryland, 482 U.S. 496 (1987) (holding that the statutory requirement that a victim impact statement be presented to the jury was irrelevant to the sentencing decision, and that such a requirement is unconstitutional because it violates the Eighth Amendment), overruled by Payne v. Tennessee, 501 U.S. 808 (1991) (holding that the Eighth Amendment does not prohibit a jury from considering victim impact statements).

¹⁰⁷ Booth, 482 U.S. at 508-09 (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).

¹⁰⁸ Payne, 501 U.S. at 808. Unlike the trial in Booth, which included evidence of the effect of the homicides on surviving members of the family and opinions of the survivors about the degree of heinousness of the defendant’s conduct, the trial in Payne included only the former, and the holding was expressly limited to such evidence. See id. at 830 n.2.

¹⁰⁹ Id. at 825.
Professor Paul Gewirtz has observed:

[T]he glib distinction between "reasoned" and "emotional" responses is far too simplistic. This insight dates back at least to Plato. But more recently, scholars from fields as diverse as philosophy, psychology, and neurobiology have demonstrated that emotions have a cognitive dimension and are connected to beliefs in various respects. For example, emotions can open up ways of knowing and seeing and can therefore contribute to reasoning. (Fear and caring, for example, can make us attentive to more facts; sympathy may be part of properly assessing mitigation evidence in capital sentencing). Indeed, reasons are constituted in part by emotion, and are modifiable by emotion.

This is not at all to deny that emotion can be a problem in the courtroom, but rather to affirm that it is inescapable and has an appropriate place. One should grant that emotion must be bounded if the court is to remain a place of law. But the issue is boundedness, not whether emotion has a place.\textsuperscript{110}

Furthermore, triers of fact approach the task of evaluating evidence with more than reason and emotion. They also apply presuppositions, cognitive filters, and strategies to the often-conflicting evidence presented at trial. A substantial psychological and legal literature has addressed the issue of schematic information processing.\textsuperscript{111} Jurors and judges are not electronic tape

\begin{footnotes}
\textsuperscript{110} Paul Gewirtz, Victims and Voyeurs: Two Narrative Problems at the Criminal Trial, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135, 145 (Peter Brooks & Paul Gewirtz eds., 1996) (footnotes omitted); see Paul Gewirtz, On “I Know It When I See It,” 105 YALE L.J. 1023, 1044 (1996) (“It is clear, I hope, what my main point is: Law is not all reasoning and analysis—it is also emotion and judgment and intuition and rhetoric. It includes knowledge that cannot always be explained, but that is no less valid for that.”); Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 COLUM. L. REV. 269, 277-78 (1996):

To introduce the two sides in a highly schematic way, we may say that the mechanistic view holds that emotions are forces more or less devoid of thought or perception—that they are impulses or surges that lead the person to action without embodying beliefs, or any way of seeing the world that can be assessed as correct or incorrect, appropriate or inappropriate. The evaluative view holds, by contrast, that emotions do embody beliefs and ways of seeing, which include appraisals or evaluations of the importance or significance of objects and events. These appraisals can, in turn, be evaluated for their appropriateness or inappropriateness.

\textsuperscript{111} See, e.g., Cammack, supra note 105, at 463 & n.335; Albert J. Moore, Trial by
recorders of information, to be rewound, reviewed, and evaluated at the end of a trial when a case is submitted for decision. Thus, for example, the words "school," "policeman," and "robbery" inevitably call forth varied images and meanings to different people, depending on their life experiences. This results in presuppositions of thinking—mental templates, sometimes called "schemas." These become devices for filling in factual assumptions, even though not reflected in evidence at trial, and filtering out (disregarding or rejecting) evidence—even if uncontradicted—that was received at trial if the evidence is inconsistent with prior schemas. The consequence of these and other psychological phenomena are processes that vary, in a variety of respects, from a rationalistic conception of evidence assessment in a variety of respects, including insensitivity to probabilities and a relative disregard of abstract, as compared to concrete, types of evidence. Simply informing a jury that the accused has been convicted of a felony therefore may be significantly less meaningful than receiving the judgment into evidence and reading it, in full, to the jury. The use of a stipulation or admission, even if coupled with an instruction, may be filtered out by a lay juror as meaninglessly abstract or as inconsistent with what the juror views as significant, based on his own life experiences. To authorize similar substitutions of defense concessions, together with an instruction, for more concrete evidence of mens rea in cases like Crowder and Davis is to risk even greater rejection by juries.

Public perceptions of the administration of law are disproportionately affected by publicized cases. To the extent that probative evidence is kept from the jury, and the jury acquits, there is the possibility that the public interpretation of the event—based on the richer account of the case available


112 Cf. 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 10.01 (4th ed. 1992) ("It is important that you keep an open mind and not decide any issue in the case until the entire case has been submitted to you and you have received the final instructions of the court regarding the law which you must apply to the evidence.").

113 "A schema may be defined as a cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes." FISKE & TAYLOR, supra note 111, at 98 (citations omitted).

114 See Moore, supra note 111, at 279-80.

115 See id. at 285-90.
to it than to the jury—can dilute the moral message of the law. Professor Charles Nesson has contrasted two different meanings of verdicts:

A verdict that a defendant is guilty or liable can carry two different meanings and project two different rules. The verdict can articulate a legal rule: “You did the thing enjoined by the law; therefore, you will pay the penalty.” This message encourages each of us to conform our conduct to the behavioral norms embodied in the substantive law. Alternatively, the verdict can emphasize a proof rule: “We will convict and punish you only if your violation is proved by due process of law.” This message invites people to act not according to what they know is lawful, but according to what they think can be proved against them . . .

Successful projection of a legal rule depends on a court’s ability to cast a verdict not as a statement about the evidence presented at trial, but as a statement about a past act—a statement about what happened.\(^{116}\)

The point easily can be overstated. The moral message of the law also can be diluted by intemperate verdicts encouraged by inflammatory evidence, yet the general trend of the twentieth-century law of evidence, reflected in the Federal Rules, has been one that increasingly trusts juries with relatively more complete accounts of the events being litigated.

In addition to its eloquent general tributes to richness in evidentiary presentation and the need for narrative completeness, the Court in *Old Chief* made the observation that a conviction may be so old or so marginally related to the fear of violence behind the criminalization of possession of a gun by a felon that evidence of the nature of the prior crime may not be prejudicial to the defendant, and even may unfairly prejudice the government.\(^{117}\) In the latter case, the Court observed that because the defendant could not be compelled to admit to the prior conviction, the government would be faced with the risk of jury nullification.\(^{118}\) This might encourage the prosecution to instead offer a redacted judgment of conviction with the name of the crime deleted, although this would require an instruction that the offense was not one of the predicate prior crimes excluded from the gun prohibi-

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\(^{117}\) See *Old Chief*, 117 S. Ct. at 652 n.8.

\(^{118}\) See id.
The Court stated that such an instruction would require the consent of the defendant.\textsuperscript{120}

VII. THE SCOPE OF TRIAL COURT DISCRETION TO EXCLUDE PREJUDICIAL EVIDENCE

The language of Rule 403, that a court may exclude evidence if its probative force is outweighed by its tendency to unfairly prejudice, explicitly invites much discretion.\textsuperscript{121} The rule's legislative history reinforces this conclusion. The Preliminary Draft of the Proposed Rules of Evidence divided Rule 403 as follows:

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

(b) EXCLUSION DISCRETIONARY. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.\textsuperscript{122}

It would be an overstatement to conclude that the mandatory language in the first proposed subdivision would have eliminated discretion, as varying judicial findings with respect to "probative value," "substantially outweighed," and "danger of unfair prejudice" unavoidably would have been made and sustained in many situations. Still, the Preliminary Draft text would have encouraged appeals by parties hoping to obtain different assessments of the relative balance of the costs and benefits of excluding and admitting items of evidence, as well as appellate reversals and new trials. Furthermore, in criminal cases, trial judges averse to the risk of reversal might systematically tend to err on the side of keeping out the prosecution's evidence based on the government's inability to obtain review on appeal in the event of acquittal. The Advisory Committee received a number of criticisms of its effort to limit discretion in paragraph (a) of the Preliminary Draft, and in its Second Revised Draft of the Proposed Rules (November 1971), the bifurcation and the mandatory words were eliminated.\textsuperscript{123}

\begin{itemize}
  \item \textsuperscript{119} See id. at 655 n.10.
  \item \textsuperscript{120} See id.
  \item \textsuperscript{121} See FED. R. EVID. 403 Advisory Committee's Note.
  \item \textsuperscript{122} 46 F.R.D. 161, 225 (1969).
  \item \textsuperscript{123} Some of the critical commentary with respect to the original draft is contained in 2 WEINSTEIN'S FEDERAL EVIDENCE, supra note 94, § 403A, at 3-9. (The writer of the present Article served as a consultant to the Department of Justice and was among the
\end{itemize}
The draft thus became similar to its three primary influential precursors, the Model Code of Evidence,124 the 1953 Uniform Rules of Evidence,125 and the California Evidence Code.126 The Model Code is particularly explicit in its emphasis of the trial court's broad discretion.127 Both the text of the rule28 and its Comment emphasize the trial court's authority.129 This language reflected the view of its reporter, Professor Edmund Morgan of Harvard, who wrote: "The proposed Code leaves no room for doubt as to the power of the trial judge. His historic role as master of the trial is restored. He has complete control of the conduct of the trial. . . . Rule 303 is the keystone of the arch . . . ."130

Rule 403 of the Federal Rules is less emphatic than the Model Code, the Uniform Rules, and the California Evidence Code. The word "discretion" does not explicitly appear in the final form of the rule.131 While "may" is retained, "may" itself is ambiguous. It sometimes means "can" in the sense that the judge has authority to exclude the evidence but implying that the evidence generally should not be admitted.132 It sometimes means the judge has wide discretion to rule either way.133 Here, both meanings seem plausible. The broad discretion of the trial court was strongly supported by the 1984 decision of the Supreme Court in United States v. Abel.134 A witness for the defense was impeached by testimony that the witness and the defendant were both members of a prison gang that was committed to perju-
ry, theft, and murder on each other's behalf. This, Abel argued, inter alia, violated Rule 403 in that the prejudicial effect of this evidence outweighed its probative value. A unanimous Supreme Court upheld the trial judge's ruling in an opinion strongly emphasizing the broad scope of his discretion:

A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of common membership in any particular group, and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 and ultimately, if the evidence is admitted, for the trier of fact.

In a seminal article, Professor Maurice Rosenberg distinguished what he termed "primary discretion" and "secondary discretion." In the former, the trial court is free to make a choice among alternatives without constraints. In the latter, which is primarily addressed to appellate courts, the decision of the trial judge is given "an unusual amount of insulation from appellate revision. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal." This right, characteristically, is not unlimited. Judge Henry J. Friendly noted a galaxy of meanings of "abuse of discretion," from almost total deference to the trial judge to reversal whenever the appellate court disagrees with him. Judge Friendly approved of varying standards of review, depending on the reasons for granting trial court discretion in specific situations, and consequently supported permitting varying degrees of discretion in the trial judge. In general, Judge Friendly's article reflects skepti-

\[135\] See id. at 47-48.
\[136\] See id. at 53.
\[137\] Id. at 54.
\[138\] Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 637 (1971).
\[139\] See id. This form of discretion is rare.
\[140\] Id. at 637.
\[141\] Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 754-64 (1982) (discussing various interpretations of the term "discretion").
\[142\] Judge Friendly listed the following factors as favoring full appellate review: Appellate courts have more time to consider a question, see id. at 757; they have the resources of multiple-judge panels, see id.; collegial review tends to curtail decisions on impermissible factors, even subconscious ones, see id.; and they can better further uniformity of decisions in like cases, see id. at 758. Among the factors favoring deference to the trial court, Judge Friendly listed the latter's superior position to determine the facts. See id. at 759. Furthermore, the exercise of discretion is often based on a multi-
cism of the frequent determination of appellate courts that judgments below should be upheld as within the discretion of the trial judge. In contrast, Judge Jack Weinstein (perhaps, in part, reflecting his experience as a judge of a trial court rather than of an appellate court) has emphasized the broad authority of the trial judge:

Cases decided after the enactment of the Federal Rules of Evidence consistently recognize the trial court’s considerable discretion in excluding of evidence [sic]. . . . The trial judge is the person on the spot who has experienced all the events and personalities, and his or her discretion must be respected unless it has been abused.143

While this last sentence expresses a tautology, the thrust of the paragraph as a whole encourages a large degree of deference.144 A trial judge might, for example, in the case of a felon in possession of a gun (absent the decision in Old Chief), allow a judgment of a felonious assault to be considered by a jury dominated by Western ranchers, while requiring redaction or acceptance of a stipulation before a jury dominated by Eastern suburbanites.145

VIII. STIPULATIONS, ADMISSIONS, PLEAS

Prior to trial, counsel for Old Chief moved that the prosecution be forbidden from mentioning or offering evidence of the nature of the defendant’s prior felony conviction and “offered to ‘solve the problem here by stipulating, agreeing and requesting the Court to instruct the jury that he has been convicted of a crime punishable by imprisonment exceeding one (1) year.’”146 Defense counsel also proposed that the jury be instructed that the defendant had been so convicted and that, in effect, proof of that element of the statute under which the charge had been brought had been satisfied.147 The trial court’s permitting the government to put on evidence of the written judgment of conviction, which showed the nature of the prior felony, was the basis of the ultimate reversal of the conviction.148 The Su-

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143 2 WEINSTEIN’S FEDERAL EVIDENCE supra note 94, § 403.03, at 403-27 to -28.
144 See id. at 403-27 to -30.
145 See id. at 655.
146 Old Chief, 117 S. Ct. at 648 (quoting the appellate record).
147 See id.
148 See id. at 655.
preme Court treated the proffered stipulation, in the absence of the government joining in the stipulation, as an admission, citing Federal Rule 801(d)(2)(A). That rule, however, is addressed to an out of court, evidentiary admission receivable as an exclusion from the hearsay rule. Like a pretrial confession, it would be subject to contradiction by other evidence at trial, and it's acceptance would not be binding on the jury. Old Chief, however, was proposing a judicial admission, which would given binding effect. As McCormick stated:

_Evidentiary_ admissions are to be distinguished from _judicial_ admissions. Judicial admissions are not evidence at all. Rather, they are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, the judicial admission, unless allowed by the court to be withdrawn, is conclusive in the case, whereas the evidentiary admission is not conclusive but is always subject to contradiction or explanation.

Because a judicial admission may be the functional equivalent of a pleading, the normal rule that a court may not direct a verdict against the accused even as to a single issue in a criminal case may be inapplicable. In any event, Old Chief offered not only the concession of his prior felony

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149 See _id._ at 653.

150 See _2 MCCORMICK, supra_ note 76, § 254, at 140-42.

151 _Id._ at 142 (footnotes omitted).

152 _Cf. FED. R. EVID. 201(g)_ ("In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."). Suggested "pattern" jury instructions vary with respect to stipulations. _Compare DEVITT ET AL., supra_ note 112, § 12.03, at 333 ("When the attorneys on both sides stipulate or agree as to the existence of a fact, you may accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts."), _with THOMAS A. FLANNERY ET AL., FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS_ 19 (1988):

While we were hearing evidence you were told that the government and the defendant agreed, or stipulated, that . . . . There is no disagreement over that, so there was no need for evidence by either side on that point. You must accept that as fact, even though nothing more was said about it one way or the other. The federal courts of appeal disagree as to the appropriateness of a "binding" instruction when the defense has stipulated to an element of a crime. _See_ United States v. Gonzalez, 110 F.3d 936, 945 (1997) (discussing a circuit split in which the Fourth Circuit has held that a defendant retains the right to have the element proved and the government retains the duty to prove the issue to the jury, and in which the Tenth Circuit has held that stipulation waives the right to proof and the duty to charge the jury).
conviction but also his acceptance of a "binding" instruction to the jury on the issue. Because this constituted only a functional equivalent of a pleading, not a formal one, Rule 12 of the Federal Rules of Criminal Procedure, which limits a criminal defendant to pleas of not guilty, guilty, and nolo contendere, and abolishes other pleas, may be met.\textsuperscript{153}

The potential of a defendant's strategy to alter the normal limitations on the defendant's pleadings, with consequences on the scope and force of the evidence at trial, is apparent. Even a binding instruction is unenforceable in a criminal case if the jury chooses to disregard it and acquits the accused. Accordingly, Wigmore's evaluation and suggestion seem sensible:

Nevertheless, a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate \textit{moral force of his evidence}; furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations (especially in criminal cases), so as to be technically but not practically a waiver of proof. Hence, there should be no absolute rule on the subject; and the trial court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances.\textsuperscript{154}

IX. \textbf{WHAT DOES \textit{OLD CHIEF} MEAN?}

It is rare that much meaning can be confidently ascribed to a new departure in what may or may not become a body of precedent. The decision in \textit{Old Chief} presents such a quandary. Among the possibilities are the following, beginning with the most limited and proceeding to the more expansive.

\textbf{A. Defensive offers to stipulate ex-felon status and submit to binding instructions in firearm prosecutions under 18 U.S.C. § 922(g) must be accepted by the prosecution.} The prosecution may not refuse the offer and instead use a judgment showing a prior violent felony. In other situations, the prosecution generally is entitled to prove its case despite a defendant's concession or offer to stipulate. This interpretation is consistent with the facts of \textit{Old Chief} and with the vacating of broader court of appeals rulings in \textit{Crowder} and \textit{Davis}. It also is consistent with the opinion of the Court: "While our discussion has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon status."\textsuperscript{155}

\textsuperscript{153} See Fed. R. Crim. P. 12(a).
\textsuperscript{155} \textit{Old Chief}, 117 S. Ct. at 651 n.7; United States v. Crowder, No. 92-3133 (D.C.
B. Old Chief requires similar limitations on government proof of the status element of other offenses. In Old Chief, the Court treated the status element as being distinct from other elements of the offense.

This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant’s legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him.\(^{156}\)

Note, however, that if the proof of the judgment were to reveal a prior felony relevant to the establishment of the new offense in addition to showing ex-felon status, the prosecution would still be free to introduce it.\(^{157}\) This interpretation also is consistent with the vacation of the more unrestrained judgments of the court of appeals in Crowder and Davis.\(^{158}\)

C. The Court has embarked upon the task of developing a common law of required acceptance of defensive stipulations or admissions in criminal, and perhaps civil, cases. It may also be commencing a judicial gloss that directs the exercise of Rule 403 power in other situations. The reversal of the judgment in Old Chief is a rejection of complete trial court discretion in declining to exclude prejudicial evidence under Rule 403, despite the permissive literal language of the rule. It may encourage further development of more specific rules, standards, and principles, in addition to those set

\(^{156}\) Old Chief, 117 S. Ct. at 654-55.

\(^{157}\) The Court cited Rule 404(b) of the Federal Rules of Evidence, which permits the introduction of uncharged offenses to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. at 655 (quoting Fed. R. Evid. 404(b)).

\(^{158}\) A large number of federal crimes have what may be termed "status" elements, often as the basis for federal jurisdiction. Illustrative is federal officer or employee status, see, e.g., 18 U.S.C. § 201 (1994) (bribery of public officials and witnesses); id. § 205 (federal officers and employees acting as agent in filing a claim against the United States); id. § 207 (conflicts of interest); and status of things, such as that relating to the commerce power, see, e.g., id. § 1201 (kidnapping); id. § 2421 (transportation for illegal sexual activities); id. § 1962 (racketeering activity). The risk of unfair prejudice rarely will be present in most of these situations.
forth in the other parts of the Federal Rules of Evidence, to guide federal trial courts in exercising their Rule 403 power.

In *United States v. Cottman*, 159 a false statement prosecution under 18 U.S.C. § 1001, the Court of Appeals for the Second Circuit cited the opinion of the Supreme Court in *Old Chief* in support of its decision to uphold a district court’s decision not to require the prosecution to accept a stipulation offered by the defendant as to all elements of the charge other than the materiality of the false statement. In reaching its decision, the appellate court stated that the latter issue could not be adequately understood by the jury without the other evidence that the defendant sought to preclude from trial. At the same time, the court did not repudiate its own cases requiring the acceptance of stipulations in other non-status situations, stating that the evidence properly precluded was of events unrelated to the crime charged. The opinion in *Cottman* was ordered not to be cited in other cases and may have reflected a desire to postpone reconsideration of prior cases in the circuit, which gave defendants greater authority to compel acceptance of proffers of stipulations than does the dicta in *Old Chief*. The effect is to begin a case law defining, beyond the status element of some crimes, those stipulations that must be accepted as well as those that need not be.

D. The Court, in effect, has introduced civil defensive pleading into federal criminal litigation. Rule 8 of the Federal Rules of Civil Procedure provides that “[a] party shall . . . admit or deny the averments upon which the adverse party relies.” The privilege against self-incrimination doubtlessly precludes requiring a defendant to so respond in a criminal case, but, if he so chooses, arguably Rule 403 empowers him to do so and to foreclose damaging prosecution evidence that otherwise would be admissible. While this is a possible interpretation of the reversal in *Old Chief*, it is inconsistent with its text, as well as with the decisions in *Crowder* and *Davis*, which vacated court of appeals rulings that would have had such effect.

An alternative argument for importing civil-type pleading into criminal litigation is a constitutional one: Failure to force the prosecution to accept a defendant’s concession or offer to stipulate may constitute a denial of equal protection of the laws, given the ability of civil case defendants to preclude

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159 116 F.3d 466 (2d Cir. 1997). This unpublished opinion may be found in No. 96-1774, 1997 WL 340344 (2d Cir. June 20, 1997).

160 See id. at *4.

161 See id. at *5.

162 See *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980) (holding that evidence of prior crimes was inadmissible because the intent of the defendant was not at issue); *United States v. Mohel*, 604 F.2d 748 (2d Cir. 1979) (holding that the government may not refuse an unequivical offer to stipulate to a defendant’s intent and knowledge in order to introduce evidence of other crimes).

163 FED. R. CIV. P. 8(b).
damaging proof by concessions in the pleadings.\textsuperscript{164} This is the thesis of Professor Edward Imwinkelried, who candidly has conceded that prevailing law does not require the prosecution to accept such a concession.\textsuperscript{165} The decisions in \textit{Old Chief}, \textit{Crowder}, and \textit{Davis}, while based on an interpretation of nonconstitutional rules of evidence, a fortiori do not support such a constitutional claim. The higher burdens of proof,\textsuperscript{166} the limitations in criminal but not civil cases on the use of evidence obtained by illegal searches and seizures,\textsuperscript{167} the immunity of the defendant from compulsory testimony,\textsuperscript{168} the larger federal jury trial right,\textsuperscript{169} the protections against double jeopardy,\textsuperscript{170} and the trier of fact's obvious awareness of the great human cost to the defendant of being convicted, even if guilty,\textsuperscript{171} all mili-


\textsuperscript{165} See id. at 344 (citing 22 WRIGHT & GRAHAM, supra note 80, § 5194, at 198.

\textsuperscript{166} See In re Winship, 397 U.S. 358, 364-68 (1978) (holding that due process requires the standard of proof of beyond a reasonable doubt in criminal and quasi-criminal prosecutions).

\textsuperscript{167} Compare Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the exclusion of evidence obtained by illegal searches and seizures is required in state criminal cases), and Weeks v. United States, 232 U.S. 383 (1914) (holding that, in federal criminal cases, evidence obtained by an illegal search must be excluded), with United States v. Janis, 428 U.S. 433 (1976) (holding that the exclusion of illegally seized evidence was not required in a civil tax case).

\textsuperscript{168} See U.S. CONST. amend. V; Griffin v. California, 380 U.S. 609 (1965) (holding that it is a violation of the privilege against compulsory self-incrimination for a prosecutor to comment to the jury on a defendant's failure to take the witness stand).

\textsuperscript{169} See U.S. CONST. amend. VI; Duncan v. Louisiana, 391 U.S. 145 (1968) (extending to the states a defendant's right to trial by jury in non-petty criminal cases). In Sandstrom v. Montana, 442 U.S. 510, 513 (1983), the Court held an instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" violated due process in that it risked being interpreted as a direction of a verdict on the issue of intent. While the Seventh Amendment recognizes a jury trial right in some civil cases ("[s]uits at common law"), it has not been extended to the states. See U.S. CONST. amend. VII. Directed verdicts (now termed judgments as a matter of law under Rule 50 of the Federal Rules of Civil Procedure) are conventionally allowed in civil cases.

\textsuperscript{170} See Benton v. Maryland, 395 U.S. 784 (1969) (holding that setting aside an acquittal inflicted with constitutional error and conducting a new trial violated double jeopardy, and applying the double jeopardy prohibition to state criminal trials).

\textsuperscript{171} See Nesson, supra note 116, at 1364:

Both civil and criminal instructions speak to how jurors should feel after the verdict. The criminal instruction says, in effect, "Recognize that you are dealing with a person's life and liberty, and decide he is guilty only if you are confident that you will not be nagged by doubts about the propriety of your decision. Make a decision you can live with."

tate in favor of allowing the prosecution in a criminal case to put on a complete account of the crime charged.

E. Old Chief may portend constitutional restrictions on the introduction of unnecessary emotionally laden prosecution evidence in state as well as federal cases. Although the holding of the Court was a narrow one, the balancing analysis under Rule 403 is not dissimilar to procedural due process analysis of whether fundamental fairness has been satisfied. McCormick has suggested that "[t]here are intimations that the rule [excluding evidence of defendants' bad character] has constitutional overtones as applied to criminal defendants." Although the cases cited contain language defending such concepts as the "presumption of innocence" and the precept that "a defendant must be tried for what he did, not for who he is," they do not constitute holdings based on the Constitution. On the other hand, in McGuire v. Estelle, the Ninth Circuit Court of Appeals reversed a district court decision denying habeas relief to a California state court murder defendant. The state trial judge had admitted evidence of prior injuries to the infant victim while in the care of the defendant and her mother. The court of appeals concluded that the evidence that the defendant had caused this abuse was insufficient to permit its consideration by the jury consistent with due process, which also was violated by a related instruction. The Supreme Court reversed, holding that none of the alleged errors rose to the level of constituting a due process violation, and cautioned that federal habeas relief was not available for violation of state evidentiary law. Old Chief, however, may lead state courts to make similar rulings as a matter of their own law.

172 1 McCormick, supra note 76, § 190, at 797 n.1.
173 See, e.g., United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985) (holding that "the exclusion of other crimes evidence . . . gives meaning to the central precept of our system of criminal justice, the presumption of innocence"); Government of the Virgin Is. v. Toto, 529 F.2d 278, 283 (3d Cir. 1976) (holding that the prosecution's evidence of other crimes undermined the defendant's presumption of innocence).
174 United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977) ("A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is."); cf. State v. Manrique, 531 P.2d 239, 241 (Or. 1975) ("[A] person accused of [a] crime has a constitutional right to be informed of the nature of the charge against him and to be held to answer only the crime named in the indictment.").
176 See McGuire, 502 U.S. at 65.
177 See id. at 66-67.
178 See id. at 67. Lower federal courts occasionally continue to confuse their role as appliers of federal law in federal trials with their limited constitutional authority to review state court convictions. See, e.g., Dunnigan v. Keane, 972 F. Supp. 709 (W.D.N.Y. 1997) (holding that identification evidence, including the lack of a cautionary instruction, denied the accused due process and warranted habeas relief).
X. CONCLUSION

The decision in *Old Chief* appears to be a relatively conservative one. While the conviction was upset, the rationale could hardly have been more cautious. Far more sweeping change could have been effected by declaring the defendant's status as a convicted felon irrelevant on the theory that following his concession, that fact was no longer in issue and hence not "of consequence to the determination of the action" under the definition of relevancy in Rule 401. The judgment of conviction would then be inadmissible under Rule 402, without embarking on the vagaries of balancing under Rule 403. This interpretation of relevancy would be permissible within the text of Rule 401. Although the Advisory Committee's Note to Rule 401 is to the contrary, the Committee's language could be disregarded as not controlling and as inconsistent with a literal reading of the text. Although less sweeping in its implications, a similar analysis could have been developed under the balancing test of Rule 403, with the "probative value" of such evidence summarily discounted, and the tendency to create "unfair prejudice" emphasized. Both of these approaches would encourage parties to "plead out" the weaker aspects of their criminal and civil cases. Instead, the Court emphasized the government's need for descriptive

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179 See *Fed. R. Evid.* 401.

180 Rule 402 states that only relevant evidence is admissible. See *id.* 402.

181 See *id.* 403 (setting forth the "probative value" versus "unfair prejudice" consideration).

182 See 1 *STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE Manual* 186 (7th ed. 1998) ("In our view, the wording 'fact that is of consequence to the determination of the action' requires that all proof be directed to the issues in dispute."); see also 2 *JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[09], at 404-51-52 (Joseph M. McLaughlin ed., 1st ed. 1996) (footnotes omitted):

Evidence directed to a category other than propensity is not, however admissible unless this issue is actually being controverted. This is simply a specialized application of the usual rule that evidence must be probative of a fact that is of consequence, that is to say material, to an action in order to be relevant.

183 See *Fed. R. Evid.* 401 Advisory Committee's Note. The same committee note indicates that the language of 401 "is that of California Evidence Code § 210." *Id.* However, the California Evidence Code defines relevant evidence as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." *Cal. Evid. Code* § 210 (West 1995) (emphasis added) (originally enacted in current form as Cobey-Song Evidence Act, 1965 Cal. Stat. 299 § 210). The advisory committee removed "disputed" from the proposed Federal Rule. This change is unlikely to have been meaningful to Congress when the Federal Rules were adopted. Congress accepted Rule 401 as proposed. The hearings brought forth no criticism of the rule, and it was not the subject of debate on the floor of either house. See 2 *WEINSTEIN'S FEDERAL EVIDENCE, supra* note 95, § 4.01 App.01[3].
richness and narrative completeness in placing cases before juries, which could be expected to engage in nonlinear reasoning.

These implications from the Court’s opinion in *Old Chief* are significantly strengthened by the vacations and remands in *Crowder* and *Davis*. If those decisions had been affirmed, litigants could stipulate around disadvantageous aspects of their cases. Trials presumably would be somewhat shorter, but in our imperfect world it is unlikely that they would be more fair. Still, *Old Chief* clearly means that trial judges do not have unlimited discretion to decline to exclude evidence under Rule 403. The extent of this limitation on discretion, however, must await the clarification of further decisions.