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An Exercise in Sound Discretion: Old Chief v. United States

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Since the promulgation of the Federal Rules of Evidence in 1973 by the Supreme Court and their subsequent adoption by Congress in 1975,[1] courts have struggled with the application of the various rules. Although many of these rules have presented difficulties in their application, Rule 403 has perhaps caused the greatest uncertainty.[2] Regardless of whether this confusion results from the ambiguity in its terms, the discretion it affords to the trial judge, or the balancing process it necessitates,[3] Rule 403 is part of a code intended to promote truth and fairness in the judicial process.[4] Generally characterized as a rule granting judicial flexibility to aid in the achievement of these goals,[5] Rule 403 primarily serves as a guide for situations in which no other specific rules control.[6]

Noted as the foundation of the Federal Rules of Evidence,[7] Rule

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1. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. app. (1994)). *See generally* Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 913-14 (1978) (discussing the promulgation of the Federal Rules of Evidence).

2. *See, e.g.*, Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1017 (1978) ("The dispute over the proper approach to rule 403 balancing questions has never been resolved.").

3. Federal Rule of Evidence 403 states: "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." FED. R. EVID. 403.

4. *See* FED. R. EVID. 102. Rule 102 describes the goal of the Federal Rules of Evidence as being "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.*; *see also* Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1098 (1985) (noting a "high, if somewhat vague, purpose" intended by the drafters of the Federal Rules of Evidence).

5. *See* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 414 (1989); *see also infra* notes 113-21 and accompanying text (discussing the various views about the policy behind Rule 403).

6. *See* FED. R. EVID. 403 advisory committee's note (recognizing that under the case law, some situations require the "exclusion of evidence which is of unquestioned relevance"); *see also infra* note 119 and accompanying text (noting the drafter's intent and the description in the Advisory Committee's Note).

7. *See* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 (1983) (noting the importance of Rule 403 as a means to control the admissibility of evidence in a system that favors admission); Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in*

403 presents a balancing test for trial courts to apply when deciding whether to exclude certain evidence.[8] After determining initial relevancy and admissibility under Rules 401 and 402,[9] the trial court must then exercise its soundest discretion in ruling on whether to exclude the evidence under Rule 403.[10] Reasons for excluding under Rule 403 include the "danger of unfair prejudice, confusion of the issues, or misleading the jury," and "considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[11] While trial courts receive criticism for the lack of precision in their decisions under Rule 403,[12] most commentators nevertheless realize that the drafters intended for trial judges to have flexibility in their application of the rule.[13]

Recognizing the uncertainty enshrouding the entire rule and its applicability in cases coming before the federal courts of appeals, the Supreme Court recently resolved an unsettled application of Rule 403 in the context of criminal trials involving felons in possession of firearms.[14] In *Old Chief v. United States*,[15] the petitioner, Old Chief, was a defendant charged as a felon in possession of firearms under

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Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?, 41 VAND. L. REV. 879, 905-06 (1988) (describing Rule 403 as "a cornerstone of the Federal Rules [of Evidence]"); Waltz, *supra* note 4, at 1110 (identifying Rule 403 as "one of the most, if not *the* most important of the Federal Rules of Evidence").

8. *See* FED. R. EVID. 403; *supra* note 3 (quoting FED. R. EVID. 403).

9. Federal Rule of Evidence 401 defines relevant evidence as "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. Rule 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

10. *See* Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 230-31 (1976).

11. FED. R. EVID. 403; *see also supra* note 3 (quoting FED. R. EVID. 403).

12. *See* 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5223, at 317-18 (1978). A trial judge's explanation of the ruling would "help to avoid knee-jerk responses" and would also help counsel to understand the application of the rules. 22 *id.* at 318.

13. *See, e.g.*, 22 *id.* § 5212, at 251. Professors Wright and Graham note that even though Rule 403 does not use the word "discretion," it nevertheless almost undoubtedly confers discretionary power on the trial judge. *See* 22 *id.*; *see also* Mengler, *supra* note 5, at 414-15 (noting that the drafters intentionally built flexibility into the Federal Rules of Evidence); Waltz, *supra* note 4, at 1098-99 (describing the flexibility intentionally built into the Federal Rules of Evidence); *infra* notes 108-12 and accompanying text (discussing the drafters' intent behind Rule 403).

14. *See* Old Chief v. United States, 117 S. Ct. 644, 649, 655-56 (1997); *infra* notes 122-39 and accompanying text (detailing cases from the federal courts of appeals that applied Rule 403 in the context of cases arising under the federal felon-in-possession statute).

15. 117 S. Ct. 644 (1997).

title 18, § 922(g)(1) of the United State Code.[16] He asserted that under Rule 403 the potential danger of unfair prejudice required the prosecution to accept his offer to stipulate to his prior conviction as a felon.[17] However, the prosecution refused to accept the stipulation, arguing that the long-standing rule that permits the prosecution to choose the evidence it will use to present its case justified its refusal.[18] The Supreme Court recognized the prosecution's reasoning but accepted Old Chief's argument because the general rule advocated by the prosecution has no application when a defendant's legal status is at issue.[19] Thus, in a five-to-four decision, the Court held that the district court abused its discretion by admitting into evidence the full record of Old Chief's prior conviction.[20] Because the name and nature of the prior conviction as contained in the record may have led the jury to improper considerations as a basis for its conclusions, and because the only purpose of the evidence was to prove the fact of prior conviction, the Court ruled that the trial court should not have admitted the evidence under Rule 403.[21]

This Note discusses the facts of *Old Chief*, its history in the lower courts, and the Supreme Court's resolution of the issues presented by the case.[22] The Note then reviews the background of Rule 403[23] as well as the historical controversy in the federal appeals courts surrounding the appropriate application of the rule, particularly in the context of criminal cases involving offers of stipulation by the defense.[24] Next, the Note discusses *Old Chief*'s impact on Rule 403.[25] It then considers the policy behind the prosecution's unwillingness to stipulate and the possible motivation of the Court in its holding on evidentiary issues in cases involving the felon-in-possession statute.[26]

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16. *See id.* at 647. The statute penalizes persons convicted of a crime punishable by a term of imprisonment exceeding one year if such persons possess or receive a firearm shipped in interstate commerce. *See* 18 U.S.C. § 922(g)(1) (1994); *see also infra* note 28 (quoting § 922(g)(1)).

17. *See Old Chief*, 117 S. Ct. at 648.

18. *See id.* at 653; *see also* Parr v. United States, 255 F.2d 86, 88 (5th Cir. 1958) (stating that the reason for the rule is to allow a party " 'to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.' " (quoting Dunning v. Maine Cent. Ry. Co., 39 A. 352, 356 (Me. 1897))).

19. *See Old Chief*, 117 S. Ct. at 654.

20. *See id.* at 655.

21. *See id.* at 647, 655.

22. *See infra* notes 28-105 and accompanying text.

23. *See infra* notes 106-21 and accompanying text.

24. *See infra* notes 122-39 and accompanying text.

25. *See infra* notes 140-239 and accompanying text.

26. *See infra* notes 240-60 and accompanying text.

Finally, the Note examines the potential effects of the Court's holding.[27]

Johnny Lynn Old Chief was charged with violating title 18, § 922(g)(1) of the United States Code, which prohibits felons from possessing firearms.[28] He was also charged with using or carrying a firearm during the commission of a violent crime and assault with a dangerous weapon.[29] The charges arose out of Old Chief's involvement in a brawl on an Indian reservation during which someone fired at least one gunshot.[30] Prior to trial, Old Chief requested a court order prohibiting the prosecution from introducing evidence of a prior conviction for assault causing serious bodily injury.[31] Asserting that the name and nature of his prior conviction would prejudice the jury to such an extent that the prosecution would not be held to its requisite burden of proof beyond a reasonable doubt,[32] Old Chief offered instead to stipulate to the fact of his prior conviction.[33] He therefore requested the court to instruct the jury that he had been convicted of a crime punishable by imprisonment of more than one year, rather than disclosing specifically that he had been convicted of assault causing serious bodily injury.[34]

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27. *See infra* notes 261-70 and accompanying text.

28. The statute makes it a crime for anyone "who has been convicted in any court of, [sic] a crime punishable by imprisonment for a term exceeding one year . . . [to] possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(1) (1994). Section 921(a)(20) identifies certain crimes not included in the term "crime punishable by imprisonment for a term exceeding one year" as

> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
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> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

Id. § 921(a)(20). The statute further notes that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." *Id.*

29. *See Old Chief*, 117 S. Ct. at 647.

30. *See id.*

31. *See id.* at 647-48. Specifically, Old Chief requested that the prosecution abstain from mentioning his previous felony conviction during jury selection, in the opening statement, or in the closing argument, and from offering the testimony of any witnesses concerning the details of his criminal record. *See id.*

32. *See id.* at 648.

33. *See id.*

34. *See id.* Old Chief also proposed a jury instruction that purported to define the meaning of a "crime punishable by one year." *See id.* However, the proposed instruction failed to clarify whether Old Chief's conviction was as a *matter of law* within the given definition or was instead a mere *statement of fact* from which the jurors could not determine if the prior crime fell within the stated exceptions. *See id.* at 648 n.2. Because

Furthermore, Old Chief supported his claim by arguing that his offer to stipulate the fact of his prior conviction made the name and nature of his prior conviction inadmissible under Rule 403 because the danger of unfair prejudice likely to result from its admission substantially outweighed the probative value of the evidence.[35]

The prosecution firmly opposed the stipulation, arguing that in accordance with the general rule granting prosecutorial discretion it had the right to choose which evidence it would use to prove the elements of the charge.[36] Agreeing with the prosecution, the trial court refused to apply Rule 403 to exclude the detailed evidence of Old Chief's prior conviction,[37] and, in an oral ruling, declared that the prosecution did not have to accept the stipulation.[38] The trial court thus permitted the prosecution to introduce into evidence the order of judgment and commitment for Old Chief's prior assault conviction.[39] In addition, the trial court allowed the prosecution to read the order of judgment and commitment for Old Chief's prior conviction, disclosing unequivocally to the jury that on December 18, 1988, Old Chief assaulted and caused serious bodily injury to another person and was sentenced to five years in prison.[40] The jury thereafter found Old Chief guilty on all three counts, and he subsequently appealed.[41]

In an unpublished opinion, the Ninth Circuit affirmed the trial court by briefly noting that even though Old Chief offered to

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the trial court denied Old Chief's motion on the basis of the general rule that permits the prosecution to choose its own evidence, Old Chief's defective instructions were insignificant. *See id.*

Even though Old Chief's erroneous instructions were not used, the jury nevertheless received defective instructions. *See id.* The trial court wrongfully directed the jury that it could consider the prior-conviction evidence only as it affected the defendant's credibility as a witness, when in fact Old Chief never testified at trial. *See id.* However, the Court blamed Old Chief as much as the prosecution for the error in the jury instructions: Although Old Chief had initially asked the court to instruct the jury not to consider his prior conviction for impeachment purposes, he later withdrew his request after the trial court charged the jury. *See id.*

35. *See id.* at 648.

36. *See id.* Old Chief also contended that the prosecution's refusal to accept his stipulation amounted to prosecutorial misconduct because a prosecutor's duty requires "the pursuit of just convictions, not victory by fair means or foul." *Id.* at 650 n.5. However, the Court determined that any ethical duty was dependent on Rule 403's construction and that it had no reason to expect ethical misconduct once the meaning of the rule was decided. *See id.*

37. *See id.* at 648.

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

stipulate, the prosecution had the right to prove the prior felony conviction element by using probative evidence.[42] Furthermore, the court stated that a stipulation was not proof under Ninth Circuit law,[43] and therefore it had no function in the balancing process under Rule 403.[44] The court also distinguished Old Chief's case from its holding in *United States v. Hernandez*,[45] in which it held that a defendant's stipulation to the prior felony conviction satisfies the prior-conviction element of § 922(g)(1).[46] The court stated that its holding in *Hernandez* did not mean that the prosecution must always accept a defendant's proposed stipulation as proof of the prior-conviction element.[47] Therefore, the court held that the trial court had not abused its discretion by permitting the prosecution to admit evidence of the name and nature of Old Chief's prior conviction.[48]

The Supreme Court granted certiorari in order to resolve the division among the courts of appeals in their treatment of cases in which a defendant attempts to exclude evidence of the name and nature of a prior conviction under circumstances similar to *Old Chief*.[49] The Court noted that the name and nature of the prior crime, particularly assault causing serious bodily injury, increased the chance of conviction in the later trial.[50] Therefore, it held that the district court had abused its discretion by refusing Old Chief's offer

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42. *See* United States v. Old Chief, 56 F.3d 75 (table decision), No. 94-30277, 1995 WL 325745, at *1 (9th Cir. May 31, 1995), *rev'd*, 117 S. Ct. 644 (1997).

43. *See id.*

44. *See id.*

45. 27 F.3d 1403 (9th Cir. 1994).

46. *See id.* at 1408.

47. *See Old Chief*, 1995 WL 325745, at *2.

48. *See id.*

49. *See Old Chief*, 117 S. Ct. at 649. *Compare, e.g.*, United States v. Breitkreutz, 8 F.3d 688, 690-92 (9th Cir. 1993) (acknowledging the prosecution's right to reject a defendant's proposed stipulation and to use its own evidence of the prior conviction), United States v. Burkhart, 545 F.2d 14, 15 (6th Cir. 1976) (same), *and* United States v. Smith, 520 F.2d 544, 548 (8th Cir. 1975) (same), *with* United States v. Wacker, 72 F.3d 1453, 1472-73 (10th Cir. 1995) (holding that a defendant's proposed stipulation to the fact of prior conviction requires the trial court to exclude the name and nature of the prior conviction from the case), United States v. Jones, 67 F.3d 320, 322-25 (D.C. Cir. 1995) (same), United States v. Tavares, 21 F.3d 1, 3-5 (1st Cir. 1994) (en banc) (same), *and* United States v. Poore, 594 F.2d 39, 40-43 (4th Cir. 1979) (same). *See infra* notes 122-39 (reviewing cases that illustrate the division among the circuits).

50. *See Old Chief*, 117 S. Ct. at 647. Justice Souter wrote the majority opinion, and joining him in the opinion were Justices Stevens, Kennedy, Ginsburg, and Breyer. *See id.* Justice O'Connor wrote the dissenting opinion, and joining her in the dissent were Chief Justice Rehnquist, and Justices Scalia and Thomas. *See id.* at 656 (O'Connor, J., dissenting); *infra* notes 82-105 and accompanying text (discussing the dissent).

to stipulate the evidence of his prior conviction.[51]

The Court began its analysis by noting that as a threshold requirement under Rule 401, the name of a prior conviction as stated in the official record is relevant to the prior-conviction element of a § 922(g)(1) offense because it makes a defendant's guilt more probable than it would be without the evidence.[52] Therefore, the Court concluded that Old Chief's prior conviction for assault was relevant evidence admissible under Rule 402.[53]

Next, the Court turned to an analysis under Rule 403. In the context of a criminal case in which the defendant offered to stipulate an element of the alleged offense, the Court recognized the predominant issue was the scope of the trial judge's discretion.[54] Thus, the Court sought to clarify the scope of that discretion by interpreting the ambiguous phrases of Rule 403.[55] It initially noted that "unfair prejudice" refers to the potential for relevant evidence to entice the factfinder away from a rational line of thinking and a decision based on specific proof of the alleged crime into an improper chain of reasoning for a determination of guilt.[56] The Court suggested that the jury might use evidence of prior bad acts to make the misguided generalization that a defendant had the propensity to perpetrate the crime charged.[57]

The Court then recognized that under Rule 403 a trial court must evaluate the admissibility of relevant evidence by balancing the relative "probative value" of prior-conviction evidence against the danger of unfair prejudice.[58] The Court addressed two possible approaches for the Rule 403 balancing test.[59] Under the first approach, an item offered for evidence may be viewed in isolation as an "island," with valuations of its own probative value and unfair prejudice being the sole considerations to determine its

51. *See Old Chief*, 117 S. Ct. at 655.

52. *See id.* at 649.

53. *See id.*; *see also supra* note 9 (quoting FED. R. EVID. 401, 402).

54. *See Old Chief*, 117 S. Ct. at 650.

55. *See id.* at 650-53.

56. *See id.* at 650.

57. *See id.* The Court also referred to the Advisory Committee's Note to Rule 403, which explains "unfair prejudice" by noting that " 'within its context [it] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' " *Id.* (quoting FED. R. EVID. 403 advisory committee's note).

58. *See id.* at 651. While the majority discussed both probative value and unfair prejudice in its analysis under Rule 403, the dissent did not address the concept of probative value or the majority's view of the phrase.

59. *See id.*

admissibility.[60] According to the second approach, the question of admissibility may require a complete contextual assessment of all evidence available in a particular case as the trial judge understands it at the time of the evidentiary ruling.[61] The second approach extends beyond the first one by requiring the trial judge, after a party has objected to the evidence, to evaluate the degrees of the probative value and the unfair prejudice for the item in question and for any available substitutes.[62] The Court readily adopted the second approach, and therefore, it concluded, a determination of the probative value of the evidence in question must consider the availability of alternative evidence.[63] If the judge finds that the alternatives have substantially the same or even greater probative value, but less risk of unfair prejudice, then the judge should exercise sound discretion to discount the probative value of the evidence offered first.[64] The judge should exclude the evidence offered

60. *See id.*

61. *See id.*; *see also* Dolan, *supra* note 10, at 233-34 (recognizing the difficulty courts face in deciding whether to determine the probative value of each piece of evidence in isolation or in light of what it contributes to the weight of the showing of evidence on a particular fact, and endorsing the latter); D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 318-19 (1989) (supporting the drafters' recognition that assessments of unfair prejudice and probative value should be contextual); Mengler, *supra* note 5, at 442 (noting that the balancing test requires the trial court "to look at other evidence already admitted against the litigant, as well as at the evidence in question"); Saltzburg, *supra* note 2, at 1011 (acknowledging that judges often limit their determination of probative value to the specific item in question and thus fail to account for its probative value in light of its relationship to other evidence).

62. *See Old Chief*, 117 S. Ct. at 651.

63. *See id.* at 652. The Court elaborated on this point by distinguishing between the probative value of a piece of evidence and its relevance. *See id.* Based on the availability of evidentiary alternatives, the probative value of the evidence at issue may vary. *See id.* However, this variation does not detract from the relevancy of the piece of evidence. *See id.*; FED. R. EVID. 403 advisory committee's note; *see also* FED. R. EVID. 404(b) advisory committee's note (noting that no "mechanical solution" exists, but that the decision should be made in light of the other evidence available); 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 782 n.41 (John W. Strong ed., 4th ed. 1992) (indicating that probative value is relative to the alternative evidence available); 22 WRIGHT & GRAHAM, *supra* note 12, § 5250, at 546-47 (stating that the availability of other evidence on the same issue affects the probative value).

64. *See Old Chief*, 117 S. Ct. at 651. Professor Louis Jacobs criticizes the Court's "Wal-Mart" approach to discounting probative value and argues that its approach obscures the factors balanced under Rule 403. *See* Louis A. Jacobs, *Evidence Rule 403 After* United States v. Old Chief, 20 AM. J. TRIAL ADVOC. 563, 569 (1997). Professor Jacobs identifies four major flaws in the Court's "discount" methodology under Rule 403. *See id.* First, while the need for a particular piece of evidence may vary according to the availability of acceptable alternatives, its probative value remains fixed. *See id.* at 569-70. Second, balancing is a special kind of weighing that permits measurement of conflicting factors that are intrinsically different, while weighing requires a common measure. *See id.*

initially if its risk of unfair prejudice substantially outweighs its reduced probative value.[65]

Consistent with the general rule that permits the prosecution to choose its evidence despite a defendant's proposed stipulation, the Court limited its holding in *Old Chief*.[66] It noted that the trial judge must not forget to consider the prosecution's need to paint a complete evidentiary picture in order to prove its case.[67] Accordingly, the Court limited its ruling to cases involving proof of felon status and stated that a defendant still has the burden, on appeal, of demonstrating an abuse of discretion.[68] Recognizing that a criminal defendant cannot stipulate out of the evidentiary impact of the prosecution's choice of proof and that jurors bring certain expectations with them into the courtroom, the Court determined that the prosecution's need for "evidentiary depth to tell a continuous story has ... virtually no application when the point at issue is a defendant's legal status."[69] Therefore, Old Chief's stipulation of his status as a convicted felon transcended the general rule that permits the prosecution to choose the evidence it will use to prove its case.[70]

In analyzing the case under Rule 403, the Court noted that propensity evidence may be relevant.[71] Nevertheless, the chance that the jury will convict because of prior crimes or because of its determination that a bad person deserves punishment creates prejudice that outweighs ordinary relevance.[72] Under this

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at 570. Thus, after the court has discounted the probative value, it should balance, rather than weigh, the discounted probative value and the risk of unfair prejudice in the context of the specific case. *See id.* Third, because Rule 403 necessarily entails the use of judicial discretion in the balancing process, no single factor ought to be treated as grounds for a per se ruling. *See id.* at 571. According to Professor Jacobs, the Court in *Old Chief* overemphasized the probative value of the evidence and neglected other important factors such as the "explicit preference for admission that Rule 403's passive voice and use of the adverb 'substantially' reflect." *Id.* Finally, the Court's methodology failed to produce a standard conducive to regular use by a trial judge. *See id.*

65. *See Old Chief*, 117 S. Ct. at 651.

66. *See id.*

67. *See id.*

68. *See id.* at 651 n.7.

69. *Id.* at 654; *see also* United States v. Rhodes, 32 F.3d 867, 871 (4th Cir. 1994) (noting that "[t]he nature of the conviction is not an element of section 922(g)(1)").

70. *See Old Chief*, 117 S. Ct. at 654-55.

71. *See id.* at 650-51. The Court noted that Rule 404(b) directly addresses propensity evidence by making " 'evidence of other crimes, wrongs, or acts' " inadmissible to prove one's character for the purpose of showing one acted in conformity therewith. *Id.* at 651 (quoting FED. R. EVID. 404(b)); *see infra* note 72 (quoting FED. R. EVID. 404(b)).

72. *See Old Chief*, 117 S. Ct. at 651 (citing United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982)). Under Rule 404(b) of the Federal Rules of Evidence,

framework, the Court held that evidence of the name and nature of the prior conviction unquestionably carried the risk of unfair prejudice because the record was conspicuous enough to tempt the jurors into a line of bad character reasoning.[73] Moreover, the stipulation was a reasonable alternative that was relevant, admissible, and conclusive evidence of the prior-conviction element.[74] The Court noted, however, that the mere existence of evidentiary alternatives does not automatically result in an abuse of discretion by the trial court.[75] A defendant cannot satisfy the abuse of discretion standard if he simply provides other means of proof that the prosecution, which has broad discretion in choosing how to present its case, has not selected.[76] Instead, a defendant must establish the failure of the trial court to meet the balancing requirement under Rule 403.[77]

The Court stated that Old Chief's offer to stipulate had evidentiary value that was at least equivalent to the prosecution's own evidence.[78] Therefore, because no discernible difference existed between the probative value of the stipulation and the official conviction record, the Court concluded that the risk of unfair prejudice inherent in the official record substantially outweighed its probative value.[79] For these reasons, the Court held that the trial court abused its discretion in admitting the name and nature of the prior conviction.[80] Thus, the Court's analysis under the balancing process of Rule 403 required the prosecution to accept the stipulation.[81]

> [e]vidence 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....

FED. R. EVID. 404(b).

73. *See Old Chief*, 117 S. Ct. at 651.
74. *See id.* at 653.
75. *See id.* at 651-52.
76. *See id.* at 652.
77. *See id.*
78. *See id.* at 653.
79. *See id.* at 655.
80. *See id.*
81. *See id.* at 655-56. The Court stated:

> Given [the] peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, 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.

Id. at 655. However, the Court also recognized the limited nature of its holding under these particular circumstances. *See id.* at 656; *supra* text accompanying notes 66-68.

In dissent, Justice O'Connor argued that the majority misapplied Rule 403 and upset the long-standing precedent that permits the prosecution in criminal trials to choose the evidence it will use to prove its case.[82] She maintained that the majority created a new rule under § 922(g)(1), with which a defendant can require the prosecution to accept a stipulation to the fact of prior felony conviction, thus preventing the prosecution from submitting direct evidence to prove an essential element of its case—namely, conviction of a crime punishable by imprisonment for a term exceeding one year.[83] Justice O'Connor supported her position that Old Chief's record of conviction did not present unfair prejudice by stating first that all evidence, to some degree, is prejudicial.[84] However, she noted, Rule 403 requires that the prejudice be "unfair," and thus the rule does not allow the court to exclude the prosecution's evidence just because it may prove detrimental to the defendant.[85] Asserting that the majority never explained exactly why the prior-conviction record could cause "unfair" prejudice, Justice O'Connor pointed out that the list of exceptions for admitting evidence of other crimes under Rule 404(b) is clearly not exhaustive.[86] Therefore, Justice O'Connor argued that the trial court's admission of the record of prior conviction was not

82. *See Old Chief*, 117 S. Ct. at 656 (O'Connor, J., dissenting).

83. *See id.* at 660 (O'Connor, J., dissenting). *But see* United States v. Rhodes, 32 F.3d 867, 871 (4th Cir. 1994) (stating that "the nature of the conviction is not an element of section 922(g)(1)"); *infra* note 122 (citing cases in accord with *Rhodes*).

84. *See Old Chief*, 117 S. Ct. at 656 (O'Connor, J., dissenting).

85. *See id.* (O'Connor, J., dissenting). The dissent pointed out that the Advisory Committee's Note to Rule 403 suggests that evidence is unfairly prejudicial if it has " 'an undue tendency to suggest decision on an improper basis.' " *Id.* (O'Connor, J., dissenting) (quoting FED. R. EVID. 403 advisory committee's note). The dissent failed to see anything improper about admitting the record of prior conviction. *See id.* (O'Connor, J., dissenting). While Justice O'Connor acknowledged the majority's concern that "improper considerations" may taint the jury's verdict if it learns about the details of a defendant's prior conviction, she questioned what specifically was improper about the record that revealed the circumstances surrounding Old Chief's prior conviction. *See id.* at 658 (O'Connor, J., dissenting). Justice O'Connor suggested that "improper considerations" may include the exact name of the prior felony, the date, the location, and the name of the victim, or the fact that the charge was joined with other counts of using a firearm in a violent crime. *See id.* (O'Connor, J., dissenting). Because the Court's vague standard left open the question of what constitutes an improper consideration, Justice O'Connor criticized the majority's approach. *See id.* (O'Connor, J., dissenting).

86. *See id.* at 657 (O'Connor, J., dissenting). Rule 404(b) provides a specialized application of the rule that excludes using circumstantial character evidence. *See* FED. R. EVID. 404(b) advisory committee's note. While Rule 404(b) does not allow evidence of other crimes to prove action in conformity therewith, it does permit evidence of other crimes for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b).

necessarily unfair because the prosecution was merely using the available evidence to prove conclusively an essential element of its case.[87]

Justice O'Connor further relied on congressional intent to support her position that evidence of a prior-conviction record was not unfairly prejudicial to a criminal defendant.[88] She noted that Congress chose to make a defendant's prior criminal conviction an element of an offense under § 922(g)(1),[89] and she asserted that, because crimes have names, Congress therefore must have realized that jurors would learn the name and nature of a defendant's prior conviction.[90] Referring to the structure of § 922(g) as evidence of Congress's intent,[91] Justice O'Connor pointed out that due to the statutory exception of specific business-related crimes and state misdemeanors when the punishment is for less than two years, "the Government must prove that the defendant committed a *particular* crime."[92] She thus claimed that the prosecution should be able to use evidence of a prior felony conviction because it shows not only that a defendant is a prior felon but also that a defendant has engaged in a specific criminal offense in the past.[93] Accordingly, Justice O'Connor concluded that because the name and nature of an offense are inseparable from the fact of a prior conviction, they were admissible as proof of Old Chief's guilt.[94]

In addition to claiming the lack of unfair prejudice in Old Chief's record of prior conviction, Justice O'Connor argued that a defendant

87. *See Old Chief*, 117 S. Ct. at 657 (O'Connor, J., dissenting).

88. *See id.* at 656-57 (O'Connor, J., dissenting).

89. *See id.* (O'Connor, J., dissenting).

90. *See id.* at 657 (O'Connor, J., dissenting); *see also supra* note 28 (quoting 18 U.S.C. § 922(g)(1) (1994)). Justice O'Connor thus inferred that within the meaning of the statute, " 'a crime' is not an abstract or metaphysical concept." *Old Chief*, 117 S. Ct. at 656 (O'Connor, J., dissenting).

91. Justice O'Connor asserted that the structure of § 922(g)(1) reveals that Congress was aware that jurors would learn both the name and the basic nature of the defendant's prior conviction. *See Old Chief*, 117 S. Ct. at 656 (O'Connor, J., dissenting). She further noted that Congress did not make the statute applicable to *all* persons with prior felony convictions, but only to persons convicted of " 'a crime punishable by imprisonment for a term exceeding one year.' " *Id.* (O'Connor, J., dissenting) (quoting § 922(g)(1)). Thus, according to Justice O'Connor, § 922(g)(1)'s exclusion of specific crimes enumerated in § 921(a)(20) reflects Congress's intent that jurors learn the name and nature of the defendant's prior criminal offense. *See id.* at 656-57 (O'Connor, J., dissenting); *see also supra* note 28 (quoting § 922(g)(1) and § 921(a)(20)).

92. *Old Chief*, 117 S. Ct. at 656-57 (O'Connor, J., dissenting); *see supra* note 28 (quoting the statutory exceptions of § 921(a)(20)).

93. *See Old Chief*, 117 S. Ct. at 657 (O'Connor, J., dissenting).

94. *See id.* (O'Connor, J., dissenting).

cannot force the prosecution to accept a stipulation to the prior-conviction element of a § 922(g)(1) offense.[95] However, Justice O'Connor found even more disturbing the Court's deviation from the long-standing rule that permits the prosecution in a criminal trial to choose what evidence it will use to prove its case.[96] By accepting a defendant's stipulation and thus withholding from the jury detailed evidence of the prior conviction, a trial court may confuse the jury.[97] Furthermore, Justice O'Connor argued that a criminal defendant cannot make the prosecution try its case by stipulation.[98] In addition to confirming the prosecution's need for evidentiary depth in presenting its case, Justice O'Connor recognized that the Constitution mandates that criminal convictions rest on a jury's finding a defendant guilty of each element of an alleged offense beyond a reasonable doubt.[99] A defendant's stipulation neither removes nor negates the prosecution's burden of proof.[100] Because a defendant's decision to agree that the prosecution does not have to prove an element of the crime charged does not remove the burden of proof as to that element,[101] Justice O'Connor determined that the trial court must grant the prosecution wide latitude to offer its choice of evidence in proving its case.[102]

Justice O'Connor further contended that a criminal defendant should not be able to force the prosecution to accept a stipulation of prior conviction because the stipulation may be an attempt to waive a

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95. *See id.* at 656 (O'Connor, J., dissenting).

96. *See id.* at 658 (O'Connor, J., dissenting).

97. *See id.* at 659 (O'Connor, J., dissenting). For example, the jury may question why it has not been told the name of the defendant's prior conviction, or the jury may speculate as to why, given the widespread national acceptance of gun ownership, the defendant's possession of a firearm was illegal. *See id.* (O'Connor, J., dissenting); *see also* United States v. Barker, 1 F.3d 957, 960 (9th Cir. 1993) (explaining that " '[d]oubt as to the criminality of [the defendant's] conduct may influence the jury when it considers the possession element' " (second alteration in original) (quoting United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989))).

98. *See Old Chief*, 117 S. Ct. at 659 (O'Connor, J., dissenting).

99. *See id.* (O'Connor, J., dissenting). *See generally* Lewis, *supra* note 61, at 295 (asserting that Rule 403 is an "unconstitutional balancing test" because it contradicts the requirement of proof beyond a reasonable doubt in criminal trials and thus heightens the chance of trial error).

100. *See Old Chief*, 117 S. Ct. at 659 (O'Connor, J., dissenting); *see also* Estelle v. McGuire, 502 U.S. 62, 69 (1991) (noting that the defendant's choice not to dispute an element of the alleged crime does not discharge the prosecution from its duty to prove every element of the crime).

101. Noting that a stipulation consists of an agreement between a defendant and the prosecution, Justice O'Connor asserted that Old Chief and the prosecution never reached an agreement. *See Old Chief*, 117 S. Ct. at 659 (O'Connor, J., dissenting).

102. *See id.* at 659-60 (O'Connor, J., dissenting).

jury trial without the prosecution's consent.[103] Under Federal Rule of Criminal Procedure 23(a), a defendant must have the prosecution's agreement in order to submit a partial plea of guilty and thus take an issue from the jury.[104] Therefore, if Old Chief wanted to use a stipulation to waive his right to a jury trial on the prior-conviction element, he needed to have the prosecution's consent, and because Old Chief failed to obtain that consent, Justice O'Connor concluded, he could not force the prosecution to accept his proposed stipulation.[105]

A review of the legislative history of Rule 403 and the case law leading up to *Old Chief* is helpful in achieving a clearer understanding of the Court's interpretation of the rule. The Court's decision reflects issues that were in contention during the drafting of Rule 403. The common law traditionally recognized that particular situations necessitated the exclusion of unequivocally relevant evidence,[106] and the discretionary power established by the case law increased significantly through the codification of the Federal Rules of Evidence.[107] However, the Preliminary Draft of the Federal Rules of Evidence bifurcated Rule 403, making the exclusion of evidence *mandatory* when the danger of unfair prejudice, or of misleading or confusing the jury, substantially outweighed the probative value of evidence,[108] but making the exclusion *discretionary* when

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103. *See id.* at 660 (O'Connor, J., dissenting).

104. *See* FED. R. CRIM. P. 23(a); *Old Chief*, 117 S. Ct. at 660 (O'Connor, J., dissenting).

105. *See Old Chief*, 117 S. Ct. at 660 (O'Connor, J., dissenting).

106. *See* FED. R. EVID. 403 advisory committee's note; 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 403App.01[2], at 403App.-1 (John L. McLaughlin ed., 2d ed. 1997). The circumstances requiring exclusion of unquestionably relevant evidence involve risks that "range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme," and while the rules following Rule 403 involve more particular situations, Rule 403 "is designed as a guide for the handling of situations for which no specific rules have been formulated." FED. R. EVID. 403 advisory committee's note; *see* 2 WEINSTEIN & BERGER, *supra*, § 403App.01[2], at 403App.-1.

107. *See* Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 60 (1984). Professor Gold also notes that codification "creates the danger that the imprecision and rigidity of the written word will obscure underlying statutory policy," but that Rule 403 intended to address this danger by permitting "discretionary exclusion of evidence when admission would undermine accurate factfinding and procedural fairness, the basic goals of modern evidence law." *Id.*; *see also* Glenn Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1334-35 (1992) (describing Rule 403 as a codification of the "long-standing power of the trial judge to exclude evidence").

108. *See Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 225 (1969) [hereinafter *Preliminary Draft of*

considerations of undue delay, waste of time, or unnecessary presentation of cumulative evidence substantially outweighed its probative value.[109] The separation of the sections accentuated the expansive discretionary authority of the trial court to classify offered evidence according to the particular facts of each case.[110] In addition, because of the wide discretion created by the ambiguity in words such as "unfair prejudice," "substantially outweighed," and "danger," the court's finding would be virtually unreviewable under the rule.[111] Therefore, in order to avoid this threat and upon the recommendation of the Department of Justice, the final draft eliminated the mandatory exclusion.[112]

While the codification of Rule 403 substantiated common-law precepts,[113] the rule's underlying rationale and policy concerns were unclear.[114] Thus, the rule has stirred widespread debate about its goals. One view cites "accuracy and fairness through judicial flexibility" as the fundamental purpose and policy of Rule 403,[115] while another description connects the policy of Rule 403 with the policies behind other rules of evidence.[116] For example, in

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Proposed Rules of Evidence]; *see also* 2 WEINSTEIN & BERGER, *supra* note 106, § 403App.100[1], at 403App.-3 (noting the bifurcation in the preliminary draft); 22 WRIGHT & GRAHAM, *supra* note 12, § 5211, at 244 n.1 (citing the proposed draft).

109. *See Preliminary Draft of Proposed Rules of Evidence*, *supra* note 108, at 225; 2 WEINSTEIN & BERGER, *supra* note 106, § 403App.100[1], at 403App.-3; 22 WRIGHT & GRAHAM, *supra* note 12, § 5211, at 244 n.1.

110. *See* 2 WEINSTEIN & BERGER, *supra* note 106, § 403App.100[1], at 403App.-3. However, the distinction was one "of emphasis rather than kind." 2 *id.*

111 *See* 2 *id.*; *see also* Imwinkelried, *supra* note 7, at 888 (describing the terms of Rule 403 as ambiguous).

112. *See* 117 CONG. REC. 33,650 (1971) ("It is generally recognized that this matter is best left to the discretion of the trial judge."); *see also* 2 WEINSTEIN & BERGER, *supra* note 106, § 403App.100[1], at 403App.-4 (quoting a Department of Justice report recognizing the need for trial court discretion); 22 WRIGHT & GRAHAM, *supra* note 12, § 5211, at 245-46 n.9 (same). Congress did not make any textual changes in Rule 403 as drafted by the Supreme Court. *See* 2 WEINSTEIN & BERGER, *supra* note 106, § 403App.01[3], at 403App.-2; 22 WRIGHT & GRAHAM, *supra* note 12, § 5211, at 246.

113. *See* 1 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 160 (5th ed. 1990); Cleary, *supra* note 1, at 909.

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

115. Gold, *supra* note 7, at 499; *see also* Gold, *supra* note 107, at 60 (asserting that discretionary exclusion promotes "accurate factfinding and procedural fairness, the basic goals of modern evidence law"). Professor Gold's view of Rule 403 accords with Rule 102. *See* Gold, *supra* note 107, at 65 n.18 (stating that both courts and commentators acknowledge that "Rule 102 identifies the policies that should control the exercise of discretion under Rule 403"); *see also* Lewis, *supra* note 61, at 290-91 (noting the purported aim of the Federal Rules of Evidence as stated in Rule 102); Mengler, *supra* note 5, at 446 (stating that Rule 403 permits trial judges to effectuate the policies of Rule 102); *supra* note 4 (quoting FED. R. EVID. 102).

116. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5212, at 250. Professors Wright and

accordance with policies similar to the ones expressed in Federal Rule of Evidence 102,[117] the three main goals of Rule 403 may be described as avoiding error by the factfinder, promoting both real and perceived fairness in the judicial process, and attaining an economical fact-finding process.[118] In this respect, Rule 403 does not establish an unequivocal standard, but serves as a guide to the courts in the absence of precise, controlling standards.[119] A narrower interpretation of Rule 403's application describes the rule as an attempt to conventionalize and to direct the use of discretion in applying the rules of evidence.[120] However, establishing a conventionalized use of discretion would limit judicial flexibility and thus would also seem to circumscribe the potential effectiveness of the more general policy of promoting the search for truth and justice.[121]

The application of Rule 403 in cases involving the treatment of defendants' offers to stipulate evidence of the prior-conviction element of § 922(g)(1) illustrates two different viewpoints among the federal courts of appeals. Some circuits refused to allow evidence of a defendant's prior conviction when a defendant offered to stipulate, and therefore they ruled that the prosecution could not introduce evidence of a prior felony in the absence of extenuating circumstances.[122] Other circuits, in contrast, held that the defense's

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Graham note, for example, the need created by Rule 401 for an additional means of determining the roles of the conventional understandings of relevance, the boundaries imposed by Rule 402 on courts' attempts to fashion new exclusionary rules, and the values under Rule 102 that are to be promoted by the prudent exercise of discretion. *See* 22 *id.*

117. *See* FED. R. EVID. 102; *see also supra* note 4 (quoting FED. R. EVID. 102).

118. *See* Dolan, *supra* note 10, at 226; *see also* 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 10a, at 684 (Peter Tillers rev. ed., 1983) (citing also the prevention of jury error as an aim of Rule 403).

119. *See* FED. R. EVID. 403 advisory committee's note; *see also* 2 WEINSTEIN & BERGER, *supra* note 106, § 403App.100[2], at 403App.-6 n.4 (citing cases from the federal courts of appeals).

120. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5212, at 250. In addition, Professors Wright and Graham note that the policy of Rule 403 is "limiting judicial discretion in the admission and exclusion of evidence." 22 *id.* § 5214, at 263.

121. *See* FED. R. EVID. 102; *see also supra* note 4 (quoting FED. R. EVID. 102).

122. Among the courts of appeals adhering to this rule are the First, Second, Fourth, Fifth, and Tenth Circuits. *See* United States v. Lomeli, 76 F.3d 146, 150-51 (7th Cir. 1996); United States v. Wacker, 72 F.3d 1453, 1472-73 (10th Cir. 1995); United States v. Palmer, 37 F.3d 1080, 1084-85 (5th Cir. 1994); United States v. Tavares, 21 F.3d 1, 5 (1st Cir. 1994) (en banc); United States v. Gilliam, 994 F.2d 97, 102-03 (2d Cir. 1993); United States v. Poore, 594 F.2d 39, 40-43 (4th Cir. 1979); *see also infra* notes 124-30 and accompanying text (discussing cases decided in these appellate courts based on the rule that the prosecution should accept a defendant's stipulation).

The District of Columbia Circuit and the Eleventh Circuit also fall into this category,

offer of stipulation could not bar the prosecution's introduction of evidence on the nature of a prior conviction.[123]

The circuits that required the prosecution to accept a defendant's offer to stipulate to his status as a convicted felon under § 922(g)(1) held that a district court's refusal to exclude the nature of a defendant's prior felony conviction from the evidence admitted at trial was an abuse of its discretion because when a defendant stipulated the fact of a prior felony conviction, the nature of the prior conviction was not an essential element of a § 922(g)(1) offense.[124] In

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but they have stated more specifically that the trial court, in the exercise of its sound discretion, could limit the prosecution's proof under Rule 403 to the fact of a defendant's prior conviction for an unnamed felony. *See* United States v. Jones, 67 F.3d 320, 322-24 (D.C. Cir. 1995) (holding that the district court committed reversible error by denying the defendant's motion to exclude evidence of his prior felony conviction when he volunteered to stipulate to the fact); United States v. O'Shea, 724 F.2d 1514, 1516 (11th Cir. 1984) (recognizing that because an offer to stipulate is a factor that the trial court ought to consider under Rule 403, an abuse of discretion may exist when the trial court allows the nature of the prior offense into evidence).

123. The courts of appeals adhering to the line of reasoning not requiring the prosecution to accept the stipulation are the Third, Sixth, Eighth, and Ninth Circuits. *See* United States v. Breitkreutz, 8 F.3d 688, 690-92 (9th Cir. 1993), *abrogated by* Old Chief v. United States, 117 S. Ct. 644 (1997); United States v. Burkhart, 545 F.2d 14, 15 (6th Cir. 1976), *abrogated by* Old Chief v. United States, 117 S. Ct. 644 (1997); United States v. Smith, 520 F.2d 544, 548 (8th Cir. 1975), *abrogated by* Old Chief v. United States, 117 S. Ct. 644 (1997); *see also infra* notes 131-39 and accompanying text (discussing cases decided by these appellate courts according to the rule that the prosecution does not have to accept a defendant's stipulation).

In *United States v. Williams*, 612 F.2d 735 (3d Cir. 1979), the Third Circuit held that the prosecution did not have to accept the defendant's stipulation to the prior-conviction element and that the prosecution had the right to offer proof on the point admitted, *see id.* at 740. The Supreme Court in *Old Chief* did not cite *Williams* because it dealt with title 18, § 922(h)(1) of the United States Code, a provision that, similar to § 922(g)(1), prohibited convicted felons from receiving firearms shipped in interstate commerce. *See id.* at 736, 739-40. By analogy, however, the same reasoning applies to *Williams*. In fact, *Williams* even cited *Smith* as a case with a "like holding" involving a "similar statute." *See id.* at 740.

124. *See Wacker*, 72 F.3d at 1472-73 (holding that when a defendant offers to stipulate to the existence of a prior felony conviction, the trial court ought to admit the stipulation as proof of the prior-conviction element or provide an alternative means of evidence that reveals only the fact of prior felony conviction); *Palmer*, 37 F.3d at 1084-85 (holding that a stipulation does not interfere with the prosecution's right to present evidence); *Tavares*, 21 F.3d at 5 (holding that the prosecution must accept a defendant's stipulation as to felony status and cannot introduce evidence of the nature of the prior felony in the absence of extenuating circumstances); *Gilliam*, 994 F.2d at 102-03 (holding that the prosecution did not have to accept the defendant's proposed stipulation to the entire element of prior conviction but that the prosecution would have had to accept a stipulation to the fact of prior conviction if it had not agreed to do so); *Poore*, 594 F.2d at 42 (holding that the district court abused its discretion by refusing to strike the nature of the defendant's prior felony conviction from the indictment when the defendant offered to stipulate to the prior conviction).

applying Rule 403, some courts recognized the probative value of the stipulation as a factor for consideration in the balancing process.[125] Most courts, however, focused on the nature of the prior conviction, declaring it to be irrelevant under a § 922(g)(1) charge because the statute does not call for a particular kind of prior felony conviction, but rather "*any* felony conviction suffices."[126] Furthermore, the acceptance of a stipulation to the fact of prior conviction under § 922(g)(1) does not interfere with the prosecution's right to present its case fully because "[t]he status element is a discrete and independent component of the crime," and thus "the predicate crime is significant only to demonstrate status, and a full picture of that offense is—even if not prejudicial—beside the point."[127] Therefore,

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In *Poore*, the defendant was charged under title 18, § 1202(a)(1) of the United States Code, the forerunner of § 922(g), which stated that any person who has been convicted of a felony and receives, possesses, or transports in commerce any firearm will be fined a maximum $10,000 or imprisoned for no more than two years or both. *See Poore*, 594 F.2d at 40 n.2.; Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. app. § 1202(a) (1994)), *repealed by* Act of May 19, 1986, Pub. L. No. 99-308, 100 Stat. 459, *reprinted in* 1986 U.S.C.C.A.N. 459.

125. *See O'Shea*, 724 F.2d at 1516; *cf.* United States v. Quintero, 872 F.2d 107, 111 (5th Cir. 1989) (noting that a defendant's offer of stipulation weighs in the balancing process of determining the probative value of additional convictions). *But see Breitkreutz*, 8 F.3d at 692 ("A stipulation . . . has no place in the Rule 403 balancing process.").

The Fifth Circuit in *O'Shea* affirmed the general rule that the prosecution cannot prevent the defense's offer of proof through a stipulation. *See O'Shea*, 724 F.2d at 1516 (relying on *Parr v. United States*, 255 F.2d 86, 88 (5th Cir. 1958)). However, the court noted that Rule 403 qualifies the principle by placing the final decision to exclude evidence under Rule 403 in the " 'sound discretion of the trial court, tempered by the particular facts presented.' " *Id.* (quoting United States v. Grassi, 602 F.2d 1192, 1197 (5th Cir. 1979)). The court concluded that because a codefendant intended to introduce evidence of O'Shea's prior conviction and the witnesses testifying would also more than likely reveal his past conviction, and because a stipulation is only one factor for consideration in the Rule 403 equation, the trial court's refusal to accept the stipulation did not constitute an abuse of discretion. *See id.* at 1516-17.

126. *Poore*, 594 F.2d at 41 (emphasis added) (citing United States v. Kemper, 503 F.2d 327, 329-30 (6th Cir. 1974) (stating that in cases involving an alleged violation under § 922(g), "[i]t should suffice for the indictment to contain language simply stating that defendant had previously been convicted in a specified court of a crime punishable by imprisonment for a term exceeding one year, omitting language descriptive of the offense")); *see also Wacker*, 72 F.3d at 1472-73 (holding that evidence of the nature of the prior crime is irrelevant because "the probative value of th[e] additional information generally will be overshadowed by its prejudicial effect under Federal Rule of Evidence 403"); *Jones*, 67 F.3d at 324 (recognizing the nature of the defendant's prior conviction as irrelevant under § 922(g)); United States v. Rhodes, 32 F.3d 867, 870-71 (4th Cir. 1994) (holding that the prosecution cannot introduce evidence of a defendant's specific prior felony); *Tavares*, 21 F.3d at 3-4 (observing that the nature of the prior felony is not relevant to a § 922(g) charge); *Gilliam*, 994 F.2d at 103 ("The *underlying facts* of the prior conviction . . . are completely irrelevant to § 922(g)(1). The jury has no need to know the nature of the prior conviction . . . .").

127. *Tavares*, 21 F.3d at 4; *see also Wacker*, 72 F.3d at 1472 (recognizing that the

in terms of Rule 403, the courts' decisions implied that the danger of unfair prejudice arising from the details surrounding a defendant's prior conviction outweighed the probative value.

Several of the circuits that required the prosecution to accept a defendant's stipulation drew a careful distinction between a stipulation in which a defendant tries to keep the entire element of a prior felony conviction from the jury and a stipulation in which a defendant seeks to exclude evidence concerning the nature and the details of a prior felony conviction.[128] For example, the Second

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nature of the prior felony is irrelevant); *Jones*, 67 F.3d at 323 (quoting *Tavares*); United States v. Lewis, 40 F.3d 1325, 1342 (1st Cir. 1994) (stating that the district court should have accepted defendants' offers to stipulate their status as felons); Katherine Conboy, Note, *Probative or Prejudicial? Defendant Charged as Felon in Possession of a Firearm May Stipulate to Status as Felon*—United States v. Tavares, 21 F.3d 1 (1st Cir. 1994), 29 SUFFOLK U. L. REV. 941, 945-46 (1995) (noting the appropriately limited ruling by the court in *Tavares*).

The *Tavares* court carefully emphasized the narrow scope of its ruling, declaring that it was not establishing a per se rule of exclusion. *See Tavares*, 21 F.3d at 5 ("[W]e are not saying that the *fact* of the prior predicate felony can be kept from the jury .... [T]he prosecution ordinarily cannot be forced to accept a stipulation if it prefers to introduce a judgment of conviction properly redacted."). Instead, the court held, the trial court should refuse to permit evidence exceeding the fact of prior conviction unless the trial court finds that the noncumulative relevance is adequately compelling to withstand the balancing process under Rule 403. *See id.*; *see also id.* at 7 (Selya, C.J., concurring) (stressing the circumscribed holding by the majority and asserting that the district courts should refrain from any efforts to formulate a general rule based on the majority's case-specific ruling).

The court also discussed the effectiveness of other alternatives available to prove a defendant's status, including a redacted record, an affidavit by the defendant, testimony from a clerk, or judicial notice. *See id.* at 5; *see also Wacker*, 72 F.3d at 1472-73 (stating that the trial court can provide an alternative procedure that reveals the fact, but neither the nature nor the details, of a defendant's prior felony conviction). However, the First Circuit noted that the defense cannot hide a prior felony conviction from the jury, and while the defense usually cannot force the prosecution to accept a stipulation, the trial court maintains the discretion to exclude a redacted record if the nature or number of convictions would unfairly prejudice the jury. *See Tavares*, 21 F.3d at 5; *see also Wacker*, 72 F.3d at 1473 (recognizing that the prosecution still maintains broad discretion to offer evidence of the underlying details of a crime if the facts are actually relevant to the case).

Furthermore, the *Tavares* court underscored the fact that the part of § 922(g)(1) that made the defendant's status relevant was the existence of a prior conviction punishable by a prison sentence exceeding one year. *See Tavares*, 21 F.3d at 4. Thus, the statute "does not embrace additional facts such as a particular kind of felony. Congress required no gradation for seriousness, numerosity or recency, although such distinctions have in other contexts been given significance." *Id.*

128. *See Wacker*, 72 F.3d at 1472; *Gilliam*, 994 F.2d at 102-03; *see also Tavares*, 21 F.3d at 5 (stating that there is rarely any reason, "other than the government's desire to color the jury's perception of the defendant's character, for revealing the nature of the defendant's prior felony"); United States v. Barker, 1 F.3d 957, 959 n.3 (9th Cir. 1993) (describing the underlying facts of the prior conviction as wholly irrelevant in the context of § 922(g)(1)), *modified*, 20 F.3d 365 (9th Cir. 1994); Conboy, *supra* note 127, at 946

Circuit emphasized that "it is the *fact* of such a conviction that is pertinent to the statute and to the crime charged, which is why the fact of the conviction cannot be removed from the jury's consideration."[129] The Second Circuit also pointed out that the "*underlying facts* of the prior conviction, however, are completely irrelevant to § 922(g)(1). The jury has no need to know the nature of the prior conviction; all that it needs to know is that there was a prior conviction sufficient to sustain that element of the crime."[130]

Other circuits took a different view, rejecting the effect of a defendant's stipulation by asserting that introduction of a defendant's felony record did not constitute substantial prejudice.[131] Some of

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(noting that the nature of the prior conviction lacks relevance in the context of § 922(g)(1)); *supra* note 127 (discussing the holding in *Tavares*).

Under § 922(g)(1), the prosecution must prove three elements: possession of a firearm, transportation of the firearm in interstate commerce, and prior felony conviction. *See* 18 U.S.C. § 922(g)(1) (1994). A stipulation to the prior-conviction element removes the entire element from the jury's consideration; consequently, the prosecution would be allowed to present evidence only on the two remaining elements—possession of a firearm and transportation of the firearm in interstate commerce. *See, e.g.*, *Wacker*, 72 F.3d at 1472-73; *Tavares*, 21 F.3d at 3, 5; *Gilliam*, 994 F.2d at 102-03; *see also* Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 524-30 (1995) (explaining the appropriate use of stipulations in felon-in-possession cases). Although courts will not allow a defendant to stipulate to the entire *element*, some courts will allow the a defendant to stipulate to the *fact* of his prior felony conviction. Thus, while his status as a prior felon will go the jury as proof of the prior felony conviction, the name and nature of the past crime remain undisclosed for fear of unfair prejudice. *See, e.g.*, *Wacker*, 72 F.3d at 1472-73; *Tavares*, 21 F.3d at 3, 5; *Gilliam*, 994 F.2d at 102-03.

129. *Gilliam*, 994 F.2d at 102; *see also* Granholm & Richards, *supra* note 128, at 528-30 (discussing *Gilliam* and noting that a stipulation to the fact of a prior felony conviction, but not the element itself, aids the prosecution in establishing the full crime, yet protects the defendant from unfairness).

130. *Gilliam*, 994 F.2d at 103. While the prosecution willingly consented to the defendant's stipulating the fact of his felony status, it refused to accept the defendant's offer to stipulate the entire element of prior conviction. *See id.* at 102-03. The court noted that if the prosecution had not accepted the defendant's stipulation to the fact of his felony status, the trial court would have excluded any evidence about the nature of the defendant's prior convictions because under § 922(g)(1) proof of only one conviction suffices. *See id.* at 102 (citing United States v. Pirovolos, 844 F.2d 415, 420 (7th Cir. 1988) (holding that the trial judge committed error by admitting evidence of prior convictions when the defendant offered to stipulate to a single but sufficient prior conviction)). The *Gilliam* court reasoned that withholding evidence relating to the nature of the prior conviction conveyed to the jury the gravity of the crime without biasing them with potentially prejudicial details. *See id.* at 103. Furthermore, because the trial court's limiting instruction discouraged the jury from speculating about the nature of the defendant's prior conviction, no abuse of discretion occurred. *See id.*; *see also* Stephen A. Saltzburg, *Trial Tactics: Stipulations, Part III: Convicted Felons on Trial*, CRIM. JUST., Summer 1995, at 31, 33-34 (discussing the facts and holding in *Gilliam* and concluding that *Gilliam* illustrates that "there are limits to how far courts will go in forcing stipulations").

131. *See* United States v. Breitkreutz, 8 F.3d 688, 690-92 (9th Cir. 1993) (holding that

these circuits noted, however, that the introduction of multiple convictions might raise the possibility of unfair prejudice.[132] For example, the Ninth Circuit held that admitting proof of three prior felony convictions constituted reversible error because a conviction for being a felon in possession of a firearm required only one prior conviction.[133] While the court based its ruling on the number of felony convictions, it held that evidence of only one prior conviction was admissible in spite of the defendant's offer to stipulate the fact.[134] Because the balance between probative value and unfair prejudice under Rule 403 tips remarkably against the admission of subsequent felonies once the prosecution has proven one, the evidence of other

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the prosecution may charge and prove a defendant's prior felony offense despite a defendant's offer to stipulate), *abrogated by* Old Chief v. United States, 117 S. Ct. 644 (1997); United States v. Williams, 612 F.2d 735, 740 (3d Cir. 1979) (holding that the prosecution did not have to accept a defendant's stipulation and that the prosecution has a right to offer proof of the point admitted); United States v. Burkhart, 545 F.2d 14, 15 (6th Cir. 1976) (holding that the prosecution is not limited to proving only one prior felony conviction as part of its case), *abrogated by* Old Chief v. United States, 117 S. Ct. 644 (1997); United States v. Smith, 520 F.2d 544, 548 (8th Cir. 1975) (holding that the trial court's admission of the defendant's felony record revealing his multiple felony convictions did not constitute error because no substantial prejudice resulted), *abrogated by* Old Chief v. United States, 117 S. Ct. 644 (1997).

132. *See Breitkreutz*, 8 F.3d at 692; *Smith*, 520 F.2d at 548-49; *infra* note 136 (discussing the facts and the holding in *Breitkreutz*). The facts in *Smith* differ slightly from the situation in *Old Chief*. The trial court in *Smith* permitted the prosecution to present evidence revealing the defendant's multiple prior convictions, *see Smith*, 520 F.2d at 548, whereas the trial court in *Old Chief* allowed the prosecution to present evidence of the defendant's one prior, but substantially similar, conviction, *see Old Chief*, 117 S. Ct. at 647. The defendant in *Smith* was charged with violating title 18, § 1202(a)(1) of the United States Code, which made it illegal for a person with a prior felony conviction to receive a firearm that had been shipped in interstate commerce. *See Smith*, 520 F.2d at 546; *see also supra* note 124 (noting that § 1202(a)(1) was the predecessor of the current felon-in-possession statute, 18 U.S.C. § 922(g) (1994)).

While the *Smith* court noted the possibility of prejudice arising from the introduction of more than one conviction in some cases, it recognized no such prejudice in the case in question. *See Smith*, 520 F.2d at 548-49. The court supported its conclusion by noting that the prosecution had offered the evidence in a customary manner, had not emphasized the defendant's prior convictions, and had not read or requested that the conviction record be read to the jury at any point during the trial. *See id.* Thus it concluded that the prosecutor minimized the potential prejudice of the evidence. *See id.*

133. *See Breitkreutz*, 8 F.3d at 692.

134. *See id.* In a concurring opinion in *Breitkreutz*, Judge Norris claimed that the prosecution should not be allowed to introduce evidence of the entire record of prior conviction to establish that the defendant was a felon when he committed the alleged statutory violation. *See id.* at 693 (Norris, J., concurring). Judge Norris relied on the court's decision in *United States v. Barker*, 1 F.3d 957, 959 n.3 (9th Cir. 1993), *modified*, 20 F.3d 365 (9th Cir. 1994), asserting that under an alleged violation of § 922(g)(1) the underlying details of the prior conviction are "completely irrelevant," but the basic fact of the prior conviction's existence is not. *See Breitkreutz*, 8 F.3d at 693, 695 (Norris, J., concurring).

felonies may then be excluded on the basis of cumulative evidence under Rule 403.[135] In addition, a trial court does not have to consider the proposed stipulation in its balancing of evidence under Rule 403.[136] Other courts rejected the view that limits the prosecution to proving only one prior conviction as part of its case, holding that the prosecution could introduce evidence of more than one prior conviction.[137] While these circuits vary about the number of prior convictions that may be admissible, the shared reasoning behind their refusals to accept stipulations of prior felony convictions is the long-standing principle of prosecutorial discretion that permits the prosecution to prove its case as it wishes.[138] Thus, these circuits endorse the contention that accepting a defendant's stipulation would

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135. *See Breitkreutz*, 8 F.3d at 692; *see also* Saltzburg, *supra* note 130, at 31-34 (discussing the facts and holding in *Breitkreutz* and concluding that proof of multiple convictions should generally be excluded). *But see Burkhart*, 545 F.2d at 15 (holding that the prosecutor did not have to accept the defendant's stipulation and "was not limited to establishing only one prior conviction"); *Smith*, 520 F.2d at 548 (holding that the prosecutor did not have to accept the defendant's stipulation and was not limited to showing only one of the defendant's multiple prior convictions); *supra* note 132 (discussing the facts and the holding in *Smith*); *infra* note 137 (discussing the facts and the holding in *Burkhart*).

136. *See Breitkreutz*, 8 F.3d at 691. Distinguishing a stipulation as a "partial amendment to the defendant's plea, a means of precluding any and all proof on a particular issue," *id.*, the court concluded that because a "stipulation is not proof," it does not belong in the balancing process of Rule 403, *id.* at 692. The court pointed out the possible consequences of holding otherwise: In cases in which the defendant offered to stipulate to a prior felony conviction, or any other element of the prosecution's case, the balance under Rule 403 would lean toward the prosecution's evidence because it would unavoidably have minimal, if any, probative value beyond that of the proposed stipulation. *See id.* The Ninth Circuit followed the same line of reasoning that a stipulation is not evidence in affirming the district court's holding in *Old Chief*. *See* United States v. Old Chief, 56 F.3d 75 (table decision), No. 94-30277, 1995 WL 325745, at *1-*2 (9th Cir. May 31, 1995), *rev'd*, 117 S. Ct. 644 (1997) (stating that alternative evidence factors into the determination of probative value under the balancing process of Rule 403); *supra* notes 58-65 and accompanying text (discussing the viewpoint of the majority in *Old Chief*).

137. *See Burkhart*, 545 F.2d at 15; *Smith*, 520 F.2d at 548. *Burkhart* also involved an alleged violation of § 1202(a)(1), the predecessor of § 922(g)(1). *See Burkhart*, 545 F.2d at 15; *see also supra* note 124 (noting the relationship between § 922(g)(1) and § 1202(a)(1)). The defendant offered to stipulate his conviction for the lesser of two prior felonies listed on the indictment in order to keep evidence of either conviction from the jury, but the court refused to force the prosecution to accept the stipulation. *See Burkhart*, 545 F.2d at 15. Furthermore, in reliance on *Smith*, the court pointed out that the prosecution was not limited to proving only one prior conviction as part of its case. *See id.* The court's reliance on *Smith* seems misplaced, however, because the court in *Smith* had noted the possibility of prejudice arising from the introduction of more than one conviction in some cases. *See Smith*, 520 F.2d at 548; *see also supra* note 132 (discussing the Eighth Circuit's holding in *Smith*).

138. *See Breitkreutz*, 8 F.3d at 692; United States v. Williams, 612 F.2d 735, 740 (3d Cir. 1979); *Smith*, 520 F.2d at 548.

"seriously undermine the rule that the prosecution has a right to refuse a stipulation."[139]

The federal appeals courts' recognizable discrepancy concerning stipulations in the context of § 922(g)(1) set the stage for resolution by the Supreme Court in *Old Chief*. The Court upheld the prevailing view of the federal courts of appeals, and it also extended their prior holdings and clarified some of their concerns. Among the primary issues resolved in the Court's opinion in *Old Chief* is the interpretation of Rule 403, including an explanation of the ambiguous terms "probative value" and "unfair prejudice" and a determination of the amount of discretion that the rule affords the trial court.[140] Nevertheless, *Old Chief* is anomalous in two respects. First, even though the Court's decision reflects the explicit Rule 403 policy of protecting a defendant from unfair prejudice and the general Rule 102 policy of promoting the search for truth and justice,[141] it has accomplished these goals at a great cost—one that effectively removes the trial court's discretion originally granted under Rule 403.[142] Second, despite clarifying the question of congressional intent under § 922(g)(1),[143] *Old Chief* unfortunately raises further questions concerning prosecutorial discretion and motivation.[144]

By requiring the trial court to force the prosecution to accept a defendant's proposed stipulation, the Supreme Court has contradicted the judicial flexibility built into Rule 403 and has, in effect, bifurcated the rule, as originally presented in the preliminary draft.[145] The Court crafted its own version of Rule 403 through its decision to take away some of the trial judge's broad discretion originally intended by the drafters of the Federal Rules of Evidence.[146] Even though the Court recognized the limited nature of its holding,[147] it nevertheless formulated a "general rule [applying]

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139. *Breitkreutz*, 8 F.3d at 692.

140. *See infra* notes 159-239 and accompanying text.

141. *See supra* note 4 (discussing the goals of the Federal Rules of Evidence).

142. *See infra* notes 145-58 and accompanying text.

143. *See infra* notes 240-53 and accompanying text.

144. *See infra* notes 254-70 and accompanying text.

145. *See Preliminary Draft of Proposed Rules of Evidence*, *supra* note 108, at 225; *see also* 22 WRIGHT & GRAHAM, *supra* note 12, § 5211, at 244-45 n.1 (quoting the bifurcation of Rule 403 in the Preliminary Draft of the Evidence Rules); *supra* notes 108-12 and accompanying text (discussing the bifurcation as originally drafted).

146. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5211, at 245-46 n.9; *see also* Mengler, *supra* note 5, at 441 (noting Rule 403's conferral of broad power to trial judges).

147. *See Old Chief*, 117 S. Ct. at 651 n.7 ("[O]ur holding is limited to cases involving proof of felon status."); *see also supra* text accompanying notes 66-68 (discussing the

when proof of convict status is at issue."[148] The Court has thereby directly undermined the role the drafters intended for the judiciary to play in reviewing decisions under Rule 403, for courts should not "become rulemakers themselves by establishing binding precedents that narrow or focus the Federal Rules' general language. Appellate fine-tuning . . . is inconsistent with the drafters' purpose."[149]

While the Court's decision may have achieved individualized justice, it has sacrificed the flexibility essential to the workings of Rule 403 in order to arrive at the result.[150] Rule 403 grants the trial court "the flexibility to decide that the government already has aimed enough arrows in the criminal defendant's direction . . . and that no more will be tolerated."[151] However, the Court has effectively removed this flexibility, thus creating a precise, controlling standard.[152] In doing so, the Court has taken on a preemptive role by creating a new rule that will apply in "limited" circumstances.[153]

Although the Court's decision worked in opposition to the flexibility goal of Rule 403, its decision nevertheless promoted some of the general policies underlying the Federal Rules of Evidence and, specifically, Rule 403.[154] In the context of cases involving the felon-in-possession statute, the opinion can be seen as an attempt to advance the general policy of promoting the search for truth and justice.[155] The Court's interpretation of the essential terms of Rule 403 illustrates an effort to achieve fairness in the judicial process.[156] Furthermore, by limiting the amount of judicial discretion, the new

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Court's limitation on its holding).

148. *Old Chief*, 117 S. Ct. at 656.

149. Mengler, *supra* note 5, at 458 (footnote omitted). Professor Mengler further notes that the drafters also intended for the generality and flexibility of the Federal Rules to continue, based in part on the idea that "each trial is unique and calls for discrete resolution" and individualized justice. *Id.* at 457-58; *see also* 22 WRIGHT & GRAHAM, *supra* note 12, § 5215, at 279 (asserting that courts need not strictly adhere to precedent established under Rule 403).

150. *See* Mengler, *supra* note 5, at 458.

151. *Id.* at 446. Furthermore, Rule 403 permits the trial judge to allocate fairly the prejudice between the parties in a criminal trial. *See id.*

152. *See Old Chief*, 117 S. Ct. at 656. *But see* Mengler, *supra* note 5, at 415 (proclaiming that the drafters intended flexible principles, not rigid rules with mechanical application); 2 WEINSTEIN & BERGER, *supra* note 106, § 403App.100[2], at 403App.-6 (arguing that Rule 403 acts as a guide to courts in the absence of fixed standards).

153. *See Old Chief*, 117 S. Ct. at 651 n.7.

154. *See supra* notes 113-21 and accompanying text (discussing the policies of Rule 403).

155. *See* FED. R. EVID. 102; Lewis, *supra* note 61, at 290-91. By stating the general policies of the Federal Rules of Evidence, Rule 102 applies to Rule 403. *See* FED. R. EVID. 102; *supra* note 4 (quoting FED. R. EVID. 102).

156. *See* FED. R. EVID. 102.

interpretation may also further the policy of lowering the risk of juror error,[157] but only when the facts do not vary substantially from the ones in *Old Chief*.[158]

However, the majority's narrow reading of Rule 403 is consistent with the prevailing interpretations of the key terms of the rule. "Probative value" has numerous interpretations due to the ambiguity inherent in the phrase.[159] For example, the Advisory Committee's Note to Rule 403 associates probative value with the need for the evidence,[160] and some commentators have asserted that probative value may also address the dual concerns of reliability and accuracy in fact-finding.[161] In contrast, another view of probative value claims

157. *See* 1 WIGMORE, *supra* note 118, § 10a, at 684; Dolan, *supra* note 10, at 226. *But see Old Chief*, 117 S. Ct. at 659 (O'Connor, J., dissenting) (noting that juror confusion may result from withholding the details of a defendant's prior conviction); Daniel C. Richman, Old Chief v. United States: *Stipulating away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 941 (1997) (describing the Court's "futile effort" to minimize the unfair prejudice created in § 922(g)(1) cases); *supra* note 97 and accompanying text (discussing Justice O'Connor's view of the effect of withholding evidence of the name and nature of the prior felony offense). Professor Richman asserts that the rule established by the Court in *Old Chief* does not mean that juries will no longer consider the nature of a defendant's felony. *See* Richman, *supra*, at 941. Rather, he argues that the rule "merely deprives them of accurate information about it. The juror who gives any thought to the nature of a defendant's underlying felony can only speculate . . . [,] and that will simply be driven underground by instructions that she not consider the defendant's prior record." *Id.* (footnote omitted); *see also* Saltzburg, *supra* note 2, at 1019 (noting that because jurors bring certain expectations with them to the courtroom, they may punish a party who deprives them of specific evidence by making a negative judgment against the party). Even though the majority cites Professor Saltzburg's article, it dismisses his argument by claiming that the general rule allowing broad prosecutorial discretion does not apply in the context of a case in which a defendant's legal status is at issue. *See Old Chief*, 117 S. Ct. at 654.

158. While the Court noted that the exclusion of the name of a prior conviction may apply outside of the context of a formal admission, *see Old Chief*, 117 S. Ct. at 655 n.10, it was careful to limit its holding to cases involving the proof of felon status, *see id.* at 651 n.7.

159. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5214, at 269; *see also* DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF ADMISSIBILITY § 1.9.2, at 1:55 (Richard D. Friedman ed., 1998) (noting that the probative value of the evidence incorporates the idea that the jury will use the evidence appropriately).

160. *See* FED. R. EVID. 403 advisory committee's note (stating that courts should balance "the probative value of and need for the evidence" with the potential harm of admitting the evidence).

161. *See* Gold, *supra* note 107, at 74; Lewis, *supra* note 61, at 315. Professor Gold further describes the appropriate measure of probative value under Rule 403 as including considerations of "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, *supra* note 107, at 79.

that it functions as a more relative concept that incorporates notions of both relevancy and logical distance.[162] Even though some judges may think in mathematical or ethical terms in trying to determine what value a piece of evidence has, the phrase commonly refers to economic value, or "value in the relative sense, as being determined by supply and demand."[163] In other words, the crux of the phrase centers on a determination of the need for the evidence.[164]

Another explanation of the concept of probative value distinguishes between considering the availability of alternative evidence in the actual balancing process and in deciding whether to exclude the evidence after the completion of the process.[165] Regardless, both of these factors fall under the general heading of probative value, especially when interpreted as meaning "need."[166] Furthermore, when an opponent does not plan to contradict the fact for which the evidence is offered or volunteers to stipulate the fact, the court may believe the opponent has less need for the evidence.[167] Thus, the court may also view admission of the evidence as a waste of time because other means of proof are available.[168]

The Court in *Old Chief* adopted a contextual approach to probative value.[169] In accordance with commentators' views,[170]

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162. *See* Dolan, *supra* note 10, at 233-34. In addition, Professor Dolan defines probative value as the "measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case." *Id.* at 233.

163. 22 WRIGHT & GRAHAM, *supra* note 12, § 5214, at 269.

164. *See* 22 *id.*; *see also* Gold, *supra* note 107, at 74 (noting that the predominant definition of probative value indicates that "it is a product of the logical implications of evidence that can be totaled almost like a column of numbers"). In order to determine the need, or probative value, the trial judge must consider the evidence being offered in the larger context of all evidence presented in the case. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5214, at 273.

165. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5222, at 311.

166. *See* 22 *id.* However, Professors Wright and Graham are careful to point out that the hypertechnical distinction may be too difficult to enforce in practice under Rule 403. *See* 22 *id.*

167. *See* 22 *id.* at 313.

168. *See* 22 *id.*; *see also* Dolan, *supra* note 10, at 250-51 (noting that the availability of other probative evidence of the same fact is a relevant factor to aid in determining whether to exclude prejudicial evidence). Professor Dolan also recognizes the probative value of a stipulation. *See* Dolan, *supra* note 10, at 252.

169. *See Old Chief*, 117 S. Ct. at 652.

170. *See, e.g.*, Gold, *supra* note 107, at 75. Professor Gold, after succinctly describing the value of evidence as "its usefulness in the context within which it is offered," *id.* at 74, explains that the context encompasses "[a]mong other things, the presence of other evidence that establishes the disputed fact, the relative strength of the offeror's case, the difficulty of proving the fact in question, the importance of the fact in the offeror's case, and the evidence offered by the opponent," *id.* at 75 (footnotes omitted); *see also supra*

Justice Souter, writing for the majority, described the probative value of an item offered for evidence in terms of the availability of alternative means of proof.[171] However, Justice Souter's reference to the Advisory Committee's Note to Rule 404(b) is somewhat ironic. He noted that the Advisory Committee's Note provided " '[n]o mechanical solution' " when the evidence in question supported an element of the offense, but, if admitted, would also constitute illegitimate character evidence.[172] In such cases, a " 'determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision[s] of this kind under [Rule] 403.' "[173] Justice Souter therefore concluded that the trial judge's discretionary judgment turns not only on an assessment of the probative value and the danger of unfair prejudice that a piece of evidence presents, but also on putting the outcome of that evaluation beside other similar evaluations of the alternative evidence.[174] Thus, while he noted the absence of a mechanical solution under Rule 403, Justice Souter seemingly contradicted himself by creating one through the establishment of a new general rule in the majority's holding.[175]

After addressing the probative value of the stipulation according to the context of the case, the Court essentially characterized "unfair prejudice" in terms of emotion.[176] The Court defined "unfair prejudice" as the capability of relevant evidence to draw the factfinder into determining guilt on a basis that differs from the proof specific to the charged offense.[177] Additionally, it quoted the explanation of "unfair prejudice" in the Advisory Committee's Note,

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note 61 and accompanying text (citing other authority advocating a contextual approach to an assessment of probative value under Rule 403).

171. *See Old Chief*, 117 S. Ct. at 652.

172. *Id.* (quoting FED. R. EVID. 404(b) advisory committee's note).

173. *Id.* (misquoting FED. R. EVID. 404(b) advisory committee's note, substituting "facts" for "factors"). *But see id.* at 657 (O'Connor, J., dissenting) (noting that Rule 404(b) does not apply); *infra* note 180 (discussing Justice O'Connor's dissenting view that Rule 404(b) does not apply to *Old Chief*).

174. *See Old Chief*, 117 S. Ct. at 652; 1 MCCORMICK, *supra* note 63, at 782 & n.41; 22 WRIGHT & GRAHAM, *supra* note 12, § 5250, at 546-47.

175. *See Old Chief*, 117 S. Ct. at 655-56.

176. *See id.* at 650-52. After determining the initial relevancy and admissibility of the prior-conviction evidence under Rules 401 and 402, the Court moved into a discussion of "unfair prejudice," because Old Chief's argument centered around the phrase. *See id.* at 649-50. Although the Court immediately began the balancing process, it later defined "probative value" in terms of need and in the context of available alternatives. *See id.* at 651-52; *supra* notes 58-65 and accompanying text (discussing the Court's analysis).

177. *See Old Chief*, 117 S. Ct. at 650.

which describes it as the " 'undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' "[178] The Court recognized the existence of such an "improper basis" in *Old Chief*,[179] under which it feared that the jury generalized the defendant's earlier conviction into bad character evidence, thus engaging in a chain of bad character reasoning or possibly deciding to punish him on the basis of his prior conviction.[180]

Although the Court found that the danger of unfair prejudice outweighed the probative value of the evidence, it failed to consider other aspects of unfair prejudice. While the Court in *Old Chief* followed the Advisory Committee's Note by recognizing emotion as a basis for unfair prejudice, it may be that "[e]quating all emotion with prejudice is erroneous."[181] Because emotion may promote accuracy in fact-finding by incorporating the human factor into the legal reasoning process, it helps to effectuate the real merit behind the jury system.[182] In contrast to the Court's approach, unfair prejudice can be measured as well by considering "the extent to which an inferential error will detract from the goal of accurate fact-

178. *Id.* (quoting FED. R. EVID. 403 advisory committee's note). Unlike the vague reference to "need" given in association with probative value, the Advisory Committee's Note to Rule 403 actually defines "unfair prejudice." *See* FED. R. EVID. 403 advisory committee's note.

179. *See Old Chief*, 117 S. Ct. at 650 (recognizing the "improper grounds" as "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged").

180. *See id.* The Court further discussed the dangers of "propensity evidence" and the serious likelihood that it will unfairly prejudice a criminal defendant. *See id.* (citing United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982)). The Court thus concluded that propensity is an "improper basis" for conviction and that prior-conviction evidence falls under Rule 403 analysis for a determination of relative probative value and prejudicial risk of abuse as propensity evidence. *See id.* at 650-51. However, the dissent claimed that Rule 404(b) does not preclude admission of prior-conviction evidence because under § 922(g)(1), the prosecution does not offer evidence of a prior felony conviction to prove a defendant's bad character or to " 'show action in conformity therewith.' " *Id.* at 657 (O'Connor, J., dissenting) (quoting FED. R. EVID. 404(b)). Instead, the prosecution merely introduces the evidence of a prior felony conviction as direct proof of an essential element of the charged offense. *See id.* (O'Connor, J., dissenting). Thus, Justice O'Connor argued that the majority "misread[] the Rules of Evidence and defie[d] common sense." *Id.* at 657-58 (O'Connor, J., dissenting).

181. Gold, *supra* note 107, at 79.

182. *See id.*; *see also* Gold, *supra* note 7, at 503-04 (noting the same considerations in a previous article and claiming that the detection of unfair prejudice directs emphasis to the "end product of the prejudice"). Professor Gold also reasons that if probative value pertains to the ability of evidence to yield a judgment grounded in correct fact-finding, unfair prejudice relates to the ability of evidence to undermine this particular aim. *See id.* *See generally* 22 WRIGHT & GRAHAM, *supra* note 12, § 5215, at 275 (discussing the Advisory Committee's Note and its unfortunate reference to emotion, since fairness, as a goal of the rule, does not eliminate all reliance on feeling).

finding, and the likelihood the jury will commit such an error."[183] Furthermore, in the context of Rule 403, prejudice may not merely refer to an appeal to emotion.[184] Rather, prejudice may occur when facts cause the jurors to base their decision on feelings, such as hostility or sympathy, and to disregard the probative worth of the evidence presented.[185]

Providing even more insight into the workings of unfair prejudice, the Advisory Committee's Note to Rule 403 also suggests that the likely effectiveness or ineffectiveness of a limiting instruction to the jury is another important consideration in determining whether to exclude evidence on the basis of undue prejudice.[186] In her dissent in *Old Chief*, Justice O'Connor stated that an effective limiting instruction mitigates "[a]ny incremental harm resulting from proving the name or the basic nature of the prior felony."[187] In addition, Justice O'Connor further asserted that efficient limiting

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183. Gold, *supra* note 107, at 84. Also, like probative value, the danger of unfair prejudice ought to be weighed according to the context in which the evidence is proffered. *See id.*; *see also* LEONARD, *supra* note 159, § 1.9.2, at 1:55-56 (quoting Gold, *supra* note 107, at 73).

184. *See* 1 MCCORMICK, *supra* note 63, at 780; 22 WRIGHT & GRAHAM, *supra* note 12, § 5215, at 275. Professors Wright and Graham elaborate on the meaning of "prejudice" by suggesting that courts refer to Wigmore's definition of "undue prejudice":

> "Whenever the admission of a particular class of relevant evidential facts would (1) be likely to stimulate an excessive emotion or to awaken a fixed prejudice as to a particular subject or person involved in the issues, (2) and thus dominate the mind of the tribunal and prevent a rational determination of the truth, (3) and where the evidence having this tendency is not necessary to the ascertainment of the truth...."

22 *id.* at 278 (quoting JOHN HENRY WIGMORE, CODE OF EVIDENCE 355 (3d ed. 1942)); *see also* Dolan, *supra* note 10, at 238 (asserting that prejudice occurs when evidence appeals "to irrationality or emotion").

185. *See* 1 MCCORMICK, *supra* note 63, at 780. Professor McCormick also noted that evidence of prior crimes "may lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as would otherwise be the case." 1 *Id.*

186. *See* FED. R. EVID. 403 advisory committee's note; *see also* 1 SALTZBURG & MARTIN, *supra* note 113, at 160 (stating that in balancing under Rule 403, the trial judge ought to take into account whether a limiting instruction offers adequate protection against the danger of unfair prejudice if the evidence is admitted); 22 WRIGHT & GRAHAM, *supra* note 12, § 5222, at 311 (restating that the trial court may consider the effectiveness of a limiting instruction when determining unfair prejudice).

187. *Old Chief*, 117 S. Ct. at 658 (O'Connor, J., dissenting). Justice O'Connor relied on Federal Rule of Evidence 105, which permits restricting evidence and instructing the jury accordingly when evidence is admissible for one reason but inadmissible for another reason. *See id.* (O'Connor, J., dissenting); *see also* FED. R. EVID. 105 ("When evidence which is admissible ... for one purpose but not admissible ... for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

instructions cure or alleviate the prejudice created by admitting detailed evidence of a defendant's prior conviction.[188] Although Justice O'Connor did not question the jury's adherence to limiting instructions, she ignored the questionable effectiveness of a limiting instruction under Rule 403.[189] Thus, Justice O'Connor did not recognize that while passions may not be running high in a § 922(g)(1) case, "[e]ven when passions are low, not everyone can follow jury instructions."[190] Nevertheless, in spite of their own awareness of the shortcomings of limiting instructions,[191] a great number of courts use cautionary instructions as "talismans for the solution of any possible prejudice problem."[192] Justice O'Connor's argument for the use of limiting instructions implies that they are a magical solution to a material problem, and in doing so, she fails to justify or to remedy the likelihood of unfair prejudice that will result from admitting evidence on the nature of a prior conviction.

Although the Court's analysis did not expressly recognize all of these differing views of unfair prejudice, its failure to do so does not detract from its opinion. All of these definitions entail emotion to some degree, and thus in one way or another recognize the quintessential role of emotion in the exercise of Rule 403. To ask the members of the jury to ignore their emotions in the process of rendering a verdict defies human nature.[193] While the jury's emotions

188. *See Old Chief*, 117 S. Ct. at 658 (O'Connor, J., dissenting). The majority did not address whether a limiting instruction effectively mitigates the risk of unfair prejudice, despite the reference to limiting instructions in the Advisory Committee's Note. *See* FED R. EVID. 403 advisory committee's note (stating that the likely effectiveness or ineffectiveness of a limiting instruction is a consideration for the court under Rule 403); *see also* 1 SALTZBURG & MARTIN, *supra* note 113, at 160 (noting that the possibility of a limiting instruction is a factor in the balancing test under Rule 403).

189. *See Old Chief*, 117 S. Ct. at 658 (O'Connor, J., dissenting); *see also* Richman, *supra* note 157, at 948 n.33 (noting that the Court's decision in *Old Chief* illustrates skepticism of the effectiveness of limiting instructions).

190. Dolan, *supra* note 10, at 249. Professor Dolan notes that in a case involving Rule 403, the court determines that an item offered for evidence conveys "negative connotations," and should therefore "immediately raise heightened suspicion about the evidence, particularly if the prohibited effect is unfair prejudice." *Id.* at 248-49.

191. *See id.* Professor Dolan characterizes the problematic effects of limiting instructions by noting that despite the need for heightened sensitivity by the court under issues involving Rule 403, many courts assume that juries comply with limiting instructions, while law professors and others simply wink at the fiction. *See id.* at 248; *see also* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction." (citation omitted)).

192. Dolan, *supra* note 10, at 249.

193. *Cf.* 22 WRIGHT & GRAHAM, *supra* note 12, § 5215, at 276-78 (noting that emotion plays a proper role so long as it does not exclude the operation of all logic);

must not be the sole basis for its decision, and the evidence should not unduly incite it,[194] the trial process, which incorporates the jury's role, does not operate devoid of all emotion.[195] Therefore, even though the Court did not note all of the different descriptions of unfair prejudice, its opinion recognized the essence of the phrase.[196]

In her dissent in *Old Chief*, Justice O'Connor pointed to the precise wording of Rule 403 to go beyond the majority's emphasis on the emotional aspect of unfair prejudice.[197] In accordance with the view that prejudice does not equate with the sheer harm done to one party's case,[198] Justice O'Connor countered the majority's holding by noting that all evidence has the tendency to be prejudicial.[199] For this reason, Justice O'Connor asserted, Rule 403 requires that the danger of prejudice be "unfair," so that even though the prosecution's evidence may be prejudicial and thus damage the defendant's case, mere harm does not necessitate excluding the prosecution's relevant evidence.[200] However, even a determination of unfairness would seem to hinge on emotion.[201] Thus, in the limited setting of § 922(g)(1), the majority's reasoning proves more persuasive than

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Dolan, *supra* note 10, at 226-28 (arguing that jurors cannot ignore evidence of prior convictions, and thus human nature requires withholding information).

194. *See* 1 MCCORMICK, *supra* note 63, at 780.

195. The Court noted that members of a jury approach a trial with certain expectations. *See Old Chief*, 117 S. Ct. at 654. While the Court did not specifically refer to any emotional expectations, it noted that the expectations may stem from the totality of the human experience. *See id.* ("[B]eyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be."); *see also* Saltzburg, *supra* note 2, at 1019 (noting that jurors may punish the party who fails to meet their expectations by making negative inferences against that party); *supra* note 157 (discussing Professor Saltzburg's argument and the expectations of jurors).

196. *See Old Chief*, 117 S. Ct. at 650.

197. *See id.* at 656 (O'Connor, J., dissenting).

198. *See* 1 MCCORMICK, *supra* note 63, at 780; *see also* 22 WRIGHT & GRAHAM, *supra* note 12, § 5215, at 274-75 (defining "prejudice" not as harm to the other party's case that occurs due to the "legitimate probative force of the evidence; rather, it refers to the *unfair advantage* that results from the capacity of the evidence to persuade by illegitimate means" (emphasis added)); Dolan, *supra* note 10, at 238 (claiming that prejudice does not refer to all evidence that proves detrimental to the case of the party seeking to preclude the admission of the evidence).

199. *See Old Chief*, 117 S. Ct. at 656 (O'Connor, J., dissenting) (" 'Virtually all evidence is prejudicial or it isn't material. The prejudice must be "unfair." ' " (quoting Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977))).

200. *See id.* (O'Connor, J., dissenting).

201. *See, e.g.*, Dolan, *supra* note 210, at 236-37 (noting that Rule 403 entails numerous subjective decisions); *see also infra* note 211 (quoting Professor Dolan's view on the subjective nature of Rule 403).

Justice O'Connor's claim that the prejudicial details of a prior conviction carried no unfairness. The prosecution offered the record of Old Chief's prior conviction for assault resulting in serious bodily injury as direct proof of an essential element under § 922(g)(1),[202] and while Justice O'Connor admitted the potential prejudicial nature of this evidence, she nevertheless refused to view its admissibility as unfair.[203]

While the *Old Chief* Court did not define "substantially outweighed,"[204] the term has various interpretations. For example, one view proposes that the requirement shows the drafters' realization of the difficulty, and often the impossibility, of confidently determining that the "potential for probative value outweighs the potential for unfair prejudice, or vice versa."[205] The directive language also makes evident that the exclusion of evidence is an extreme solution to be arrived at after considering whether other means may adequately diminish the danger of prejudice.[206] In contrast, a more limited approach to the phrase "substantially outweighed" suggests that because Rule 403 entails numerous decisions based on the discretion of the trial judge, the words represent "little more than gentle admonitions" to the trial judge.[207] Furthermore, the requirement affects the discretion of the trial court by creating a condition precedent—that the danger outweighs the value—before the discretion to exclude even exists.[208] The words

202. *See Old Chief*, 117 S. Ct. at 656 (O'Connor, J., dissenting).

203. *See id.* (O'Connor, J., dissenting); *see also* 22 WRIGHT & GRAHAM, *supra* note 12, § 5215, at 275 (noting that it is "somewhat ironic that 'fairness'—a concept dripping with emotive content—should be invoked to bar other forms of sentiment"). Professors Wright and Graham further assert that it would be "unfortunate indeed if Rule 403 is to be based on the flawed conception of justice as an affair of the head and not of the heart. Most citizens would be appalled to discover that ... 'human feeling and sentiment' are out of place in the courtroom." 22 *id.* (footnote omitted). They define fairness not as a concept that pits emotion against reason, but rather as one that joins intellect and emotion in order to "weed[] out inhuman logic and infamous sentiments." 22 *id.*

204. Perhaps the Court failed to address the meaning of the term because the Advisory Committee's Note offers no explanation. *See* FED. R. EVID. 403 advisory committee's note.

205. Gold, *supra* note 107, at 94. Professor Gold further notes that "the word 'substantially' does not relieve the court of the need to search for unfair prejudice and does not resolve all hard cases in favor of admissibility ... [but] merely confirms that the burden of proof is on the person objecting to the evidence." *Id.* Nevertheless, Professor Gold submits that under this interpretation, Rule 403 favors admissibility because whether the disputed evidence will necessarily prove harmful is not evident. *See id.*

206. *See* 1 WIGMORE, *supra* note 118, § 10a, at 680.

207. Dolan, *supra* note 10, at 236-37. Professor Dolan additionally notes that the phrase fails to establish any reliable standards for review. *See id.* at 237.

208. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5221, at 309-10.

then necessitate a "significant tipping of the scales" before the judge can actually exercise discretion to exclude the prejudicial evidence.[209] While the Court's extensive analysis under Rule 403 illustrates the difficulty of determining whether the risk of unfair prejudice substantially outweighs the probative value of the evidence, its decision suggests the extreme solution of exclusion.[210]

The discrepancy between the majority and dissenting opinions concerning the terms of Rule 403 illustrates the unavoidably subjective character of the rule that arises from its grant of discretion to the trial judge.[211] The language of Rule 403 implicitly recognizes the prejudicial quality of most evidence by requiring that the danger of *unfair* prejudice be *substantially outweighed* by the probative value of the evidence.[212] Unfairness may arise when evidence has the potential to cause the jury to rely on "something other than the established propositions in the case."[213] While Rule 403 accords the trial judge much latitude in weighing the probative value of the evidence against the danger of unfair prejudice, it does not rule out abuse of the broad allowance of discretion.[214] Thus, the appellate court may reverse the trial judge's ruling when the trial judge abuses this discretion or refuses to exercise it.[215] Despite the temptation for

209. 22 *id.*

210. *See Old Chief*, 117 S. Ct. at 655.

211. *See* Dolan, *supra* note 10, at 236-37 ("The prejudice rule involves so many subjective decisions by the judge that both tests [whether the probative value outweighs or substantially outweighs the risk of unfair prejudice] represent little more than gentle admonitions to trial courts rather than firm standards of review.").

212. *See* 2 WEINSTEIN & BERGER, *supra* note 106, § 403.04[1][a], at 30-31 ("Prejudice alone is not sufficient to warrant exclusion under Rule 403. Virtually all evidence is prejudicial to one party or another. To justify exclusion under Rule 403, the prejudice must be *unfair*." (emphasis added) (footnote omitted)).

213. 2 *id.* § 403.04[1][b], at 33. The authors identify evidence that incites the "instinct to punish" as an example. 2 *id.* § 403.04[1][c], at 36, 38.

214. *See Old Chief*, 117 S. Ct. at 647 n.1 (citing *United States v. Abel*, 469 U.S. 45, 54-55 (1984), as establishing the abuse of discretion standard for review of evidentiary rulings); 1 MCCORMICK, *supra* note 63, at 783; 1 WIGMORE, *supra* note 118, § 10a, at 680. The appellate court will not reverse the trial court unless it finds an abuse of discretion. *See* 2 WEINSTEIN & BERGER, *supra* note 106, § 403.03, at 27-28; 1 WIGMORE, *supra* note 118, § 10a, at 681. Also, the discretion applies to the evaluation of probative value and unfair prejudice, to the balancing of these aspects, and to the court's actual decision to exclude or to admit the evidence based on its analysis. *See* 1 WIGMORE, *supra* note 118, § 10a, at 682. However, "[c]onstitutional considerations and general considerations of policy suggest that exclusion of evidence on the ground of undue prejudice must be more cautiously and rarely done." 1 *id.* at 682-83 (footnote omitted).

215. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5212, at 252. Furthermore, because any conferral of discretion brings a restricted immunity from appellate review, the issue on review goes to the degree of discretion granted under Rule 403. *See* 22 *id.* Moreover, Professors Wright and Graham view discretion as "a tool for change in legal rules" and

the reviewing court to indulge in hindsight, the reviewing court should analyze the lower court's decision from the perspective of the lower court at the time it ruled.[216] However, even though the judgment of whether the evidence's probative value substantially outweighs its unfair prejudice occurs at the trial court level, the subjectivity and discretionary nature of the rule make engaging in hindsight seem inevitable.

Against the somewhat unsettled background of Rule 403, the Court in *Old Chief* determined the scope of the trial judge's discretion when a defendant offers to stipulate his status as a prior felon under § 922(g)(1).[217] As a general rule, the prosecution has the choice of what admissible evidence it will use to prove its case.[218] Thus, a criminal defendant cannot use a stipulation as a means to deny the prosecution the complete power of its evidence.[219] Reasoning that the trial judge's exclusion of the evidence and acceptance of the stipulation will diminish their case, prosecutors often insist that they have the right to take advantage of the full evidentiary weight of the admissible evidence.[220] They further contend that they do not have to settle for less by accepting a mere stipulation that is unlikely to arouse any emotion or feeling in the jury.[221]

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suggest "judicial creativity and the need for choice where rules cannot account for all of the relevant factors." 22 *id.* at 255 (footnote omitted). While some commentators assert that the trial judge's decision under Rule 403 is essentially unreviewable and appellate courts defer greatly to the trial judge's ruling, reversal for abuse of discretion is not unknown. *See* 22 *id.* § 5224, at 323.

216. *See Old Chief*, 117 S. Ct. at 651 n.6; *cf.* Mengler, *supra* note 5, at 415 (asserting that the task of the reviewing court is "solely to check the overall fairness of a trial, not to fine-tune the Federal Rules, and in the process, undermine their flexibility through binding precedents").

217. *See Old Chief*, 117 S. Ct. at 650.

218. *See* Parr v. United States, 255 F.2d 86, 88 (5th Cir. 1958).

219. *See id.* A party has the right to paint a picture of the happenings that it depends on to develop its case, and a denial of the right by way of substituting a stipulation may adversely affect the potential strength of the evidence. *See id.*; *see also Old Chief*, 117 S. Ct. at 653 (quoting *Parr* in its recognition of the standard rule that a criminal defendant cannot use a stipulation to circumvent the evidentiary impact of the prosecution's case); *id.* at 658-59 (O'Connor, J., dissenting) (discussing the Court's disavowal of the general rule that the prosecution in a criminal case may choose how to prove its case); *supra* notes 95-105 and accompanying text (reviewing Justice O'Connor's arguments for adhering to the general rule that permits prosecutors broad prosecutorial discretion in proving their case).

220. *See* Edward J. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L.J. 341, 375 (1991).

221. *See id.*

While some federal courts support the prosecution's argument and do not force prosecutors to accept defendants' stipulations,[222] the justifications behind the rulings are not readily apparent.[223] Moreover, when the defense volunteers to make a complete and unqualified stipulation to a disputed issue, "there is an 'utter absence of a legitimate state interest' justifying the rejection of the offer. The introduction of evidence is a means to the end. The only legitimate purpose for introducing evidence is to prove the ultimate, historical propositions disputed between the parties."[224] Furthermore, trial courts should usually accept offers to stipulate, especially if the stipulations will depreciate the prejudicial nature of the evidence.[225]

Prior to *Old Chief*, however, few judges would refuse the prosecution the opportunity to tell the jury, either by way of proof or stipulation, that a defendant was a prior felon when a defendant's felony status constituted an essential element of the crime charged.[226] Due to the Court's ruling in *Old Chief*, though, trial judges no longer have the discretion to decide whether the prosecution must accept a defendant's offer to stipulate prior felon status in cases under § 922(g)(1).[227] The Court in *Old Chief* recognized that the defendant's offer to stipulate constituted a proposal to admit the essential element of a prior felony conviction,[228] and consequently the

222. *See supra* notes 123, 131-39 and accompanying text.

223. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5194, at 198-99. For example, due to the general rule that the prosecution does not have to accept a defendant's stipulation if doing so would harm the effectiveness of its case, a number of cases involving stipulations offered by the defense may illustrate only that the proposed stipulation was inadequate. *See* 22 *id.* at 199. Although the stipulations themselves may be lacking in some form, the court should view the defendant's proffered stipulation as one factor in the balancing process under Rule 403, in which the court may, in the exercise of its discretion, exclude relevant evidence. *See* 22 *id.* Under Rule 403, if the probative value of the evidence substantially outweighs the danger of unfair prejudice, the admission of the evidence may be appropriate in some circumstances, even if the litigant against whom the evidence is offered agreed to accept the stipulation, because the stipulation may not carry equal probative force. *See* 2 WEINSTEIN & BERGER, *supra* note 106, § 403.04[3], at 44.

224. Imwinkelried, *supra* note 220, at 376 (quoting Marshall v. Lonberger, 459 U.S. 422, 447 (1983) (Blackmun, J., dissenting)); *see also* Dolan, *supra* note 10, at 252 (noting that a stipulation ought to be viewed as equivalent to other evidence and thus a litigant ought not to be permitted to introduce prejudicial evidence on a matter not disputed).

225. *See* 2 WEINSTEIN & BERGER, *supra* note 106, § 403.04[3], at 45.

226. *See* Saltzburg, *supra* note 130, at 33.

227. *See Old Chief*, 117 S. Ct. at 655. Thus, if trial judges refuse to force the prosecution to accept a defendant's stipulation of prior felony status under § 922(g)(1), they will have abused their generally broad discretion under Rule 403. *See id.* at 655-56; *see also supra* note 128 (discussing the distinction between a stipulation to the entire prior-conviction element and one to the fact of felony status).

228. *See Old Chief*, 117 S. Ct. at 653.

stipulation was not only "good evidence[,] ... but seemingly conclusive evidence of the element."[229]

Justice O'Connor intimated that the trial court should retain its broad discretion under Rule 403, and thus disagreed with the majority's view that a stipulation constituted conclusive proof.[230] However, her argument failed to clarify specifically whether she meant a stipulation to the entire element of prior conviction or to the fact of prior conviction. The distinction is crucial,[231] and her references throughout her dissent confuse the issue.[232] Indeed, as a consequence of the heavy burden of proof borne by the prosecution in a criminal trial, the prosecution must have considerable latitude to offer its choice of evidence to prove its case,[233] but *Old Chief* does not remove the entire element of a prior felony conviction from the jury's consideration.[234] Rather, it only precludes the jury from learning the details of a defendant's prior conviction.[235] In spite of the wide margin of choice Justice O'Connor strongly advocated and the serious concerns she raised in dissent, the majority's holding in effect denies the prosecution any option in choosing evidence to prove prior felony conviction status in cases under § 922(g)(1) when the defendant offers to stipulate the same.

Because of the potential for abuse, appellate courts often urge trial judges to record the rationale behind their decisions to exclude

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229. *Id.* (citation omitted). The Court referred to Federal Rule of Evidence 801(d)(2)(A) to support its conclusion that the proffered stipulation was competent evidence, not hearsay. *See id.* Rule 801(d)(2)(A) excludes from the definition of hearsay a statement that is offered against a party if it is the statement of that party. *See* FED R. EVID. 801(d)(2)(A) (amended 1997).

230. *See Old Chief*, 117 S. Ct. at 656, 659 (O'Connor, J., dissenting).

231. *See supra* notes 128-30 and accompanying text (discussing the distinction between a stipulation to the entire prior-conviction element and one to the fact of felony status and reviewing cases that relied on that distinction).

232. *See Old Chief*, 117 S. Ct. at 656, 659 (O'Connor, J., dissenting). Early in her dissent, Justice O'Connor stated that she did not agree with the majority's decision that a defendant charged under § 922(g)(1) can require the prosecution "to accept his concession to the prior conviction *element* of that offense." *Id.* at 656 (O'Connor, J., dissenting) (emphasis added). She later concluded from her discussion of the prosecution's constitutionally required burden of proof beyond a reasonable doubt that "a defendant's stipulation to an element of an offense does not remove that element from the jury's consideration." *Id.* at 659 (O'Connor, J., dissenting); *see also supra* notes 98-102 and accompanying text (discussing Justice O'Connor's dissent).

233. *See Old Chief*, 117 S. Ct. at 659-60 (O'Connor, J., dissenting).

234. *See id.* at 647, 655-56.

235. *See id.* at 655 ("The issue is not whether concrete details of the prior crime should come to the jurors' attention but whether the name or general character of that crime is to be disclosed."); *see also supra* note 128 (discussing the distinction between a stipulation to the entire prior-conviction element and one to the fact of felony status).

evidence under Rule 403.[236] However, the subjective nature and flexibility afforded in the exercise of discretion do not seem conducive to recordation. Trial judges must have considerable discretion to act in balancing evidence under Rule 403[237] because they are the ones who see the action firsthand.[238] Therefore, even if a trial judge recorded any of the possibly numerous reasons behind the discretionary determination, the written word cannot convey to the appellate court every detail of the trial or the richness of the context in which the decision took place. The trial court in *Old Chief* neither applied Rule 403 nor wrote an opinion, and thus the reviewing courts had no record upon which to base their analysis of the lower court's procedure. The Supreme Court's ruling, however, obviates the need for the trial court to explain its rationale.[239] Because the trial court no longer has the discretionary authority to exclude the name and nature of a defendant's prior conviction in § 922(g)(1) cases, it need not worry about the discernment of its reasoning.

In recognizing the name and nature of the defendant's prior conviction as inadmissible,[240] *Old Chief* bolsters the scant legislative history of § 922(g). The statutory language creates a broad, general category of persons who have "been convicted in any court of, [sic] a crime punishable by imprisonment for a term exceeding one year."[241] However, Congress specifically excluded certain crimes from this general category.[242] Congress's main concern in enacting § 922(g) was "to keep firearms out of the hands of criminals."[243] Furthermore,

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236. *See* 1 MCCORMICK, *supra* note 63, at 783-84; 2 WEINSTEIN & BERGER, *supra* note 106, § 403.03, at 28; 1 WIGMORE, *supra* note 118, § 10a, at 685. Recordation may help fight assertions that the trial court acted arbitrarily in its exercise of discretion under Rule 403. However, those who advocate the grant of broad discretion to the trial judge claim that the decisions under Rule 403 entail numerous indescribable and subjective elements. *See* 1 WIGMORE, *supra* note 118, § 10a, at 685.

237. *See* United States v. Abel, 469 U.S. 45, 54 (1984) (stating that the trial judge "is accorded a wide discretion" in assessing admissibility under Rules 401 and 403).

238. *See Old Chief*, 117 S. Ct. at 651 n.6. The Court noted the importance of reviewing the trial court's ruling from the perspective of when the trial court had to make the evidentiary ruling and "not indulg[ing] in review by hindsight." *Id.*

239. The Court did not expressly state that trial courts should or should not record their reasoning, but the Court's holding makes the recordation irrelevant because it effectively removed the trial court's discretion by creating a general rule. *See id.* at 655-56.

240. *See id.* at 653.

241. 18 U.S.C. § 922(g)(1) (1994).

242. *See id.* § 921(a)(20); *see also supra* note 28 (quoting § 921(a)(20), which excludes certain crimes from the purview of § 922(g)(1)).

243. H.R. REP. NO. 99-495, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1329. Another concern was the impact of the statute as enforced against sportsmen and firearm owners and dealers. *See id.*

courts have also affirmed that Congress intended to prohibit firearm possession by felons,[244] or persons it considers unreliable.[245]

Given that the Court was operating within such a broad framework, it had considerable leeway in interpreting the general statutory language of § 922(g)(1). The Court appropriately recognized that the specific language of § 922(g)(1) reveals no express congressional concern about the name or the nature of the prior felony conviction, other than the bare minimum required under the broad classification.[246] Therefore, by placing Old Chief in the general category of prior felons as called for under the statute, his proposed stipulation satisfied the requisite element.[247] Thus, the stipulation rendered the specific name and the exact nature of his prior felony conviction irrelevant under the statute.[248]

While Justice O'Connor disagreed with the majority's interpretation of the statutory classification, her argument unnecessarily went beyond the plain language of the statute.[249] Upon close inspection, Justice O'Connor's claim that the statutory structure clearly evidences Congress's intent that the jury learn the name and nature of a defendant's prior conviction appears lacking. She contended that Congress, by excluding certain crimes,[250] did not mean to make the word "crime" an "abstract or metaphysical concept";[251]

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244. *See* United States v. Carter, 981 F.2d 645, 647 (2d Cir. 1992).

245. *See* United States v. Crochet, 788 F.2d 1061, 1062 (5th Cir. 1986); *see also* Barrett v. United States, 423 U.S. 212, 218 (1976) (stating that the purpose of the Gun Control Act was to keep firearms from those Congress classified as "dangerous or potentially irresponsible"); Huddleston v. United States, 415 U.S. 814, 824 (1974) (noting that Congress intended to "curb crime by keeping firearms out of the hands of those not legally entitled to possess[ion]"); Richman, *supra* note 157, at 941 (asserting that Congress simply did not give much consideration to the expansive prohibition it created in § 922(g)(1)).

246. *See Old Chief*, 117 S. Ct. at 653.

247. *See id.*

248. *See id.* at 653, 655.

249. Commentators have noted that courts have often struggled with the application of the plain meaning rule. *See, e.g.*, Arthur W. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1308 (1975) ("[T]he courts have no clear idea about what the plain meaning rule is and, what is more, . . . they really do not care."); *see also* Harry Willmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 23-24 (1939) (advocating the use of extrinsic evidence at the outset of interpretation); *cf.* Cleary, *supra* note 1, at 911 (noting that under the plain meaning rule, statutory text is "the prime source of meaning, to be read in such context as may be relevant").

250. *See* 18 U.S.C. § 921(a)(20) (1994); *see also supra* note 28 (discussing the exclusion of certain crimes).

251. *Old Chief*, 117 S. Ct. at 656 (O'Connor, J., dissenting).

rather, crimes have names, and the prosecution must still prove that the defendant committed a specific crime.[252] However, the majority's interpretation of the language did not make the prior crime an "abstract or metaphysical concept."[253] Instead, it merely removed the unnecessary and potentially prejudicial qualities of the crime from the jury's consideration upon the defendant's offer to stipulate the fact of his prior conviction.

The Court's acceptance of the broad categorization under the felon-in-possession statute may also curb prosecutorial discretion.[254] The prosecution in *Old Chief* chose to charge the defendant with a violation of § 922(g)(1) in addition to accusing him of assault with a dangerous weapon and using or possessing a weapon during the commission of a violent crime.[255] Likewise, the prosecution chose not to accept the defendant's stipulation of his prior-conviction status.[256] While the prosecution did not have to seek the felon-in-possession charge, its decision to do so is understandable because the statute's mere existence illustrates at least some legislative support for the conviction of felons in possession of firearms.[257]

In contrast, the prosecution's insistence that it did not have to accept the proffered stipulation under the particular circumstances of the case did not have any justifiable basis.[258] Because the stipulation offered presumably conclusive proof of Old Chief's status as a prior felon, it established an essential element of § 922(g)(1).[259] While the Court's opinion did not speculate about the prosecution's motivation behind its refusal to accept the stipulation, the details therein nevertheless imply that the prosecution wanted to maximize the conviction.[260] Furthermore, one commentator even suggests that an

252. *See id.* at 656-57, 660 (O'Connor, J., dissenting).

253. *Id.* at 656 (O'Connor, J., dissenting).

254. *See* Richman, *supra* note 157, at 979 (advocating granting prosecutors "virtually unaccountable discretion," but recognizing that the Court's decision in *Old Chief* limits prosecutors' choices in felon-in-possession cases).

255. *See Old Chief*, 117 S. Ct. at 644.

256. *See id.* at 648.

257. *See* Richman, *supra* note 157, at 952-53.

258. *Cf. id.* at 941, 966 (recognizing both the need for accurate, precise information in order to prevent juror speculation and the desire of prosecutors to maximize convictions). Professor Richman's argument is certainly noteworthy, but the prosecution in *Old Chief* did not show that its need substantially outweighed the danger of unfair prejudice. *See Old Chief*, 117 S. Ct. at 654-55. The Court insisted that the need for evidentiary depth essentially does not apply when a defendant's status is at issue. *See id.* at 654.

259. *See Old Chief*, 117 S. Ct. at 653.

260. *See* Richman, *supra* note 157, at 966-67. Furthermore, perhaps the prosecution in *Old Chief* intended to prejudice the jury by introducing the name and nature of the defendant's prior conviction. Prejudicial motive would appear likely because prosecutors

increasing number of cases falling under Rule 403 show "the persistence of lawyers, especially prosecutors, in attempting to load the record with inflammatory information they hope will move the jury."[261]

While the Court in *Old Chief* recognized the harshness of excluding evidence under Rule 403, it nevertheless held that when proof of convict status is at issue, the trial court must not admit the full record of conviction to prove the element of prior conviction.[262] The Court carefully pointed out the limited nature of its holding,[263] yet it formulated a general rule for all cases "in which the prior conviction is for an offense likely to support conviction on some improper ground."[264] Even if the Court has not invited other arguments for excluding evidence under Rule 403, its decision requiring absolute exclusion in a particular set of cases effectively removes the trial judge's discretionary power.[265]

It is possible, however, to reconcile *Old Chief* with Rule 403 if a distinction is made between the discretion of the trial court and the discretion of the judiciary. While the Court held that the trial court abused its discretion by refusing to accept Old Chief's stipulation,[266] it may nevertheless have acted in a manner wholly consistent with the Federal Rules of Evidence. In establishing Rule 403, the drafters meant to provide a rule to cover situations in which no specific rule applied.[267] In *Old Chief*, the Court has formulated a new rule that applies in the narrow context of cases requiring proof of a defendant's status as a felon.[268] Thus, the Court has used the discretion that Rule 403 affords the judiciary *generally* to provide a specific rule that negates a trial court's discretion in determining the admissibility of prior convictions under the felon-in-possession statute.[269]

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are seemingly aware that "[e]videntiary doctrine ... quite correctly fears that a jury will be quicker to convict, or will at least have fewer regrets about convicting, when it learns of a defendant's prior criminal record." *Id.* at 977; *cf.* DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-63.513, at 19 (1992) (directing that indictments charging § 922(g)(1) violations be drafted in accordance with circuit precedent, and when there is none, "in the manner most advantageous to the government").

261. Dolan, *supra* note 10, at 228.
262. *See Old Chief*, 117 S. Ct. at 655-56.
263. *See id.* at 651 n.7, 655.
264. *Id.* at 655.
265. *See id.* at 656.
266. *See id.* at 647.
267. *See* FED. R. EVID. 403 advisory committee's note.
268. *See Old Chief*, 117 S. Ct. at 651 n.7.
269. *See* 22 WRIGHT & GRAHAM, *supra* note 12, § 5212, at 250 (characterizing Rule

Although the Court's holding under the case-specific circumstances seems to promote truth and justice in Old Chief's own case, it is questionable whether its interpretation of Rule 403 will work similar benefits in every case arising under the new rule. The drafters of Rule 403 intentionally included ambiguous phrases in direct recognition of the inevitable need for judicial flexibility to adapt to the facts of each particular case. Indeed, the Court took advantage of the flexibility afforded by the rule to arrive at a just result in *Old Chief*. However, if the "drafters intended that the Federal Rules' generality and flexibility should perpetuate,"[270] the Court's exercise in sound discretion has checked the original design.

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403 as an attempt "to regularize and channel the use of discretion in the administration of the rules of evidence"); *see also* 22 *id.* at 255 (describing discretion as a "tool for change in the legal rules").

270. Mengler, *supra* note 5, at 457.


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