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THE RELEVANCY REVOLUTION IN CRIMINAL LAW: A PRACTICAL TOUR THROUGH THE TEXAS RULES OF CRIMINAL EVIDENCE

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I. INTRODUCTION

The adoption of the Texas Rules of Criminal Evidence in September, 1986,[1] created a major change in the legal standards of admissibility of evidence in criminal trials. The newly codified rules of evidence are rules of inclusion, not exclusion, and favor the admission of all logically relevant evidence for the jury's consideration.[2] Yet this "quiet revolution"[3] has gone largely unnoticed and unfulfilled in

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1. The Texas Rules of Criminal Evidence were promulgated by the Texas Court of Criminal Appeals on December 18, 1985, pursuant to special rulemaking authority granted to the court by the Legislature. TEX. GOV'T CODE ANN. § 22.109 (Vernon 1988); *see also* Wellborn, *Article I of the Texas Rules of Evidence and Articles I and XI of the Texas Rules of Criminal Evidence: Applicability of the Rules, Procedural Matters, and Preserving Error,* 18 ST. MARY'S L.J. 1165, 1169 (1987). The rules became effective on September 1, 1986. *Id.*; *see also* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 101.2 (West 1988). The Liaison Committee, appointed in 1981 by the Texas Legislature to propose codified rules of evidence for Texas, originally considered an integrated code covering both criminal and civil applications. Caperton & McGee, *Background, Scope and Applicability of the Texas Rules of Evidence*, 20 HOUS. L. REV. 49, 50-54 (1983 Tex. R. Evid. Handbook). The concept of an integrated code, however, was abandoned when members of the Criminal Law Section of the State Bar as well as other members of the criminal law bar lobbied against codification. *Id.* at 54; *see also* Caperton, *Federal Rules—Proposed Texas Code Overlay; Part IV*, 45 TEX. B.J. 1049, 1050 (1982). While the Texas Rules of Evidence, applicable to civil proceedings, were promulgated by the state's supreme court in November, 1982, and became effective on September 1, 1983, the comparable criminal code was delayed for three years. *See* Caperton & McGee, *Background, Scope and Applicability of the Texas Rules of Evidence*, 20 HOUS. L. REV. 49, 57 (1983 Tex. R. Evid. Handbook).

2. *See generally* Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIGATION 129, 129 (1987)(noting that federal rules of evidence have dramatically liberalized admissibility of evidence and arguing that only "real" rules of evidence are rules 402 and 403). Professor Imwinkelried notes that the federal rules of evidence, and rule 402 in particular, are clearly an attempt to fulfill Dean McCormick's prophesy that "[t]he manifest destiny of evidence law is a progressive lowering of the barriers to truth." *Id.* at 174 (citing C. MCCORMICK, MCCORMICK ON EVIDENCE § 81, at 165 (1954)); *see also* Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 172 (1983 Tex. R. Evid. Handbook)(if previous Texas law properly said to allow exclusion of evidence when negative factor outweighed evidence's probative value, then rule 403 changed law of Texas by favoring admissibility). The Texas Court of Criminal Appeals has also noted this change in the evidentiary standard of admissibility. Crank v. State, 761 S.W.2d 328, 342 n.5 (Tex. Crim. App. 1988)(noting that Rule 403's plain language shifts focus and admits relevant evidence unless probative value of relevant evidence *substantially* outweighed by danger of unfair prejudice a defendant). Justice Robertson of the Fourteenth Court of Appeals was the first Texas appellate jurist to note this significant change in *Rodda v. State*, 745 S.W.2d 415, 417-18 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd)(quoting Dean Blakely and emphasizing that relevant evidence now excluded only if its probative value *substantially* outweighed by danger of unfair prejudice).

3. *See* Rossi, *The Silent Revolution*, 9 LITIGATION 13, 13 (1983). In his article, Professor Rossi notes that the federal rules of evidence have brought about a "quiet revolution" in evidentiary rulings in three distinct areas. *Id.* First, they grant considerably more discretion to

Texas courtrooms which have continued to invoke mechanistic common-law rules of exclusion and whose appellate courts have occasionally misquoted and misapplied the pertinent rules.[4]

The present article first presents a brief philosophical overview of the purpose and rationale of the relevancy rules in the Texas Rules of Criminal Evidence and compares them to the comparable Federal Rules of Evidence, from which they were derived.[5] Although the emphasis here is on application of the relevancy rules to criminal proceedings, much of the same reasoning and result is applicable to civil cases as well.

Next, the article traces the practical steps that should be taken by each of the participants—the proponent of evidence, the opponent, and the trial judge—in determining whether a particular piece of evidence should be admitted for the jury's consideration.[6] This analysis

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judges in determining whether to admit evidence; second, the rules demand creativity and imagination by the trial judge in making this discretionary determination; and third, they have put the emphasis upon admission, rather than exclusion, of all relevant evidence. *See id.* Rossi advises that "[t]he trial judge can no longer take refuge behind mechanical rules of thumb. Specific exceptions have been subordinated to probativeness and reliability. The judge must exercise discretion, which requires time and thought—both sparse commodities in the courtroom setting." *Id.* at 59.

4. *See infra*, notes 11, 36-37, 72, 112, 120-21 and accompanying text.

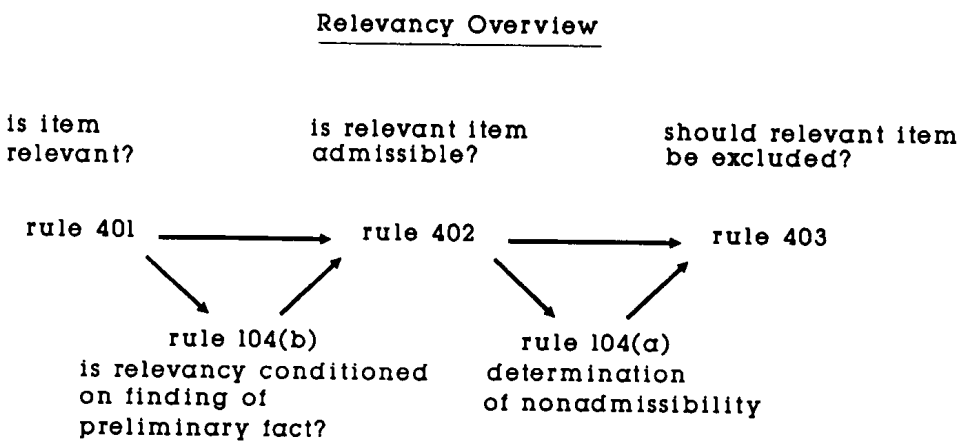
5. Campbell v. State, 718 S.W.2d 712, 716 (Tex. Crim. App. 1986). In holding that a prior consistent statement must have been made prior to the time there was a motive to testify falsely, even though that requirement is not explicit in rule 801(e)(1)(B), the court stated:

> When the new Rules of Criminal Evidence were promulgated, a decision was made to adopt the wording of Fed. Rule 801(d)(1)(B), supra, for Tex. R. Crim. Evid. 801(e)(1)(B), supra. The intent was to adopt not only the wording of the Federal Rule but its interpretation as well.

Id.; *see also Rodda*, 745 S.W.2d at 418 (noting that now that federal rules, Texas civil rules and Texas criminal rules on relevancy are all identical, there should be no distinction and all courts' opinions should harmonize). In *Rodda*, the court further stated that "[w]hile we recognize Texas courts are not bound by lower federal court decisions, in order to advance the harmony in judicial construction of the rules of evidence, greater than usual deference should be given to the construction of the federal rules by the federal courts." *Id.*; Cole v. State, 735 S.W.2d 686, 690 (Tex. App.—Amarillo 1987, no pet.)(since Texas rules are based upon Federal Rules of Evidence, federal decisions construing the rules are helpful); *see also* Caperton & McGee, *Background, Scope and Applicability of the Texas Rules of Evidence*, 20 HOUS. L. REV. 49, 51 (1983 Tex. R. Evid. Handbook)(State Liaison Committee considered, but rejected, adoption of federal rules verbatim: Committee consistently considered federal language; "[w]here there is a variance between the two rules, the variance is intentional"). Thus, throughout this article, the author relies upon federal authority and the reasoning contained within that precedent as well as scholarly secondary material dealing with the federal rules when the Texas rule follows the comparable federal rule of evidence.

6. Most of the examples used in this article pertain to evidence offered by the State. Since all criminal trials begin with the State's case, so must any analysis of relevancy begin with the

will focus on a path that begins with rule 401, moves to 104(b), thence to 402, back to rule 104(a), and finally to rule 403, which is considered by many commentators as the only proper rule of exclusion in the code.[7] This path may be shown schematically as follows:



Throughout this article, the emphasis is upon the importance of articulating the logical rationale and legal basis for evidentiary rulings. Since, under the Texas Rules of Criminal Evidence, a trial judge has enormous discretion in making the decision to admit or exclude any specific piece of evidence, the appellate courts should uphold that ruling if the record shows the judge had a tenable reason for ruling in the manner that he did. Under the old common-law technical eviden-

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State's evidence. Obviously, the rules operate equally for both sides of any lawsuit, and thus evidentiary offers by the defense must be analyzed on the same basis as are those by the State. There are no separate evidentiary standards for different parties to a lawsuit.

7. *See* Imwinkelried, *The Need to Amend the Federal Rules of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1486 (1985)(rule 403 reflects emphasis and importance of search for truth in litigation process; "probative value is a reality while prejudicial danger ordinarily is only a risk"); Rossi, *The Silent Revolution*, 9 LITIGATION 13, 60 (1983)(reformers' dream of rule 403's single basic principle admitting any relevant evidence unless confusion of issues, unfair prejudice, or time wasted outweigh probative value is close to reality); Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U.L. REV. 1097, 1099 (1985). Professor Waltz posits:

> The philosophy of the Federal Rules, and it qualifies as revolutionary, is that any relevant evidence, by which is meant anything that gives promise of being helpful to the trier of facts, is admissible if it is not rendered incompetent, for policy-based reasons, by a dwindling number of exclusionary rules, the most important of which is Rule 403. It is here, at the junction of Rules 102, 401, and 402, at one tangent, and Rule 403, at the other, that judicial discretion assumes significance in the Federal Rules of Evidence.

Id. at 1120.

tiary rules, judges were more likely to be upheld if they ruled without explanation, following some pertinent or analogous precedent.[8] Today, judicial rulings will be upheld if the trial court followed the appropriate analysis and balancing of factors,[9] though the appellate court might disagree with the weight given those individual factors.[10]

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8. *See* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 704 (1941) ("history of evidence has been in the development of sound principles into arbitrary and unworkable rubrics, a development not to be encouraged in case law or by code"); *see also* State v. Johnson, 348 N.W.2d 196, 200 (1984)(under rules of evidence, misuse of discretion for trial court to ignore factors upon which discretion should be based and rest decision solely in trial court's "accustomed" practice).

9. *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 401[01], at 401-14 (1985). Judge Weinstein spoke forcefully to his brethren on the trial bench when he urged:

> Despite the fact that the trial judge's rulings are in large measure insulated from full appellate review, he is not justified in being silent on how he arrived at his decision. He should identify and articulate the circumstances and factors crucial to his ruling so that the appellate court can discern whether or not an arbitrary exercise of power adversely effected [sic] rights of the party. Discretion does not mean immunity from accountability.

Id. As Professor Rosenberg has observed:

> The final reason—and probably the most pointed and helpful one—for bestowing discretion on the trial judge as to many matters is, paradoxically, the superiority of his nether position. It is not that he knows more than his loftier brothers; rather he sees more and senses more. In the dialogue between the appellate judges and the trial judge, the former often seems to be saying: "You were there. We do not think we would have done what you did, but we were not present and we may be unaware of significant matters, for the record does not adequately convey to us all that went on at the trial."

Rosenberg, *Judicial Discretion Viewed from Above*, 22 SYRACUSE L. REV. 635, 663 (1971); *see also* Rosenberg, *Judicial Discretion*, 38 OHIO BAR 819, 826 (1965). Rosenberg states:

> [T]he difference between government of law and a government of man is not that the lawyers decide cases in one and fools in the other. Men, that is the judges, always decide. The difference is in whether judges are aware of their power, sensitive to their responsibilities and true to the tradition of the common law.

Id.; *see also* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959)(reasoned explanations are "very essence of judicial method"); *cf.* United States v. Jamil, 707 F.2d 638, 642 (2d Cir. 1983)(when trial court excludes evidence under rule 403, it should provide clear statement of reasons on record so that counsel may obviate objection); United States v. Dwyer, 539 F.2d 924, 928 (2d Cir. 1976). Despite repeated requests by counsel, in *Dwyer*, the trial judge adamantly refused to explain the rationale for excluding evidence. The appellate court reversed, stating:

> [u]nfortunately, where the reasons for a discretionary ruling are not apparent to counsel, they will probably not be apparent to an appellate court. We therefore find it difficult to comprehend the district judge's adamant refusal to respond to defense counsel's inquiries. The spirit of rule 403 would have been better served had the judge "confront[ed] the problem explicitly, acknowledging and weighing both the prejudice and the probative worth" of the proffered testimony.

Id.

10. *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 401[01], at 401-8-9 (1985)(flexible approach in assessing and balancing unique facts more likely to lead to "sensible" result than mechanical formula).

Under the flexible rules of evidence, a trial judge has "a limited right to be wrong,"[11] so long as the result was reached reasonably.[12]

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11. *See* Rosenberg, *Judicial Discretion*, 38 OHIO BAR 819, 823 (1965)(trial judge has wide scope for decision in particularized situations where unique, incalculable, and unpredictable factors interacting). Numerous appellate courts have recognized that their role is not that of a "Monday morning quarterback" who may second-guess the reasoning of the trial judge and evaluate his decision on the basis of hindsight or a delayed replay. *See, e.g.*, Hamling v. United States, 418 U.S. 87, 124-25 (1974)(petitioners have difficult burden in showing evidentiary rulings constitute reversible error, since tendency is to leave rulings as to relevance of testimony largely to discretion of trial court); National Labor Relations Bd. v. Donnelly Garment Co., 330 U.S. 219, 236 (1947)(courts of appeals less inclined to base error on trial judge's ruling admitting or excluding evidence since trial court has discretion to determine relevance of testimony); United States v. Robinson, 560 F.2d 507, 512-16 (2d Cir. 1977)(applying "arbitrary-irrational" standard of judicial discretion). Broad discretion is accorded to a trial judge in deciding to admit or exclude evidence because he is in a superior position to evaluate the impact of evidence, since he sees witnesses, the defendant, jurors and counsel, and their mannerisms and reactions. *Id.* The *Robinson* court further opined that "we cannot weigh on appeal, as he could at trial, the intonation and demeanor of the witnesses preceding the testimony in issue . . . nor can we determine the emotional reaction of the jury to other pieces of evidence . . . or judge the success of impeachment by cross-examination through observation of the jurors." *Id.*; *see also* United States v. Wyers, 546 F.2d 599, 603 (5th Cir. 1977)(rule well established that trial court's rulings as to relevancy and materiality of evidence not disturbed absent clear showing of abuse of discretion); United States v. Cohen, 544 F.2d 781, 786 (5th Cir. 1977)(determination of relevancy in admitting five year old letter for trial judge and will not be disturbed in absence of clear showing of abuse of discretion), *cert. denied*, 431 U.S. 914 (1977); Construction Ltd. v. Brooks-Skinner Bldg. Co., 488 F.2d 427, 431 (3d Cir. 1973)(if sitting as trial judge, appellate court might well have concluded that potentially prejudicial nature of evidence outweighed probative worth; however, court could not say trial judge abused discretion in reaching contrary conclusion). Texas courts have long held the same. *See, e.g.*, Marras v. State, 741 S.W.2d 395, 404 (Tex. Crim. App. 1987)(trial judge has broad discretion in admitting evidence and action not disturbed absent abuse of discretion); Stone v. State, 574 S.W.2d 85, 89 (Tex. Crim. App. 1978)(admission of evidence rests in sound discretion of trial judge); Williams v. State, 535 S.W.2d 637, 639-40 (Tex. Crim. App. 1976)(appellate court will not reverse trial court's admission or exclusion of evidence unless it finds clear abuse of discretion). However, in one astonishing opinion, the Texas Court of Criminal Appeals announced that:

> We are cited to many cases of the different states of the Union relative to what is meant by an "abuse of discretion" and while not lending itself to an absolute measuring stick by which such abuse could be understood, the opinions seem to be in fair agreement that an abuse of discretion usually means doing differently from what the reviewing authority would have felt called upon to do.

Williams v. State, 159 Tex. Crim. 443, 449, 265 S.W.2d 92, 95 (1954)(opinion on motion for rehearing). The court cited no such out-of-state authority and "abuse of discretion" has never been so defined in any jurisdiction. If this were the test for abuse of discretion, then a trial court would have *no* discretion to come to a different conclusion than would the appellate court which is setting itself up as a "super trial judge." This attitude would be the antithesis of judicial discretion, not its embodiment.

12. As Justice Felix Frankfurter stated in addressing the trial judge's substantial discretion to admit or exclude evidence regarding a defendant's character traits,

The article concludes that, under the Texas Rules of Criminal Evidence, juries should be allowed to hear and consider more logically relevant evidence and determine the guilt or innocence of a defendant based upon a greater understanding of the full context and circumstances of the charged offense and of the people who were involved in that event. Properly utilized, the Texas Rules of Criminal Evidence will aid in the paramount goal of the criminal trial—the search for truth.[13]

II. RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

The definition of relevant evidence under rule 401[14] has nothing to do with legal standards, legal precedent, or legal reasoning. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case."[15] It is a matter of common-sense. "The law furnishes no test of relevancy."[16] The appropriate practical

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> To leave the District Courts of the United States the discretion given to them . . . presupposes a high standard of professional competence, good sense, fairness and courage on the part of the federal district judges. If the United States District Courts are not manned by judges of such qualities, appellate review, no matter how stringent, can do very little to make up for the lack of them.

Michelson v. United States, 335 U.S. 469, 487-88 (1948)(Frankfurter, J., concurring).

13. Some have argued that the paramount goal of the criminal justice system is to ensure that the defendant receives a fair trial, but in the best of all possible worlds, a "fair" trial is one in which the truth is revealed. The guilty are found guilty and the innocent exonerated. To suppose that a trial whose mission is to seek the truth would not be fair to the defendant is to assume his guilt, a notion totally contrary to the American jurisprudential belief that all persons are presumed innocent. However, because the present justice system is not perfect, certain constitutional and legal mechanisms occasionally take precedence over the truth-seeking function when society agrees that these societal and public goals are of greater importance. *See infra*, note 82.

14. TEX. R. CRIM. EVID. 401 reads: "[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This is a verbatim duplicate of FED. R. EVID. 401.

15. FED. R. EVID. 401 advisory committee's note; *see* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 696 n.15 (1941)(tendency of offered piece of evidence to prove material proposition can be demonstrated only in terms of some general proposition based most often on practical experience of judge and jurors, sometimes upon scientific generalizations introduced in trial to act as connecting links).

16. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (1898)(to determine relevancy, law refers to logic and general experience; in making such decisions, trial judge may use own personal experience and knowledge to evaluate probabilities and assess whether given item "relevant" to particular issue); *see* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 401.3, at 64

test is: would a reasonable person, with some experience in the everyday world, believe that this particular piece of evidence is helpful in determining the truth or falsity of "any fact that is of consequence" to the lawsuit?[17] The evidence need not be offered to prove a disputed fact.[18] The evidence may be either direct or circumstantial proof of some fact.[19] The evidence need not, by itself, prove or disprove the

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(West 1988); 1A J. WIGMORE, WIGMORE ON EVIDENCE § 27 at 965 (Tillers rev. 1983)(emphasizing that logical powers used must be those of everyday life and tests and conclusions of everyday experience must constantly control the standards of legal logic"); James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 694 (1941)(test of relevancy logic and common sense); *see also* Shepard v. United States, 290 U.S. 96, 104 (1933)(rules of evidence are framed for ordinary minds, not psychoanalysts); Pound v. Popular Dry Goods Co., 139 S.W.2d 341, 343 (Tex. Civ. App.—El Paso 1940, no writ)(quoting James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941))("[i]t may be generally said that whatever naturally and logically tends to establish a fact in issue is relevant").

17. *See* United States v. Brashier, 548 F.2d 1315, 1325 (9th Cir. 1976)(rule of thumb is to inquire whether reasonable man might believe probability of truth of consequential fact to be different if he knew of proffered evidence)(quoting 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 401[07], at 401-27 (1985)). The use of the word "might" rather than "would" ensures that relevancy is measured by its loosest construction rather than its narrowest interpretation. Thus, while a particular trial judge could determine that while he, personally, does not find a logical connection between the proffered evidence and the fact in issue, but he further believes that some other, reasonable, man might, he should conclude that the evidence is relevant. *See* United States v. 478.34 Acres of Land, 578 F.2d 156, 160 (6th Cir. 1978)(judge himself need not be convinced of probative value of evidence if determination that jury reasonably could so find).

18. *See* United States v. Grassi, 602 F.2d 1192, 1197 (5th Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980). The court of appeals in *Grassi* opined:

> A piece of evidence can have probative value even in the event of an offer to stipulate to the issue on which the evidence is offered. A cold stipulation can deprive a party "of the legitimate moral force of his evidence," . . . and can never fully substitute for tangible, physical evidence or the testimony of witnesses.

Id. at 1197 (quoting 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2591 at 589 (3d ed. 1940)); *see also* FED. R. EVID. 401 advisory committee's note. As the committee noted, "[a] rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of [much] helpful evidence, or at least the raising of endless questions over its admission." *Id.* As noted by Professor Goode, there is no mention of the word "disputed" in rule 401 when referring to those facts which are susceptible to proof in a lawsuit. S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 401.2, at 63 (West 1988). *But see* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 111 (4th ed. 1986)(arguing that language of rule, "fact that is of consequence to the determination of the action," requires that all evidence be directed toward disputed issues).

19. Suppose that "A" is on trial for robbery. A witness who will testify that she saw "A" point a gun at the bank teller's head offers direct evidence that "A" used a deadly weapon in the commission of the robbery. A witness who will testify that, he found a gun in "A"s' pocket, when he arrested "A" half an hour after the robbery, offers circumstantial evidence that "A" used a deadly weapon in the commission of the robbery. In the former example, the witness' direct testimony alone might be sufficient to prove the ultimate fact, the use of a

particular fact.[20] It is sufficient if this evidence provides a small nudge toward proving or disproving some fact of consequence.[21] Does it alter the probabilities of the existence of this fact to some degree, any

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deadly weapon. In the latter example, the witness' testimony would be insufficient, alone, to prove the ultimate fact. Nonetheless, the latter witness' testimony is relevant and probative of the ultimate fact. Relevancy of the evidence must not be confused with sufficiency of the evidence. Columbian Ins. Co. v. Lawrence, 27 U.S. (2 Pet.) 25, 44 (1829)(Marshall, C.J.).

> This blending of an objection to the admissibility of evidence in the same application which questions its sufficiency, is said to be not only unusual; but to confound propositions distinct in themselves . . . . It is undoubtedly true, that questions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot with strict propriety be propounded at the same time.

Id.; *see also* 1A J. WIGMORE, WIGMORE ON EVIDENCE § 28 & n.1 (Tillers rev. 1983). When a case depends entirely upon circumstantial evidence for proof, the rules of evidence ought "not be so stringently applied so as to exclude evidence" which is only inferentially relevant. Bailey v. State, 532 S.W.2d 316, 319 (Tex. Crim. App. 1976); Kimes v. State, 740 S.W.2d 903, 907 (Tex. App.—Corpus Christi 1987, no pet.). In *Kimes*, for example, the trial judge properly permitted a witness to testify that the murder suspect's co-defendant had twice unsuccessfully attempted to purchase a gun from her. *Id.* As the appellate court stated, "[f]rom this testimony the jury could have inferred or not inferred that Hendon [the co-defendant] intended to shoot the deceased. By being informed of all the circumstances leading up to the murder, the jury was more aptly prepared to evaluate the evidence." *Id.* Thus, this testimony was worth putting into evidence for the jurors to consider and accept or reject as they felt appropriate.

20. "The standard of probability under the rule is 'more probable than it would be without the evidence.' Any more stringent requirement is unworkable and unrealistic." FED. R. EVID. 401 advisory committee's note. As Dean McCormick has explained:

> The test of relevancy which is to be applied by the trial judge in determining whether a particular item or group of items of evidence is to be admitted is a different and less stringent one than the standard used at a later stage in deciding whether all the evidence of the party on an issue is sufficient to permit the issue to go to the jury. A brick is not a wall.

C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 185, at 436 (2d ed. 1972); *see also* Johnson v. State, 698 S.W.2d 154, 160 (Tex. Crim. App. 1985). As the Texas Court of Criminal Appeals stated in *Waldrop v. State*, 138 Tex. Crim. 166, 168, 133 S.W.2d 969, 970 (1940):

> Relevancy is defined to be that which conduces to the proof of a pertinent hypothesis—a pertinent hypothesis being one which, if sustained, would logically influence the issue. Hence it is relevant to put in evidence any circumstance which *tends* to make the proposition at issue either more or less probable.

Id. (quoting from Branch's Annotated Penal Code § 97)(emphasis added). Thus, evidence which does not prove a particular fact but which merely "tends" to affect the probability of the truth or falsity of that fact is relevant.

21. "The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." FED. R. EVID. 401 advisory committee's note. Such evidence need not be credible to be relevant and admissible. *See, e.g.*, Brennan v. Braswell Motor Freight Lines, Inc., 396 F. Supp. 704, 707-09 (N.D. Tex. 1975)(in employee discrimination suit, district court admitted employee's testimony regarding harassment though found to be incredible; trier of fact entitled to disregard unbelievable witness, but judge cannot exclude evidence on this basis). While the judge determines admissibility, the

degree?[22] If it does, then it is logically relevant under rule 401.[23] This accords with the prior common law definition of logical relevancy.[24] Neither the federal nor the Texas rules of evidence have changed the meaning of logical relevancy.[25]

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jury determines credibility. A judge cannot prevent even the Cretan Liar from testifying as long as his testimony is relevant, though a bald-faced lie.

22. *See* United States v. Curtis, 568 F.2d 643, 645-46 (9th Cir. 1978)(rule 401 contains expansive definition of relevant evidence; admission of evidence that, prior to victim's murder, defendant said he would commit rape if woman refused his attentions was upheld); *see also* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 701-02 (1941)(any notion of "legal relevancy" that requires more than minimum probative value of "logical relevancy" is "nuisance" and leads to exclusion of worthwhile evidence). The word "probable" in rule 401 is given its ordinary meaning: "uncertain but likely to be true." 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5165, at 55 (1978).

23. "Relevancy is an absolute. Either it is present or it is not. If it alters the probabilities involved to any degree, it is present. An item of evidence may be more or less probative, but cannot be more or less relevant." Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 157 (1983 Tex. R. Evid. Handbook); *see also* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 401.3, at 65 (West 1988).

24. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 271-75 (1988); 1A J. WIGMORE, WIGMORE ON EVIDENCE §§ 27-28 at 965-66 (Tillers rev. 1983); Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 158 (1983 Tex. R. Evid. Handbook); *see also* Stewart v. State, 138 Tex. Crim. 286, 288, 135 S.W.2d 103, 104 (1940). The Texas Court of Criminal Appeals has explicitly equated the common law definition of relevancy quoted above with the definition contained in TEX. R. EVID. 401 (precisely same as TEX. R. CRIM. EVID. 401). *See* Plante v. State, 692 S.W.2d 487, 491 n.6 (Tex. Crim. App. 1985). As the court noted, both the common law and code definitions of relevancy encompass the concept of materiality. That is, probative evidence must be directed to a "pertinent hypothesis," "the proposition at issue," or "any fact that is of consequence to the determination of the action." *Id.* Thus, probative evidence directed toward a fact that has no relationship to the issues in the trial is not relevant. For example, in a D.W.I. trial, evidence that the defendant had no car keys and was driving a car that had a broken steering column is probative of the fact that he had stolen that car. "Stolen car," however, is not a "fact that is of consequence" to a D.W.I. trial and thus is not, by itself, relevant. It is not properly provable in the case unless offered to prove some other fact of consequence. For example, suppose that the police officer pulled the defendant over *because* he saw the broken steering column and reasonably believed that the car was stolen. Now the same evidence is relevant to demonstrate the officer's probable cause for stopping the defendant's car. Evidence which is not relevant upon one theory of proof may be relevant to a different theory.

25. Utilizing the Texas Rules of Criminal Evidence, appellate courts have also upheld the exclusion of evidence under rule 401 when they have detected no logical relationship between the offered evidence and any issue in the lawsuit. *See, e.g.*, Morrow v. State, 757 S.W.2d 484, 492-93 (Tex. App.—Houston [1st Dist.] 1988, no pet.)(trial court properly excluded officer's testimony regarding FAA regulations applicable to outbound luggage containing cocaine as no showing that outbound regulations applicable to inbound luggage and testimony not relevant to case under rule 401); Cole v. State, 735 S.W.2d 686, 690-91 (Tex. App.—Amarillo 1987, no pet.)(trial court did not abuse discretion in excluding defendant's evidence on extraneous offenses to disprove identity as rapist). *Id.* Defendant offered evidence that his fingerprints did

Imagine, for example, that Mr. Toad, driving alone in his Toadmobile, runs into Little Nell's Nissan, containing Little Nell and her baby, Hortense, at Main and Elm Street on January 1, at 3:00 a.m. Hortense dies in the accident. Mr. Toad appears to be intoxicated and is arrested for involuntary manslaughter. A police officer, Sergeant Friday, arrives at the accident scene and starts searching the area for possible evidence. He brings with him a large wheelbarrow to place the material he wishes to examine more carefully into one large container. He searches the scene carefully, picks up every can, bottle, nail, piece of wire, and broken shard of glass that he finds, turns it over, thinks about it, and makes a decision: Should I put this item into my wheelbarrow of "stuff" that might be connected to this accident? Might this particular piece of evidence be connected to the automobile accident that I am investigating? A shiny beer can, still cold and with a few drops of what smells like beer goes into the wheelbarrow. A dull, rusty beer can, half buried in the dirt, is examined and then discarded when Sergeant Friday decides that it can have no possible relationship to the present accident.[26] When Mr. Toad goes to trial on the involuntary manslaughter charge, the trial judge acts exactly as Sergeant Friday did at the accident scene. The trial judge is the "gatekeeper" of the evidence. His determination of whether the evidence is related to any issue in the case will not be disturbed absent a "clear abuse of discretion."[27] He looks at each piece of evidence

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not match those found on extraneous victim's car to show he was not guilty of charged offense since a rash of rapes were arguably committed by the same person. The trial court's exclusion was upheld because of an insufficient showing that fingerprints were those of assailant in the extraneous offense. Thus, no logical relevance existed as to any issue, even under the expanded standards of admissibility in Texas rules. *Id.*

26. Since Sergeant Friday is a careful, cautious, and experienced accident investigator, he errs on the side of putting too much into the wheelbarrow, rather than hastily discarding any piece of evidence. He has discovered that what, at first glance, might not seem very important or related to the accident, might take on much greater importance after he has done more investigation. His investigatory methods are reflected in the evidentiary standards codified in rule 104(b) regarding conditional relevancy and rules 401 and 402. Under the federal and Texas rules of evidence, there is a distinct bias toward admitting all relevant evidence. In close cases, it is better to admit than exclude evidence. *See* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 137 (4th ed. 1986)(fearing evidence might tend to prove fact in dispute in hard-to-see way, judge might be extraordinarily cautious of exclusion).

27. *See supra*, notes 9-12 and accompanying text; *see also* Johnson v. State, 698 S.W.2d 154, 160 (Tex. Crim. App. 1985)(determination of whether evidence relevant to any issue in case lies within sound discretion of trial court and not disturbed absent clear abuse of discretion), *cert. denied*, 479 U.S. 871 (1986); Williams v. State, 535 S.W.2d 637, 639-40 (Tex. Crim. App. 1976).

offered by the prosecution and the defendant and determines whether that item should go into the wheelbarrow of "relevant" evidence the jury takes into their deliberation room. A trial judge's evidentiary rulings determine the size of the pile of items that the jury is allowed to consider in any lawsuit. The judge should exclude as irrelevant[28] only those items which he can say, with assurance, that no jury would find helpful in determining any issue.[29] He should consider as relevant all of those items which have a "plausible" connection to the lawsuit.[30]

Frequently, the relationship between a given piece of evidence and the issues at trial is obvious, and an attorney need not waste time belaboring the logical connection. Sometimes, however, the relevancy of a piece of evidence will not be immediately apparent to a trial judge.

Thus, the proponent of that evidence should be as thorough as possible in providing a foundation to show that a particular piece of evi-

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28. This is not to say that the trial judge ought to admit the evidence automatically once he has determined that it is relevant, only that he should continue forward in the determination of admissibility rather than summarily excluding it as irrelevant which would end further inquiry.

29. *See, e.g.*, United States v. Gould, 741 F.2d 45, 48-52 (4th Cir. 1984)(in bank robbery case in which defendant asserted insanity defense based upon purported "gambling disorder," court of appeals held issue of whether novel defense of this type could be considered subject to threshold test of relevancy under rule 401). The *Gould* court stated that the test is "whether the general scientific hypothesis of a putative causal relation between specific disorder and specific conduct has substantial acceptance in the relevant discipline." *Id.* The court properly excluded this evidence since the hypothesis that pathological gambling deprived some persons of their ability to conform their behavior to the requirements of the law was not shown to have any general acceptance in the relevant discipline, thus the evidence was logically irrelevant). *Id.*; *see also* United States v. Bear Ribs, 722 F.2d 420, 423 (8th Cir. 1983)(in prosecution for assault with intent to commit rape, evidence that victim was intoxicated and routinely undressed and exposed herself in public irrelevant to any issue on trial as no evidence that she was nude or undressed at or immediately before time of offense).

30. *Compare* United States v. Hollister, 746 F.2d 420, 422 (8th Cir. 1984)(relevant evidence under federal rule 401 broad, but does have limits and no abuse of broad discretion to exclude defendant's evidence of co-defendant's propensity to commit bank robberies as part of duress defense since defendant admitted unawareness of these crimes: Thus, no logical connection between this testimony and any issue at trial) *with* Holt v. United States, 342 F.2d 163, 166 (5th Cir. 1965)(when doubt exists, resolve issue in favor of admissibility of evidence; and evidence tending to show, or at least sufficient to permit jury to draw inference that defendant was victim of mistaken identity on prior occasions relevant to contention that he was victim of mistaken identity in charged offense) *and* Jackson v. State, 551 S.W.2d 351, 352-53 (Tex. Crim. App. 1977)(trial court erroneously excluded evidence that victim of separate crime had previously identified defendant as suspect and later discovered it was committed by another person who confessed to committing charged offense as well; thus, evidence "germane" and "material" to disputed issue).

dence is logically relevant to the lawsuit.[31] Since he is asking the judge to make a relevancy judgment in the face of the unknown, the proponent should explain to the judge: 1) what the evidence is; 2) how it is relevant; and 3) what fact of consequence it is offered to prove.[32]

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31. *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 401[08], at 401-55 to 56 (1985). Weinstein states:

> Where relevancy is not immediately apparent, the judge and counsel should clearly identify the terms of the relevancy relationship in the particular case . . . . That is, they should describe the item of evidence being proffered, the consequential fact to which it is directed, and the hypothesis required to infer the consequential fact from the evidence. Without this analysis it is impossible to decide how the evidence may alter the probability of the existence of the consequential fact . . . . If it cannot be demonstrated that an item of evidence may affect the trier's evaluation of the probability of a consequential fact, it should be excluded . . . .

Id. (footnotes omitted). It is the explanation of relevance that is made to the trial judge that is controlling, not the newly devised and perhaps more persuasive arguments that are made to the appellate court. Appellate courts should not reverse trial courts on the basis of arguments never made to the trial judge. The general rule is that the specific objection on appeal must match the specific objection at trial. *See, e.g.*, Sharp v. State, 707 S.W.2d 611, 619 (Tex. Crim. App. 1986); Pennington v. State, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985); Vanderbilt v. State, 629 S.W.2d 709, 721 (Tex. Crim. App. 1981). The rationale for such a rule is to prevent the trial court from being "sandbagged" into unnecessary reversals. *Pennington*, 697 S.W.2d at 390; *see also* Ash v. State, 420 S.W.2d 703, 705 (Tex. Crim. App. 1967)(candor and specificity necessary in telling trial judge what party complaining about). The purpose in requiring a clear and specific objection at trial is two-fold: 1) it enables the trial judge to understand the precise question presented and to make intelligent rulings based upon the particular issues; and 2) the offering party is afforded opportunity to remedy any potential deficiencies. 1 R. RAY, TEXAS LAW OF EVIDENCE § 24 (3d ed. 1980); *see* Almanza v. State, 724 S.W.2d 805, 807 (Tex. Crim. App. 1986)(requiring specific objection at trial aids correction of error at that level).

32. *See* Daskarolis v. Firestone Tire & Rubber Co., 651 F.2d 937, 940 (4th Cir. 1981)(in products liability case, appellate court declined to consider whether trial judge erred in excluding tire offered as demonstrative evidence since offering party did nothing to explain its importance); United States v. Kelly, 556 F.2d 257, 265 (5th Cir. 1977)(district court did not err in excluding defendant's exhibits when defense made no attempt to detail relevance to his theory). Texas law has long held that a party cannot complain of a judge's error in excluding relevant evidence if the proponent fails to make an offer of proof or otherwise explain its purported relevancy. *See* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 103.3 (West 1988); 1 R. RAY, TEXAS LAW OF EVIDENCE § 21, at 25 (3d ed. 1980)(where any doubt as to relevancy of evidence offering counsel must specify purpose for which it offered or other details necessary to make it admissible); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5166, at 68 (West 1978). Here, the authors state:

> Once an objection has been made to proffered evidence on the grounds of relevance, the trial court should ask the proponent to state the purpose for which the evidence is offered . . . . If there is a real dispute as to relevance, requiring the proponent to state the purpose of the evidence will identify the consequential fact towards which the proof is directed . . . . If not, the proponent will have to explain the steps in his line of proof.

For example, in the hypothetical involuntary manslaughter prosecution, suppose that the State opens its case by calling Sergeant Friday who offers to testify that he found a cold, wet, empty beer can in Mr. Toad's car. Although one can of beer does not a drunken driver make, it is of some relevance in the chain of permitted inferences. A reasonable jury could infer from the discovery of a cold beer can in his car that Mr. Toad drank the beer that had been in the can, that he had done so in the recent past, and that he may have done so while he was driving his car. While proof that Mr. Toad drank one beer while driving does not prove the ultimate fact, intoxication, it is some evidence that nudges the probabilities in favor of that proposition. It is clearly relevant evidence.[33]

Id. at 68-69. *See generally* TEX. R. CRIM. EVID. 103(2), Offer of Proof, which provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> . . .
>
> (2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

The proponent of evidence bears the burden of pointing out the relevancy of the particular testimony. *See* Harris v. United States, 371 F.2d 365, 366 (9th Cir. 1967)(when question objected to as irrelevant, failure to advise court of question's purpose and question not "inevitably and patently material' " and objection may be sustained); United States v. Sanchez, 361 F.2d 824, 825 (2d Cir. 1966); United States v. Jones, 360 F.2d 92, 95-96 (2d Cir. 1966), *cert. denied*, 385 U.S. 1012 (1967); *see also* Robbins v. Whelan, 653 F.2d 47, 53 (1st Cir. 1981)(Campbell, J., dissenting)(reason party must communicate purpose for offering evidence is to put trial judge on notice while still time to save situation), *cert. denied*, 454 U.S. 1123 (1981). "A trial judge is only human; he may not have perfect recall of earlier testimony; it is counsels' duty, not the court's, to articulate the purpose for which evidence is being offered." *Id. But see* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 401[08], at 401-5 - 57[I] (1985)(wrong for judge to not assist attorney if judge more capable of suggesting potential relevancy relationships). Indeed, if one accepts the notion that the primary goal of a criminal trial is to seek the truth, a judge who intentionally sits back and allows a lawyer to flounder inarticulately, refusing to prompt or help him, is himself frustrating the criminal justice system. A criminal trial is not a sporting match, and judges are more than mere referees. The trial judge's goal should be to ensure that the truth is fairly heard; to the extent that he aids the advocates to articulate their respective positions, he is fulfilling that goal.

33. Texas courts have traditionally found that containers, which may have held an alcoholic beverage, found in a driver's car are relevant evidence in a driving while intoxicated trial. *See* Ragland v. State, 391 S.W.2d 418, 420 (Tex. Crim. App. 1965); Lacy v. State, 168 Tex. Crim. 220, 222, 325 S.W.2d 392, 394 (1959); Bedwell v. State, 165 Tex. Crim. 143, 145, 305 S.W.2d 372, 374 (1957); Chamberlain v. State, 163 Tex. Crim. 529, 530-31, 294 S.W.2d 719, 720 (1956); Marshall v. State, 159 Tex. Crim. 268, 270, 262 S.W.2d 491, 492-93 (1954); Musgrove v. State, 158 Tex. Crim. 303, 304, 255 S.W.2d 218, 218 (1953); Cornelius v. State, 157 Tex. Crim. 598, 599, 252 S.W.2d 163, 164 (1952); Hancock v. State, 156 Tex. Crim. 83, 84-86, 238 S.W.2d 961, 962-63 (1951). *But see* Garrison v. State, 134 Tex. Crim. 159, 161-62, 114

Similarly, evidence that Mr. Toad's wife, were she in the car with him at the time of the accident, was intoxicated would be admissible as the jury might make the inference that her lack of sobriety made Mr. Toad's similar state somewhat more probable.[34] Testimony regarding the nature and extent of damage done to the cars in the accident would be relevant.[35] Evidence of skid marks which showed that Mr. Toad's car had been weaving would be relevant; evidence that he was driving without his headlights would be relevant; evidence that Mr. Toad staggered out of his car after the accident would be admissible to show his intoxication even though an alternate inference, that he was shaken by the accident, would also be possible. This evidence is logically relevant under rule 401 because everyday experience shows that intoxicated drivers frequently weave, forget to turn on their headlights, and stagger. All of these facts are independently relevant and form part of the circumstances, the res gestae, of the offense.

All too frequently, however, any evidence found at the scene of a crime is admitted under this misapplied "res gestae" doctrine.[36] The

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S.W.2d 557, 558 (1938)(D.W.I. defendant not allowed to prove that owner of borrowed car was "a man who drank whiskey" in effort to demonstrate that whiskey bottle found in glove compartment of car not his).

34. *See* Long v. State, 375 S.W.2d 913, 914 (Tex. Crim. App. 1964); Andrews v. State, 161 Tex. Crim. 550, 552, 279 S.W.2d 331, 332 (1955); *see also* Yarbrough v. State, 384 S.W.2d 705, 708 (Tex. Crim. App. 1964)(state may show passenger in car also intoxicated in D.W.I. prosecution of driver).

35. *See* Whitaker v. State, 421 S.W.2d 905, 906-07 (Tex. Crim. App. 1967); Massoletti v. State, 165 Tex. Crim. 120, 121, 303 S.W.2d 412, 413 (1957); Atkinson v. State, 157 Tex. Crim. 556, 557, 251 S.W.2d 401, 402 (1952); Allen v. State, 149 Tex. Crim. 612, 613-14, 197 S.W.2d 1013, 1015 (1946). As the Texas Court of Criminal Appeals explained in *Allen*:

> It is provable that one accused of drunken driving had a collision on the highway with an automobile driven by another person, on the ground that the manner in which accused handled his car *might* throw light upon whether accused was intoxicated at the time. Also, it seems reasonable and pertinent to show the effect of such collision upon the car collided with as shedding light upon the speed and manner of driving accused's car, in determining the question whether he was intoxicated.

Id. (emphasis added). Once again, evidence that *might* shed light on some fact of consequence is relevant. Neither the trial nor the appellate court need themselves believe that the proffered evidence *will* throw light on the disputed issues before admitting it for the jury's consideration.

36. One example of how this doctrine has permitted admission of irrelevant, prejudicial evidence is the hoary line of precedent which holds that evidence of a defendant's having a gun in his car is always admissible in a D.W.I. trial. *See* Yaffar v. State, 171 Tex. Crim. 341, 343, 349 S.W.2d 730, 731 (1961)(evidence of finding of pistol admissible as part of res gestae in drunken driving prosecution); Ross v. State, 169 Tex. Crim. 313, 314, 334 S.W.2d 174, 175 (1960)(jury entitled to know defendant controlled pistol as well as motor vehicle while intoxicated as proof of circumstances surrounding commission of offense which forms part of occur-

"res gestae" doctrine is properly utilized to permit the introduction of independently relevant evidence which is closely connected to the offense, the crime scene, or the defendant even though it may involve evidence of a separate criminal offense.[37] The doctrine is improperly

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rence). What logical connection is there between the ownership or possession of a firearm and the probability of being intoxicated? The present author can think of none, yet judges throughout the state routinely admit such evidence based upon the authority of *Yaffar* rather than the logical thought processes required under rule 401. The holding in *Yaffar* was based upon a line of cases dealing with the criminal offense of transporting intoxicating liquors, otherwise known as "rum running." *See, e.g.*, Riojas v. State, 102 Tex. Crim. 460, 461, 277 S.W. 696, 697 (1925); King v. State, 99 Tex. Crim. 425, 426, 269 S.W. 1042, 1042-43 (1925); Hill v. State, 96 Tex. Crim. 364, 365, 257 S.W. 262, 263 (1924). In the days of Prohibition, Al Capone and Elliot Ness, transporting large quantities of liquor was a dangerous occupation and one in which such drivers frequently carried firearms. Thus, in the cases cited above, a juror might make the reasonable inference that one who possessed a firearm at the same time he possessed a hefty quantity of liquor was somewhat more likely to be intentionally "rum running" rather than innocently carrying a personal supply of apple cider turned sour. There is a logical connection between "rum running" and possessing a firearm whereas there is, at least in the present times, no logical connection between intoxication and the possession of a firearm. Today, however, a similar analogy can be made between the possession of large amounts of illegal narcotics and the possession of firearms. Drug smuggling in the 1980's is akin to the "rum running" of the Prohibition era. Thus, the possession of a firearm by a person who is arrested for the possession of a significant quantity of illegal drugs is relevant to show the inherent violence of the narcotics industry and to demonstrate that the defendant "knowingly" possessed cocaine rather than what he claims to have believed was five pounds of powdered sugar. Gobin v. State, 690 S.W.2d 702, 705 (Tex. App.— Fort Worth 1985, pet. ref'd)(weapon found under seat of car defendant driving at time of arrest for delivery of controlled substance admissible as having probative value because showed appellant prepared to use gun if necessary to protect drugs and effect sale and delivery of substance); *see also* United States v. De La Torre, 639 F.2d 245, 250 (5th Cir. 1981)(weapons seized from three co-defendants charged with conspiracy to import marihuana admissible as part and parcel of drug scheme; thus, guns necessary to fully explain circumstances or setting of charged crime). Under the *Yaffar* type of reasoning, evidence that Mr. Toad had his murdered mother-in-law packed in the trunk of his car would be admissible in a trial for the involuntary manslaughter of baby Hortense. The probability that Mr. Toad will be convicted of Hortense's death would certainly be increased by this evidence, but the discovery of his mother-in-law's body bears no connection to whether, due to his intoxication, he recklessly caused an accident which led to Hortense's death. Conversely, however, evidence of the accident and Mr. Toad's intoxication would be admissible in his trial for the murder of his mother-in-law. Here, such evidence would be relevant as showing the circumstances under which the victim's body was discovered.

37. *See, e.g.*, United States v. Wiener, 534 F.2d 15, 18 (2d Cir.)(loaded gun found with narcotics in burlap bag in apartment of defendant admitted as "experience on the trial and appellate benches" teaches that substantial dealers in narcotics have firearms on their premises as tools of trade), *cert. denied*, 429 U.S. 820 (1976). This language is interesting because the Second Circuit implicitly assumes that experience on the criminal bench and concomitant exposure to the recurrent testimony of the narcotics milieu lends a relevancy value to evidence which might not otherwise be apparent to the average juror. Texas has long followed the common-law rule that the State is entitled to show all of the circumstances surrounding an

invoked when it permits the introduction of otherwise irrelevant evidence merely because that evidence is temporally or spatially connected to the offense, the crime scene, or the defendant. "Although the prosecutor has a right to paint a complete picture for the jury, the prosecutor has no right to paint another picture."[38]

The opponent of the offered item of evidence is neither required nor permitted to bring forward other evidence or witnesses to counter the proponent's showing of relevancy in an effort to prohibit its admission. For example, in the involuntary manslaughter hypothetical, suppose that the State offers Sergeant Friday's testimony that Mr. Toad staggered out of his car and fumbled through his wallet for five minutes before finding his driver's license. The defense attorney

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offense or arrest unless that evidence is "inherently prejudicial and *has no relevance* to any issue in the case." Maddox v. State, 682 S.W.2d 563, 564 (Tex. Crim. App. 1985)(emphasis added). There must, however, be some logical connection between the proffered evidence and the issues involved in the trial. *Id.*; *see also* Ponder v. State, 713 S.W.2d 178, 182-83 (Tex. App.—Austin 1986)(improperly relying upon generalized "res gestae" doctrine, but properly showing independent relevancy of evidence where State permitted to show defendant had gun in suitcase at time of arrest since weapons possessed by fugitive at time of capture show he evaded arrest and was prepared to resist capture, thus showing consciousness of guilt), *aff'd on other grounds*, 745 S.W.2d 372 (Tex. Crim. App. 1988); Kinsey v. State, 639 S.W.2d 486, 490 (Tex. App.—Texarkana 1982, no pet.)(improperly invoking res gestae doctrine, but properly admitting evidence of defendant's possession of victim's checks and driver's license to prove defendant's identity as thief and controvert defendant's denial of offense, offered alibi, and disputed identity). Since a trial judge's ruling is given great deference, it would behoove him, as well as the parties to the lawsuit, to explain on the record what the logical relevancy of the evidence is. Judges do not need a specific precedent to support their evidentiary rulings regarding relevancy; instead, they need an articulate, common sense explanation of their decision. To the extent that trial judges have demanded precedent before admitting evidence despite an attorney's logical explanation of the evidence's relevancy, they have erred. Under the new, liberalized rules of evidence, their reliance upon prior precedent to exclude evidence without independent analysis may be considered an abuse of discretion. *See supra*, note 8 and accompanying text.

38. E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 6:25 at 42 (1984); *see* Stuart, *Evidentiary Use of Other Crimes Evidence: A Survey of Recent Trends in Criminal Procedure*, 20 IND. L. REV. 183, 205 (1987)(courts have stretched res gestae exception beyond limits). *See generally* 1A J. WIGMORE, WIGMORE ON EVIDENCE § 218, at 1888 (Tillers rev. 1983). As Wigmore criticizes the rubric:

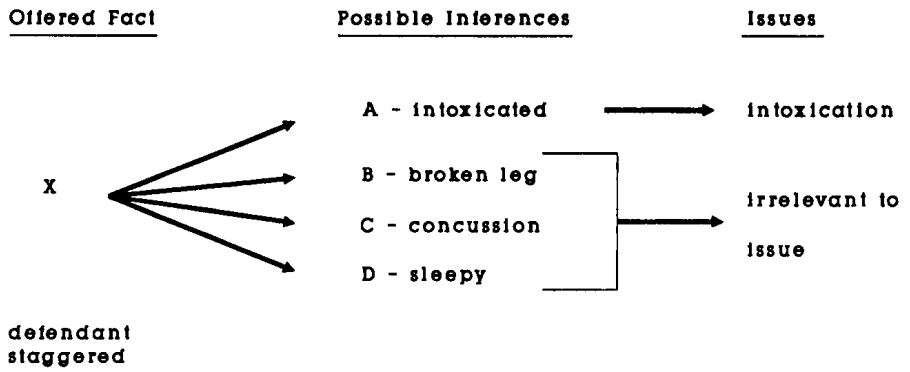
> It is not too much to say that [the term "res gestae"] is nowadays most frequently used merely as a cover for loose ideas and ignorance of principles . . . . The term "res gestae" should be once and for all abandoned as useless and confusing. Let it be said that such acts are receivable as "necessary parts of the proof of an entire deed," or as "inseparable elements of the deed," or as "concomitant parts of the criminal act," or anything else that carries its own reasoning and definition with it; but let legal discussion sedulously avoid this much-abused and wholly unmanageable Latin phrase.

Id.

might argue that this testimony is irrelevant and therefore inadmissible because he can offer proof that Mr. Toad received a concussion in the accident and it was the head injury, not alcohol, that caused his disorientation.

The fact that there are alternate, reasonable inferences which could be drawn from the proffered evidence does not render that evidence irrelevant as long as some reasonable juror could make the inference suggested by the proponent of evidence.[39] From any given fact, there may be numerous possible inferences that could be made. To demonstrate the relevancy of the offered fact, the proponent need only show that *one* of these reasonable inferences would nudge the probabilities of the truth or falsity of some fact of consequence in the trial.

Schematically, the offer would appear as follows:



If "A" is one reasonable inference that could be drawn from prof-

39. *See* Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 158 (1983 Tex. R. Evid. Handbook)(proposition on which evidence offered need not even be most likely inference drawn from evidence); *see also* C. MCCORMICK, MCCORMICK ON EVIDENCE § 185, at 437-38 (1954); J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN & J. MANSFIELD, CASES AND MATERIALS ON EVIDENCE 545-47 (5th ed. 1965)(chain of inferences from offered evidence to fact of consequence may be lengthy and convoluted and, despite such fractionalizing, trial judge often concludes that initial item of evidence should be admitted). As Judge Weinstein advises trial judges:

> It is important for the judge to bear in mind in a jury case that the experience of jurors may be quite different from his and that consequently their assessment of probabilities may vary from his. So long as a juror might rationally have his assessment of probabilities affected by proffered evidence that evidence is relevant . . . . The judge may be doubtful about probative force and yet admit evidence because the jury may rationally assess probative force differently from the way he does. That does not mean the jurors are acting irrationally or emotionally but only that they are utilizing their own experiences to supply and evaluate appropriate hypotheses of proof.

1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 401[09], at 401-63 (1985).

fered evidence "X," then "X" is relevant to the case, even though "B," "C," and "D" are all permissible, perhaps preferable, inferences. When alternate inferences could be drawn from a given piece of evidence, it is for the factfinder, the jury, to determine what inference it believes is the proper one. Thus, the trial judge should conclude that "X" is relevant under rule 401.

Once the trial judge has determined that a particular piece of evidence is logically relevant to some issue in the trial, he does not immediately admit it, but rather he moves on from rule 401 to rule 402 in deciding whether the logically relevant evidence should be admitted. There are, however, occasions in which the trial judge must make a detour from rule 401 to rule 104(b) before moving to rule 402. Suppose, for example, in the hypothetical involuntary manslaughter trial outlined above, that the State opens its case by calling Sergeant Friday who offers to testify that he found five beer cans *close* to the accident scene. The defendant objects that this evidence is irrelevant. It is the State's burden to explain to the judge how these beer cans are logically connected to the case.[40] The prosecutor might say that Sergeant Friday will testify that the beer cans were shiny, cold, had a few drops of alcoholic-smelling liquid still inside, and were found six feet from the defendant's Toadmobile. Is this, by itself, a sufficient showing of logical relevancy to support a finding by a reasonable person that the beer can is connected to the defendant? Probably not.[41] There has been no showing, however slight, that the beer cans did, in fact, come from Mr. Toad's car.

Suppose, however, that the prosecutor tells the judge that his next witness, Officer Obie, will testify that he found one more empty beer can, matching the five found on the ground, in the defendant's car immediately after the accident. If the prosecutor can show the defendant's possession of one beer can inside the car, the matching beer cans found outside the car are conditionally relevant. In this circum-

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40. *See supra*, note 32 and accompanying text.

41. Many judges simply exclude the evidence by declaring that there are too many other alternate possible reasons for how and why the beer cans arrived at this location. Perhaps there was a crowd of teenagers standing on the street corner drinking beer and throwing cans in the street immediately before the accident. Or some other car had just driven by and thrown the cans out its car window. These alternate reasonable explanations, however, do not prove that the beer cans are irrelevant under rule 401. They affect the weight, not the admissibility of the evidence. *See supra*, notes 20-22 and accompanying text. The opposing party, during his case-in-chief or rebuttal, may introduce evidence that relates to the weight or credibility of the conditionally relevant evidence.

stance, the trial judge would refer to rule 104(b) before making his relevancy ruling.

III. RULE 104(b). RELEVANCY CONDITIONED ON FACT

Under Texas Rules of Criminal Evidence 104(b),[42] a trial judge has no discretion to exclude a piece of evidence that is conditionally relevant.[43] Once the proponent of the evidence has produced sufficient admissible[44] evidence "to support a finding" of the fulfillment of the condition, the evidence must be admitted for the jury to decided whether or not it is relevant.[45] That is, if the judge in Mr. Toad's

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42. TEX. R. CRIM. EVID. 104(b) reads:

> (b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Federal Rule 104(b) is the same.

43. FED. R. EVID. 104(b) advisory committee's note; *see* CALIF. EVID. CODE § 403(a), comment at 142 (Deering 1986)(trial judge *required* to admit proffered evidence if evidence sufficient to support finding of preliminary fact and no discretion to exclude proffered item on relevancy grounds once condition fulfilled); N.J. R. EVID. 8(2) (where evidence otherwise admissible if competent and competence subject to condition, judge *shall* admit it if sufficient evidence to support finding of condition). The use of the word "shall" in both the federal and Texas rule indicates a mandatory, rather than discretionary, direction to the trial judge. *See* FED. R. CRIM. PROC. 104(b); TEX. R. CRIM. EVID. 104(b).

44. While a judge is not bound by the rules of evidence in making a determination of admissibility under rule 104(a), he may consider only admissible evidence in making a relevancy determination under rule 104(b). Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1220 (E.D. Pa. 1980). In addressing a 104(b) ruling on the authenticity of documents, the court stated that "the substantive determination which the court is required to make on the issue of authentication is whether *admissible* evidence exists which is sufficient to support a jury finding of authenticity. (emphasis in original). For it would be a pointless exercise for a judge to rely upon inadmissible evidence to fulfill the . . . requirement when the trier of fact can only consider admissible evidence." *Id.*

45. Professor Morgan explains the issue as follows:

> It often happens that upon an issue on the existence of fact C, a combination of facts A and B will be highly relevant but that either without the other will have no relevance . . . . If the proponent offers evidence of A and the existence of B is in dispute, is the dispute to be determined by the judge? The question is one of the kind customarily answered by a jury; no rule of policy applicable to evidence requires the exclusion of this sort of evidence or forbids its consideration by the jury. If the proponent can make the existence of B a question for the judge by first offering evidence of the existence of A, he can make the existence of A determinable by the judge by first offering evidence of the existence of B. Consequently, when the only objection to admissibility is lack of relevance, it seems clear that the function of the judge should be to see to it only that sufficient evidence of each is introduced to justify a finding of its existence, and the jury should determine the dispute as to each under proper instructions from the judge.

E. MORGAN, BASIC PROBLEMS OF EVIDENCE 39-40 (5th ed. 1976); *see also* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMI-

involuntary manslaughter trial makes a preliminary determination that some reasonable juror might believe that the five beer cans lying close to Mr. Toad's car are connected to the other one inside the car, he must admit Sergeant Friday's testimony regarding the cache of cans. Public policy favors having these relevancy issues resolved by the jury who, as ultimate factfinder, is charged with weighing the credibility of testimony and assessing the probative value of evidence that is admitted.[46]

NAL § 104.2, at 23 (West 1988)(noting that questions affecting only relevancy of evidence are appropriate questions for juries, and that if judge decided all conditional relevancy issues, the functioning of jury as trier of fact would be greatly restricted and in certain cases destroyed).

46. CAL. EVID. CODE § 403, comment at 143 (Deering 1986). *See also* FED. R. EVID. 104(b) advisory committee's note, which explains:

> If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence on the issue is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.

Id.; *see also* United States v. Barletta, 652 F.2d 218, 219 (1st Cir. 1981). In distinguishing the operation of rule 104(a) from "preliminary questions of fact," latter questions ought to be decided by juries. *Id.* Thus, the court's role in this instance is not to make factual determination, but rather to rule as a matter of law whether a reasonable jury could properly find that the ultimate fact favors the proponent of evidence. The court further stated: "Indeed, to hold otherwise—to deny the jury the possibility of making a particular factfinding simply because the court would determine the fact otherwise—might in criminal cases deprive a defendant of his sixth amendment right to have his case tried to a jury." *Id.* In its original form, Federal Rule 104(b) read:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition. If under all the evidence upon the issue the jury might reasonably find that the fulfillment of the condition is not established, the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled. If under all the evidence upon the issue the jury could not reasonably find that the condition was fulfilled, the judge shall instruct the jury to disregard the evidence.

Committee on Rules of Evidence & Procedures of the Judicial Conference of the United States, PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS & MAGISTRATES, PROP. R. EVID. 104(B) (Prelim. Draft 1969), *reprinted in* 46 F.R.D. 161, 186 (1969). As originally written, the rule is more precise, if also more verbose. Part of the opposition to the second and third sentences came from those who feared that rule 104(b) would misdirect judges into instructing jurors that they could not consider conditionally relevant facts unless they were unanimous in their finding of the preliminary fact. Professor Ball finds this possibility so "staggering in its possibilities for misunderstanding, mistake, and mistrial," that he advocates the repeal of rule 104(b) altogether. Ball, *The Myth of Conditional Relevancy*, 14 GA.

The types of issues that most frequently arise in the area of conditional relevancy include whether:

1. The relevance of the proffered evidence depends upon the preliminary fact's existence;[47]

L. REV. 435, 458-60 (1980). Unanimity by the jurors is, of course, required *only* of the material elements of the offense, not as to the weight each juror assigns a particular piece of evidence or to the reasoning he uses in reaching a verdict. *See* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[02], at 104-21 (1985). Weinstein states: "To insist that all jurors agree on whether they will consider items of evidence is, assuming the instruction is meant to be followed, to encourage mistrials through jury disagreement." *Id.*; *see also* Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435, 459 (1980). If jurors arrive at verdict on ultimate issues, that is all that law requires and the only instruction the judge should give regarding conditionally relevant evidence is "on how to find disputed facts, not on determining whether supposed conditions on their relevancy have been fulfilled." *Id.* Policy considerations weighed heavily in the drafting of rule 104(b). See 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5054, at 266-67 (West 1977), in which the authors list four policy factors behind rule 104(b). The first policy factor is the preservation of the right to jury trial where a preliminary fact coincides with the ultimate issue. *Id.* These are fact questions and that is what juries are for. Therefore, if some juror could reasonably find this fact, the judge must give him an opportunity to accept or reject it. Second, these determinations do not involve any technical issues that are beyond the understanding of jurors, rather they are everyday logical inferences. *Id.* at 266-67. Third, there is no reason to believe that jurors are going to be hoodwinked by irrelevant evidence into misusing that evidence. *Id.* at 267. Finally, there is no reason to believe that jurors will be swayed by irrelevant material into making an emotional rather than rational decision. *Id.* Questions of relevancy rarely involve prejudicial evidence which cannot be disregarded by a jury if they decide their it is irrelevant. *Id.* Both the Federal Rules of Evidence and their state counterparts are implicitly based upon the assumption that jurors, as a class, are a relatively sophisticated group who make rational decisions based upon evidence, not emotion, and who will follow the trial judge's instructions, including those to disregard evidence improperly or improvidently admitted.

47. CAL. EVID. CODE § 403(a) (Deering 1986); *see also* FED. R. EVID. 104 advisory committee's note. For example, if the prosecution introduces evidence that a homicide victim was killed with a bullet fired from a .38 Smith & Wesson, then evidence that the defendant bought a .38 Smith & Wesson the day before the murder is relevant. If the defendant subsequently offers evidence that the fatal bullet came from a .38 Colt, then the defendant's purchase of the Smith & Wesson is "conditionally relevant." *See* Seidelson, *Conditional Relevancy and Federal Rule of Evidence 104*, 47 GEO. WASH. L. REV. 1048, 1050 (1979). An individual juror should consider the evidence of the defendant's gun purchase only if he has first determined that the victim was killed by a Smith & Wesson. Nonetheless, the evidence of the defendant's purchase should be admitted for the jury's consideration once the trial judge determined that there had been sufficient evidence produced such that a reasonable juror might conclude that a Smith & Wesson was involved in the murder. This evidence could be from a forensics expert, but it could also be from a crime scene officer with experience in ballistics, or it could be from an ordinary layman who said he had only once before in his life seen a Smith & Wesson bullet and this bullet looked like that one. Another common example of the relevance of proffered evidence dependent upon the existence of the preliminary fact is that of D.W.I. intoxilyzer tests. Returning to the involuntary manslaughter hypothetical, suppose that Mr. Toad is taken down to the police station and he consents to take an intoxilyzer test. In Texas, as in virtually all other states, the results of an intoxilyzer test are valid only if the test is performed in

2. The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;[48]
3. The preliminary fact is the authenticity of a writing;[49] and

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accordance with the applicable Department of Public Safety regulations. *See* TEX. REV. CIV. STAT. ANN. art. 67011-5, § 3(b) (Vernon 1988). Whether a particular test was given in accordance with the specific statute is determined by the judge under rule 104(a), who uses a "preponderance of the evidence" standard. *See infra*, note 101 and accompanying text. However, an intoxilyzer test is relevant to the issue of intoxication only if a reasonable juror could infer from the facts in the particular case that the test was given in accordance with the DPS regulations. Once the judge has heard evidence that is "sufficient to support a finding" by some reasonable juror that the individual test was valid, he must admit that evidence for the factfinder's consideration. It is the jury's job, not the judge's, to accept or reject the facts that could support a finding that the test was valid. *See* State v. Betsch, 368 N.W.2d 547, 550 (N.D. 1985)(issue of whether blood test was taken within two hours of driving as required by statute was issue to be determined by jury under rule 104(b)). For example, one of the Texas statutory requirements regarding an intoxilyzer test is that the person being tested must be continuously observed for 15 minutes before taking the test. If Officer Obie testified that he watched Mr. Toad for 16 minutes before giving him the test, but Mr. Toad and nine bishops will testify that Officer Obie waited only 14 minutes, the judge must admit Officer Obie's testimony and the test result. If a reasonable juror could believe that Officer Obie gave the test after 15 minutes, the test results are relevant under rule 104(b), despite the fact that there is contradictory evidence. Credibility is for the jury, not the judge. Conversely, if all the witnesses agree that Officer Obie watched Mr. Toad for only 14 minutes, then the judge determines the admissibility of the test result under rule 104(a). Now it is a question of the applicability of legal standards to an undisputed factual situation, and the judge, not the jury, determines legal questions. *See* Ray v. State, 749 S.W.2d 939, 943 (Tex. App.—San Antonio 1988, no pet.).

48. CAL. EVID. CODE § 403(a) (Deering 1986). Under FED. R. EVID. 602 and TEX. R. CRIM. EVID. 602, a witness may not testify to facts of which he has no personal knowledge, but when his testimony would be relevant if he has personal knowledge, that determination is one of conditional relevancy. A trial judge must admit the witness' testimony if the proponent has offered evidence "sufficient to support a finding" that the witness does have such knowledge. *See* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[09], at 104-79-80 (1985)(quoting FED. R. EVID. 901(a)). For example, in a D.W.I. trial, the intoxilyzer instrument supervisor may testify that the instrument was working properly on the night the defendant took an intoxilyzer test. The defendant objects, saying that this testimony is irrelevant since the supervisor was not present at the time the test was given, and thus he has no personal knowledge of its function. The prosecution offers to prove that the supervisor tested the instrument on the Monday before the test and the Monday after the test and the instrument was working on both occasions. If the trial judge determines that a reasonable juror could conclude from this evidence that the supervisor had personal knowledge that the instrument was working at the time the defendant took his test, this testimony is conditionally relevant and should be admitted for the jury's consideration. *See Ray*, 749 S.W.2d at 944 (in addressing whether proper intoxilyzer procedures followed in particular case, court stated that questions regarding procedure or accuracy used in administering scientific test go to weight given test's results, not admissibility).

49. CAL. EVID. CODE § 403(a) (Deering 1986). Under FED. R. EVID. 901 and TEX. R. CRIM. EVID. 901, a document is admissible if evidence "sufficient to support a finding" is offered to show its authenticity. For example, in criminal trials, the prosecution frequently

4. The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether the person made the statement or so conducted himself.[50]

Other examples of conditional relevancy rulings include: When the prosecutor wishes to use a judgment of conviction to impeach a witness' testimony, is the witness the same person who was convicted? Did the hearsay declarant actually make the statement attributed to him? Was the agent authorized to speak for the principal? Did "X" adopt an admission? Were "A" and "B" co-conspirators such that "A" 's statement is admissible in "B" 's trial?[51]

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wishes to prove that a defendant has prior convictions through the use of a "penitentiary packet," a document assembled by prison officials and kept in the course of their business and public records. Such a document is admissible if the prosecution has offered enough evidence to support a reasonable inference that the "pen packet" is what it purports to be, the prior criminal history of the defendant, and that some rational juror could conclude that the document refers to the defendant. Sufficient proof that the document itself is authentic might be a showing that the document bears a seal and the signature of its custodian stating that it was kept in a public office. TEX. R. CRIM. EVID. 902(1); *see also* Yeager v. State, 737 S.W.2d 948, 950-52 (Tex. App.—Fort Worth 1987, no pet.)(discussing authentication requirements under Texas rules of evidence). Proof that this document is the criminal history of the present defendant might include testimony that the defendant's fingerprints were contained within the packet, a photograph purporting to be that of the defendant contained within the packet, a detailed physical description matching that of the defendant contained within the packet, or a witness with personal knowledge who testifies that the person is the person convicted in the cause numbers of the judgments contained within the packet. Littles v. State, 726 S.W.2d 26, 30-32 (Tex. Crim. App. 1984)(op. on reh'g)(while there may be "preferred methods of proving identity," for purposes of prior convictions, any evidentiary method, whether conventional or "unorthodox," which is sufficient is acceptable). *See generally* United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985). Regarding the sufficiency of evidence to demonstrate identification and chain of custody of a counterfeit bill, the court in *Jardina* stated: "[w]hen confronted with evidence of questionable origin, the court should admit the evidence if a prima facie showing of authenticity is made. The sponsor need not present proof beyond a reasonable doubt." *Id. See generally* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULE OF EVIDENCE: CIVIL AND CRIMINAL § 104.2, at 23-24 (West 1988). Here, Professor Goode states:

> The authentication of a document or an item of real evidence requires evidence sufficient to support a jury finding that the offered item is what its proponent claims. The function of the judge is merely to determine whether a prima facie has been presented, not to decide the actual issue of genuineness.

Id.

50. CAL. EVID. CODE § 403(a) (Deering 1986); *see* United States v. Sliker, 751 F.2d 477, 497-500 (2d Cir. 1984)(evidence must be admitted when judge makes preliminary determination that it *could* be defendant's voice on tape recordings and jury makes own comparison), *cert. denied*, 470 U.S. 1058 (1985).

51. *See* Bourjaily v. United States, __ U.S. __, __, 107 S. Ct. 2775, 2779-80, 97 L. Ed. 2d 144, 153-55 (1987)(under rule 104, co-conspirator statements may be considered in determining whether conspiracy exists and whether defendant was part of it); *see also* United States v.

Frequently, the situation arises in which each of two facts are conditionally relevant to proof of the other and trials would never move forward unless the proponent of the evidence were permitted to offer evidence of both. For example, the defendant in a delivery of cocaine prosecution might be charged as a party to the offense along with six other cohorts. In the individual defendant's trial, evidence of a conspiracy among the seven men is irrelevant unless the defendant was a participant in the conspiracy, but the defendant's participation in dealings and discussions with the other six is irrelevant unless there was a conspiracy. The relevance of each fact is thus conditional upon the existence of the other, and neither fact is relevant to the lawsuit unless the other fact has already been proven.

Rule 104(b) cuts through this Gordian knot and tells the trial judge that he must admit evidence of the conspiracy if some reasonable factfinder could conclude that the defendant was a participant in it. While the trial judge may require the prosecutor to offer some preliminary evidence of the defendant's dealings with at least one of the other six participants before admitting evidence of the nature, extent, and activities of the conspiracy, he has the discretion to permit the reverse order as well.[52] Thus, rule 104(b) permits the judge to admit

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Herrera, 407 F. Supp. 766 (N.D. Ill. 1975). The court in *Herrera* was one of the first to interpret rule 104(b). *Id.* at 770-72. Though the case involved a court trial without a jury, the judge recognized his dual functions of "gatekeeper" to the admissibility of evidence and "factfinder" as to its relevancy conditioned upon fact. *Id.* at 771-72. The defendant was charged with selling heroin. A co-defendant, Rodriquez, pled guilty at Herrera's trial, and the government presented independent evidence of a conspiracy between the defendant and Rodriquez to sell heroin, as well as Rodriquez' co-conspirator declarations inculpating Herrera. *Id.* at 768-69. Pursuant to a motion to set aside the conviction as unsupported by admissible evidence, the court examined the admissibility of the co-conspirator declarations. *Id.* at 770. The judge rejected the notion that the government was required to prove that the defendant was a part of a conspiracy beyond a reasonable doubt before any co-conspirator statements should be admissible. Such a requirement would be tantamount to telling the factfinder that "you may not consider this evidence unless you first find the defendant guilty." *Id.* at 771 (quoting *Carbo v. United States*, 314 F.2d 718, 736 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964)). The court rejected an evidentiary burden of either "beyond a reasonable doubt" or "by a preponderance of the evidence" and instead adopted an admissibility standard for co-conspirator statements of "substantial evidence" from which a reasonable mind could infer the existence of the preliminary fact, here the existence of a conspiracy. *Id.*

52. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5054, at 269-70 (1977). Under FED. R. EVID. 104(b), the trial judge has discretion to:

1. admit the conditionally relevant evidence now, subject to a motion to strike if the proponent fails to offer proof of the connecting fact;

2. defer any ruling until the connecting fact is offered; or

the proponent's evidence subject to "connecting it up" later.[53]

In the involuntary manslaughter trial, the trial judge could permit Sergeant Friday to testify to the discovery of the five beer cans outside the car, conditioned upon Officer Obie testifying later about the lone beer can found inside the car. Conversely, the trial judge might require the State to offer Officer Obie's testimony first. A cautious trial judge would be wise to require the proponent to produce the less prejudicial evidence before that which is more damaging to the other side.[54] By doing so, the trial judge avoids the greater potential for prejudice to the other party if the offering party is unable to connect

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3. reject the evidence now and require the proponent to prove the base facts first, then reoffer the conditionally relevant evidence. *See id.*

53. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5054, at 269-70 (noting and approving practice of connecting up relevancy of evidence offered in early part of trial to evidence offered through another, later witness).

> When an item of evidence is conditionally relevant, it is often not possible for the offeror to prove the fact upon which relevance is conditioned at the time the evidence is offered. In such cases it is customary to permit him to introduce the evidence and "connect it up" later. Rule 104(b) continues this practice, specifically authorizing the judge to admit the evidence "subject to" proof of the preliminary fact . . . . It is, of course, not the responsibility of the judge sua sponte to insure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition . . . .

Id. Under both the federal and Texas version of rule 104(b), the opponent of the evidence is responsible for requesting the judge to strike the evidence if, at the end of the trial, he believes that no rational trier of fact could find that the preliminary facts exists. Under the original federal proposal, this was the trial court's responsibility. *See* Seidelson, *Conditional Relevancy and Federal Rule of Evidence*, 104 GEO. WASH. L. REV. 1048, 1051 n.10 (1979)(referring to Justice Committee report which recommended that burden be placed on opposing counsel to move to strike since this would conform to the general procedures of rule 103); *see also supra*, note 46 and accompanying text.

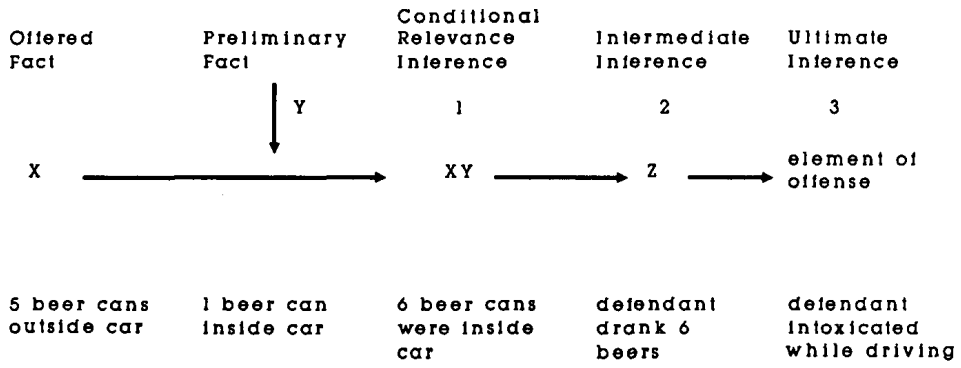
54. *See, e.g.*, United States v. James, 590 F.2d 575, 581-82 (5th Cir.)(en banc), *cert. denied*, 442 U.S. 917 (1979). In addressing the order of proof regarding co-conspirator statements and the proof of the underlying conspiracy, the fifth circuit stated:

> Both because of the "danger" to the defendant if the statement is not connected and because of the inevitable serious waste of time, energy, and efficiency when a mistrial is required in order to obviate such danger, we conclude that the present procedure warrants that statement of a preferred order of proof in such a case. The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator. If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.

Id. at 82; *see also* United States v. Vinson, 606 F.2d 149, 152 (6th Cir. 1979)(eschewing "hard and fast procedures" since trial judge needs considerable discretion to control order and mode of proof and outlining various different possible procedures for judicial guidance), *cert. denied*, 444 U.S. 1074 (1980). *Compare* United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978)(requiring trial court to make explicit determination for record regarding admissibility of co-

up the conditionally relevant evidence at a later stage. Obviously, the evidence of the lone beer can inside Mr. Toad's car is both more directly probative and less prejudicial than the discovery of the cache of cans outside the car, which is relevant to the trial only after the connection has been made. While it would not be an abuse of discretion to permit Sergeant Friday to testify first, it would be the better part of discretion to have Officer Obie testify first unless this would be unduly disruptive to the trial's progress.[55]

Schematically, conditionally relevant evidence might be shown as follows:



The proponent of "X" must offer some evidence of "Y" to demonstrate the connection between "X" and "1," whereas the connections between "1" and "2," and "2" and "3," are logical inferences that the factfinder himself may accept or reject. In other words, the step from "X" to "1" must be supported by proof, while the steps from "1" to "2" to "3" need not.

The proponent must produce merely "some evidence" or a "prima facie" showing[56] before the trial judge is required to admit the conditionally relevant fact. The threshold burden of relevancy under rule

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conspirator's statement at end of trial) *with* United States v. Littlefield, 594 F.2d 682, 686 (8th Cir. 1979)(failure to follow *Bell* procedure not reversible error).

55. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5054, at 270 (1977)(trial judge should balance convenience of postponing proof against possible prejudice to opposing party if subsequent evidence not sufficient to justify admission).

56. Wellborn, *Article I of the Texas Rules of Evidence and Articles I and XI of the Texas Rules of Criminal Evidence: Applicability of the Rules, Procedural Matters and Preserving Error*, 18 ST. MARY'S L.J. 1165, 1189 (1987)(rule 104(b) requires only a "prima facie" showing of preliminary fact).

104(b) is very low: "the preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist."[57] For example, in the case of Mr. Toad and the beer cans, the judge could exclude, as irrelevant, the five beer cans Sergeant Friday found outside the car only if no rational trier of fact could conclude that they were connected to Mr. Toad.

Similarly, a defendant's penitentiary packet could be excluded under rule 104(b) only if the judge determined that no jury could reasonably find that the defendant was the same person who had been previously convicted. Thus, if the defendant's fingerprints are not contained within the packet, there is no picture, there is no physical description, and there is no witness to testify that the defendant is the same person whose conviction is contained within the packet, then the judge could exclude the packet. Conversely, if the prosecutor offers any one of the above types of evidentiary connections, such that some rational juror could reasonably find that the penitentiary packet was that of the defendant, the packet is relevant conditioned upon the factfinder's determination that it does belong to the defendant.[58] The trial judge, in that event, must admit the penitentiary packet; he does not have the discretion to exclude it as irrelevant.

In a recent, unanimous decision, *Huddleston v. United States*,[59] the United States Supreme Court held that rule 104(b) applies to all preliminary issues of relevancy, including the admission of extraneous offenses under rule 404(b).[60] Prior to *Huddleston*, the federal circuits

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57. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5054, at 269 (1977); *see also* United States v. Astling, 733 F.2d 1446, 1457 (11th Cir. 1984)(in drug prosecution case, relevance of extraneous offense evidence could be decided against proponent only if jury could not reasonably find that defendant committed extraneous offense).

58. *See supra*, note 49 and accompanying text; *see also* Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIGATION 129, 143-44 (1987)(proponent of tape recording should be allowed to rely on foundation sufficient to create permissive inference that recording genuine).

59. __ U.S. __, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

60. FED. R. EVID. 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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.

Id. TEX. R. CRIM. EVID. 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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, pro-

had been split as to whether the government was required to prove that the defendant committed the extraneous offense by evidence sufficient to support a finding,[61] by a preponderance of the evidence,[62] or by "clear and convincing" evidence.[63] In *Huddleston*, the Supreme Court concluded that evidence of an extraneous offense "should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."[64] That is, if there has been "some evidence" such that a hypothetical juror could reasonably conclude that the defendant committed the extraneous offense, that offense is conditionally relevant and, if otherwise admissible,[65] the judge may not exclude it.[66] The Court explained the trial judge's lim-

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vided, upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief such evidence other than that arising in the same transaction.

Id.

61. United States v. Ingraham, 832 F.2d 229, 235 (1st Cir. 1987); United States v. Martin, 773 F.2d 579, 582 (4th Cir. 1985); United States v. Dothard, 666 F.2d 498, 502 (11th Cir. 1982); United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978)(en banc), *cert. denied*, 440 U.S. 920 (1979).

62. United States v. Ebens, 800 F.2d 1422, 1432 (6th Cir. 1986); United States v. Leonard, 524 F.2d 1076, 1090-91 (2d Cir. 1975).

63. United States v. Leight, 818 F.2d 1297, 1302 (7th Cir. 1987); United States v. Weber, 818 F.2d 14, 14-15 (8th Cir. 1987); United States v. Vaccaro, 816 F.2d 443, 452 (9th Cir. 1987); United States v. Lavelle, 751 F.2d 1266, 1276 (D.C. Cir.), *cert. denied*, 474 U.S. 817 (1985).

64. Huddleston v. United States, __ U.S. __, __, 108 S. Ct. 1496, 1499, 99 L. Ed. 2d 771, 779-80 (1988).

65. *See id.* at __, 108 S. Ct. at 1501, 99 L. Ed. 2d at 782. The trial judge must still determine that the uncharged act is being offered for some permissible purpose, such as any of those enumerated under rule 404(b), and that its prejudicial effect does not substantially outweigh its probative value under rule 403. *See id.* at __, 108 S. Ct. at 1500, 99 L. Ed. 2d at 781 (if offered for a proper purpose, evidence of extraneous offenses is "subject only to general strictures limiting admissibility such as Rules 402 and 403"); *see also* United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978)(two-step analysis of 404(b) requires determination of relevance of extrinsic offense evidence to issue other than defendant's character evidence must possess probative value not substantially outweighed by unfair prejudice and meet rule 403's other requirements).

66. *See Huddleston*, __ U.S. at __, 108 S. Ct. at 1501, 99 L. Ed. 2d at 782. In *Huddleston*, a prosecution for selling stolen goods in interstate commerce, the government introduced evidence of extraneous offenses that the defendant offered stolen television sets and other appliances for sale. *Id.* at __, 108 S. Ct. at 1498, 99 L. Ed. 2d at 778. This evidence was relevant to prove that the defendant knew that the Memorex tapes with which he was charged with having possessed and sold were stolen. *Id.* The only issue in dispute at trial was whether the defendant knew that the tapes were stolen, thus the extrinsic acts evidence was critical to establishing the truth of that disputed issue. *Id.* On appeal, the defendant argued that the government had failed to prove, by at least a preponderance of the evidence, that the television sets were stolen or that he knew that they were stolen *before* the evidence of the extraneous

ited role by saying: "[i]n determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence."[67]

As the Supreme Court noted, the trial judge frequently permits the government to introduce some evidence concerning an extraneous offense based upon the representation that further evidence on this event will be forthcoming.[68] Then, at the end of the government's

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offenses was heard by the jury. *Id.* at __, 108 S. Ct. at 1499, 99 L. Ed. 2d at 780. Thus, he argued, the trial court erred in admitting the evidence for the jury's consideration without a preliminary finding that the government had shouldered this evidentiary burden. *Id.* The Supreme Court rejected any requirement for such a preliminary finding by the trial court. *Id.* at __, 108 S. Ct. at 1500, 99 L. Ed. 2d at 781. Instead, the Court upheld the trial court's admission of testimony regarding the television set sales once the government had offered some evidence from which a reasonable juror could conclude that the sets were stolen. *Id.* at __, 108 S. Ct. at 1501, 99 L. Ed. 2d at 782.

67. *Id.* at __, 108 S. Ct. at 1501, 99 L. Ed. 2d at 782. As noted by Professor Wellborn, under TEX. R. CRIM. EVID. 104(b), the function of the trial court is to determine whether a "prima facie" case of the preliminary fact has been presented. Wellborn, *Article I of the Texas Rules of Evidence and Articles I and XI of the Texas Rules of Criminal Evidence: Applicability of the Rules, Procedural Matters, and Preserving Error*, 18 ST. MARY'S L.J. 1165, 1189 (1987). Professor Wellborn posits that if the judge determined relevancy, there would no longer be a need for juries as the finder of fact. *Id.*; *see also* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 104.2 (West 1988). By acting as an inhospitable "gatekeeper" who only permits the jury to hear evidence that the judge himself considers relevant and probative, the jury's verdict would be predetermined by the "gatekeeper" of evidence, rather than the factfinder. The trial judge must, however, consider the relationship between the preliminary fact and the conditionally relevant fact in determining that there is a plausible logical connection between the two. For example, suppose, in the involuntary manslaughter trial, that the prosecutor offers the testimony of Sergeant Friday regarding the five beer cans outside the Toadmobile. The defense objects, arguing that there has been no connection made between those five cans and Mr. Toad. The State offers Officer Obie's testimony that he found a monkey in the back set of the car. Here, the preliminary fact, "monkey in car," even if proved beyond a reasonable doubt, has nothing whatever to do with connecting the five beer cans to the car. Thus, a trial judge must not only determine that there has been a sufficient showing of the preliminary fact, he must also find that the preliminary fact is logically connected to the conditionally relevant fact. In sum, the trial judge, in addressing conditionally relevant evidence must make three interrelated determinations:

1. Proof of the preliminary fact is relevant under rule 401 to proof of the conditionally relevant fact;

2. There has been evidence "sufficient to support a finding" of the preliminary fact offered by the proponent; and

3. Before a final ruling on admissibility is made (frequently at the end of the trial), the judge must determine that all of the evidence offered, when considered in its entirety, is enough that a rational trier of fact *could* find, by a preponderance of the evidence, that the offered fact exists.

68. *See* Huddleston v. United States, __ U.S. __, __ n.7, 108 S. Ct. 1496, 1501 n.7, 99 L.

case or even at the end of the entire trial, the judge will, if requested, determine whether sufficient evidence has been produced which would permit the jury to make the requisite finding.[69] At that time, the judge must consider all of the evidence, direct and circumstantial, presented to the jury: "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts."[70] Only if the proponent fails to meet the minimal standard of proof, should the trial judge tell the jurors to disregard the evidence.[71]

The reasoning and result in *Huddleston* is but one more example of how the codified rules of evidence, both federal and Texas, have swung the balance toward the admission of all relevant evidence in modern trials. Unfortunately, Texas courts, even after the adoption of rule 104, have not always recognized and followed it.[72]

Ed. 2d 771, 783 n.7 (1988); *see also* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5054, at 269-70 (1977).

69. *See Huddleston*, __ U.S. at __ n.7, 108 S. Ct. at 1501 n.7, 99 L. Ed. 2d at 783 n.7.

70. *See* Bourjaily v. United States, __ U.S. __, __, 107 S. Ct. 2775, 2781, 97 L. Ed. 2d 144, 155 (1987)(quoted in *Huddleston*, __ U.S. at __, 108 S. Ct. at 1502, 99 L. Ed. 2d at 783).

71. *Huddleston*, __ U.S. at __, 108 S. Ct. at 1501-02, 99 L. Ed. 2d at 782-83.

72. For example, in *Pyles v. State*, 755 S.W.2d 98, 112-14 (Tex. Crim. App. 1988), delivered almost two years after the promulgation of the Texas Rules of Criminal Evidence, the Court of Criminal Appeals mistakenly applied a "beyond a reasonable doubt" standard to the admission of conditionally relevant evidence. *See id.* at 114. In that capital murder case, the State offered evidence of the defendant's jail cell graffiti, displaying, inter alia, the words, "Kill, kill Judge, D.A." *Id.* at 112. The defendant objected to the evidence on several grounds, including the fact that there was "no proof that he made the writings." *Id.* at 113. The graffiti would be relevant to show the defendant's predisposition toward violence only if he made them. *See id.* at 115. Thus, the graffiti was relevant conditioned upon sufficient evidence to support a finding of the preliminary fact—that the defendant wrote the words. *See* TEX. R. CRIM. EVID. 104(b). The Court of Criminal Appeals, however, analyzed the *admissibility* of the evidence by the same standard used to determine the *sufficiency* of the evidence to prove the offense. *See Pyles*, 755 S.W.2d at 113 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). In upholding the admission of the graffiti evidence, the court stated: "[w]e conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant made the writings. There was sufficient evidence before the trial court to support that conclusion." *Id.* at 114. The court cited no precedent for analyzing the admission of evidence by the same standard as that used in determining guilt or innocence. Indeed, *Huddleston*, had been delivered more than a month earlier, addressed this same issue, and unanimously held that the admission of conditionally relevant evidence is determined by the "minimal" proof of some evidence "sufficient to support a finding" by a reasonable juror. *Huddleston*, __ U.S. at __, 108 S. Ct. at 1501, 99 L. Ed. 2d at 782. Since the wording in FED. R. EVID. 104(b) is precisely the same as that in TEX. R. CRIM. EVID. 104(b), and since the Court of Criminal Appeals has announced on several occasions that it will follow the federal interpretation when the two rules are the same, one can only conclude that the Texas court simply overlooked rule 104(b) in deciding

The codified rules of evidence are based upon the presumption that jurors are sophisticated enough to feed on more than pre-digested pablum. In other words, they are presumed to be capable of making the decision of whether to accept or reject conditionally relevant facts if they have sufficient information upon which to base a rational decision. Once the trial judge has determined that the proponent has offered "evidence sufficient to support a finding of the fulfillment of the condition,"[73] under rule 104(b), he now returns to rule 402.

IV. RULE 402: RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

Rule 402,[74] along with rule 403,[75] are frequently held up as the only "real" rules of evidence.[76] Rule 402 has been hailed as the main agent

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Pyles. See Campbell, 718 S.W.2d at 715; Casillas v. State, 733 S.W.2d 158, 168 (Tex. Crim. App. 1986)

73. FED. R. EVID. 104(b); TEX. R. CRIM. EVID. 104(b).

74. *See* TEX. R. CRIM. EVID. 402. Rule 402 reads:

Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules' or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is inadmissible.

FED. R. EVID. 402 has precisely the same meaning, though slightly different wording:

Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

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.

75. *See* TEX. R. CRIM. EVID. 403. Rule 403 reads:

Exclusion of Relevant Evidence on Special Grounds.

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, or needless presentation of cumulative evidence.

The only difference between the Texas and analogous federal rule is that the federal rule also permits the exclusion of relevant evidence on the grounds of "waste of time." Dean Blakely suggests that the elimination of this factor in the Texas rules does not "make a significant change in the coverage of the rule. The general concern of consumption of time is still covered by the factors of undue delay and needless presentation of cumulative evidence." Blakely, *Article IV: Relevancy and its Limits*, 20 HOUS. L. REV. 151, 171 (1983 Tex. R. Evid. Handbook); *see also* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 403.1 (West 1988)(noting that there is no significance to omission of phrase "waste of time" in Texas rule).

76. *See* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5199, at 222-23 (1978)(common-law doctrines not carried forward in codified rules as legislative history shows intent that judges exclude relevant evidence only on bases mentioned in rule 402); Imwinkelried, *Federal Rules of Evidence 402: The Second Revolution*, 6 REV. OF LITIGATION 129, 162-63 (1987); Rossi, *The Silent Revolution*, 9 LITIGATION 13, 59 (1983); *see also* Peter-

in the progressive lowering of evidentiary barriers to the truth.[77] It is a simple rule designed to provide the trial judge with a guiding principle of admissibility rather than a binding, detailed blueprint to follow.[78]

Because rule 402 explicitly states that "[a]ll relevant evidence is admissible, except as otherwise provided," in theory, if not in practice, no common law of evidence remains in existence.[79] The concept that

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freund, *Relevancy and Its Limits in the Proposed Rules of Evidence for the United States District Courts: Article IV*, 25 REC. OF N.Y.C.B.A. 80, 81 (1977)(rule 403 is "cornerstone" on which rules of evidence built). Professor Moore explained the rationale for considering "relevancy and materiality" as "the only universal rules of evidence" as follows:

> When these rules are applied by a court or jury with average power to judge credibility better results are apt to be attained than by the use of many technical and refined rules that (1) either exclude reliable evidence of sound probative value, or (2) are so difficult in application that their method of application can be drawn into question by an appellant with a fair chance of securing a reversal that has no relation to the merits involved.

10 J. MOORE, MOORE'S FEDERAL PRACTICE § 5[3] (1976).

77. *See* Imwinkelried, *The Need to Amend the Federal Rules of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1493-94 (1985). Judge Weinstein explained the importance of the admission of relevant evidence in the justice system as serving the paramount goal of "truth seeking."

> Truth finding must be a central purpose. Unless we are to assume that the substantive law is perverse or irrelevant to the public welfare, then its enforcement is properly the primary aim of litigation; and the substantive law can be best enforced if litigation results in accurate determinations of facts made material by the applicable rule of law. Unless reasonably accurate fact finding is assumed, there does not appear to be any sound basis for our judicial system. The fundamental condition for enhancing the possibility of accurate fact finding is that as much relevant information as possible be placed before the trier.

1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 402[01] at 402-8 (1985).

78. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 530 (1898)(evidentiary rules should be simplified and take on general character of principle to guide sound judgment of judge, rather than minute rules to bind it).

79. *See* Imwinkelried, *Federal Rule Evidence 402: The Second Revolution*, 6 REV. LITIGATION 129, 130 (1987)(under rule 402, judges may exclude relevant evidence only on bases mentioned within that rule; therefore, all evidentiary doctrines found only in prior case law are no longer applicable); *See also* Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978). Professor Cleary suggests that the purpose and rationale of the particular rule in question must be examined before deciding whether the rule should be regarded "as an exclusive occupancy of the area or as a basis for extension by analogy." *Id.* at 916. That is, sometimes the rule should be read literally and narrowly, other times it should be used as an intellectual guide by which to determine questions not directly addressed by the rules. He cites several examples in which the reviewing court extended the logical rationale for the particular rule to cover situations not specifically addressed in the explicit language of the rule. *Id.* at 916-19; *see also* United States v. Lewis, 565 F.2d 1248, 1251-52 (2d Cir. 1977)(rule 801(d)(1)(C) would admit as non-hearsay statement identifying "show-up" photograph of defendant even though language of rule clearly contemplated that witness saw individual being identified in person rather than in photograph); Kennedy v. Great Atl. & Pac. Tea Co., 551 F.2d 593, 596-98 (5th Cir. 1977)(court reasoned that judge's law clerk incompetent witness

all relevant evidence is admissible while irrelevant evidence is not, has

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under rule 605, though explicit language of rule covers only presiding judge of trial). *But see* United States v. Beechum, 555 F.2d 487, 509 (5th Cir. 1977)(engrafting former common-law evidentiary standard of "clear and convincing" evidence before proof of extraneous offense offered to prove defendant's intent admissible). The *Beechum* court stated that "[a]s a codification founded on its historical antecedents, the Federal Rules of Evidence shall not be taken to repeal the products of our studied deliberation unless that intention is clearly manifest." *Id.* Professor Cleary roundly rejected the *Beechum* rationale and argued that the Fifth Circuit's "result was to frustrate application of the Rule, to destroy uniformity of interpretation, and to violate the accepted principles of statutory construction." Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 917 (1978). The panel opinion in *Beechum* was reversed by the Fifth Circuit sitting en banc. United States v. Beechum, 582 F.2d 898 (1978)(en banc). In this exhaustive opinion, the Fifth Circuit explicitly adopted the 104(b) "sufficient to support a finding" minimal burden of proof. *See id.* at 914. The Texas Court of Criminal Appeals, in *Campbell v. State*, 718 S.W.2d 712, 714-17 (Tex. Crim. App. 1986), indicated that it would follow prior decisional law in evidentiary matters to the extent that it did not conflict with the new rules. In addressing the admissibility of a prior consistent statement under TEX. R. CRIM. EVID. 801(e)(1)(B), the court held that the new rule was "simply a codification of well-established Texas caselaw." *Id.* at 715. The court noted that there was no explicit requirement "that prior consistent statements be made before the time when the motive to fabricate arose," under rule 801(e)(1). *Id.* But since prior Texas law and some decisions under the analogous federal rule had laid down such a requirement, the court would read that predicate into the rule. *Id.* at 717. Since there was no dispute in *Campbell* that the witness made the prior consistent statement *after* the motive to falsify had arisen—the witness was promised money by Crimestoppers in return for information—this predicate was not met and thus the evidence was improperly admitted. *Id.* Had there been some testimony, however, that the witness had made the statement before being promised a reward, the prior consistent statement would have been admissible under rule 104(a) if the judge had found this fact by a preponderance of the evidence. Conversely, the Austin Court of Appeals used the Texas Rules of Criminal Evidence to advocate jettisoning the common-law *Frye* test in determining the admissibility of scientific evidence. *See* Jones v. State, 716 S.W.2d 142, 145-54 (Tex. App.—Austin 1986, no pet.). After an extraordinarily detailed analysis of both the *Frye* test and prior Texas law, the court concluded that, under the new rules of evidence, the admissibility of expert scientific evidence should be analyzed under the general relevancy doctrine of rules 401, 403, and 702. *See id.* at 153-54. Both of these post-rule opinions articulated the logical rationale for accepting or rejecting prior decisional law as a basis for analyzing admissibility under the new rules. As such, they are both consistent with each other. Sometimes prior decisional law will guide the resolution of issues under the codified rules of evidence and sometimes it will not. The courts should be guided by the logical rationale and purpose of the new rules and whether the prior precedent is in harmony or discord with those policies and purposes. As a general proposition, Professor Cleary asserts that the rules should be read as parts of a whole, with the emphasis upon judicial creativity and imagination, keeping in mind that the basic premise of the entire code is rule 402 which favors admissibility of all relevant evidence. *See* Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 917-18 (1978). Both the federal and Texas rules contain a general statement of flexibility and fairness in rule 102 which provides:

> Purpose and Construction.
>
> These rules shall be construed 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.

long been hailed as "a presupposition involved in the very conception of a rational system of evidence."[80] The reality, however, too frequently has been that relevant evidence was not admitted until and unless the proponent could provide some legal precedent, as well as logical reasoning, for its admission. Thus, while rule 402 does not change prior Texas law,[81] it may change Texas practice to the extent that the proponent of evidence will no longer be required to show legal precedent as well as logical relevancy before the trial judge will admit an item of evidence.

Under the rules of evidence, once the proponent of an item of evidence shows that the evidence is logically relevant to some issue in the trial under rule 401, it is admissible under rule 402 unless the opponent of the evidence demonstrates that it should be excluded because of some other provision, whether constitutional, statutory, or evidentiary.[82] All of the rest of the rules of evidence specify instances in

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FED. R. CRIM. EVID. 102; TEX. R. CRIM. EVID. 102; *see* Wallace, *Article I: General Provisions*, 20 HOUS. L. REV. 87, 89-90 & n.9 (1983 Tex. R. Evid. Handbook)(flexibility is overriding guide that judges should utilize in determining when to bend rule's technical requirements to reach rule 102's objectives; most advantageous aspect to approach is that it deals with unforeseen developments that might make rule's restrictions too burdensome); *see also* United States v. Abel, 469 U.S. 45, 49-52 (1984)(Supreme Court announced that while federal rules of evidence did not specifically deal with impeachment for bias, it is implicit part of rules). The court stated: "[w]e think it unlikely that [the drafters] intended to scuttle entirely the evidentiary availability of cross-examination for bias." *Id.* at 50 (citing advisory committee's note for fact that the body of common-law knowledge exists though in somewhat altered form of source of guidance in exercise of delegated powers).

80. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264 (1898). Thayer continued with:

> [T]he rules of evidence should be simplified; and should take on the general character of principles, to guide the sound judgement of the judge, rather than minute rules to bind it. The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.

Id. at 530.

81. *See* Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 161 (1983 Tex. R. Evid. Handbook).

82. *See id.* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 402.3, at 84 (West 1988). While the admission of relevant evidence secures the most fundamental goal of the criminal justice system, truth-seeking, the exclusion of relevant evidence may be based upon other important goals of that system, "which the law considers more important than ascertaining the truth in a particular law suit." 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 402[01], at 402-11 (1985). The single most important countervailing consideration to the "truth-seeking" goal of a criminal trial is the preservation of a criminal defendant's constitutional rights. There has been a dra-

which otherwise relevant evidence may be excluded or specify conditions precedent to admissibility.[83] This is not to say, however, that a trial judge must admit all evidence that is relevant to any degree. Under the rules of evidence, as under common law, the trial judge retains the discretion to exclude relevant evidence whose probative value is substantially outweighed by other factors.[84]

On occasion, the logical relevancy of a proffered piece of evidence is obvious, but the opponent of the evidence raises a question as to the legal admissibility of that evidence. That is, while the opposing party can agree that the evidence proves a material fact, he argues that the substantive law, constitutional considerations, or procedural statutes require its exclusion.

Suppose, in the hypothetical involuntary manslaughter trial, that

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matic shift away from the common-law rule that "the admissibility of evidence is not affected by the illegality of the means through which the party has obtained the evidence." C. MCCORMICK, MCCORMICK ON EVIDENCE § 72, at 152 (1954). The United States Supreme Court has enforced a number of constitutional guarantees by excluding relevant evidence obtained by unconstitutional modes. Probative evidence obtained by illegal searches has been excluded. *See* Katz v. United States, 389 U.S. 347, 354-59 (1967). Evidence obtained in violation of the right to counsel has been excluded. *See* United States v. Wade, 388 U.S. 218, 235-37 (1967). Evidence obtained without sufficient regard for the right against self-incrimination has been excluded. *See* Miranda v. United States, 384 U.S. 436, 466 (1966). Because "[t]hey do not in any wise aid the ascertainment of truth, but rather they shut out the light," the "sole warrant" of these rules of exclusion "is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifices of sources of facts needed in the administration of justice." C. MCCORMICK, MCCORMICK ON EVIDENCE § 72, at 152 (1954). Other policy rationales support exclusion of some evidence on the grounds of the sound administration of the justice system. As Judge Weinstein has noted,

> Trials in our judicial system are intended to do more than merely determine what happened. Adjudication is a practical enterprise serving a variety of functions. Among the goals—in addition to truth finding—which the rules of procedure and evidence in this country have sought to satisfy are terminating disputes, economizing resources, inspiring confidence, supporting independent social politics, permitting ease in prediction and application, adding to the efficiency of the entire legal system, and tranquilizing disputants.

1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 402[01] at 402-7 (1985).

83. For example, Article V recognizes that privileged communications between certain people advance sufficiently important societal goals that the secrecy of these communications may, on occasion, take precedence over the general rule that the law is entitled to all men's testimony. Article VI imposes limitations upon witnesses and the methods by which their testimony may be introduced. Article VII specifies the types of opinions that may be given in a trial and the necessary predicates for admission of lay or expert opinions. Article VIII deals with the admission of out-of-court statements and the various exceptions and exemptions to the hearsay rule. Article IX deals with authentication and identification procedures, while Article X specifies the methods of proving up the contents of writings or recordings.

84. *See infra*, notes 113 to 137 and accompanying text discussing TEX. R. CRIM. EVID. 403.

the State offers evidence that Mr. Toad was given an intoxilyzer test at the police station which showed that he was over the .10 level of legal intoxication.[85] The defense objects to the admission of this concededly relevant evidence, contending that the intoxilyzer test was given to Mr. Toad without first providing him an opportunity to consult an attorney. The defense argues that this is a violation of the fifth and sixth amendment rights to counsel under the United States Constitution[86] and the right to counsel under the Texas Constitution.[87] In essence, the defense attorney is stating that while evidence of an intoxilyzer result is relevant under rule 401 and therefore generally admissible under rule 402, it should be excluded in this case under a constitutional exception to the general admissibility of rule 402. Since these particular constitutional issues have been resolved recently by the Texas Court of Criminal Appeals,[88] and have been held inapplicable to the decision of whether or not to take an intoxilyzer test, the judge would overrule this objection under rule 104(a)[89] and prepare to admit the relevant evidence under rule 402. This is an issue of pure law and the judge alone determines the proper application of law to the facts.[90]

Suppose, however, that the defense counsel asserts that Mr. Toad refused to take the intoxilyzer test, and it was only when four police officers jumped on top of him and held him to the floor that he was physically forced to take the test against his will. Texas law provides that while a defendant does not have a legal right to refuse the intox-

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85. *See* TEX. REV. CIV. STAT. ANN. art. 6701l-1 (Vernon Supp. 1988)(defining "intoxication" for purposes of D.W.I. statute to include having alcohol concentration of .10 or more).

86. U.S. CONST. amend. V reads, in pertinent part: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. VI reads, in pertinent part: "[i]n all criminal prosecutions the accused shall . . . have the assistance of counsel for his defense."

87. TEX. CONST. art. I, § 10 reads, in pertinent part: "[i]n all criminal prosecutions the accused . . . shall have the right of being heard by himself or counsel, or both."

88. *See* Forte v. State, 759 S.W.2d 128, 139 (Tex. Crim. App. 1988)(no right to counsel prior to making decision to take intoxilyzer test under Texas Constitution); Thomas v. State, 723 S.W.2d 696, 699-706 (Tex. Crim. App. 1986)(no fifth amendment right or right against self-incrimination under Texas Constitution to counsel prior to making decision to take intoxilyzer test); McCambridge v. State, 712 S.W.2d 499, 504 (Tex. Crim. App. 1986)(no sixth amendment right to counsel prior to making decision to take intoxilyzer test); Forte v. State, 707 S.W.2d 89, 92 (Tex. Crim. App. 1986)(no sixth amendment right to counsel prior to making decision to take intoxilyzer test).

89. *See infra*, notes 92 to 112 and accompanying text.

90. *See infra*, note 96 and accompanying text.

ilyzer test, he cannot be physically compelled to take it either.[91]

Having made this assertion, the opponent of the evidence, Mr. Toad, must produce some evidence to support the exclusion of the intoxilyzer test. The judge must then decide the issue under rule 104(a).

V. RULE 104(A): QUESTIONS OF ADMISSIBILITY GENERALLY

Rule 104(a)[92] gives the trial judge broad discretion in resolving issues regarding the competency, capacity, and qualifications of witnesses and in ruling on preliminary questions concerning the general admissibility of evidence.[93] Under rule 104(a), the judge is taking into account public policy considerations which might operate to exclude relevant evidence.[94]

Frequently, the admission of evidence will depend upon the existence of a factual condition. Was the child witness mature enough to accurately perceive, remember, and recount the event she witnessed? Is the witness whose former testimony is now offered truly "unavailable"? Was a third-person present during the discussions between an attorney and his client? To the extent that these questions are factual, the judge acts as the trier of fact under rule 104(a).[95]

Sometimes, the admission of evidence also calls for the application

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91. *See Forte*, 759 S.W.2d at 138; *see also* Turpin v. State, 606 S.W.2d 907, 914 (Tex. Crim. App. 1980)(consent to take intoxilyzer must be voluntary and "voluntariness" is fact question for jury).

92. TEX. R. CRIM. EVID. 104(a) reads:

> Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the rules of evidence except those with respect to privileges.

The federal rule is exactly the same.

93. *See* Wallace, *Article I: General Provisions*, 20 HOUS. L. REV. 87, 97-98 (1983 Tex. R. Evid. Handbook). *See generally* C. MCCORMICK, MCCORMICK ON EVIDENCE § 53 (1954); E. MORGAN, BASIC PROBLEMS OF EVIDENCE §§ 45-50 (5th ed. 1976); J. WIGMORE, WIGMORE ON EVIDENCE § 2550 (Tillers rev. 1983).

94. *See supra*, note 82.

95. *See* FED. R. EVID. 104 advisory committee's note (citing C. MCCORMICK, MCCORMICK ON EVIDENCE § 53 (1954)). McCormick explained the concept of the judge's rule in determining questions of admissibility as follows:

> [T]he trial judge decides with finality those preliminary questions of fact upon which depends the admissibility of an item of evidence which is objected to under an exclusionary rule of evidence. The same practice extends to the determination of preliminary facts conditioning the application of the rules as to the competency and privileges of witnesses.

of specific legal principles. For example: Was the hearsay statement made "against interest" as that term is legally defined? Was the warrant under whose authority the house was searched supported by a legally sufficient affidavit? Did the man and woman hold themselves out to the public as married to such an extent that the marital privilege should apply? Have the legal requirements regarding the need that a co-conspirator's statement be made in the course of an ongoing conspiracy and in furtherance of that conspiracy been met? Under rule 104(a), the judge is the sole decision maker regarding the applicability of the appropriate legal principles and their fulfillment.[96]

When making his preliminary rulings as to the admissibility of evi-

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On all these preliminary questions the judge, on request, will hold a hearing in which each side may produce evidence.

C. MCCORMICK, MCCORMICK ON EVIDENCE § 53, at 122-23 (1954); *see also* Lutwak v. United States, 344 U.S. 604, 610-16 (1953)(trial court had discretion and authority to determine that marriage between alien spouses and American residents under War Bride Act was "sham" and scheme to defraud, thus ostensible spouses competent to testify against each others and marital privilege did not apply); United States v. Wilson, 798 F.2d 509, 512 (1st Cir. 1986)(in tax evasion prosecution, appellate court held that existence of attorney-client privilege was factual determination to be made by trial judge and ruling that privilege did not exist could be rejected only if clearly erroneous); Carbo v. United States, 314 F.2d 718, 737-38 (9th Cir. 1963)(distinguishing between judge's role in admitting evidence under "prima facie" showing and jury's role in determining whether all of evidence is convincing beyond reasonable doubt), *cert. denied*, 377 U.S. 953 (1964).

96. *See* FED. R. EVID. 104 advisory committee's note; *see also, e.g.*, Huddleston v. United States, __ U.S. __, __ n.5, 108 S. Ct. 1496, 1500 n.5, 99 L. Ed. 2d 771, 780-81 n.5 (1988)(preliminary findings under rule 104(a) determined by judge); *Bourjaily*, __ U.S. __, __, 107 S. Ct. 2775, 2778-79, 97 L. Ed. 2d 144, 152 (1987)(before admitting co-conspirator's statement, court must be satisfied that statement actually falls within definition of rule and all preliminary questions of fact under 104(a) must be resolved by court); Gilbert v. California, 388 U.S. 263, 269-74 (1967)(trial judge responsible for determining adequacy of line-up procedures utilized); Jackson v. Denno, 378 U.S. 368, 394 (1966)(defendant entitled to hearing, outside presence of jury, for court to determine whether confession "voluntarily" given and issue of admissibility of confession for court alone and should not be redetermined by jury); Miranda v. Arizona, 384 U.S. 436, 490-91 (1966). Under Texas common law, questions of law have always been determined by the judge as a preliminary matter. *See* 1 R. RAY, TEXAS LAW OF EVIDENCE § 2 (3d ed. 1984). In *Casillas v. State*, 733 S.W.2d 158 (Tex. Crim. App. 1986), the Texas Court of Criminal Appeals held that, under TEX. R. CRIM. EVID. 104(a), judges should not give a limiting instruction to the jury regarding the admissibility of co-conspirator statements. *Id.* at 166-68. The court noted that this was a change from prior Texas law, explaining as follows:

> Prior to the rule [rule 104(a)], the procedure for admission of out-of-court statements by alleged co-conspirators was like Texas practice, sharing the responsibility between judge and jury. First, the judge made a preliminary determination to whether the alleged conspiracy existed and that the declarant and defendant were members. Then the jury was instructed that it could consider the evidence against a particular defendant only if it first determined that the conspiracy existed, that the declarant and defendant were members of

dence, the trial court is not bound by the rules of evidence, except with regard to privileges.[97] He is expected to make the "right" ruling

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it, and that the statement was made during the course and in furtherance of the conspiracy.

Rule 104 changed that practice, requiring that the judge alone make the determination of the admissibility of the evidence. The policy behind this conclusion stems from the danger that a jury might convict on the basis of co-conspirator statements without first dealing with the admissibility question.

We have adopted our new Rules of Criminal Evidence with identical language in Rule 104 as the Federal Rules . . . and hold that the same result is indicated under Texas Criminal Rule of Evidence 104.

Id. at 168.

97. FED. R. EVID. 104 advisory committee's note; *see also* United States v. Matlock, 415 U.S. 164, 175 (1974)(hearsay statements can be relied upon during suppression hearing; such statements generally reliable and judge should give them such weight as his experience and judgment counsel); United States v. Whitton, 706 F.2d 1000, 1019 (9th Cir. 1983)(trial judge not bound by hearsay rule in making preliminary evidentiary determinations), *cert. denied*, 465 U.S. 1100 (1984); United States v. Merritt, 695 F.2d 1263, 1268-71 (10th Cir. 1982)(trial court erred in excluding hearsay offered by government at suppression hearing on issue of whether police had adequate grounds for stopping truck and searching it since hearsay was relied upon by arresting officer and it was trustworthy); United States v. Tussell, 441 F. Supp. 1092, 1097 (M.D. Pa. 1977)(photostatic copies not fully authenticated may be relied upon in preliminary hearing because hearsay evidence permissible at suppression hearing without regard to matter in issue, although court remains obligated to weigh evidence and discount less reliable evidence). Texas common law had long permitted the admission of hearsay and hearsay-upon-hearsay in preliminary hearings regarding the existence of probable cause to arrest or search. *See* Hennessy v. State, 660 S.W.2d 87, 91 (Tex. Crim. App. 1983)(hearsay-upon-hearsay can be used to show probable cause as long as underlying circumstances indicate substantial basis for crediting hearsay at each level); Evans v. State, 530 S.W.2d 932, 936-37 (Tex. Crim. App. 1975)(inclusion of hearsay upon hearsay can be simply treated as one factor magistrate weighs in determining whether information contained in affidavit is reliable). Less certain is whether prior Texas common law had permitted other inadmissible evidence to be considered in preliminary hearings. To the extent that prior law did not permit the judge to use reliable, yet legally inadmissible, evidence in making his admissibility determinations under rule 104(a), the rules of evidence have liberalized Texas practice. With regard to the policy considerations for allowing otherwise inadmissible evidence to be considered at a preliminary hearing, see generally 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[02], at 104-22 (1985). As Judge Weinstein explains:

Where an issue is being tried before a judge alone, as in the case of preliminary questions under Rule 104(a), there is no real need to erect this structure of evidentiary obstacles. The trial judge's experience and legal training can be relied upon to winnow the chaff from the wheat. Simply stated, the judge will generally be fully cognizant of the inherent weakness of evidence by affidavit or hearsay and will take such weakness into account when evaluating its weight on the preliminary question. Furthermore, elimination of the rules considerably expedites the course of the preliminary hearing and the trial itself.

Id.; *see also* Wallace, *Article I: General Provisions*, 20 HOUS. L. REV. 87, 98 (1983 Tex. R. Evid. Handbook)(under Texas rule 104(a), trial judge not bound by rules of evidence, "but is permitted to draw on his personal experience, judgement and legal training"). Obviously, privileged communications cannot be delved into even in a preliminary hearing to determine the

and he may use whatever resources he needs to reach that result as long as the sources are reliable and helpful to his determination.[98]

Under rule 104(a), the trial court has great discretion in making his determination and, if there is evidence in the record to support his ruling, the appellate courts will uphold his ruling.[99] The proponent must prove, by a preponderance of the evidence, that the proffered item is admissible.[100] Once the evidence is admitted, both sides may

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existence of the privilege. To do so would defeat the purpose underlying the privilege in the first place. *See id.*; *see also* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[04], at 104-27 (1985)(irreparable damage to confidential relationship sustained at moment of disclosure regardless of whether evidence ultimately used by trier of fact in reaching verdict).

98. *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[03], at 104-24 (1985).

99. This has long been the law in Texas. *See* Green v. State, 615 S.W.2d 700, 707 (Tex. Crim. App. 1980)(appellate courts will not disturb any finding under trial court's determination of admissibility which is supported by record); Sinegal v. State, 582 S.W.2d 135, 137 (Tex. Crim. App. 1979)(trial court rulings regarding admissibility of evidence, including defendant's confession, are matters of discretion and reviewed only for abuse of discretion or whether trial court properly applied law to facts); *see also* Kelly v. State, 669 S.W.2d 720, 726 (Tex. Crim. App. 1984)(as trier of fact in motion to suppress hearing, trial court determines credibility of witnesses and weight given their testimony); Hawkins v. State, 660 S.W.2d 65, 72 (Tex. Crim. App. 1983)(in preliminary hearings, court is sole judge of credibility of witnesses and weight of evidence). Federal law, both prior and subsequent to the rules of evidence, is in accord. Bourjaily v. United States, __ U.S. __, __, 107 S. Ct. 2775, 2782, 97 L. Ed. 2d 144, 156 (1987)(under rule 104(a), trial judge makes all admissibility determinations and he should receive evidence and lend it such weight as judgment and experience counsel); Hoffman v. United States, 341 U.S. 479, 487 (1951)(trial court determines whether fifth amendment properly invoked by witness and the trial judge, in appraising claim governed as much by personal perception of peculiarities of case as by facts actually in evidence); United States v. Dysart, 705 F.2d 1247, 1251 (10th Cir.)(relying on 104(a) in upholding judge's determination that witness was qualified expert), *cert. denied*, 464 U.S. 934 (1983); United States v. Pensinger, 549 F.2d 1150, 1151 (8th Cir. 1977)(under rule 104, court determined that marital privilege did not apply); *see also* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[03], at 104-26 (1985)("clearly erroneous" standard of review in dealing with questions of witness' competency). *See generally supra*, notes 9 to 12 and accompanying text.

100. *See Huddleston*, __ U.S. at __ n.5, 108 S. Ct. at 1500 n.5, 99 L. Ed. 2d at 780-81 n.5 (reaffirming that all preliminary factual findings under rule 104(a) subject to preponderance of evidence test); *Bourjaily*, __ U.S. at __, 107 S. Ct. at 2778-79, 97 L. Ed. 2d at 152-53 (Supreme Court has "traditionally required" that decisions regarding the admissibility of evidence be established by preponderance of proof); Colorado v. Connelly, 479 U.S. 57, 168, (1986)(preliminary question of whether defendant waived rights before giving confession must be shown by preponderance of evidence); United States v. Matlock, 415 U.S. 164, 177 (1974)(voluntariness of consent to search must be proven by preponderance of evidence). The "preponderance of the evidence" standard was first enunciated and applied by the United States Supreme Court in *Lego v. Twomey*, 404 U.S. 477, 486-87 (1972), in which the Court held:

> Since the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines

produce further testimony in support or rebuttal of that evidence.[101]

Rules 104(a) and (b) are two separate "sorting" rules for the admis-

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. . . the presumption of innocence. A guilty verdict is not rendered less reliable . . . simply because the admissibility of a confession is determined by a less stringent standard.

Id. (citations omitted). The Court then went on to reject the proposition that a defendant could take another "bite of the apple" with the jury and request them to redetermine the issue of "voluntariness." *Id.* at 489-90. These questions of admissibility have always been determined by the court, not the jury, and the Supreme Court saw no reason to change that rule merely "to afford petitioner a second forum for litigating his claim." *Id.* at 490. This standard was roundly criticized in Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STANFORD L. REV. 271, 290-92 (1975), in which the author posited that the proper standard of proof in preliminary questions should differ depending on whether the rule of exclusion relates to "reliability" of the evidentiary item or other social policy concerns such as the marital privilege. Professor Saltzburg argues that a higher standard of proof should apply in such determinations as the "voluntariness" of "confessions, dying declarations, and some declarations against interest." *Id.* at 305. Saltzburg's view, however, has been specifically rejected by the Supreme Court and by most of the federal circuits. Chief Justice Rehnquist announced in *Bourjaily*:

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

Id. at __, 107 S. Ct. at 2778-79, 97 L. Ed. 2d at 152. As was stated by the first circuit in *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977):

> Although the prima facie standard is no longer appropriate, we see no reason to require that conspiracy be proved beyond a reasonable doubt. That is the standard the jury will apply to the evidence as a whole. The judge is ruling on admissibility, not guilt or innocence; the government's burden need not be so great . . . . The ordinary civil standard is sufficient; if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy, the hearsay is admissible.

Id. at 23; *see also* United States v. Martorano, 557 F.2d 1, 11-12 (1st Cir. 1977). In reviewing admission of co-conspirator statements under rule 104(a), the *Martorano* court stated: [t]he new rules permit a trial judge to base his determination on hearsay and other inadmissible evidence, including perhaps the very statement seeking admission." *Id.* A judge must find, by preponderance of evidence, that a conspiracy exists and the statement sought to be admitted may be considered in deciding whether a conspiracy exists. *Id.*

101. *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[07], at 104-75 (1985).

> In the case of many preliminary questions, even after the court decides to admit evidence, the parties may still introduce before the jury, much of the same evidence that the court has already considered. This is done usually because there is an issue of probative force and material proposition.

Id.; *see also* Lego v. Twomey, 404 U.S. 477, 486 (1972)(despite court's ruling that confession was legally voluntary, defendant may always familiarize jury with circumstances attendant to taking of his confession, which includes facts bearing upon its voluntariness and weight, as juries are always free to disregard confessions they deem unworthy of belief).

sion or exclusion of evidence. Rule 104(b) deals exclusively with relevancy items while rule 104(a) deals with preliminary questions of all other admissibility issues. The trial judge's determination under rule 104(a) is based upon a "preponderance of the evidence" standard[102] while rulings under 104(b) are based upon a "sufficient to support a finding" standard.[103] Further, under rule 104(a), the judge directly decides the base facts; thus, he must hear both sides from the proponent and opponent of the evidence before making his ruling.[104] In contrast, under rule 104(b), the judge is making a derivative finding based upon some hypothetical juror and thus need hear only the evidence offered by the proponent.[105] Under rule 104(b), the judge may consider only admissible evidence in determining relevancy, whereas he is not bound by the rules of evidence, except those dealing with privileges, when he makes determinations under rule 104(a).[106] The major problem for parties, trial judges, and appellate judges in dealing with the distinctions between rule 104(a) and (b) is deciding whether the underlying objection to the proffered evidence is one of relevancy or any other basis.[107]

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102. *See Bourjaily*, __ U.S. at __, 107 S. Ct. at 2779, 97 L. Ed. 2d at 152. In *Bourjaily*, the Supreme Court explicitly held that the existence of a conspiracy and the defendant's participation in it need to be proven only by a preponderance of the evidence for the co-conspirator's statements to be admissible under Fed. R. Evid. 104(a). *Id.* at __, 107 S. Ct. at 2779-80, 97 L. Ed. 2d at 152-53. Further, the trial court may consider the out-of-court statement itself before determining the existence of the conspiracy and the defendant's complicity. *Id.* This latter holding had been considered by many commentators as an impermissible "bootstrapping" by which the evidence sought to be admitted was used to prove its own admissibility. *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[05], at 104-44-46 & 51 (Supp 1988).

103. *See supra*, notes 45 to 51 and accompanying text.

104. 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2550, at 663 (Tillers rev. 1983)(judge hears evidence from both sides in determining facts on which his admissibility ruling turns); C. MCCORMICK, MCCORMICK ON EVIDENCE § 53, at 122 (1954)(on these preliminary questions judge, on request, will hold hearing in which each party may produce evidence). *See generally* Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101 (1927)(discussing history of permitting trial judge to utilize inadmissible evidence in making his preliminary rulings).

105. *See supra*, notes 39 to 41 and accompanying text.

106. *Compare* United States v. Haldeman, 559 F.2d 31, 107 (D.C. Cir. 1976)(citing rule 104(a) and stating that technical rules of evidence inapplicable to hearing before trial judge on preliminary legal question of admissibility of evidence) *with* Zenith Radio Corp. v. Matsushita Elec. Indust. Co., 505 F. Supp. 1190, 1219-20 (E.D. Pa. 1980)(citing rule 104(b) and holding that only admissible evidence may be considered when ruling on conditionally relevant evidence).

107. *See* Seidelson, *Conditional Relevancy and Federal Rule of Evidence 104*, 47 GEO. WASH. L. REV. 1048, 1064-66, 1070-73 (1979)(noting confusion of issues in appellate decisions

In the hypothetical problem regarding the admissibility of Mr. Toad's intoxilyzer test, the defendant, claiming that he was physically forced to take the test, would undoubtedly ask for a preliminary hearing outside the presence of the jury.[108] He would then produce some testimony, probably his own in this scenario, to raise a factual issue regarding his lack of "voluntariness." The State is then required to rebut this testimony with evidence, probably from the police officers though possibly from cross-examination of Mr. Toad alone, that the test was freely and voluntarily taken.[109] The trial judge would then weigh all of the testimony, assess the credibility of the witnesses, and, if he found from a preponderance of the evidence that Mr. Toad voluntarily took the test, he would admit the evidence of the test result. Mr. Toad could, if he wished, testify again in front of the jury and

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and suggesting that first determination should be whether evidence is relevant to some issue in case whether or not preliminary fact is true; if so, then objection should be analyzed under rule 104(a), and if not, then rule 104(b) applies). Suppose, in a murder trial, that the State offers to introduce a silver knife with the initials "J.R." which was found near the scene of the murder. If offered to prove that the defendant, Jack the Ripper, was the killer, the knife is admissible if the State offers "evidence sufficient to support a finding" that the knife belongs to Jack under rule 104(b). If the State offered the same knife to prove that this weapon was the one used to cause the victim's death, its admissibility is governed by rule 104(a), since the knife is relevant whether or not the preliminary fact, "knife belongs to Jack," is true.

108. Under TEX. R. CRIM. EVID. 104(c), either party may request a hearing outside the presence of the jury on preliminary questions of admissibility. The rule reads:

> (c) HEARING OF JURY. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

The federal rule is the same. All questions regarding the admissibility of confessions must be conducted outside the jury's presence. The rationale for this rule was expressed by Justice Fortas in *Pinto v. Pierce*, 389 U.S. 31 (1967)(Fortas, J., concurring):

> A telescoped hearing before judge and jury, in which the judge finds voluntariness for the purposes of admissibility, in reality reduces the jury function to an echo. Hearing the evidence simultaneously with the judge, the jury is not apt to approach disagreement with him.

Id. at 34. Several cases, however, have found that the jury's presence during a confession hearing is not reversible error when the confession has been found to be voluntary. *See, e.g.*, *Pinto*, 389 U.S. at 32-33; Lugo v. Gladden, 382 F.2d 957, 960 (9th Cir. 1967); United States v. Kennedy, 377 F.2d 989, 990 (6th Cir.), *cert. denied*, 389 U.S. 992 (1967); Smith v. Texas, 236 F. Supp. 857, 862-63 (S.D. Tex. 1964). In deciding whether to excuse the jury while determining other preliminary issues of admissibility, the trial judge should weigh the potential for prejudice against either party in having the jury hear evidence which may not be admissible against the possible adverse effect on the jury's attitude toward the court, attorneys, and parties in making jurors come in and out the revolving door of the jury room.

109. *See* Turpin v. State, 606 S.W.2d 907, 913-15 (Tex. Crim. App. 1980).

raise the issue for their consideration.[110] Under the rules of evidence and under federal authority, he is not entitled to a jury instruction on the "voluntariness" of the test once the judge has admitted the evidence under rule 104(a).[111] Under a special Texas statute, however, a defendant is entitled to ask the jury to redetermine admissibility if there are disputed fact issues as to whether evidence was obtained "illegally."[112]

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110. *See* Crane v. Kentucky, 476 U.S. 683, 691-92 (1986)(defendant's murder conviction reversed when denied right to present evidence to jury regarding circumstances of the taking of his confession). While the trial judge had made a 104(a) finding against defendant on the issue of the voluntariness of a confession and admitted it, the defendant should have been permitted to present evidence at trial on the manner in which the confession was taken which could have cast doubt on the police officer's credibility and the confession's reliability. *See id.*; *see also supra*, note 101 and accompanying text.

111. *See* Seidelson, *Conditional Relevancy and Federal Rule of Evidence 104*, 47 GEO. WASH. L. REV. 1048, 1059 (1979). As Professor Seidelson points out, the judge who has already determined that an item of evidence is admissible under rule 104(a), should not instruct the jury to redetermine the issue. The judge's determination:

> was made exclusively for the purpose of ruling on admissibility. To deny the jury the opportunity of redetermining that issue and disregarding the evidence does no violence to the litigant's right to trial by jury because that right has never included the right to have the jury determine admissibility of evidence.

Id. at 1059. This issue was also addressed by the Supreme Court in *Lego v. Twomey*, 404 U.S. 477 (1972), in which the Court concluded that a jury should not be asked to redetermine the voluntariness of a confession once the judge has ruled it legally admissible. *Id.* at 483. In part, the Court's conclusion was based upon the recognition that even coerced confessions were likely to be relevant and that jurors would be hard-pressed to ignore reliable evidence even if they could be taught the appropriate legal standards and were instructed to apply the law to the particular facts. *Id.*

> Precisely because confessions of guilt, whether coerced or freely given, may be truthful and potent evidence, we did not believe a jury could be called upon to ignore the probative value of a truthful but coerced confession; it was also likely, we thought, that in judging voluntariness itself the jury would be influenced by the reliability of a confession it considered to be an accurate account of the facts.

Id.; *see also* United States v. Dennis, 183 F.2d 201, 230-31 (2d Cir. 1950)(giving jurors "second bite at the apple" of admissibility serves only to confuse and achieves no useful purpose), *aff'd*, 341 U.S. 494 (1951). As Judge Hand noted:

> The better doctrine is that the judge is always to decide . . . any issue of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent. Indeed, it is a practical impossibility for laymen, and of that matter for most judges, to keep their minds in the isolated compartments that this requires.

Id.; *see also* United States v. Enright, 579 F.2d 980, 987 (6th Cir. 1978)(court disapproved use of such potentially confusing and internally inconsistent instruction to jury).

112. TEX. CRIM. PROC. CODE ANN. art. 38.23 (Vernon Supp. 1988); *see also* Stone v. State, 703 S.W.2d 652, 655 (Tex. Crim. App. 1986)(defendant entitled to jury instruction to disregard evidence if it found investigating officer did not have reasonable suspicion to stop

Once the trial judge determines, under rule 104(a) that the evidence is legally admissible, he has one more step to complete if the opponent of the evidence has objected to its admission as being substantially outweighed by some counterfactor under rule 403.

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

Rule 403[113] speaks to three distinct but interrelated goals: 1) the

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him and if fact issue raised, trial court must submit charge on admissibility of evidence); Hawkins v. State, 660 S.W.2d 65, 77 (Tex. Crim. App. 1983)(defendant entitled to instruction that before confession can be considered as evidence, jury must find that defendant voluntarily and knowingly waived his right to counsel and self-incrimination); Murphy v. State, 640 S.W.2d 297, 299 (Tex. Crim. App. 1982)(when fact issue raised under 38.23, defendant has statutory right to have jury charged on admissibility of evidence). This aberrational rule is in explicit conflict with TEX. R. CRIM. EVID. 104(a) and all pertinent United States Supreme Court decisions. *See supra*, notes 92 to 112 and accompanying text. It adds nothing but confusion to juror deliberations and appellate court opinions. *See* Wallace, *Article I: General Provisions*, 20 HOUS. L. REV. 87, 97 (1983 Tex. R. Evid. Handbook). Justice Wallace of the Texas Supreme Court stated, with regard to evidentiary rulings in civil cases:

> Rule 104 vests exclusive authority in the trial judge to resolve preliminary questions of evidence competency. The standard for determining competency is a legal one since the predominant view is that a jury is incapable of making a reliable and discriminating evaluation. Thus, rule 104 keeps incompetent evidence from the jury altogether, thereby preserving the effectiveness of exclusionary rules such as hearsay.

Id. Presumably, the Texas Legislature will soon repeal this statute, now that the Texas Rules of Criminal Evidence supercede it and the federal rules so clearly reject it. *See* United States v. Santiago, 582 F.2d 1128, 1131-36 (7th Cir. 1978).

113. *See* FED. R. EVID. 403. As originally drafted, federal rule 403 read:

> Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
> (a) EXCLUSION MANDATORY. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
> (b) EXCLUSION DISCRETIONARY. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

See 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[01], at 403-6 (1985). This drafting was objected to by the Department of Justice in 1971, whose report stated:

> We are opposed to an absolute standard of inadmissibility which would appear to require reversal on appeal whenever an appellate court disagreed with the trial court's exercise of discretion. It is generally recognized that this matter is best left to the discretion of the trial judge.

THE DEPARTMENT OF JUSTICE REPORT 9 (1971)(reprinted in 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[01], at 403-7 n.4 (1985). Senator John L. McClellan, Chairman of the Senate Judiciary Committee, expressed the same sentiment in a letter he wrote to the Standing Committee on Rules of Practice and Procedure:

> My difficulty lies with the failure of Subdivision (a) to see the ultimate issue in terms that

avoidance of an incorrectly based result; 2) the promotion of actual and perceived fairness; and 3) the promotion of judicial efficiency.[114]

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emphasize the sound discretion of the trial judge and to uphold his ruling on appeal, absent abuse of discretion, in what will always be a balancing situation. I see no reason to purport to draw a hard and fast line that no one will be able to trace in practice. The adoption of the present draft will only provide criminal defendants with another standard ground for appeal and lead to more needless reversals and retrials in criminal cases.

Letter of John L. McClellan to the Standing Committee on Rules of Practice and Procedure, 3 (August 12, 1971), *reprinted in* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[01], at 403-8 n.4 (1985); *see also* Comment, *Relevancy and Its Limits in the Proposed Federal Rules of Evidence*, 16 WAYNE L. REV. 167, 171 (1969)(recommending addition of "if the trial judge in his discretion" to both subsections (a) and (b)). The fact that the final rule, both federal and Texas, did give discretion to the trial judge in balancing all counterfactors, including "unfair prejudice," again emphasizes the importance of the trial judge's role in weighing the probative and prejudicial factors and articulating his rationale for the parties and appellate courts. *See, e.g.*, United States v. Leuben, 812 F.2d 179, 184 (5th Cir. 1987)(trial court's ruling under FED. R. EVID. 403 will not be overturned absent abuse of discretion; such abuse existed when trial judge permitted government to offer evidence on issue of materiality, but not defense); United States v. De Parias, 805 F.2d 1447, 1453-54 (11th Cir. 1986)(trial court has great discretion in weighing prejudice against probative value; in extortion prosecution, no error in admitting photographs of badly decomposed body of kidnapping victim since items had probative value in identifying victim and corroborating testimony of crucial witness; fact that another witness also testified to cause of death did not result in such needless cumulation of evidence as to amount to abuse of discretion), *cert. denied*, __ U.S. __, 107 S. Ct. 3189, 96 L. Ed. 2d 678 (1987); United States v. Booth, 669 F.2d 1231, 1239 (9th Cir. 1982)(trial court's ruling under rule 403 reversible only under "abuse of discretion" standard which existed where trial court had improperly weighed balancing factors); United States v. Long, 574 F.2d 761, 766 (3d Cir.)(when objection invokes rule 403, trial judge should record balancing analysis to extent that exercise of discretion will be fairly reviewed on appeal), *cert. denied*, 439 U.S. 985 (1978). Vesting discretion with the trial judge for balancing all counterfactors is generally in accord with prior Texas common law. *See* Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 166-67 (1983 Tex. R. Evid. Handbook). For a discussion regarding the reconciliation of different attitudes toward the use of judicial discretion embodied in rule 403, see generally 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5212, at 252-57 (1977). The authors conclude:

> Rule 403 embodies these conflicting issues of discretion. It recognizes the desirability of discretionary power to exclude evidence, but attempts to limit the exercise of discretion by stating that policy considerations that are to justify its use. . . . The judge can exclude evidence under Rule 403 only after he has balanced the competing considerations listed in the rule and concluded that the costs of the evidence exceed its benefits . . . . Rule 403 does not require the judge to choose admission or exclusion, but it does require him to follow the balancing procedure if exclusion is to be based on the rule.

Id. at 256-57.

114. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 226 (1976). In separating these three goals, Professor Dolan states that the first "aims at control by the judge of the information which reaches the factfinder, usually the jury, in such a way that the probability of objectively 'correct' factual determinations is maximized." *Id.* That is, the trial judge should ensure that the jury "keeps its eye on the ball" of the litigated issues and is not misdirected in its focus, thereby running a risk of reaching an incorrect result because of

This rule emphasizes the importance of the truth-seeking function of a criminal trial,[115] but it does give a trial judge some discretion[116] in

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misleading or improperly emotionally-charged material. With respect to the second goal of actual and perceived justness of the system, rule 403 acts by "discouraging the use of reprehensible tactics by counsel, by protecting witnesses from harassment, and by encouraging production of evidence in accordance with the properly expected decorum of a trial." *Id.* at 228. The third goal speaks to the economy of the trial process and the need to prevent trials from becoming evidentiary marathons. *Id.* at 226. It is "a concession to the shortness of life" that a trial judge must have discretion to exclude some data which, though relevant, is of such limited probative value, that its admission, and the admission of all other marginally probative evidence, would make the field of judicial inquiry last forever. *See* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 700-01 (1941).

> Trials could come to an end only when the exhaustion of lawyers' ingenuity or clients' money, and the trial judge or jury might be overwhelmed and bewildered by the multiplicity of collateral issues. Such a rule would result in the apparent justice and practical injustice characteristic of English Chancery practice a century and a half ago.

Id. at 701.

115. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1485 (1985).

116. Because of the importance of permitting the jury to hear all relevant evidence, a trial judge should use his discretion in excluding evidence rule 403 very sparingly. United States v. Betancourt, 734 F.2d 750, 757 (11th Cir. 1984)(rule 403 is "extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence" and "in criminal trials relevant evidence is inherently prejudicial"), *cert. denied*, 469 U.S. 1021 (1984); United States v. Jamil, 707 F.2d 638, 642 (2d Cir. 1983)(trial judge must take special care to use rule 403, sparingly); United States v. Thevis, 665 F.2d 616, 633-34 (5th Cir. 1982)(rule 403 is "extraordinary remedy"). Dean Blakely noted that some prior, common-law Texas decisions had held that "even a slight negative side effect of relevant evidence is enough to cause the exclusion of such evidence." Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 167 (1983 Tex. R. Evid. Handbook). Under rule 403, "courts should not exclude relevant evidence without '*very good* cause.'" *Id.* (emphasis in original)(citing *Davis v. Davis*, 521 S.W.2d 603, 607 (Tex. 1975)). Professor Goode is less convinced that rule 403 marks a dramatic change in Texas law. He states:

> It must be assumed that the wording of rule 403 represents a deliberate effort to maximize the relevant evidence that will be presented to the trier of fact. . . Yet no dramatic change in Texas law was intended by the adoption of this rule and, given the breadth of the discretion afforded the trial judges in this regard. . . , there is no reason to think that any significant difficulty will be experienced in adjusting to the directives of rule 403 as a matter of either language . . . or substance. . .

S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 403.1, at 90-91 (West 1988)(citations omitted). One might have thought that the conscious decision to adopt the wording of the federal rule which had itself announced a dramatic change from prior common law, would and should be interpreted as announcing a dramatic change from prior common law. Significantly, the authorities that Professor Goode relied upon were all pre-rule ones. *See id.* In any "close" case, the trial judge probably should decide to admit the evidence. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL at 101 (4th ed. 1986)(slight presumption favoring admission of relevant evidence). Judge Weinstein recommends:

> If there is doubt about the existence of unfair prejudice, confusion of issues, misleading,

excluding otherwise relevant evidence when that evidence is "substantially outweighed" by specified countervailing factors.[117] If probative value and the countervailing factor are in "rough parity," the evidence may not be excluded.[118]

It is in the adoption of this rule that Texas evidentiary law has shifted dramatically from its common law heritage. Thus far, Texas trial and appellate courts have been relatively slow in reading or applying the explicit words and intent of this rule.[119] Formerly, the pro-

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undue delay, or waste of time, it is generally better practice to admit the evidence taking necessary precautions by way of contemporaneous instructions to the jury followed by additional admonition in the charge.

1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[01], at 403-10 (1985).

117. Dean Blakely asserts that the five counterfactors listed in rule 403 are exclusive. Thus, a trial court may never exclude evidence under rule 403 for some reason other than those listed.

The five factors listed in Texas rule 403 are the only factors to be balanced against probative value. In rules that have nonexclusive lists, such as rule 404(b), the drafters have carefully set up the listed factors merely as examples. Rule 404(b) states, in part, that evidence "may, however, be admissible for other purposes, *such as* proof of motive, opportunity, intent, [and] preparation. . ." In rule 403, the absence of "such as" or similar phrase indicates that the listed factors are the only factors to be considered, not mere examples.

Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 170 (1983 Tex. R. Evid. Handbook) (emphasis in original)(citation omitted); *see also* S. GOODE, O. WELLBORN AND M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 403.1, at 88 (West 1988).

118. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 236 (1967)(suggesting that exclusion is subject to "tightfisted use of the rule").

119. *See, e.g.*, Alexander v. State, 740 S.W.2d 749, 762-64 (Tex. Crim. App. 1987)(post-rules decision, but trial held before adoption of rules and applied old standard of probative value outweighing prejudicial effect in determining admissibility of extraneous offenses); Parks v. State, 746 S.W.2d 738, 740-41 (Tex. Crim. App. 1987)(post-rule decision but pre-rules trial where extraneous offenses admissible if probative value not outweighed by prejudicial nature); Wilkerson v. State, 736 S.W.2d 656, 659 (Tex. Crim. App. 1987)(post-rules decision which failed to cite rule 404 and applied old common-law rule of admissibility that probative value of evidence outweighs prejudicial or inflammatory nature; probable, however, that trial was held before effective date of rules and therefore controlled by prior law, not rules of evidence); Morgan v. State, 692 S.W.2d 877, 879, 882 n.7 (Tex. Crim. App. 1985)(pre-rules decision relying upon prior common law; holding that relevancy value of extraneous offense must outweigh "its inflammatory or prejudicial potential"); Kirkpatrick v. State, 747 S.W.2d 833, 835 (Tex. App.—Dallas 1987, pet. ref'd)(misstating rule 403 as testimony's probative value outweighs prejudicial effect). *But see* Pleasant v. State, 755 S.W.2d 204, 206 (Tex. App.—Houston [14th Dist.] 1988, no pet.)(correctly utilizing rule 403; trial judge well within discretion in determining that probative value of extraneous offense not *substantially outweighed* by danger of unfair prejudice); Pike v. State, 758 S.W.2d 357, 361 (Tex. App.—Waco 1988, no pet.)(utilizing "substantially outweighed" language of rule 403; trial court's determination of relevancy and its balancing "will not be disturbed on appeal except for a clear abuse of discretion"); Rodda v. State, 745 S.W.2d 415, 417-18 (Tex. App.—Houston [14th Dist.] 1988, pet.

ponent of evidence was required to demonstrate that the probative value of his offered item outweighed its possible negative attributes, such as prejudicial effect.[120] Now, however, the burden has shifted to the opponent of the evidence to demonstrate not merely that the counterfactor outweighs the item's probative value, but that it *substantially* outweighs any probative value.[121] This shift of focus may be

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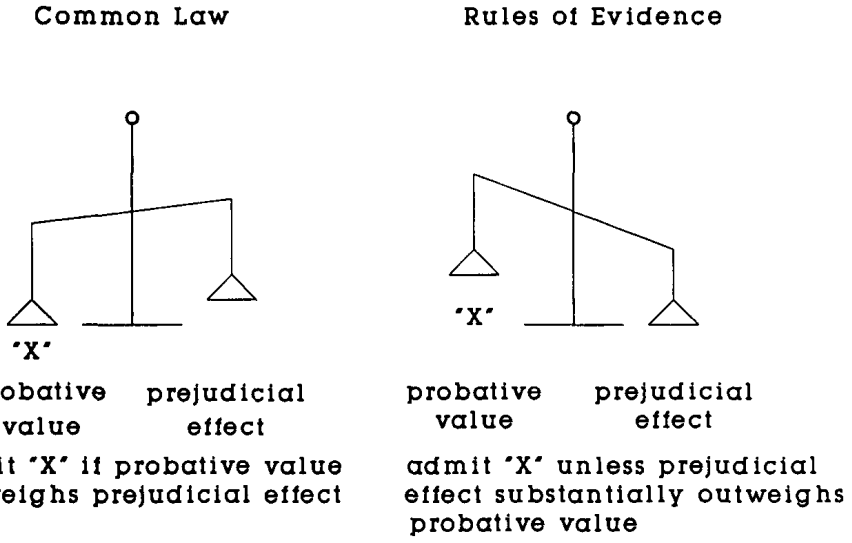
ref'd)(correctly citing and analyzing rule 403); Cole v. State, 735 S.W.2d 686, 689 (Tex. App.—Amarillo 1987, no pet.)(correctly applying rule 403). For a recent Texas case utilizing rules 102, 103, 104, 401-403, and holding that a trial court does not abuse its discretion in excluding evidence which could confuse the issues and mislead the jury, see generally *Dorsett v. State*, 761 S.W.2d 432 (Tex. App.—Houston [14th Dist.] 1988, no pet.)(construing rules liberally and holding that trial court did not abuse discretion in excluding testimony by psychologist concerning psychological profile of defendant and his expert opinion that "highly improbable" defendant was child abuser). Since expert witnesses and their opinions carry great weight in the courtroom, such "profile" opinions are generally looked at with disfavor since they can easily mislead the jury. Can scientific studies tell us that there is a "murderer" profile or a "pedaphile profile," members of which necessarily share character traits and act in conformity therewith? And does the converse necessarily apply? Those who do not test in accord with a "murderer" profile do not commit murders? Neither science nor logic appear to have reached any consensus on these issues. Thus, trial courts act well within their discretion in excluding such misleading matter. The *Dorsett* opinion exemplifies the common-sense approach toward the new rules so frequently articulated in Justice Robertson's opinions for the Fourteenth Court of Appeals.

120. Bush v. State, 628 S.W.2d 441, 444-45 (Tex. Crim. App. 1982)(in criminal cases, initial inquiry respecting admissibility of evidence whether its probative value exceeds its potential prejudice); *see also* Williams v. State, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983). In *Williams*, the Texas Court of Criminal Appeals adopted the correct methodology of determining the admissibility of an extraneous offense by analyzing its probative value and weighing that value against its prejudicial effect; however, the standard it used, "probative outweigh prejudicial" has been significantly altered by the adoption of rule 403. *See* Crank v. State, 761 S.W.2d 328, 342 n.5 (Tex. Crim. App. 1988) ("plain language of rule 403 . . . is to admit relevant evidence unless the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice to a defendant"). The opinion in *Crank*, delivered more than two years after the promulgation of the Texas Rules of Criminal Evidence, was the first time the Texas Court of Criminal Appeals noted that the balancing test of probative value versus prejudicial effect had shifted from probative value outweighing prejudicial effect to prejudicial effect substantially outweighing probative value. Thus, while *Williams* retains its usefulness as a guide to the methodology for focusing upon the probative value of extraneous offenses and how to weigh the various factors which maximize probative value, e.g., temporal and spatial proximity, similarity of mode, need for the evidence, against prejudicial effect, the correct balancing test is enunciated in *Crank* which has superceded *Williams*.

121. *See Crank*, 761 S.W.2d at 342 n.5; *see also* United States v. Jamil, 707 F.2d 638, 644 (2d Cir. 1983)(in absence of significant showing of unfair prejudice, evidence having substantial probative value not to be excluded); United States v. Dwyer, 539 F.2d 924, 928 (2d Cir. 1976)(when probative value of evidence great, it should not be excluded in absence of significant proof of unfair prejudice). The word "substantially" is not defined within the rule. Once again, it is the trial judge's articulated assessment of the factors, their weight, and probable effect upon the jury, that properly controls. Judge Weinstein suggests that:

shown schematically as follows:



Rule 403 is the rule which most clearly demonstrates that the codified rules of evidence are inclusionary rather than exclusionary.[122] Further, the rule "does not establish a mere imbalance as the standard, but rather requires that evidence 'may' be barred only if its pro-

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The usual approach on the question of admissibility on appeal is to view both probative force and prejudice most favorably towards the proponent, that is to say, to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. . . The trial court will lean towards this approach since the thrust of the Federal Rules favors admissibility. . . But . . . the trial judge should be able to weigh probative force and prejudice fairly accurately in the light of the special trial conditions and circumstances that he can observe. . . Trial judges will rule in a way that will enable them to finish the trial with an abiding sense that rationality rather than prejudice decided the issues. . .

1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 403[03], at 403-46-52 (1985)(citations omitted). Other commentators have disagreed with this standard and suggest that courts "resolve all doubts concerning the balance between probative value and prejudice in favor of prejudice." Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 223 (1976). A middle course would balance the maximum probative value that the evidence could offer against the "likely" prejudicial effect. *See* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 102 (4th ed. 1986). By utilizing this test, both the trial judge and appellate courts would use a common sense approach toward what effect upon a reasonable, hypothetical juror the offered evidence would be likely to produce.

122. *See* United States v. Beechum, 582 F.2d 898, 910-11 n.13 (5th Cir. 1978)(en banc)(noting significance of congressional committee's amendment to original rule 404(b) placing greater emphasis on admissibility of extraneous offense evidence to bring rule in line with rule 402 which establishes presumption that all relevant evidence admissible), *cert. denied*, 440 U.S. 920 (1979); Rodda v. State, 745 S.W.2d 415, 418-19 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd)(citing *Beechum* with approval and applying it to Texas law).

bative value is 'substantially outweighed' by prejudice."[123] Thus, a trial court *may*, but is not required to, exclude such evidence. [124]

Most rule 403 trial objections are leveled on the basis of "unfair prejudice," but it must be remembered that virtually all proffered evidence is prejudicial to the opposing party. Only "unfair"[125] prejudice

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123. United States v. Long, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978)(emphasizing great discretion of trial court; appellate reversal of trial judge's balancing under rule 403 must be based upon highly subjective reasons which are not always readily definable or recognizable).

124. The rule permits, but does not compel, the exclusion of evidence which runs afoul of its terms. Therefore, even if the judge finds that the probative value of the evidence is outweighed by countervailing factors, he may look to other matters in exercising his discretion and still admit the evidence. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 231-32 (1976). As a caveat, however, the trial judge must make a full explanation on the record as to the precise rationale he used in exercising his discretion in this manner, or the appellate court may well determine that the trial court was simply not doing his job, rather than doing it creatively, conscientiously, and correctly.

125. "Unfair" prejudice means an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note. *See* United States v. Jamil, 707 F.2d 638, 644-45 (2d Cir. 1983)(fact of "prejudice" does not constitute showing of "unfair" prejudice; difficulties of inhibition of trial counsel, redaction and strong ethical doubts about propriety of allowing recording in evidence, while factors to consider, did not create "unfair" prejudice); United States v. Mills, 704 F.2d 1553, 1559-60 (11th Cir. 1983)(while evidence of prison gang membership, history, and activities, "may have been damaging" to murder defendant accused of killing fellow inmate, it was not "unfairly" prejudicial), *cert. denied*, 467 U.S. 1243 (1984). *But see* United States v. Nichols, 781 F.2d 483, 485 (5th Cir. 1986)(abuse of discretion for judge to permit government to offer evidence of drug defendant's prior conviction for conspiracy to commit same crime for which he was then on trial because unfairly prejudicial nature of such evidence clearly outweighed any probative value of evidence offered to show intent and identity); United States v. Dwyer, 539 F.2d 924, 928 (2d Cir. 1976)(exclusion of testimony of defendant's witness resulted in unfair prejudice to defendant). It is evidence that unjustifiably appeals to a juror's heart, rather than his head, that arouses passion, rather than reason, or in some other manner persuades a jury to base its decision upon emotion rather than evidence, that constitutes "unfair" prejudice. As was stated in *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980):

> All evidence introduced against a defendant, if material to an issue in the case, tends to prove guilt, but it is not necessarily prejudicial in any sense that matters to the rules of evidence . . . . Evidence is prejudicial only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence . . . . The prejudicial effect may be created by the tendency of the evidence to prove some adverse fact not properly in issue or unfairly to excite emotions against the defendant . . . . When material evidence has an additional prejudicial effect, Rule 403 requires the trial court to make a conscientious assessment of whether the probative value of the evidence on a disputed issue in the case is substantially outweighed by the prejudicial tendency of the evidence to have some other adverse effect upon the defendant.

Id.; *see also* Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220 (1976). Dolan classifies "unfair" prejudicial evidence into three categories: that which "seeks to affect irrationally the jurors' perception of the party because of some intrinsic characteristic of the

should ever be the basis for exclusion of relevant evidence. When probative value is low, the unfair prejudicial effect of the offered evidence need not be great to permit exclusion of the evidence.[126] However, when the probative value of the evidence is high, courts should tolerate a fair degree of prejudicial effect since, in criminal trials at least, relevant evidence frequently has emotional overtones.[127]

For example, in Mr. Toad's involuntary manslaughter trial, the State might offer numerous photographs of the accident scene: pic-

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individual litigant"; that which "involves damning the position of a party because of the party's association with certain groups"; and that which "excite[s] the jury's rage or its lust for revenge in the hope that the jury will 'take it out' on whomever is most convenient, i.e. the defendant." *Id.*; *see also* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 403.2, at 93-94 (West 1988).

126. *See, e.g.*, Lewis v. State, 676 S.W.2d 136, 140 (Tex. Crim. App. 1984). Here, the Texas Court of Criminal Appeals, in a prosecution for indecency with a child, analyzed evidence of a magazine containing pictures of a young girl in various stages of undress that was given by the defendant to another and found that this evidence had, at best, minimal probative value; thus, since its emotional, "unfair" prejudicial effect was high, the trial court erred in admitting the magazine. *Id.* at 140. On the other hand, statements made by the defendant to the other person had greater probative value because they showed the circumstances under which the alleged offense was committed and were helpful in showing the defendant's intent to gratify his own sexual desires. *Id.* at 141. Therefore, these statements were admissible despite their possible inflammatory effect. *Id.* Although the court did not explicitly discuss the issue in *Lewis*, a trial court has the authority and discretion to admit the most probative portions of evidence and exclude the more inflammatory. *See* United States v. McManaman, 606 F.2d 919, 926 (10th Cir. 1979)(government offered portions of lengthy conversation which were relevant to impeachment, and inflammatory parts dealing with murder plans; however, explosive portions not excised, as can be done to avoid such dangers of prejudice).

127. *See* Parr v. United States, 255 F.2d 86, 88 (5th Cir.), *cert. denied*, 358 U.S. 824 (1958)(while showing obscene film to jury would admittedly arouse sympathies and prejudices of jury, defendant could not force government to accept stipulation that film was obscene since stipulation might have effect of robbing evidence of much of its legitimate and fair weight); *see also* United States v. Sampol, 636 F.2d 621, 679-80 (D.C. Cir. 1980)(not error to permit government to introduce evidence of explosion which killed victim of assassination though defendant willing to stipulate to cause of death because stipulation would have diluted value of proof); United States v. Hearod, 499 F.2d 1003, 1004-05 (5th Cir. 1974)(not error to permit doctor to testify in detail about victim's loss of eye even though defendant admitted loss in opening statement as trial judge has discretion in balancing probative value against prejudicial effect). Courts have almost always held that while it is prejudicial to defendants for a jury to see the precise nature and results of their conduct, it is not "unfairly" so. For a criticism of the right to admit prejudicial evidence over an opposing party's offer to stipulate, see generally Fortune, *Judicial Admissions in Criminal Cases: Blocking the Introduction of Prejudicial Evidence*, 17 CRIM. L. BULL. 101, 120 (1981), which concludes that when defendant admits element of State's case, the trial judge may instruct jury that element admitted and prevent prosecution from offering evidence on element. However, when a stipulation goes to an evidentiary fact rather than an ultimate fact, the trial judge should balance incremental probative value of the offered evidence against the bare stipulation under rule 403. *Id.*

tures which, in gory detail and bright color, show Hortense's bloody body, the beer cans scattered in and around Mr. Toad's car, glass and metal debris scattered over a hundred feet, and Mr. Toad wobbling unsteadily and grinning crookedly. Admittedly, these pictures are highly prejudicial to the defense. They will effectively transport the jurors to the crime scene moments after the accident occurred. They will undoubtedly evoke horror and emotional distress in the jurors' minds. But they are admissible because they are not "unfairly prejudicial."[128] They are accurate depictions of what Mr. Toad is charged with having caused.[129] A videotape of the accident scene, like the photographs, is highly prejudicial, but highly probative as well. It, too, is admissible.[130]

Relevant evidence may also be excluded, in the trial court's discretion, if the probative value of that evidence is substantially out-

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128. Burdine v. State, 719 S.W.2d 309, 316 (Tex. Crim. App. 1986)(as general rule, if verbal description of scene or person admissible, photograph of that scene or person also admissible); Lopez v. State, 630 S.W.2d 936, 939 (Tex. Crim. App. 1982)(if verbal description of body admissible, then photograph depicting same admissible and no error in admitting slides of bloody body and permitting State to project them up on courtroom wall); Kelly v. State, 621 S.W.2d 176, 181-82 (Tex. Crim. App. 1981)(not error to admit photograph of deceased's face revealing facial shotgun wounds; admissible to show nature and extent of injuries). Even in the face of an offer to stipulate, a party is entitled to prove its lawsuit in its own fashion, not in some fashion designed by the opponent. United States v. Archambault, 670 F.2d 800, 802 (8th Cir. 1982)(in conviction for involuntary manslaughter arising out of automobile accident not error to admit photographs of inside of defendant's truck immediately after accident which showed empty and broken liquor bottles and offered to prove what investigating officer saw at scene of accident). As Judge Learned Hand pointed out, evidence may not be excluded merely because it is unpleasant. Slattery v. Marra Bros., 186 F.2d 134, 138 (2d Cir. 1951)(evidence of "repulsive injuries" is not made inadmissible because they may excite the jury's emotions); *see also* State v. Moore, 102 P. 475, 477 (Kan. 1909)("[a] court cannot arrange for lively music to keep the jury cheerful while the State's case in a murder trial is being presented, and grewsome [sic] evidence can not be suppressed merely because it may strongly tend to agitate the jury's feelings").

129. Consider, however, a photograph of Little Nell screaming hysterically at the scene as she views the dead body of her daughter. Is this admissible in the involuntary manslaughter trial? It is not relevant to any issue regarding Mr. Toad's behavior, nor is it relevant to show the nature and extent of any injuries to Hortense. The unfair prejudicial effect is enormous, while the probative value of showing the nature and extent of the mental injuries to Little Nell, who is not the alleged victim, is small. It should not be admitted. The result would be otherwise in a civil suit for wrongful death, in which Little Nell sues Mr. Toad for the mental anguish she suffered over the death of her daughter.

130. *See* Marras v. State, 741 S.W.2d 395, 404 (Tex. Crim. App. 1987)(motion pictures merely collection of photographs and rules for their admission same as for photographs); Miller v. State, 741 S.W.2d 382, 388 (Tex. Crim. App. 1987)(admission of videotape depicting not only scene of capital murder death but also route taken by murderers upheld); Wilkerson v. State, 726 S.W.2d 542, 547 (Tex. Crim. App. 1986).

weighed by the danger of confusion of the issues,[131] misleading the jury,[132] or by considerations of undue delay,[133] or needless presenta-

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131. The notion of "confusion of the issues" has been explained by Wigmore thus:

> in attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instance and the similarity of conditions, new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data from which it will be difficult to extract the kernel of controversy.

2 J. WIGMORE, WIGMORE ON EVIDENCE § 443, at 528-29 (Tillers rev. 1983); *see also* United States v. Schmidt, 711 F.2d 595, 598-99 (5th Cir. 1983)(trial court did not err in excluding psycholinguistics expert's testimony offered to prove defendant did not knowingly and willfully utter purportedly false statements to grand jury because evidence would have confused issues and made complex a simple issue easily comprehensible to jury), *cert. denied*, 464 U.S. 1041 (1984): United States v. Michelena-Orovio, 702 F.2d 496, 499-500 (5th Cir. 1983)(trial court did not err in denying defendant's request to have jury smell one bale of marihuana in courtroom), *cert. denied*, 465 U.S. 1104 (1984). In *Michelena-Orovio*, government witnesses had testified that they searched a ship because of odor emanating from 363 bales of marihuana. *Id.* The defendant argued that there was no reasonable justification for searching since the agents could not have detected the smell. The court found that placing one bale of marihuana in the courtroom a year after its seizure did not replicate the conditions at the time of the search and the jury would be confused by this demonstration. *Id.* A fair rule of thumb was expressed by the trial judge in United States v. Pollock, 394 F.2d 922, 926 (7th Cir.), *cert. denied*, 393 U.S. 924 (1968):

> I don't think we can start dumping into the laps of the jury that whole civil case. This man and company have been litigating now, . . . for five years, and this [civil] trial lasted twenty-six days, and we can't incorporate that trial by reference to this trial.

Id.

132. Many commentators see no real distinction between "confusion of the issues" and "misleading the jury." *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 185, at 439 (1972); 2 R. RAY, TEXAS LAW OF EVIDENCE § 1481, at 168 (3d ed. 1980); J. WIGMORE, WIGMORE ON EVIDENCE § 1864, 642-44 (Tillers rev. 1983). The Advisory Committee Note to rule 403 offers no guidance either. Professor Dolan, however, distinguishes the two concepts thus:

> Confusion of the issues, as a prejudice rule consideration, speaks most appropriately to the doctrine of limited admissibility and to the use of evidence from, or the results of, other trials . . . . Misleading the jury may sound like a synonym for confusing the issues, but it is not. While it is true that evidence which confuses the issues is likely to mislead as well, the reverse is not always true . . . [m]isleading the jury will likely occur when evidence is seductively persuasive—a good and distinct definition.

Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 240-42 (1976).

133. Evidence which concededly has some probative value may be excluded if its proof and counterproof offered by the opposing party will consume more time and resources than the evidence is worth. *See* James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 702 (1941)(determination of whether relevant evidence has sufficient probative force to justify time taken to offer it requires considering difficulty in establishing evidentiary fact, how offered fact will fit in with other facts already in evidence, how this fact affects major issues, and whether evidence merely cumulative); *see also* United States v. Bowe, 360 F.2d 1 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966). In this pre-rules decision, the defendant was convicted of smuggling explosives into the United States and conspiring to blow up government property. *Id.* One

tion of cumulative evidence.[134] In the hypothetical involuntary manslaughter trial, suppose that Mr. Toad offers various witnesses,

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defensive theory was entrapment by the chief government witness. In excluding the testimony of a defense witness who would have testified to the star government witness' request to participate in a plan to blow up the Statue of Liberty, the Second Circuit stated:

> Thus, the issue here is whether the exclusion of the admittedly relevant evidence constituted an abuse of discretion by the trial judge. We conclude that it did not.
>
> A trial judge has discretion to exclude evidence which is only slightly probative if its introduction would confuse and mislead the jury by focusing its attention on collateral issues and if it would unnecessarily delay the trial. [citations omitted]. The rationale underlying this broad grant of discretion is that such a determination necessarily requires the balancing of intangible factors peculiarly within the knowledge of the trial judge.

Id. at 15. Obviously, if the probative value had been high rather than "slight," a different balancing would be required.

134. Cumulative evidence is defined by Dean Blakely as:

> [A]dditional evidence directed to the same point. The rule applies only to *needlessly* cumulative evidence. If the jury is to be persuaded to adopt a party's position, it will be so persuaded by the evidence already presented on the point; cumulative evidence will have no effect other than to consume time.

Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 169-70 (1983 Tex. R. Evid. Handbook)(emphasis in original; citations omitted); *see also* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULE OF EVIDENCE CIVIL AND CRIMINAL § 403.2, at 97 (West 1988)(since rule applies only to "needlessly" cumulative evidence, judges should be sensitive to 'right' of party to make case in most persuasive manner possible which may demand two or more documents or witnesses addressed to same material issue"); United States v. Crosby, 713 F.2d 1066, 1072 (5th Cir.)(Viet Nam veteran defendant's expert evidence on post-traumatic stress disorder included copious records from veterans counseling center and these records properly excluded as needlessly cumulative of other testimony offered through various sources and witnesses), *cert. denied*, 464 U.S. 1001 (1983); United States v. McLernon, 746 F.2d 1098, 1117 (6th Cir. 1984)(taped conversation between DEA agents discussing tactics to use in cajoling drug dealers to consummate drug purchase properly excluded; although evidence relevant to entrapment defense, cumulative of other evidence of inducement). While it cannot be said that when the jury has seen one character witness, it has seen them all, a trial court does have great discretion in deciding when evidence is merely cumulative and needlessly so. While the trial court would probably permit Mr. Toad to call his minister, his employer, his wife, his next door neighbor, and his bartender to testify to his reputation for sobriety, the judge could exercise his discretion in excluding the two sisters-in-law, every member on the baseball team, and his six Thursday night drinking companions. When a witness offers a new perspective on the issue or a further clarification of the evidence, his testimony may be cumulative, but not needlessly so. Conversely, when the perspective is the same, or the testimony precisely the same, the court may remember that it "has obligations to other parties who have cases to be heard." United States v. United Shoe Machinery Corp., 93 F. Supp. 190, 191-92 (D. Mass. 1950); *see also* C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5213, at 260 (1977). Wright and Graham state that

> [a] court could not refuse, on the grounds of undue consumption of time, to hear the testimony of a fifth eyewitness to an assault with a baseball bat. But if the parties are professional baseball players, as in the celebrated Marichal-Roseboro case, surely not everyone in the ball park is entitled to a seat in the witness box.

Id.

records, and eyewitness testimony to prove similar, earlier accidents that occurred at this location. His defense theory is that this location is inherently dangerous and the present accident was caused, not by his intoxication, but by the dangerous road conditions. The trial judge would be acting well within his discretion to exclude this evidence which has some probative value, but would lead to confusion of the issues and undue delay.[135]

One factor that may not be taken into account when balancing probative and prejudicial factors under rule 403 is the credibility of the witnesses as this is always a matter for the jury, not the judge, to determine.[136]

Since the issues in one trial can never be precisely duplicated in another, each judge in each case should, when employing rule 403, carefully articulate the probative value of the evidence, enunciate the specific countervailing factors he perceives and the relative weight of each, and explain why he balanced them in the manner that he did to achieve the particular result. While it is the parties' responsibility to

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135. During the debates on the adoption of Rule 303 of the Model Code of Evidence, the forerunner of the Federal Rules of Evidence, the Reporter, Professor Morgan, spoke to precisely this scenario:

> Very frequently evidence of slight probative value will be admissible because relevant but the trial judge knows that there is no use taking up time with hearing it. Take evidence of similar accidents, for example, to show that a particular place is dangerous. Now, most of the courts will say that you can put that in if there is not going to be a great dispute about each one of these accidents. Suppose you offer to show that X was hurt at this particular place one year ago and Y was hurt at this particular place two years ago and there were three or four accidents in that place, and suppose the opponent of the evidence says, "If you admit that evidence, sir, we intend to go into the question of the circumstances of each one of those accidents to show that it was due solely to the fault of the injured person." Is the trial court going to have to take all that evidence? It is all relevant. The reason that the courts give frequently for keeping that testimony out is that it will consume too much time. Of course, it is relevant. Its relevancy is slight. Sometimes they say there is danger of misleading the jury by confusing the issues.

19 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE 223 (1942); *see also* James, *Relevancy, Probability and the Law*, 29 S. CAL. L. REV. 689, 700-03 (1941); *cf.* United States v. Yarns, 811 F.2d 454, 455-56 (8th Cir. 1987)(trial court did not abuse its discretion in excluding portion of cross-examination of government witness concerning his past illegal activities). The *Yarns* court found that the testimony would have led the jury into an excursion into past events that were only relevant through defendant's impeachment theory. Even if successful, the testimony would only have shown that the witness engaged in a conspiracy, something the jury already knew. Thus, evidence would have been extremely time-consuming and could have confused the issues. *Id.*

136. C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5214, at 265-66 (1977).

bring all pertinent factors to his attention, the trial judge is required to make a very particular ruling, applicable only to this specific factual scenario. Therefore, legal precedents are of so little value in dictating the proper balance that the American Law Institute specifically forbade the use of 403 rulings as legal precedent when it drafted the Model Code of Evidence.[137] Since the policy of rule 403 is based upon the trial judge's conscious balance of competing probative and prejudicial factors, an appellate court will be focusing upon the methodology he used, rather than the result he reached, in reviewing any allegations of "abuse of discretion."[138]

VII. ADDITIONAL RELEVANCY RULES 404 TO 412

All of the rest of the relevancy rules, from rule 404 through 412, are merely specific examples of the general balancing rule of 403. They are intended to advance the truth-seeking mission of the trial while simultaneously accounting for other institutional goals of fairness and efficiency. These rules are the result of courts having been faced on numerous occasions with the same evidentiary scenario and having repeatedly found that the probative value of a certain type of evidence was outweighed by various counterfactors. Rule 404,[139] for example,

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137. A.L.I. MODEL CODE OF EVIDENCE RULE 303 (Discretion of Judge to Exclude Admissible Evidence), Comment (1942):

> The application of this Rule should depend so completely upon the circumstances of the particular case and be so entirely in the discretion of the trial judge that a decision in one case should not be used as a precedent in another.

Id.; *see also* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5214, at 265 (1977)(past decisions useless in weighing process under rule 403).

138. *See supra*, notes 9 to 12 and accompanying text.

139. Rule 404: Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Subject to Rule 412, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

deals with character or "propensity" evidence. Evidence of character to prove that a person acted in conformity with that character on the specified occasion, is logically relevant.[140] Certainly the fact that Mr. Toad drives home while intoxicated five nights of the week is logically relevant in demonstrating that he was intoxicated when he ran into Little Nell's Nissan. Nonetheless, as a matter of public policy, American trials are conducted solely on the basis of what happened on the charged occasion; thus, each trial is a brand new day for a defendant. The exclusion of character evidence is based, not on its lack of probative value, but rather on its unfair prejudicial effect, a general balancing determination under rule 403 that has become codified.[141] Thus,

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preparation, plan, knowledge, identity, or absence of mistake or accident, provided, upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief such evidence other than arising in the same transaction.
(c) Character relevant to punishment. In the penalty phase, evidence may be offered by an accused or by the prosecution as to the prior criminal record of the accused. Other evidence of his character may be offered by an accused or by the prosecution. Nothing herein shall limit provisions of Article 37.071, Code of Criminal Procedure.

140. Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 190 (1983 Tex. R. Evid. Handbook). As was so aptly put by Justice Jackson:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of the issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-76 (1948). For a collection of rhapsodic prose extolling this particular virtue of the American criminal justice system, see generally J. WIGMORE, WIGMORE ON EVIDENCE §§ 57 & 194 (Tillers rev. 1983).

141. Substantively, the rule banning "bad character" evidence supports one of the most basic and cherished notions of American jurisprudence: persons are to be punished for their evil deeds, not their evil character. *See* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5232, at 346 (1977). As one appellate judge has said: "Our law makes some allowance for the possibility of reform, and does not yet say 'once a moonshiner, always a moonshiner.' " Baker v. United States, 227 F.2d 376, 378-79 (5th Cir. 1955)(Rives, J., concurring). This assumption is valid only during the guilt/innocence portion of a trial since both judges and juries quite properly take into account the character of the defendant and his propensity toward criminality during the sentencing stage. TEX. R. CRIM. EVID. 404(c). This is precisely the purpose behind TEX. CRIM. PROC. CODE ANN. art. 37.07, § 3(a) (Vernon Supp. 1988)(evidence of convicted defendant's prior criminal record, general reputation, and character), TEX. CRIM. PROC. CODE ANN. art. 37.071(a) (Vernon Supp. 1988)(in capital murder trial, evidence presentable as to any matter that court deems relevant to sentence), and TEX. CRIM. PROC. CODE ANN. art 42.12, § 4(a) (Vernon Supp. 1988)(probation officer shall prepare report on circumstances of offense with which defendant charged, criminal and social history of defendant, and other information relating to defendant or offense requested by court).

under rule 404(b), character evidence is not admissible to prove the defendant acted in conformity with that character trait this time, but that same evidence is admissible under any other, alternate theory of relevance.[142] If the evidence of Mr. Toad's prior occasions of intoxication is relevant to the involuntary manslaughter trial under any other theory, some examples being motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, that evidence is admissible if it passes the balancing test of rule 403.[143] Similarly with rule 407;[144] subsequent remedial measures are not admissible, though they are certainly relevant, to prove negligence or culpable conduct, but they are admissible "when offered for another purpose."[145] Under rule 408,[146] evidence of compromise offers are not

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142. Dickerson v. State, 745 S.W.2d 401, 403 (Tex. App.—Houston [14th Dist.] 1987, no pet. reported)("as rule 404(b) indicates, there are numerous uses to which evidence of crimal acts may be put, and those enumerated are neither mutually exclusive nor collectively exhaustive")(quoting E. CLEARY, MCCORMICK ON EVIDENCE § 190, at 558 (3d ed. 1984)); Pleasant v. State, 755 S.W.2d 204, 205-06 (Tex. App.—Houston [14th Dist.] 1988, no pet.)("Rule 404(b) provides that other crimes may be admissible for the purpose of proving, among other things, identity"); Ruiz v. State, 726 S.W.2d 587, 590 (Tex. App.—Houston [14th Dist.] 1987)(extraneous offenses inadmissible to show defendant had bad character and acted in conformity with bad character, but admissible if relevant to some other issue in case); *see also* S. GOODE, O. WELLBORN & M. SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 404.6, at 121 (West 1988)(suggesting that Texas has, by adopting rule 404(b), accepted the "inclusionary" approach toward the admission of "other crimes" evidence); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5232, at 349 (1977)(evidence of defendant's past misdeeds inadmissible only when prosector cannot identify reason other than to show propensity to justify admission). *See generally* Weissenberger, *Character Evidence Under the Federal Rules: A Puzzle with Missing Pieces*, 48 U. CINN. L. REV. 1 (1979).

143. *See* IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 8:02-8:03 (1984)(rule 403 considerations guide judge's discretion to admit or exclude evidence of extraneous offenses under 404(b)); *see generally* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE, § 5250 (1977); Note, *Rule 404(b) Other Crimes Evidence: The Need For a Two-Step Analysis*, 71 NW. L. REV. 635, 639 (1977).

144. Rule 407, Subsequent Remedial Measures; Notification of Defect, provides in pertinent part:

> (a) *Subsequent remedial measures.* When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

FED. R. CRIM. EVID. 407.

145. *See* FED. R. EVID. 407, Advisory Committee Note (exclusion called for only when

admissible to prove liability, but they are admissible when "offered for another purpose." All of these rules exclude relevant evidence when offered for a specific, forbidden purpose, but permit admission when offered for another, legitimate purpose. They are but codifications of specific applications of rule 403.

Because rule 403 grants such broad discretion to the trial judge, both the proponent and opponent of evidence should fully articulate their relative positions, clearly drawing the court's attention to the offered item's probative factors and the anticipated prejudicial effects. In turn, the judge should evaluate and weigh all of the factors he has relied upon in reaching the conclusion that he does. By so doing, all of the participants will have focused upon the logical premises and conclusions and relevant legal criteria. The "right" logical and legal evidentiary ruling is thus more likely to be arrived at, and the chance of an appellate reversal significantly diminished.

VIII. CONCLUSION

In sum, the Texas Rules of Criminal Evidence have greatly expanded the role of the trial court judge in making discretionary judgments concerning the admissibility of relevant evidence. It is his job to ensure that all evidence which is likely to aid the factfinder in the quest for a fair and truthful result will be admitted. His discretion should be exercised consciously and conscientiously, but it is the responsibility of both the proponent and opponent of the evidence to articulate clearly all of the factual bases, logical premises, and legal criteria which might affect that decision. Under the new rules, the

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evidence of subsequent remedial measures offered as proof of negligence or culpable conduct, however other purposes allowable); Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 215 (1983 Tex. R. Evid. Handbook)(noting "back door" exceptions of rule 407 had made substantial inroads upon general rule of exclusion).

146. Rule 408. Compromise and Offers of Compromise.

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

FED. R. CRIM. EVID. 408.

role of appellate courts should be limited to a determination of whether the trial judge used the appropriate methodology in making his evidentiary ruling or whether the trial court so miscalculated the nature and weight of the factors he relied upon that he clearly abused his discretion. Appellate precedent is useful in this decision-making process not for the result reached in that case but rather for the articulation of the policy objective behind the rule, the importance of recording the trial court's logical process, and the methodology of implementing and interpreting the rules.

If the Texas Rules of Criminal Evidence are used as flexible guideposts to achieve the just determination of a particular criminal trial, rather than "black letter" law which could stultify and frustrate that goal, they will indeed fulfill the function of rule 102 and lead to the "promotion of growth and development of the law of evidence."