

John Henry Wigmore, Johnny Lynn Old Chief, and “Legitimate Moral Force”

Keeping the Courtroom Safe for Heartstrings and Gore

by
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On October 23, 1993, Johnny Lynn Old Chief and two lady-friends spent the day driving around the Blackfeet Indian Reservation in northern Montana in a borrowed truck, hanging out and getting drunk.¹ At some point, one of the women found a pistol under one of the seats and pulled it out to play with it.

Late in the day, the group drove to a bar called Ick's Place to buy more beer. In the parking lot, Mr. Old Chief was challenged to fight by one Anthony Calf Looking and a friend, who were also drunk. Calf Looking, the conceded aggressor, hit Old Chief and knocked him down. At that point, a shot was fired, though the evidence was in conflict about who had the gun, who fired the shot, and whether it was fired in the direction of Calf Looking, who fled. Significantly, neither Calf Looking nor his companion knew who fired the shot. No one was injured.

Old Chief left in the truck with the two women. They drove to an abandoned gas station, where they got out of the truck. Police had been called by someone at Ick's Bar. The police arrived at the gas station and found the gun under the seat of the truck. Old Chief was charged with assault with a dangerous weapon, and with using a firearm during that assault. Because he had a prior felony record, he was also charged with being a felon in possession of a firearm in violation

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1. A fuller rendition of the facts underlying *Old Chief v. United States*, 117 S. Ct. 644 (1997), together with an explanation concerning sources, will be found *infra* at notes 109-16 and accompanying text.

of 15 U.S.C. section 922(g).

On the morning of April 19, 1995, someone parked a rented Ryder truck filled with explosives in front of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma and detonated it, collapsing the facade and front half of the building and killing 168 people.² With a combination of luck and good police work, investigators found a truck axle with the vehicle's identification number, and traced it to a truck rental agency in Junction City, Kansas. It had been reserved on April 15 by someone who had given his name as "Robert D. Kling." Investigators then turned up a deliveryman for a local Chinese restaurant who remembered having delivered food ordered by "Bob Kling" to a motel room, which the motel records showed had been rented in the name of one Timothy McVeigh. A computer check revealed that a Timothy McVeigh had been stopped for a traffic violation and taken into custody on a weapons charge just north of Perry, Oklahoma, some seventy-eight miles from the bombing site,³ only seventy-eight minutes after the explosion.⁴ He was still in custody. He was arrested and charged with participation in the bombing.

Both the above incidents led to federal criminal indictments and trials, but beyond that, they seem to have little in common. One incident is among the most horrifying and destructive criminal incidents in the history of the nation, and the other perhaps among the least. Nevertheless, they have one other thing in common that is of interest to this paper. Both defendants were faced with charges containing elemental issues that could not be contested effectively. There was no doubt Old Chief had qualifying felony convictions; there was no doubt of the actus reus and the mens rea of the perpetrators in the Oklahoma City bombing. Further, in both cases the evidence that might be produced to formally discharge the government's burden of production on the incontestable facts was itself

2. Much of the detail in this sketch is contained in the indictment in *United States v. McVeigh*, No. CR 95-110-A, 1995 WL 559539, at *1-4 (W.D. Okla. Aug. 10, 1995). The rest is, unless otherwise noted, common knowledge sourceable through numerous printed accounts. See, e.g., David Maraniss & Walter Pincus, *The Oklahoma City Federal Building Bombing: Putting the Pieces Together*, WASH. POST, Apr. 30, 1995, at A20.

3. 77.9 miles, to be exact. See Testimony of Trooper Charles Hanger, 1997 WL 203457, at *37 (D. Col. Trans.) Apr. 28, 1997.

4. The explosion occurred at 9:02 a.m. See Maraniss & Pincus, *supra* note 2, at A20. Trooper Hanger testified that he stopped McVeigh about 10:20 a.m. See Testimony of Trooper Charles Hanger, *supra* note 3, at *4.

devastating far beyond the facts themselves. In short, both defendants could benefit from a successful judicial admission.⁵

Ah, the judicial admission. When I first encountered the notion nearly thirty years ago, it seemed right to me. It turned out that I wasn't alone. The great Wigmore's initial response was the same as mine, though he later seems to have had substantial second thoughts.⁶

Though usually formulated to apply to trials of every kind, the operation and logic of the judicial admission mechanism is most clearly illustrated in the context of a criminal prosecution. Assume a particularly brutal murder, perhaps one involving child rape, torture, and mutilation. Assume a defendant who cannot, with any practical hope of success, contest the existence of the actus reus, nor for that matter, the perpetrator's criminal state of mind. The only reasonable defensive position practically available is that he is not the perpetrator of this crime; someone else is; the State has charged the wrong man. That is, his practical defense is that the evidence will leave a reasonable doubt regarding the element of identity.⁷

Should defense counsel understand all this, and even set out this general position in an opening statement, but take no further more formal steps, the defense has little chance of excluding any evidence bearing even remotely on the factual details of the crime charged or the state of mind of the perpetrator, whoever that might have been.⁸ Though the defense's opening is admissible as evidence, should the prosecution so elect, it is by no means legally binding.⁹ The prosecu-

5. Whether McVeigh's attorneys attempted an actual judicial admission is unclear. A motion in limine based on Federal Rule of Evidence 403 was filed, but the exact content of the motion is unknown, since the motion was sealed by the court at the defense's request and remains sealed as of this writing.

6. See *infra* notes 20-23 and accompanying text.

7. This defensive posture has come to be referred to rather flippantly in recent years as the "soddi" defense ("some other dude done it"), though of course, it is not technically an affirmative defense, and it is often deadly serious business, since it is by no means uncommon that some other dude did do it.

8. See *infra* notes 35-37 and accompanying text (dealing with the one class of circumstances in which this statement might not be true in some jurisdictions).

9. Wigmore limits his comments to the admissibility of openings in subsequent litigation. See 4 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1063 (3d ed. 1940) [hereinafter WIGMORE ON EVIDENCE]. There is language in dictum in some recent opinions that "a clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party." *United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) (citing *United States v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984)). Neither *Blood* nor *McKeon* involved openings which were given the effect of judicial ad-

tion still bears the formal burden of producing sufficient evidence to justify a finding as to each element beyond a reasonable doubt. In addition, the prosecution, as a party in our particular adversary process, has a presumptive right in discharging that burden to choose and proffer whatever admissible evidence it deems most likely to persuade a jury to return a verdict in its favor. Oh, well, yes, it is true that in the federal system and those states whose rules are modeled on the Federal Rules of Evidence, there is the possibility of objecting to individual proffers under Rule 403, the famous probative value-prejudicial effect balancing test. However, this is unlikely to yield much for a number of reasons, not the least of which is a rather heavy thumb on the scale of the balancing test there set out in favor of admissibility.¹⁰

What to do? Make a formal judicial admission of the elements constituting the actus reus¹¹ and the mens rea.¹² A judicial admission

missions. Both cited the civil case of *Oscanyan v. Arms Co.*, 103 U.S. 261 (1880) for the proposition. However, the Court in that case was careful to say that, although in an appropriate case an opening statement might be treated as a judicial admission, judges should be very careful not to give it such effect if there might be any factual doubt about the statements so made. See *Oscanyan*, 103 U.S. at 263. I have found no case rendering a criminal defendant's opening non-traversable per se.

10. Probative value must be "substantially outweighed" by prejudicial effect to justify exclusion. FED. R. EVID. 403. This significant presumption in favor of the admissibility of problematical evidence was taken from the first version of the Uniform Rules of Evidence, where "substantially" was inserted in response to criticism that the original Models Rules of Evidence formulation (without the "substantially") gave judges too much discretionary power to exclude evidence. See 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5211 (1978). My own belief is that, while the original formulation might lead to a systemic problem of overexclusion in some contexts, the political sociology of judicial selection is such that excluding evidence proffered by the prosecution in a criminal case is unlikely to be such a context. Former prosecutors tend to be disproportionately represented on the bench. The failure of Rule 403 (and its state analogues) to control prosecutorial excesses is well recognized in the literature. See generally Edward J. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L.J. 341, 358 n.102 (1991).

11. It is a commonplace practice, and a useful one, that all material elements of a crime may be classified as actus reus elements (conditions which comprise the objective existence of the harm toward which the criminal sanction is directed). Note that while the term actus reus emphasizes acts, it covers non-act elements such as the fact of death in a murder charge; various status elements such as the defendant's status as a convicted felon in the *Old Chief* situation, or the pornographic nature of materials, see *infra* note 68; mens rea elements (defining the various subjective states necessary or sufficient to render the actor guilty); and identity (that the person charged is in fact the perpetrator). See *gener-*

is a unilateral declaration that a party will be bound by the admitted version of jury issues.¹³ By this, the court is authorized to give a binding instruction on those issues to the jury.¹⁴ The effect ought to

ally EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* § 3:01 (1997). Things become more complicated when we consider burden allocation rules creating defenses, many of which bear on mens rea, or when non-elemental considerations get elevated to quasi-elemental status by variance doctrines, but luckily we may avoid consideration of such variations unless we encounter them.

12. We must here deal with the assertion that is sometimes made, that a person who claims not to have done an act cannot admit that the act was done with mens rea. The claim is that such an admission is hopelessly confusing, since if the defendant did not do the act, he can have no personal knowledge of the mindset of the true culprit. Some courts have held that the conditional nature of such an admission ("I didn't do it, but if I did it, then I had mens rea") is in itself a good reason to give it no effect. See, e.g., *United States v. Muniz*, 60 F.3d 65, 69 n.2 (2d Cir. 1995); *State v. Kappen*, 180 N.W. 307, 310-11 (Iowa 1920). At the other extreme, one commentator has argued that the admission should be effective, but that the jury should be charged only on the other elements, with no reference to intent at all—which would raise serious jury nullification problems of the sort dealt with *infra* note 64 and text accompanying notes 63-67. See Edward G. Mascolo, *Uncharged Misconduct Evidence and the Issue of Intent: Limiting the Need for Admissibility*, 67 CONN. B.J. 281, 307 (1993). I think that both views are wrong, at least in identity cases. It is true that some defense attorneys, in an attempt to give up as little as possible, fail to admit what they should. See Stephen A. Saltzburg, *Stipulations to Exclude Other Act Evidence: What is Adequate?* CRIM. JUST., Spring 1995, at 39. That aside, how confusing is it to be told that the defendant concedes that whoever raped, murdered, and mutilated the little girl committed a horrible crime and obviously did so with culpable evil in his heart, but the defendant claims that it just wasn't him? This situation can generally be dealt with effectively by judicial instruction. See *United States v. Figueroa*, 618 F.2d 934, 942 (2d Cir. 1980). For this reason, I am not in favor of anything turning merely on a division of admissions between those in the defendant's "actual knowledge" and those not within "personal knowledge" as outlined (but not necessarily advocated) by Professor Duane in James Joseph Duane, *Stipulations, Judicial Notice, and a Prosecutor's Supposed "Right" to Prove Undisputed Facts: Oral Argument from an Amicus Curiae in Old Chief v. United States*, 168 F.R.D. 405, 411-12 & n.32 (1996).

13. See 9 WIGMORE ON EVIDENCE, *supra* note 9, § 2588. The form of expression in the present article emphasizes the unilateral nature of the judicial admission, though it may be proffered conditionally upon its acceptance by the opposing party, or by the judge. In another sense, all judicial admissions are bilateral, whether the opponent likes it or not, since the admission is addressed to something the opponent is already claiming to be true. For an excellent discussion unbundling these issues, see Duane, *supra* note 12, at 417-18.

14. Or is it? The status of a binding instruction on one element in a criminal case is, in a sense, constitutional *terra incognita*. On the one hand, it is clear that a full directed verdict against a criminal defendant would *a fortiori* violate the jury trial right in criminal cases, since that right is taken to encompass at least the possibility of jury nullification in favor of the defendant, and a directed verdict would render this impossible. On the other hand, the alternative to a binding instruction when a single issue is involved (the permissive inference instruction) has intelligibility and rationality aspects which make it prob-

render irrelevant (and therefore inadmissible) any evidence relevant *solely* to the issues completely established by the admission. There is no need for the invocation of any balancing test, because there is no probative value left to balance against any invoked prejudicial effect.

Of course, there are certain practical concerns, since the prosecution will predictably not want to be so limited in its proof. If the judicial admission is phrased in the form of an offer to "stipulate," the prosecution may seize upon the agreement-of-parties connotation of the word in legal parlance to defeat the offer.¹⁵ If there is anything ambiguous, grudging, or inexplicit in the admission, the prosecution properly can say that it does not accomplish the asserted purpose. And of course, in many cases, much of the evidence bearing on the admitted elements may also be shown to have rational relevance to the remaining elements, such as, in our example, identification of the perpetrator. However, by the logic of what we claim to be our proof system, a properly formulated, ungrudging judicial admission ought to render inadmissible any evidence which cannot be shown to be at least slightly relevant to the remaining issue of the identification of

lematical. See Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 194-202 (1969). For the confusion that can result from regarding permissive inference language as obligatory, see *Peterson v. State*, 930 P.2d 414, 436-37 (Alaska Ct. App. 1996). My own view is that, on balance, the binding instruction is preferable in general, in the context of non-evidence driven mechanisms like presumptions, judicial notice, stipulations, and judicial admissions, and presents no real constitutional issue as long as the jury is clearly free to return a general verdict of not guilty. No case I have seen has resolved this issue unconditionally. Nevertheless, in a fit of caution (if not analysis), many such instructions that would be binding in civil contexts are cast in permissive inference terms in criminal contexts, at least in federal practice. See, e.g., FED. R. EVID. 201(g) (judicial notice). The majority opinion in *Old Chief* made the issue disappear by (without explanation) treating Old Chief's "offer to stipulate" as a practically dispositive evidentiary admission, not as a true judicial admission. See *Old Chief v. United States*, 117 S. Ct. 644, 653 (1997). Whatever the law's default position on such instructions, the rights involved are defendant's rights, and should not be the source of arguments enuring to the prejudice of defendants. See *infra* text accompanying notes 122-126. There has been a series of post-*Old Chief* opinions on the propriety of binding instructions based on judicial admissions by criminal defendants. These opinions have not answered the question, but have concluded, not surprisingly, that if such an instruction is error, it is invited error and always harmless. See *United States v. Saez*, 111 F.3d 132 (1997); *United States v. Gonzalez*, 110 F.3d 936 (2d Cir. 1997); *United States v. Jones*, 108 F.3d 668 (6th Cir. 1997).

15. It may seem surprising that such arid characterization could be dispositive, but it often is. See, e.g., *People v. Hills*, 532 N.Y.S.2d 269, 273 (N.Y. App. Div.), *appeal denied*, 534 N.E.2d 340 (1988); *State v. Smith*, 644 S.W.2d 700, 701 (Tenn. Crim. App. 1983).

the defendant as perpetrator of the crime.¹⁶ Our official ideology accounting for and justifying our proof system is the “search for truth” model (sometimes called, perhaps more accurately, the “rectitude of decision”¹⁷ model), prominently set out in Federal Rule of Evidence 102.¹⁸ Whatever the difficulties of this ideology, at a minimum, it should mean that upon proper objection, evidence that cannot be shown to provide the jury with any relevant information on the factual issues they will be called upon to decide and that cannot be shown to bear on any officially recognized normative function committed to the jury in such a case,¹⁹ should not be admitted (at least

16. I suppose that here is as good a place as any to explain why I have concentrated so much on cases in which identity is the only real issue. Predicate felon elements aside, such cases present the clearest commonly encountered situation where judicial admissions ought to work. In addition, most epistemically troubling (at least to me) death penalty cases fit this model.

17. The term “rectitude of decision” can more comfortably cover a process which emphasizes factual accuracy in regard to legal guilt, but which also involves accurate application of law to facts, decisional rules which do not always equate the disvalue of false positives and false negatives, and the use of the jury for certain officially recognized value-judgment functions. See WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* 47-48 (1985).

18. “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of the growth and development of the law of evidence *to the end that* the truth may be ascertained and proceedings justly determined.” FED. R. EVID. 102 (emphasis supplied). Note that the clauses concerning fairness, expense, delay, and development define means subordinate to the ends of truth and justice. I used to think that the notion of justice intended was the standard notion of justice under law—accurate application of preexisting substantive law to facts accurately determined—so that like cases (as defined by the applicable substantive law) are treated alike, and different cases treated appropriately differently. See TWINING, *supra* note 17, at 12-18. Now I am less sure.

19. What I mean by an “officially recognized normative function” is involved when the law explicitly recognizes that it is using the jury as a representative of community conscience to make certain defined value judgments in regard to a particular issue, no matter how clear the facts are. The easiest example is negligence. Even if we had a full color, full sound, full feel, full smell, full taste hologram of an incident, with a cap that would allow a person to experience the subjective states of the actor, the jury would still have a legitimate and recognized function. Though everything that could be empirically characterized as a fact would be clear, the jury would still be necessary to decide whether or not the actor was “careful enough.” The presence of such normative jury functions is sometimes indicated by the particularly unhelpful and misleading phrase “mixed question of law and fact,” though what is actually at stake is a “mixed question of fact and value.” The criminal law explicitly recognizes such a role for juries globally for the benefit of *defendants* only, in the right to the opportunity for jury nullification entailed by the right to an ultimate general verdict of guilty or not guilty, which cannot be subject to direction or review on appeal. There is clearly no such explicitly approved general role for juries for the benefit of the prosecution. This is absolutely true with regard to *actus reus* and identi-

where there is any significant danger of accuracy distortion resulting from the evidence).

Ought not be, should not be. It convinced me. It still does. And it convinced Wigmore initially. In the 1905 first edition of his mighty treatise he wrote as follows:

A fact that is judicially admitted needs no evidence from the party benefiting by the admission. But his evidence, if he chooses to offer it, will even be excluded; first, because it is now as immaterial to the issues as though the pleadings had marked it out of the controversy; next, because it is superfluous and merely encumbers the trial; and furthermore, because the added dramatic force which might sometimes be gained from the examination of a witness to the fact (a force, indeed, which the admission is often designed especially to obviate) is not a thing which the party can be said to be entitled to.²⁰

However, by the second edition in 1923, something had caused a change of tune. There, he wrote:

A fact that is judicially admitted *needs* no evidence from the party benefiting by the admission. But his evidence, if he chooses to of-

fication elements, but with regard to mens rea and certain traditional affirmative defenses, things start getting fuzzy. Criminal negligence and the recklessness proxy for actual intent, for example, import such a normative function into the criminal process which can be exercised to the benefit or either side. This may also be an appropriate way to view such issues as insanity and diminished capacity. In addition, such a normative function is present with regard to self defense, at least under an objective standard. Finally, such a normative role is clearly present when the jury is given a sentencing function. Nevertheless, it is supposedly a given that the *prosecution* is not entitled to jury nullification of the law in favor of conviction generally. However, one sometimes gets the impression that many players in the system believe that such a function is appropriate globally for the benefit of the prosecution also, but they are rarely bold enough to say so openly or on paper. For an example of a judge coming close, consider the following by Judge Altamari, in *United States v. Gilliam*, 994 F.2d 97, 101 (2d Cir. 1993):

The jury speaks for the community in condemning such behavior, and it cannot condemn such behavior if it is unaware of the nature of the crime charged As representatives of the people, the jurors can rebuke the accused for violations of community standards, morals or principles Without full knowledge of the nature of the crime, the jury cannot speak for the people or exert their authority. If an element of the crime is conceded and stripped away from the jury's consideration, the jurors become no more than factfinders. The jury must know why it is convicting or acquitting the defendant, because that is simply how our judicial system is designed to work.

This case was cited with apparent approval by the majority in *Old Chief*, 117 S. Ct. at 654. See *infra* text accompanying note 133.

20. 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2591 (1st ed. 1905).

fer it, *may* even be *excluded*; first because it is now as immaterial to the issues as though the pleadings had marked it out of the controversy; next, because it may be superfluous and merely cumber the trial; and furthermore, because the added dramatic force which might sometimes be gained from the examination of a witness to the fact (a force, indeed, which the admission is often designed especially to obviate) is not a thing which the party can be said to be always entitled to. Nevertheless, a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate moral force of his evidence; furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations (especially in criminal cases), so as to be technically but not practically a waiver of proof. Hence, there should be no absolute rule on the subject; and the trial Court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances.²¹

By the third edition in 1940, Wigmore was italicizing the phrase "moral force of his evidence" for emphasis.²² I have my own notion of the cause of this change of position, and what "legitimate moral force" Wigmore had in mind,²³ which we will come to in due course. Similar considerations apparently account for the construction given to Federal Rule of Evidence 401 in the last paragraph of the Advisory Committee Note (by no means required by the wording of the rule itself) that evidence can be relevant even if its only relevance is to an uncontested fact, asserting that Rule 403 is the proper tool in such a case (though what can fail to outweigh, even substantially, "no probative value" is not made clear).

Nevertheless, whatever the conceptual problems, until the recent

21. 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2591 (2d ed. 1923) (emphasis in original).

22. 9 WIGMORE ON EVIDENCE, *supra* note 9, § 2591.

23. Professor Fortune, rather hopefully, posits that Wigmore must have meant "moral force" to mean "probative force," though he gives no reason for this conclusion. William H. Fortune, *Judicial Admissions in Criminal Cases: Blocking Introduction of Prejudicial Evidence*, 17 CRIM. L. BULL. 101, 109 (1981). I am sympathetic, but I don't believe it. While it is true that the term "moral" was used in that way in the 18th and early 19th centuries, and even by Greenleaf in the 1840s, *see* BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE" 30-38 (1991), I see no reason to believe that Wigmore was being quite that anachronistic in word selection, without explanation, when the alternative was obvious. The author of Note, *Judicial Admissions*, 64 COLUM. L. REV. 1120, 1123-24 (1964) was almost certainly closer to the mark in saying Wigmore intended that "juries should be permitted to hear such evidence even though by definition it is irrelevant to the issues to be determined."

Supreme Court decision in *Old Chief v. United States*,²⁴ it wasn't even certain that there would ultimately be *any* case where the rejection of a proffered judicial admission would count as reversible error in the federal system,²⁵ and it is unclear whether *Old Chief* ought to be regarded as a cup more empty than full. Before dealing with the meaning of these things, however, we should look at the history of judicial admissions a little more closely.

History

It is somewhat surprising that the judicial admissions doctrine seemed like a good idea to Wigmore in the first place. The roots of the doctrine trace back to civil pleading practice, where individual allegations could be admitted formally by specific pleading, and thereafter bind the admitting party and limit the evidence.²⁶ How-

24. 117 S. Ct. 644 (1997). As will be discussed at length *infra*, in *Old Chief*, the Court decided, in a 5-4 decision, that an "offer to stipulate" to the predicate felon status involved in a charge of being a convicted felon in possession of a gun could not be "rejected" by the prosecution and could be sufficient to render proof of the particular convictions inadmissible under Federal Rule of Evidence 403. However, in so doing, the majority treated the "offer to stipulate" as if it involved a normal evidentiary admission which was thus only practically dispositive of the issue admitted rather than legally dispositive. (I suppose this can be taken to mean that there is not, technically, any true judicial admission doctrine at all in federal criminal cases.)

25. On the issue presented in *Old Chief* itself, which, as we will see, is among the most clearly persuasive in favor of allowing an effective judicial admission, the circuits were sharply divided, with the First, Fourth, Tenth, and District of Columbia Circuits allowing it and the Sixth, Eighth, and Ninth rejecting it. Compare *United States v. Wacker*, 72 F.3d 1453, 1472-73 (10th Cir. 1995), *United States v. Jones*, 67 F.3d 320, 323 (D.C. Cir. 1995), and *United States v. Tavares*, 21 F.3d 1, 3-6 (1st Cir. 1994) (en banc), with *United States v. Breitreutz*, 8 F.3d 688, 690 (9th Cir. 1993), *United States v. Burkhardt*, 545 F.2d 14, 15 (6th Cir. 1976), and *United States v. Smith*, 520 F.2d 544, 548 (8th Cir. 1975). On the other major area of judicial admissions application to propensity evidence, the *Molineux*-type case, the circuits are likewise split. See *infra* note 37.

26. See generally Imwinkelried, *supra* note 10, at 347-49. The extension of the judicial admissions doctrine beyond the pleading context is also old. *Philips on Evidence*, originally published in 1814, indicates that an admission by an attorney "with intent to obviate the necessity of proving the fact" is binding. See 1 S. MARCH PHILLIPS, A TREATISE ON THE LAW OF EVIDENCE Ch. 5, § 4, at 105 (New York, Gould, Banks & Co. eds., 4th Am. ed. 1839). Greenleaf, in his influential 1842 treatise, wrote as follows:

The admissions of *attorneys of record* bind their clients, in all matters relating to the progress and trial of the cause. But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial.

1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 186 (Boston, Little,

ever, historically (in order to free a criminal defendant from the dangers of common law civil pleading) the only pleas allowed a criminal defendant were "guilty" or the general issue of "not guilty." As a side effect of this, no judicial admission procedure was available to the criminal defendant at the pleading stage, since the general "not guilty" plea was a formal denial of every allegation in the indictment.²⁷

When Wigmore first wrote, judicial admissions apparently were not commonly attempted in criminal cases,²⁸ and on those occasions when courts addressed the question, they generally rejected the notion. As Wigmore's own footnotes show, he knew the American precedents appear to have stood heavily against the use of unilateral judicial admissions in the criminal trial setting at the time of his initial writing.²⁹ Nevertheless, Wigmore formulated the doctrine generally and trans-substantively in the text, almost certainly taking Greenleaf's language set out in note 26 as a guide.³⁰

Brown eds., 2d ed. 1844) (1842). It is easy to take this statement as defining a doctrine both trans-substantive and potentially unilateral. However, when the issue arose in actual cases, 19th century courts did not generally go along. *See infra* note 29.

27. *See* Imwinkelried, *supra* note 10, at 353-56.

28. It is difficult to know for sure, since successful admissions by criminal defendants would not normally end up being reflected in appellate opinions.

29. *See* *People v. Fredericks*, 39 P. 944, 946 (Cal. 1895); *State v. Powell*, 64 A. 966 (Del. 1904); *Higgins v. State*, 60 N.E. 685, 687 (Ind. 1901); *Trogden v. State*, 32 N.E. 725, 726 (Ind. 1892); *State v. Jones*, 56 N.W. 427, 429 (Iowa 1893); *State v. Winter*, 34 N.W. 475, 478 (Iowa 1887); *State v. Valsin*, 16 So. 768, 768 (La. 1895); *Commonwealth v. Costello*, 120 Mass. 358, 369 (1876); *Commonwealth v. McCarthy*, 119 Mass. 354, 355 (1876); *Commonwealth v. Miller*, 57 Mass. (3 Cush.) 243, 251 (1849); *People v. Thompson*, 61 N.W. 345, 345 (Mich. 1894). (Wigmore cited only *Miller* and *Costello*. *See* 4 WIGMORE, *supra* note 20, § 2591 n.1. Even on the civil side, the cases were against him, as best represented by the opinion in *Dunning v. Maine Cent. R.R. Co.*, 39 A. 352, 356 (Me. 1897), quoted in the footnote.) In 1904, the *Cyclopedia of Law and Procedure* had adopted a flat statement to the effect that admissions could be rejected by the opponent. *See* H.C. Underhill & Wm. Lawrence Clark, *Criminal Law*, in 12 CYCLOPEDIA OF LAW & PROCEDURE 70, 391 (William Mack ed., The American Law Book Co. 1904). The one case Wigmore cites in support of the text, *Dean v. State*, 8 So. 38 (Ala. 1890), is discussed *infra* note 32. Though many of the above decisions could have been arrived at by finding that the admission tendered did not go far enough to eliminate the relevance of the evidence proffered, their general rationale was the right of an opponent to reject the proffered admission and rely on the evidence sought to be excluded instead.

30. Wigmore was the editor of volume one of the 16th (last) edition of Greenleaf's treatise, *see* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (John Henry Wigmore ed., Boston, Little, Brown & Co. 1899), and it was in this volume that the quoted language appears. Moreover, in Wigmore's own addition to section 169 of Greenleaf's treatise on general principles concerning admissions, we find his first edition

Wigmore is hardly chargeable with being some bleeding heart who bent over backwards for criminal defendants.³¹ There are a number of factors which may have accounted for his original formulation. First, he generally supported broadly applicable transsubstantive evidence rules. Second, he generally supported doctrines that brought what he saw as efficiency to the trial process. Third, in the one case that he cited for the application of the judicial admissions doctrine in the criminal context, the judicial admission had been made by, and had operated in favor of, the prosecution.³² Finally, as previously noted, it may have just seemed right.

Between the first and the second editions, the original formulation was fairly generally rejected by the courts and by other commentators.³³ Further, it does not seem unlikely that some of his friends on

position foreshadowed as follows:

A deliberate and formal waiver, made usually in court or by writing preparatory to trial, by the party or his attorney, by conceding for the purposes of trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted and the other party need offer no evidence to prove it. This is what is commonly termed a solemn—i.e. ceremonial or formal—or judicial admission, and is in truth, as above suggested, a substitute for evidence, in that it does away with the need for evidence.

Id. § 169, at 291.

31. He was a founder of the *Journal of Criminal Law, Criminology, and Police Science*, and of the Scientific Crime Detection Laboratory of the Chicago Police Department. It is fair to say that he generally appeared more comfortable approaching criminal law issues from the law enforcement perspective than from that of the defense. See generally William R. Roalfe, *John Henry Wigmore—Scholar and Reformer*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 277 (1962).

32. See *Dean v. State*, 8 So. 38, 39 (Ala. 1890). The case is too strange to mean much. It involves affirmance of a judge who allowed a prosecutor to defeat a motion for continuance by admitting the content of an absent witness' testimony. Wigmore might better have cited *Cole v. State*, 75 S.W. 527, 530 (Tex. Crim. App. 1903), followed in *Crenshaw v. State*, 85 S.W. 1147, 1149 (Tex. Crim. App. 1905), and *Melton v. State*, 83 S.W. 822, 823 (Tex. Crim. App. 1904), three Texas cases mandating that a defense admission of the nature and position of wounds would keep out the deceased's bloody clothes. Wigmore might also have cited *State v. Vance*, 94 N.W. 204, 204-05 (Iowa 1903), a *Molineux*-type case with the added attraction of a formal admission of intent. For a discussion of the *Molineux* case, see *infra* note 35.

33. It may be a mistake to say that Wigmore's position was rejected, since there is little direct evidence that it was even considered. I have found 23 cases from 1905 to 1923 where admission or practical concession played a part. They are listed and analyzed in Appendix 1. Of these, even in the cases consistent with Wigmore's section 2591, it was not cited (although other sections of the treatise occasionally are). Ironically, it was cited in a string cite without discussion in *State v. Lewis*, 116 N.W. 606, 607 (Iowa 1908), which went the other way. It is worth remembering that when Wigmore's four volume first edition was published in 1904-05, it was just another entry in the competition for practitioner

the law enforcement side may have explained to Wigmore how profoundly the doctrine as originally formulated would affect traditional modes of presentation in some cases, generally to the practical detriment of conviction.

Whatever the reasons, the retrenchment of the second edition text is clear. In the seventy-five years since the second edition, reported decisions reflect that few criminal defendants have been successful in excluding any evidence on this basis.³⁴ More importantly,

and library dollars. It was neither the most complete (Camp's massive 14 volume Encyclopedia of Evidence was published nearly simultaneously), the most novel (Thayer or Stephen probably held that distinction), nor immediately the most popular. In the criminal field, that palm probably went to *Wharton's Criminal Evidence*. When O.N. Hilton (of the Denver Bar) revised that work in 1913, he added a new section which showed that he had probably been reading Wigmore even if he wouldn't cite him. If so, Hilton was clearly not happy with what he had read:

It is error to exclude relevant evidence tending to prove or disprove the issues, although the facts are admitted. Notwithstanding the admission, the prosecution has a right to prove the charge by competent evidence of the facts admitted Facts, when admitted, frequently lose their probative force, and are frequently admitted for this reason alone.

1 FRANCIS WHARTON, WHARTON'S CRIMINAL EVIDENCE § 24c (O.N. Hilton ed., 10th ed. 1912). Thereafter, both the first edition of *Corpus Juris* (1920) and *Ruling Case Law* (1920) adopted flat statements consistent with Hilton's text in *Wharton's Criminal Evidence*. See 26 R.C.L. Trial § 40 (William M. McKinney & Burdett A. Rich eds., 1920); 22 C.J.S. Evidence § 370 (William Mack & William Benjamin Hale eds., 1920).

34. In 1934, an *American Law Reports* annotation: *Offer of defendant in criminal case to concede or stipulate fact, or his admission of same, as affecting prosecution's right to introduce evidence thereof*, 91 A.L.R. 1478 (1934), collected 26 cases of explicit or implied admission, and found defendants successful in only one. They generally did not include cases where courts excluded evidence based not on admission, but on the virtual incontestability of the issue toward which the admission was supposedly directed, see *infra* note 37, and they missed some cases on both sides (on the ineffectiveness of the admission: *State v. Powell*, 61 A. 966 (Del. 1904); *Higgins v. State*, 60 N.E. 685, 687 (Ind. 1901); *State v. Lewis*, 116 N.W. 606, 607 (Iowa 1908); *State v. Winter*, 34 N.W. 475, 478 (Iowa 1887); *State v. Moore*, 102 P. 475, 476 (Kan. 1909); *People v. Thompson*, 61 N.W. 345, 345 (Mich. 1894); on successful admissions: *State v. Vance*, 94 N.W. 205 (Iowa 1903); all but one of the line of Texas cases springing from *Cole v. State*, 75 S.W. 527 (Tex. Crim. App. 1903) (representing a doctrine now unfortunately no longer living in either Texas or Iowa); and perhaps *People v. Washburn*, 286 P. 711 (Cal. Dist. Ct. App. 1930)).

Still, the pattern is clear. When Wall wrote in 1962, he was able to point to seven post-1934 cases rejecting proffered admissions and none in which such admissions had worked on behalf of criminal defendants to exclude evidence. See Patrick M. Wall, *Judicial Admissions: Their Use in Criminal Trials*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 15 (1962). Nor did the author of the 1964 Columbia note on judicial admissions, see *supra* note 23, cite any such cases. Similarly, Professor Fortune, see *supra* note 23, writing in 1981, cited no such cases of successful judicial admissions between 1934 and the mid-1970s. (These latter cases will be dealt with *infra* notes 37, 65 and accompanying

most of those cases where judicial admissions were successful were what we will call *Molineux*-type cases,³⁵ which are best viewed as in-

text.) Giannelli and Imwinkelried, in Paul C. Giannelli & Edward J. Imwinkelried, *Stipulations in Criminal Cases*, CRIM. DEF. 3, May-June 1983, at 4-5, cited two such cases: *United States v. White*, 355 F.2d 909 (7th Cir. 1966), and *Beagles v. State*, 273 So. 2d 796 (Fla. App. 1973). Doubtless in the welter of a half century of reports there were other cases not cited by the above authorities, with rejections preponderating. See, e.g., *McHugh v. State*, 301 So. 2d 238, 243 (Ala. 1974); *Stallings v. State*, 32 So. 2d 233, 235 (Ala. 1946); *Brewer v. State*, 608 S.W.2d 363, 368 (Ark. 1980); *State v. Hokenson*, 527 P.2d 487, 489 (Idaho 1974); *Commonwealth v. Valcourt*, 133 N.E.2d 217, 221 (Mass. 1956); *People v. Fuller*, 205 N.W.2d 287, 289 (Mich. Ct. App. 1973); see also *People v. Mills*, 3 N.W.2d 909, 919 (Mich. 1995); *State v. Smith*, 644 S.W.2d 700, 701 (Tenn. Crim. App. 1983). For successful judicial admissions, see *Oxendine v. State*, 335 P.2d 940, 943 (Okla. Crim. 1958); *Dyken v. State*, 89 So. 2d 866, 866 (Fla. 1956). Again, the trend is clear.

35. There are a lot of *Molineux* principles, of which this is perhaps the least famous. The *Molineux* case was one of the most notorious criminal cases of the turn of 19th century America. Roland B. Molineux, scion of a wealthy and influential family headed by Civil War hero Gen. E. L. Molineux, was accused of murdering Mrs. Kate Adams. Adams died after taking a dose of Bromo-seltzer laced with cyanide of mercury which had been anonymously sent to Harry Cornish, Molineux's hated rival for influence at the Knickerbocker Athletic Club. It turned out that Molineux was associated with a couple of other sudden deaths consistent with poisoning, involving rivals for the hand of his recent bride. The most suggestive one was the death of Henry C. Barnet, another member of the Knickerbocker Athletic Club. Barnet had died six months before Mrs. Adams, after consuming a dose of poisoned Kutnow powder, another patent headache remedy, sent to him anonymously. The evidence indicated that Molineux had rented a private postbox in Barnet's name, using it to receive samples of patent remedies for impotence. He had also received Kutnow powder through that postbox, consistent in type and time with that later sent to Cornish. Further, there was evidence that Molineux had also rented a box in Cornish's name after Barnet's death, and received more impotence remedies there, but no bromo-seltzer. Molineux was tried and convicted (there was, of course, much more evidence on both sides). On appeal, the conviction was reversed. See *People v. Molineux*, 61 N.E. 286 (N.Y. 1901). Prominent among the grounds for reversal in the opinion of the court was the introduction of the evidence concerning the Barnet circumstances in the trial charging only the death of Adams. *Molineux* became a leading case in the development of the propensity rule in the United States, being cited and/or criticized in countless cases, articles and texts. See, e.g., IMWINKELRIED, *supra* note 11, § 2:27. Its relevance to our subject springs from the fact that the court, having disposed, rightly or wrongly, of the general principles, took on the prosecution's claim that the prior circumstances were admissible to prove intent, or lack of mistake or accident. The court properly observed that no question concerning such issues was raised by the defense, or was even tenable, in a case involving anonymously mailing poison in a bottle carefully dressed up to look like a normal bromo-seltzer container:

It would be a travesty upon our jurisprudence to hold that, in a case of such appalling and transparent criminality, it could ever be deemed necessary or proper to resort to proof of extraneous crimes to anticipate the impossible defense of accident or mistake. The same irrefutable logic of fact and circumstance that es-

volving a presumption independent of actual concession or judicial admission. It applies when the prosecution seeks to put in uncharged misconduct evidence supposedly to show intent,³⁶ or lack of accident or mistake when lack of intent, accident, or mistake are unasserted and untenable.³⁷

tablishes felonious intent as clearly negatives the possibility of accident or mistake.

Molineux, 61 N.E. at 298-99. On retrial, Molineux was acquitted, a result which remains controversial, a la Lizzie Borden and O.J. Simpson. It also seems likely many courts would approve admission of the Barnet evidence today. In fact, the *Molineux* court was equally divided on the bottom-line question of the admissibility of the Barnet evidence, but agreed on reversal for other reasons. See *id.* at 312-17 (Parker, C.J., concurring and Gray, J., concurring). For a more complete account, see AMERICAN TRIALS: THE MOLINEUX CASE (Samuel Klaus ed., 1929).

36. Some courts have limited the principle to general, as opposed to specific, intent. See *IMWINKELREID*, *supra* note 11, § 8:13. As a general rule, this seems disingenuous, at least in identity cases, since lack of specific intent is often as clearly untenable on the facts as lack of general intent. Presumably the capital murder in *Molineux* was a specific intent crime. There is substantial academic criticism of this limitation of the doctrine to general intent. See *id.* § 8:13 n.11 (citing critical authorities). The Supreme Court has recognized the general ambiguity and unhelpfulness of the distinction. See *United States v. Bailey*, 444 U.S. 394, 403-04 (1980). The Seventh Circuit has explicitly abandoned it for *Molineux*-type cases. See *United States v. Kramer*, 955 F.2d 479, 490-91 (7th Cir. 1992).

37. Even in the *Molineux* situation, decisions are by no means uniform. See *IMWINKELRIED*, *supra* note 11, § 8:13. Nor have *Molineux*-type decisions been all that common. Professor McCormick appears to have been a supporter of this doctrine, and perhaps of its extension. In the 1954 first edition of his treatise, he wrote:

[W]hen the crime charged involves the element of knowledge, intent or the like, the state will often be permitted to show other crimes in rebuttal, after the issue is sharpened by the defendant's giving evidence of accident or mistake, more readily than it would as part of its case in chief at a time when the court may be in doubt that any real dispute will appear on the issue.

CHARLES MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 331 (1954). Notice the inclusion of knowledge generally, and the lack of limitation of intent to general intent. McCormick cited only two cases of such exclusion, *State v. Gilligan*, 103 A. 649 (Conn. 1918), and an English case, *Thompson v. The King*, 1918 App. Cas. 221 (appeal taken from K.B.), where Lord Sumner said, "The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice." *Id.* at 232. In the second edition, the editors included the same passage with no new cases. See CHARLES MCCORMICK, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 452 (Edward W. Cleary ed., 2d ed. 1972). There were more cases than that, but they were by no means common. See, e.g., *People v. Mangano*, 30 N.E.2d 428, 429-30 (Ill. 1940); *State v. Strum*, 169 N.W. 373, 375-76 (Iowa 1918); *State v. Vance*, 94 N.W. 204, 205 (Iowa 1903). Many cases rejected the doctrine altogether. See, e.g., *People v. Sindici*, 201 P. 975, 976 (Cal. Dist. Ct. App 1921); *People v. Munday*, 127 N.E. 364, 371 (Ill. 1920). (Iowa abandoned the approach in *State v. Kappen*, 180 N.W. 307 (Iowa 1920).) More modern authorities indicate that the states remain substantially split.

There is reason to believe, however, that below the horizon of reported cases, the judicial admission tactic continued to bubble along, with occasional success at the trial level. Evidence for this comes first, ironically, from the decisions rejecting the argument on appeal.³⁸ Second, there was the hopeful tone, on almost no evidence, of the little literature generated by the question.³⁹ (I mean, it seems so right.)

A major factor in resuscitating the judicial admission option, at

For example, Wisconsin accepts the principle by rule, *see* Wisc. R. Evid. 404(b) (requiring that the issue toward which such evidence is directed be "substantially disputed"), and New Jersey by decision, *see* *State v. Cofield*, 605 A.2d 230, 235 (N.J. 1992). Tennessee and Utah, however, reject it. *See* *State v. Smith*, 644 S.W.2d 700, 701 (Tenn. Crim. App. 1983); *State v. Florez*, 777 P.2d 452, 456 (Utah 1989). However, the *Molineux* principle has had something of a renaissance since the mid 1970's, at least in some federal circuits, especially if accompanied by an actual attempt at judicial admission by the defendant. The doctrine has been broadly embraced in the First, Second, Eighth, Eleventh, and D.C. Circuits, and somewhat less expansively in the Third. The Fifth Circuit has a long line of cases going back and forth. The Fourth, Seventh, and Ninth Circuits give the doctrine short shrift. The cases are collected and analyzed in *United States v. Crowder*, 87 F.3d 1405 (D.C. Cir. 1996), *vacated and remanded in light of Old Chief v. United States*, 117 S. Ct. 760 (1997). *See also* Note, *Balancing the Scales: Limiting the Prejudicial Effects of Evidence Rule 404(b) Through Stipulation*, 21 FORDHAM URB. L.J. 389, 393-402 (1994) (concentrating on the two most extremely conflicting positions, those of the Second and the Ninth Circuits); and Vivian M. Rodriguez, Note, *The Admissibility of Other Crimes, Wrongs or Acts under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. MIAMI L. REV. 451 (1993). In 1992, the Supreme Court granted certiorari in a *Molineux*-type case, *United States v. Hadley*, 918 F.2d 848 (9th Cir. 1990), *cert. granted*, 503 U.S. 958 (1992). The case involved admission of prior (by ten years) incidents of sexual molestation of young men in the defendant's care, supposedly to show intent on the current charges. Since the charged acts, at least in part, included anal penetration, it was hard to imagine how they were supposed to be without mens rea, general or specific, and the defendant was willing to admit that whatever he did was done with requisite intent. The facts of the case are remarkably similar to one of the earliest *Molineux*-type cases, *State v. Vance*, 94 N.W. 204 (Iowa 1903). After argument, the writ was dismissed as improvidently granted. *See* 506 U.S. 19 (1992). (Today the evidence would presumably be admissible under Federal Rule of Evidence 414.) The effect, if any, of *Old Chief* on *Molineux*-type cases is considered *infra* note 128.

38. Litigators will keep pitching anything that either seems like it ought to work, or which might work only rarely, as long as it costs little in time or effort. Hence the routine polling of juries after convictions, for instance. (I actually saw a juror change a vote during a poll once, but undoubtedly it is exceedingly rare.)

39. The state of the cases is discussed *supra* notes 34 and 37. Nevertheless, Wall, *supra* note 34, Fortune, *supra* note 23, and Gianelli and Imwinkelried, *supra* note 34, were all generally positive toward the potential for the judicial admission to work. (It should be noted that the latter two articles were written as the more receptive attitude of some courts was gaining momentum.)

least in federal courts, was the increasing prosecution of predicate felon crimes.⁴⁰ Predicate felon crimes make it illegal for persons having the status of convicted felons to do acts which may be legal for average citizens.⁴¹ Because convicted felons status is an element of the offense, the plea of not guilty puts it in issue and allows the prosecution to prove it by evidence. Since any previous felony conviction satisfies the condition, if there are numerous such convictions the prosecution is initially free to prove each of them.⁴² Even if limited to less than all, the prosecution is presumptively free to choose

40. Specifically, in the federal context, possession of a firearm by a convicted felon. It may be a slight overstatement to attribute the resuscitation to the predicate felon situation, since the *Molineux* renaissance was occurring in parallel. The first swallow of the *Molineux* spring was *United States v. DeCicco*, 435 F.2d 478, 483-84 (2d Cir. 1970), but it did not really blossom until *United States v. Benedetto*, 571 F.2d 1246, 1248-49 (2d Cir. 1977). Similarly, the first suggestion that an admission ought to be successful in a felon-in-possession case is found in *United States v. Cook*, 538 F.2d 1000, 1005 (3d Cir. 1976), but the first true success was not until *United States v. Poore*, 594 F.2d 39, 43 (4th Cir. 1979).

41. There have been other status element crimes, often dealing with race (miscegenation laws, etc.), but only those having the status element of "convicted felon" create the propensity carry-over problems which can be attacked by judicial admission. Disabilities placed upon convicted felons which potentially carry criminal sanctions may include such things as voting rights, but the statutes which create the problems dealt with in this article are possessory restrictions on weapons, most notably firearms. These statutes are of fairly recent origin. The earliest appears to be a 1922 California statute descended from an earlier 1917 sentencing enhancement statute. Compare *People v. Smith*, 171 P. 696, 697 (Cal. Dist. Ct. App. 1918) (1917 statute), with *People v. Camperlingo*, 231 P. 601, 602 (Cal. Dist. Ct. App. 1924) (1922 statute). (It was definitely not New York's Sullivan law, as suggested in Susan W. Callan, Note, *Inherent Prejudice of a "Felon-in-Possession" of a Firearm Trial: Bifurcation, Stipulation, and Jury Instruction as Effective but Judicially Rejected Remedies*, 28 Rutgers L.J. 201, 203 (1996). The Sullivan Law was a general licensing law for concealable weapons. See *People ex. rel. Darling v. Warden of City Prison*, 139 N.Y.S. 277 (N.Y. Sup. Ct. 1913)). Over the course of time, almost all American jurisdictions have adopted some such statute, at least for some types of felons under some circumstances. See generally ROGER KESSINGER, FIREARMS LAWS: A STATE-BY-STATE AND FEDERAL SUMMARY (Kessinger Publishing 1990). The federal government first passed such a statute limited to those convicted of a "crime of violence" in 1938, see *United States v. Tot*, 131 F.2d 261, 263 (4th Cir. 1942), and extended it to most (but not quite all) convicted felons in 1968, see generally CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE 65-66 (Praeger 1994); Deborah S. Prutzman, Note, *Prior Convictions and the Gun Control Act of 1968*, 76 COLUM. L. REV. 326 (1976).

42. See *United States v. Washington*, 992 F.2d 785, 788 (8th Cir. 1993). Even after *Old Chief*, the Eighth Circuit has approved requiring the admission to be that the defendant has been convicted of "one or more" convictions, so that the admission would not "mislead the jury" when the defendant in fact has multiple convictions. See *United States v. Einfeldt*, No. 97-1650, 1998 WL 94945, at *1 (8th Cir. Mar. 6, 1998). How the jury would be misled as to anything it has a right to consider is not made clear.

the conviction closest to any other crime joined for trial with the predicate felon charge. Lastly, proof is usually by certified copy of the judgement of conviction, which may in a given jurisdiction contain information on the underlying crime beyond mere conviction, such as particulars concerning the individual episode or the sentence imposed, and may or may not be subject to redaction in those regards.⁴³ Thus the predicate felon charge puts a powerful weapon in the prosecution's hands to introduce evidence of the sort generally explicitly forbidden by the propensity rule, and to do it in circumstances where the element of predicate felon status is uncontestable and uncontested by the defendant. An expanded examination of the facts in *Old Chief's* case will show just how extreme such a situation can be, but first we must turn to a more formal examination of the various contexts in which a judicial admission might reasonably be proffered by a criminal defendant.

Taxonomic Interlude

There are various possible ways to organize the contexts in which judicial admissions may be proffered in criminal cases.

One initial consideration might be the types of evidence that a proffered judicial admission might be directed against. There are generally two categories of information which may precipitate an attempted judicial admission: propensity evidence, and what we may call "heartstrings and gore" evidence.⁴⁴ An admission directed to-

43. See, e.g., *Parker v. State*, 408 So. 2d 1037, 1038 (Fla. 1982) (approving, in a state felon-in-possession case, both the rejection of defendant's proffered judicial admission and proof of felon status by submission of the entire judgment of conviction document, complete with any details it might contain as to the charges, the episode itself, or the sentence, without redaction). Redaction was suggested by the majority in *Old Chief* as a possible alternative to judicial admission, see *Old Chief v. United States*, 117 S. Ct. 644, 655 n.10 (1997), but a sufficiently redacted document is going to be a pretty odd looking exhibit, likely creating more jury speculation problems than it is worth.

44. I have used the phrase "heartstrings and gore" to cover the range of emotionally riveting proffers engaging sympathy and revulsion with little real evidential content. "Heartstrings" is best represented by the widow called to identify the deceased victim from a photograph (who often predictably breaks into tears). See, e.g., *Wycoff v. Nix*, 869 F.2d 1111, 1113 (8th Cir. 1989); *Brewer v. State*, 608 S.W.2d 363, 366 (Ark. 1980); *People v. Villa*, 125 Cal. App. 3d 872 (1981) (admitting evidence of rape victim's injuries despite defendant's offer to stipulate to great bodily injuries); *People v. MacPherson*, 35 N.W.2d 376, 379-80 (Mich. 1949); *State v. Seyboldt*, 236 P. 225, 230-31 (Utah 1925). "Gore" needs no explanation to anyone who has seen color crime scene photos. Technology has expanded our ability to bring heartstrings and gore into the routine case, and continues to expand as police departments supplement still photography with videotape. See Mark

ward propensity evidence (as in *Old Chief*) attempts to remove the formally asserted, but often pretextual, non-propensity reason for its proffer in order to obtain exclusion, because the only remaining use for the evidence is the forbidden propensity use (which is usually the main benefit sought by the prosecution in the first place). In the propensity situation, the admission play is backed up by a generally recognized categorical policy of exclusion, even though the excluded information is not wholly irrelevant by anyone's definition, nor the excluded benefit wholly irrational. In the "heartstrings and gore" situation (like the child rape-murder), the law's actual position is much more ambiguous concerning the impropriety of the benefit actually sought by the proponent, even though, ironically, unlike propensity evidence, the benefit is not rational in any easily identified sense. While it would seem that, in a clear enough case, the "heartstrings and gore" evidence ought to be more easily excludable than the propensity evidence, as we shall see, the opposite is in fact the case.

In addition to the type of evidence toward which the admission is directed, the nature of the admitted issue is also of significance. Professor Fortune believes that the most important cleavage is between judicial admissions of elements and judicial admissions of mediate facts.⁴⁵ He would generally require the acceptance of properly formulated elemental admissions, while leaving the acceptance of mediate fact admissions to the mercies of a more traditional Rule 403 balancing process.

The distinction between elemental and mediate admissions is a good place to start. Certainly the proportion of mediate fact admissions which turn out to be attempts at legerdemain is higher than in the case of ultimate fact admissions.⁴⁶ But I am not so sure that there

Curriden, *Crime Scene Videos: Dead Bodies on Videotape Worry Criminal Defense Lawyers*, 76 A.B.A. J., May 1990, at 32. In one regard technology has perhaps reduced the gore. There are fewer cases in which actual body parts are exhibited in court (at least from dead bodies), which occurred on occasion in the 19th century when there was a specific evidentiary need. See, e.g., *State v. Wieners*, 66 Mo. 13, 16 (1877) (ribs and vertebrae); *Turner v. State*, 15 S.W. 838, 842 (Tenn. 1891) (vertebral column of victim). In the trial of Lizzie Borden, her father's skull was brought in for the wounds to be matched with the hatchet blade found in the basement. See EDMUND PEARSON, *THE TRIAL OF LIZZIE BORDEN* 224 (1937). It still occasionally happens. See *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986) (skull); *State v. Walker*, 675 P.2d 1310, 1314 (Ariz. 1984) (piece of charred skin of arson victim).

45. See Fortune, *supra* note 23, at 113-14. See generally Imwinkelreid, *supra* note 10.

46. The distinction between ultimate and mediate facts is not always crystal clear.

are not recurring instances of mediate admissions which ought to be just as obligatory as elemental admissions.⁴⁷ However, elemental admissions formally remove the problem of reasoning from the contents of the judicial admission to some other conclusion, and are potentially subject to clear categorical admission. They may be good candidates for fair judicial admission as a result. However, some elemental admissions are much more clearly understandable as isolated propositions unrelated to the rest of the case, and more cleanly removed from claims of acceptable spillover meaning, rational or irrational, on other issues in the case. The clearest case of complete separability, as we shall see, is a predicate felon element, such as the one in *Old Chief*.

First, however, we must examine one extreme circumstance where the matter admitted is neither mediate nor elemental, and therefore escapes the possibility of any argument of proper spillover effect, whereas the evidence to be excluded is subject to that long-standing categorical rule of exclusion, the propensity rule. Hence, rejection of a proffered judicial admission in this situation has an

Motive is not an ultimate issue, but it is a recurring, almost protean, justification for the introduction of otherwise inadmissible and devastating uncharged misconduct evidence. The reason it is not a good candidate for a judicial admission of obligatory effect, however, is not because it is mediate, but because it is an issue which varies in legitimate rational impact depending, not on presence or absence, but on magnitude judgment. It is not an on-off switch, but a rheostat. All such magnitude judgment conditions present unlikely grounds for any fairly formulated judicial admission, and many of the cases rejecting proffered admissions in both civil and criminal contexts can be accounted for in that way. See, e.g., *Dunning v. Maine Cent. R.R. Co.*, 39 A. 352 (Me. 1897), analyzed in *Fortune*, *supra* note 23, at 103. Sometimes, courts have become confused enough to allow a litigant to get away with such a ploy. See, e.g., *Griffith v. State*, 169 S.W.2d 173, 174 (Tex. Crim. App. 1943) (allowing prosecutors to avoid proper magnitude evidence by admitting defendant's good character); *Davis v. State*, 290 S.W. 163, 163-64 (Tex. Crim. App. 1927) (same); *Bowlin v. State*, 248 S.W. 396, 401 (Tex. Crim. App. 1923) (same); *State v. Douglas*, 78 A.2d 850, 853 (R.I. 1951) (defense expert qualification). Indeed, related problems may arise even if the admissions involve elements. See *United States v. Ortiz*, 125 F.3d 630, 632 (8th Cir. 1997) (defendant in a prosecution for making false statement of material fact sought to admit all elements except materiality, in order to foreclose proof of the circumstances on which the magnitude judgment of materiality turned).

47. The particular identity (name, etc.) of a murder victim may technically be a mediate fact, but it is subject to a fair categorical admission. (Such particular identification may be raised to the functional equivalent of an ultimate issue under some versions of the fatal variance doctrine.) Such particular identification is often said to justify admission of otherwise inflammatory evidence. See, e.g., *State v. Edwards*, 10 S.E.2d 587, 588 (S.C. 1940). Justice O'Connor uses it as a justifying example in her dissent in *Old Chief*, 117 S. Ct. at 657.

even smaller formal figleaf to cover its nakedness than exists in the case of a crime with the status element of "convicted felon," much less other contexts. Let us start from this clearest example and build from there.

Most, if not all, American jurisdictions have statutes imposing stiffer penalties upon those previously convicted of some crimes than upon first offenders.⁴⁸ Such statutes have been a part of our criminal jurisprudence for nearly 200 years, at least,⁴⁹ and are justified because they are conceived merely to enhance the punishment of the newly committed crime, which is nonetheless a crime for any actor, felon or not.⁵⁰ As such, it is axiomatic that the predicate felon status is not an element of the charged crime. Nevertheless, in some jurisdictions, the sentence enhancing fact of convicted felon status is not only charged in the indictment, it is submitted to the jury at the same time as the evidence of the crime charged, complete with evidence concerning the existence and nature of the previous felonies inadmissible on any issue in the crime charged. In such a case, the right of the defendant to admit felon status and keep the jury trying his guilt from even being informed of this status seems virtually beyond argument. An admission of felon status within the meaning of the applicable statute is easy to formulate and understand. And, in these cases, one cannot even argue that there is an enhanced risk of jury nullification, if the trial jury is uninformed of the *status* of the defendant, much less the details of the predicate felonies, since the acts charged are criminal regardless of the defendant's predicate felon status. The unnecessary unfairness of allowing proof of felon status in this kind of case has been widely recognized for nearly a century and a half⁵¹ and was rejected in England by statute in 1861.⁵² Most American jurisdictions adopted some procedure for insuring that the jury trying the new of-

48. See generally 24 C.J.S., *Criminal Law* § 1638 *et seq.* (1989).

49. The earliest example I have come up with is Mass. Stat. 1804, ch. 143, § 3, cited in *Ross's Case*, 2 Mass. (1 Pick.) 165, 170 (Mass. 1824).

50. The Supreme Court has long accepted the characterization of such statutes set out in the text, and upheld such statutes against constitutional challenge. See *Graham v. West Virginia*, 224 U.S. 616, 631 (1912); *McDonald v. Massachusetts*, 180 U.S. 311, 313 (1901); *Moore v. Missouri*, 159 U.S. 673, 676-78 (1895).

51. See generally Harold Dubroff, Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 N.Y.U. L. REV. 210 (1958); David S. Sidikman, Note, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332 (1965). For an example of the excesses to which attempted justification of the practice may lead see *People v. Neaton*, 292 N.W. 589 (Mich. 1940).

52. See Coinage Offences Act, 1861, 24 & 25 Vict., ch. 99, § 37.

fense is never apprised of the previous offense, at least when its existence is uncontested.⁵³ Nevertheless, the United States Supreme Court ruled in 1967, in *Spencer v. Texas*,⁵⁴ that states are free to allow proof of felon status before the jury at the same time guilt is determined, at least in situations where the jury is given some discretionary sentencing function,⁵⁵ even when the existence of the predicate felony is uncontested. The rationale of Justice Harlan's opinion for the majority acknowledges that there was no legitimate probative justification for the introduction of the prior convictions,⁵⁶ and no apparent good reason to allow their introduction along with the evidence on guilt – except the minor increase in procedural efficiency entailed in a one-stage process (guilt and sentence determined together), as opposed to a two-stage (or bifurcated) process.⁵⁷ Furthermore, the danger of using the predicate felon proof as a basis for conviction of the new crime charged was not inconsiderable.⁵⁸ Nevertheless, the Court was not prepared to say that limiting instructions were not so sufficiently effective that the desirability of the minor efficiency gain should not be left up to the states under the Constitution.⁵⁹ The claim that states who adopt this odious procedure are mo-

53. See Sidikman, *supra* note 51, at 333.

54. 385 U.S. 554 (1967).

55. If the jury had no sentencing role, then no "two-step" process would have been necessary, at least where the defendant admitted his convicted felon status, since the court could proceed to sentence him accordingly after conviction of the underlying offense.

56. See *Spencer*, 385 U.S. at 562-63 ("We recognize that the use of prior-crime evidence in a one-stage recidivist trial may be thought to represent a less cogent state interest than does its use for other purposes . . .").

57. See *id.* at 564-65.

58. See *id.* at 562 ("This type of prejudicial effect is acknowledged to inhere in criminal practice . . .").

59. Justice Harlan seems to fear that if the universal solvent effect of limiting instructions is diluted by ruling them insufficient in this context, it will undermine their acceptability in areas where reliance on them is more justifiable (i.e., where there is no way to get the legitimate probative value of the evidence without the potential for spillover prejudicial effect). "To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." *Id.* *Spencer* was decided before *Bruton v. United States*, 391 U.S. 123, 137 (1968), which found limiting instructions to be insufficient protection in regard to confessions admissible against one co-defendant and not the other. The *Bruton* situation is very close to one of the examples Justice Harlan gave as an untoward effect of eroding the useful fiction of limiting instructions' universal solvent effect.

tivated by efficiency considerations seems questionable, especially when coupled with the assertions about the presumed effectiveness of jury instructions. Perhaps if the Court were to revisit the issue, the mass of intervening social science research indicating the limited effectiveness of such instruction might sway it,⁶⁰ but given the 5-4 decision in *Old Chief*, it seems unlikely.⁶¹ It should be noted that two of the three cases before the Supreme Court in *Spencer v. Texas* involved proffered judicial admissions which were rejected by the prosecution and the court in favor of proof before the jury. Notably, the entire Supreme Court – majority, concurrence, and dissent alike – asserted that, were the decision up to them on a legislative basis, they would adopt a two-stage procedure.⁶²

Next in clarity is the situation presented by *Old Chief* itself: the crime with the predicate felon element. This situation is the functional equivalent of the sentencing enhancement situation, with one important difference. The actus reus conduct established by the evidence in this case would not be criminal for a non-felon, and if the jury is not informed that something special makes this a crime for this defendant when it would not be a crime for the jurors, it is not unreasonable to fear that the jurors may become confused, or refuse to convict for nullification reasons. This is very clearly illustrated by the facts of *Old Chief* itself, since Montana had no restrictions on the possession or open carrying of any firearm.⁶³ A Montana jury, faced with a federal statute which appeared to outlaw weapon possession generally, might very well acquit on nullification grounds. Arguably, the government has a right to be protected against such a result.⁶⁴

60. See Jonathan D. Casper & Kennette M. Benedict, *The Influence of Outcome Information and Attitudes on Juror Decision Making in Search and Seizure Cases*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 65 (Reid Hastie ed., 1993); Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407 (1995); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985).

61. The dissent in *Old Chief* relies in part on the strongly (if not rationally) presumed efficacy of limiting instructions. See *Old Chief v. United States*, 117 S. Ct. 644, 658 (1997) (O'Connor, J., dissenting).

62. See *Spencer*, 385 U.S. at 567-68 (majority), 569 (concurrence). *Old Chief* can be seen in part as a kind of institutional delivery on this promise, at least by the five members of the majority.

63. See KESSINGER, *supra* note 41, at 69.

64. This notion can quickly be extended beyond reason. Thus, the prosecution might argue that, because nullification is a legal possibility in any case, it ought to be allowed to counter that possibility with otherwise inadmissible information in every case. Surely

Accepting this, the question becomes whether or not a general instruction to the effect that "the defendant has stipulated that it was illegal for him to possess a firearm" is sufficient to protect the government without revealing even the *general* prior felon status of the defendant to the jury. This is not only debatable; it has been debated with varying results. Minnesota, for instance, accepts this form of charge as sufficient to protect the government's legitimate interest.⁶⁵ Alaska explicitly rejects it,⁶⁶ and California accepted it until forced to abandon the practice by a clause in a 1982 initiative measure, the famous Proposition 8.⁶⁷ For our purposes, it is necessary to keep in mind that this was not what was at stake in *Old Chief*, since Old Chief was willing for the jury to be told that he was a convicted felon within the meaning of the statute, as long as nothing concerning the particular felony was revealed.

Next, we must expand from the context of formal predicate felon charges to status elements in general, such as the pornographic nature of materials or the imported status of objects. By simple extension of the predicate felon arguments, such status admissions ought generally to work to prevent proof of the status by otherwise prejudicial evidence. Once again, however, the cases indicate that when the other proof raises propensity issues, the admission may work, but when it raises issues of general outrage, it will not.⁶⁸

there must be some serious particular and substantial reason to fear nullification before such arguments can even be considered.

65. See *State v. Davidson*, 351 N.W.2d 8, 12 (Minn. 1984).

66. See *State v. McLaughlin*, 860 P.2d 1270, 1277 (Alaska Ct. App. 1993). The only issue was whether the minimal instruction, or something more referring to felony conviction, was to be given. The court was at pains to say that when a defendant concedes his status as a convicted felon, evidence of that concession, "unembellished, will normally be all that is necessary to allow the state to prove this element of the offense." *Id.* at 1278 n.15.

67. The California courts had adopted this approach to felon-in-possession offenses, see *People v. Hall*, 616 P.2d 826, 832 (Cal. 1980), which appears to have been the main impetus behind the last line of the so-called "truth in evidence" provisions of the initiative-driven 1982 Victims Bill of Rights, Proposition 8: "When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court." CAL. CONST. art. I, § 28(f) (West 1983). The fairly complex details of how the California courts have dealt with this language is mercifully beyond the scope of this article. See generally Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender's Perspective*, 23 PAC. L. J. 881, 903-06 (1992).

68. Compare *Parr v. United States*, 255 F.2d 86 (5th Cir. 1958) (the wellspring federal "offer to stipulate" case cited, apparently with approval, by the majority in *Old Chief v. United States*, 117 S. Ct. 644, 653 (1997)), and *United States v. Gantzer*, 810 F.2d 349 (2d Cir. 1987) (allowing the prosecution to submit alleged pornography to the jury over

We now move beyond status elements to the situation presented by what might be called normal crimes. As it turns out, *Molineux*-type cases aside, the potential usefulness of a judicial admission in the normal crime setting to eliminate otherwise admissible uncharged misconduct evidence is much smaller in practice than one might at first imagine. In the normal criminal context, as previously noted, there are generally three classes of elements which might potentially be subject to admission: actus reus, mens rea, and identity of the defendant as the actor. In his superb and near definitive treatise on the subject, Professor Imwinkelried has outlined the many non-propensity inferential connection arguments which can and are used by prosecutors to argue for admissibility of uncharged misconduct, and which are regularly invoked by courts to justify its admission.⁶⁹ Further, he has collected and analyzed these arguments by the type of ultimate issue to which each argument is properly directed. Except in the *Molineux* situation (uncharged misconduct offered on the pretext of proving uncontested and practically incontestable presence of intent or lack of accident or mistake), rationales which are available to argue relevance to either actus reus or mens rea are also available to argue relevance to identification. Hence, there is little room to exclude anything by, for instance, admitting the actus reus and the mens rea in a case where the only practical issue is that someone else committed the crime. There is a lot of intellectually dishonest nonsense in the administration of the propensity rule to be sure, but it is not usually the kind that can effectively be exposed or cured through a judicial admission by the defendant. A court which will improperly declare pure propensity evidence relevant through some pretextual rationale will have little difficulty in declaring it equally relevant to any unadmitted element, such as identity,⁷⁰ leaving a guilty plea as the only effective admission. The upshot is that a general acceptance of the propriety of the judicial admission mecha-

admissions by the defendants (who claimed non-involvement) that the material was legally pornographic), *with* United States v. Durkan, 539 F.2d 29 (9th Cir. 1976) (finding it error, in a smuggling case, to allow the prosecution to prove the admitted imported status of the goods by proving that the defendant stole them in Canada).

69. See IMWINKELRIED, *supra* note 11, §§ 3:01-5:37.

70. See, e.g., State v. Friedrich, 398 N.W.2d 763 (Wis. 1987) and the numerous other cases collected in IMWINKELRIED, *supra* note 11, § 3:24 under the rubric "spurious plan," by which many courts regularly admit uncharged misconduct evidence on little more than the claim that it makes out a life plan to commit that type of crime. One would think that this was the very definition of propensity.

nism would not threaten the normal admissibility of virtually all otherwise admissible uncharged misconduct evidence, (at least in jurisdictions already following the *Molineux* principle), nor help cure the considerable ills of this miasmic doctrine.⁷¹

The existence of *Molineux*-type cases shows that there is at least

71. This is the place to dispel the notion that *Estelle v. McGuire*, 502 U.S. 62 (1991), has anything to do with judicial admissions. The prominent reliance on an isolated line from Chief Justice Rhenquist's opinion in *Estelle* by the *Old Chief* dissent might lead one to believe that it was at the very least the *Powell v. Texas* of *Molineux*-type cases. The line is, "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *Estelle*, 502 U.S. at 69. When cited the first time in the *Old Chief* dissent, it is cited for the proposition that "a defendant's tactical decision not to contest an essential element of the crime does not remove the prosecution's burden to prove that element." 117 S. Ct. at 659 (O'Connor, J., dissenting). Fair enough the first time, but here, context is everything. McGuire was charged with the murder of his infant daughter, who died of injuries consistent with a brutal beating, including multiple deep bruises and internal organ damage. See *Estelle*, 502 U.S. at 65. McGuire originally told his wife that the baby must have fallen off the couch. See *id.* at 65-66. Examination of the child's body revealed many healed wounds (including evidence of anal tearing). See *id.* at 65. This was admitted through a physician who testified to "battered child syndrome." *Id.* at 68 (The dependability of that testimony beyond the actual evidence of the existence of extensive healed injuries was not before the Court.). At trial, McGuire took no formal position at all. While he did not formally raise the notion of accident, the condition of the child was not such that her *immediate* injuries might not have been the result of some accident (although "falling off the couch" was highly unlikely). In order to remove this possible alternative non-criminal explanation from the jurors' minds, the State, quite properly, was allowed to tender the evidence of the extensive old injuries. See *id.* at 69. Note that this is not at all like *Molineux*, where the untenability of accident was manifest from the circumstances of the case. Note also that the defense neither explicitly, nor practically, admitted that the child had died of intentionally inflicted wounds, nor could it, for such an admission would mean to a virtual certainty that either the mother, McGuire, or both killed the child; the evidence rendered it virtually certain that no one else had access to the child at the time of her injury. (McGuire's pretrial assertion that "some Mexicans come in," *id.* at 65, like the fall from the couch, was not presented by him at trial.) Such admission would leave substantially less room for defensive argument in court, or in the jury room. McGuire's "failure to contest" was essentially his standing mute, and if this affected either the right or the obligation of the prosecution to present evidence, no prosecution could even start if the defendant elected to stand mute. It is in this context, and only this context, that the quoted line was generated. Nevertheless, notice how it is shifted to stand for the proposition that "the defendant's strategic decision to 'agree' that the Government need not prove an element cannot relieve the Government of its burden" when it is cited the second time in the *Old Chief* dissent. 117 S. Ct. at 659 (O'Connor, J., dissenting). Nonsense. Essentially, all that *Estelle v. McGuire* decides is that when the *Molineux* rationale does not apply in fact, and there is no formal admission, the State is free to introduce evidence to show the absence of accident or mistake, relying only on limiting instructions to dispel any prejudice. This result is hardly surprising (or pertinent).

limited scope for proper use of judicial admissions in the propensity evidence area which courts may be willing to honor. "Heartstrings and gore" evidence presents an entirely different picture, which brings us closer to the theme of this symposium. For there are lots of cases in which judicial admissions can be fashioned fairly to give the prosecution all the benefit to which it is rationally entitled, which render proffered "heartstrings and gore" evidence formally irrelevant. The cases are nearly uniform in result: the prosecution is free to choose to prove the uncontested facts with its "heartstrings and gore" evidence, even in the face of an admission which clearly establishes, for the case and the jury, the only things that supposedly justify the admission of the prosecution's evidence in the first place.⁷² A

72. An extensive collection of both state and federal heartstrings and gore cases is found in the 1997 supplement to 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* §§ 5213-22 (Supp. 1997). It contains annotations on nearly 200 cases involving such evidence since 1977. This is, of course, not complete, nor does it claim to be. For instance, there are now over 3,000 people on death row in the United States. U.S. BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1997 222, no. 360 (117 ed. 1997) (As of December 21, 1995, the number was 3,054 and rising by approximately 140 per year since 1990.) Many of their appeals raise the issue, where it was obviously rejected. Nevertheless, the Wright & Graham material is a sufficient base to confirm what everyone already knows. Further, it is unlikely to under-represent cases which found error in admitting heartstrings and gore evidence, with or without formal admissions, since those are unusual enough to be seized on for inclusion when encountered. In only ten cases in that compilation did such evidence contribute to the reversal of convictions, and there were generally other sufficient grounds present as well. Further, three of those cases were from one jurisdiction (Oklahoma) on the narrow issue of victim-in-life photos. By no means were all of the rest erroneously decided. Many undoubtedly involved evidence which offered information actually relevant to some contested issue which could not be as completely presented and apprehended from any other source. However, a significant percentage offered no information on any disputed issue, and one doubts that these ten reversals in twenty years, usually including other sufficient grounds for reversal, were enough to properly discipline the American criminal courtroom. In one reversal from Arizona, the prosecution introduced a piece of charred skin from an arson victim supposedly to show the extent of the burning. *See State v. Walker*, 675 P.2d 1310 (Ariz. 1984). Extreme as it is, it is not much worse than other practices routinely found acceptable in Arizona courts. *See, e.g., State v. Grilz*, 666 P.2d 1059 (Ariz. 1983) (insanity plea, victim's identity, and all details of murder uncontested; no error to admit victim's hysterical 911 call to establish "time frame," and multiple horrific crime scene photos). In an Oklahoma reversal, the prosecution supplemented photos of a decaying corpse with verbal descriptions of the smell of rotting flesh and the sound of maggots chewing. *See Tobler v. State*, 688 P.2d 350 (Okla. Crim. App. 1984). Again, not that much worse than the evidence routinely accepted. *See, e.g., Howe v. State*, 669 P.2d 780 (Okla. Crim. App. 1984) (photo of victim's body crawling with maggots admissible to corroborate testimony of place where victim was found). Oklahoma does deserve a star for being the only jurisdiction

single example will suffice for now: the prosecution is routinely allowed to introduce horrific crime scene photos in cases where the photos offer no definable information on the identity of the perpetrator, and where the only stated rationale is to prove the fact of death, its commission by another, or the intentionality of the act of killing, in the face of unqualified defense admissions of these facts. Courts may assuage their consciences on occasion by excluding a portion of the multiple photos proffered, or some other such solomonic act, but

with a general rule against victim-in-life photos (usually in prom gowns, graduation robes, or uniforms). See *Binsz v. State*, 675 P.2d 448 (Okla. Crim. App. 1984); *Smith v. State*, 650 P.2d 904 (Okla. Crim. App. 1982); *Boutwell v. State*, 659 P.2d 322 (Okla. Crim. App. 1983) (observing that a rule was necessary because the practice was near universal). Other jurisdictions are apparently untroubled by the practice. See, e.g., *United States v. Grandison*, 780 F.2d 425 (4th Cir. 1985) (harmless error); *State v. Bockman*, 682 P.2d 925 (Wash. Ct. App. 1984). The Washington Supreme Court, in affirming a case in which the prosecutor put in five photos of a decapitated murder victim, hinted that if prosecutors did not show more restraint the court might do something about it. See *State v. Crenshaw*, 659 P.2d 488, 498 (Wash. 1983). There was thereafter one reversal by the Washington Court of Appeals for the admission of unnecessary gruesome crime scene photos, see *State v. Sargeant*, 698 P.2d 598 (Wash. Ct. App. 1985), but subsequently it was business as usual, see *State v. Kendrick*, 736 P.2d 1079 (Wash. Ct. App. 1987) (finding photos of mutilated murder victims with objects protruding from their heads were no more gruesome than the crime and were properly admitted). In a murder case, a Michigan court found error (somewhat surprisingly) in the admission of a police radio tape of a transmission from the officer victim reporting that he had been shot. See *People v. O'Brien*, 317 N.W.2d 570 (Mich. Ct. App. 1982). Finally, there was a reversal in a California identity case based on the uncontested nature of the issues to which the photos were supposedly relevant. See *People v. Boyd*, 95 Cal. App. 3d 577 (1979). This is an island in a sea of contrary rulings. See, e.g., *People v. Lynn*, 159 Cal. App. 3d 715 (1984) (finding photo of deceased with cord tied around neck and tongue protruding relevant to motive). Montana has an inconsistent appellate policy of trying to curtail prosecutorial abuse. Compare *State v. Allies*, 606 P.2d 1043 (Mont. 1980), and *State v. Pendergrass*, 586 P.2d 691 (Mont. 1978) (not cited by Graham), with *State v. McKenzie*, 581 P.2d 1205 (Mont. 1978), and *State v. Austad*, 641 P.2d 1373 (Mont. 1982). Beyond this, Professor Tanford cited studies that found no reversals involving bloody photos for periods of twenty-five and eleven years, respectively. See J. Alexander Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 843 n.80 (1989), and authorities cited therein. For a look at how Indiana trial judges evaluated such evidence 30 years ago, see Thomas L. Shaffer, *Judges, Repulsive Evidence and the Ability to Respond*, 43 NOTRE DAME LAW. 503 (1967-68).

Nor, as noted in the text, do explicit admissions help. See *United States v. Gantzer*, 810 F.2d 349 (2d Cir. 1987); *State v. Garcia*, 664 P.2d 1343 (Kan. 1983); *State v. Crump*, 654 P.2d 922 (Kan. 1982); *State v. Muetze*, 368 N.W.2d 575 (S.D. 1985); see also *Parr v. United States*, 255 F.2d 86 (5th Cir. 1958) (discussed *supra*, note 68); *State v. Leland*, 227 P.2d 785 (Or. 1951) (discussed *infra*, note 88). In most jurisdictions a judge has a better chance of being killed by lightning than of being reversed for failing to control prosecutorial abuse of heartstrings and gore.

they virtually never exclude completely. What does this say about the truth we are searching for?

The Relevance of the Irrelevant

The judicial admission mechanism raises one of a cluster of related questions concerning the judicial system's tolerance for, and affirmative fostering of, presentation of evidence which is informationally irrelevant to the legally material issues of the case in any meaningful or tenable sense. When I initially sat down to write this section, the literature seemed fairly uniform in noticing the protean phenomenon of such irrelevant evidence out of the corner of its eye, and then passing quickly over it by reference to such unhelpful labels as "background"⁷³ or "res gestae."⁷⁴ The dominant response appeared to be that if such information turned out to be irrelevant, it was usually just because a certain level of irrelevant noise in testimonial expression and other evidence presentation was inevitable, harmless, and not worth the time or effort of trying to suppress it.⁷⁵ My own response was there was a lot more noise with a lot more purpose than generally recognized.⁷⁶ In what follows, I propose to examine a phenomenon which might help shed light on some usually unexamined deep background assumptions of our proof process. This may in turn help us to account in part for the surprising failure of judicial admissions (or anything else) to control the prosecution's resort to "heartstrings and gore" evidence in criminal cases.

For many years, I have presented evidence students with this puzzle: Why is the prosecution in a case charging simple possession of heroin⁷⁷ always allowed to display to the jury the typical glassine or plastic bag filled with white powder? In one sense, the answer appears to be easy. If a person is charged with possessing a contraband substance, what could be more centrally "relevant" than the very substance itself which the person is charged with possessing? Yet on

73. See FED. R. EVID. 401 advisory committee's note.

74. See 2 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE, § 365 (3d ed. 1940).

75. See FED. R. EVID. 401 advisory committee's note.

76. As I wrote this section, I received a reprint of the new article, David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1 (1997). While I may not totally agree with every aspect of Professor Crump's article, his analysis of witness examination and the rhetorical and emotional uses of irrelevancy has at last moved that subject from the twilight of practitioner lore to the spotlight of academic examination.

77. I have chosen the charge of simple possession to eliminate arguments that perception of volume is relevant to an inference of intent to distribute.

closer examination, this response seems unsatisfactory. Things have not yet come to the point that the average jury can be assumed by general life experience to be capable of concluding accurately by direct perception that the powder in a plastic bag is heroin instead of flour or some other benign substance. Even if we were to assume that a jury could so tell, the normal way in which such exhibits are handled in courtrooms would preclude the jury from getting this information itself, since the bags are never sent into the jury room to be tasted, inhaled, or injected in an exercise of direct jury fact-finding. Hence, we can neither rationally assume jury competence from average general experience to determine if the substance is heroin, nor do we conduct the trial in such a way as to allow such competence as the jury may possess to come into play. Yet without both these conditions, the bags of powder are in the most important sense, irrelevant, since the bags offer no information *rationally useable by the jury* to resolve any factual issue made material by the applicable substantive law. Yet their display is always allowed, and the bags themselves are routinely given exhibit numbers and "admitted into evidence." Why?

The answer may begin to become clearer if we distinguish between two kinds of relevance, one of which we will call potential relevance, and the other working,⁷⁸ or actual relevance. Potential relevance exists when a proffered piece of evidence is reasonably taken to be a repository of relevant information about a material issue of fact. Working relevance exists only when that potential information is also rationally useable by application of the reasoning skills and general background knowledge fairly attributable to the average juror, either directly or with the mediation of a dependable expert translator of some kind. Indeed, perhaps the clearest example of the distinction involves language translation. Suppose a visitor from the central Asian steppes, who speaks only an obscure Turkic dialect, observes an assault. We have every reason to believe that the sounds coming from the witness's mouth encode much important information. The information encoded in the sounds is undoubtedly relevant (potentially). However, no one would think it made much sense to allow the witness to sit in front of a jury and emit those sounds if no person were available who could dependably translate them into English, and thus dependably render the potential relevance into working relevance.

Although the black letter of our common rule definitions of

78. I was tempted to call this kinetic relevance, but fortunately thought better of it.

relevance fail to account for this distinction,⁷⁹ it seems obvious, at least initially, that the only kind of relevance that ought to result in admission for use by a factfinder is actual working relevance, rendering the evidence rationally useable by that factfinder.⁸⁰ Indeed, this sounds tautological, though it isn't quite, and in fact we routinely allow the display of evidence which possesses only potential relevance, if that. This curious situation may arise in regard to testimonial detail, but its most puzzling aspects are best illustrated by corporeal exhibits which are in some sense "relics" of the actual event which gave rise to the controversy being tried, such as the heroin bags.

The rational limits of potential relevance are not clear and are certainly not limited by any current state of art in transforming potential relevance into working relevance. Assume a paternity suit. The baby has traditionally been felt to be "relevant," certainly beyond the rationally demonstrable powers of a factfinder to assign parentage accurately by direct observation. There appears always to have been a strong intuition that the baby was a repository of central and telling information, though only now has science developed techniques to render that information dependably usable with any specificity in the usual case. Nevertheless, the baby was often the subject of display based on the intuition of potential relevance, and the hope that something good might come from staring at it.⁸¹ This

79. See, e.g., FED. R. EVID. 401, which declares evidence relevant if it has "any tendency to make the existence of a fact more or less probable than it would be without the evidence," without suggesting a referent to the trier of fact's rational capacities to derive or process the information. It emphasizes the content of the code independent of the characteristics of the decoder. Rule 403 does not provide an appropriate framework to deal with this problem either, since it assumes *some* probative value must be present to get past rules 401 and 402. Professor Leonard, for different but perhaps related reasons, has recently proposed a version of Rule 401 which would solve the problem. See David P. Leonard, Comment, *Minimal Probative Value and the Failure of Good Sense*, 34 HOUS. L. REV. 89, 96 (1997).

80. For an excellent discussion which attempts to deal with the knowledge and abilities of the factfinder within the terms of Rule 401, see WRIGHT & GRAHAM, *supra* note 10, § 5165 at 56-59, § 5173 at 129-31. I wrote the text without reference to these sections, but I read them when they first appeared, and have obviously been heavily influenced by them more than I was in conscious memory aware, and for that I thank Professor Graham (the laboring oar to Professor Wright's helmsman), and also Professor Wright.

81. Baby display presents a somewhat problematic example, since its rationality *vel non* is likely to be fact sensitive and case specific. Nevertheless, if my own experience with elderly aunts is any indication, people commonly claim clinical abilities to see parent-child resemblances ("she has her father's eyes") about which substantial skepticism is

intuition quickly grades off into mystical belief in the power of relics (if only that little knife could talk, the story it would tell). No doubt relics possess emotional power, which is why the Windsor chair sat upon by John Hancock when he signed the Declaration of Independence is worth a hundred times as much as its virtually indistinguishable mate from the next room.

Be this as it may, it seems clear that the operational standard of "relevance" for such relics is different than for any other evidence.⁸² All that is necessary is potential relevance of the most unformed sort.⁸³ This is as true for the knife found near a crime scene which is "consistent with" being the murder weapon but offers no useful information itself on any issue of material fact even with the aid of expert testimony, as it is for the heroin bags whose contents will be the subject of expert testimony. And in the latter case, we should keep in mind that normally *all* of the rationally useful information about the bag and its contents comes from *testimony* concerning the time and place dimensions applicable to the bag in the past, and tests done outside the presence of the jury. Virtually none comes from the ju-

justified. This seems to be a very widespread social convention. The so-called "settled features" rule can be seen as an attempt to place some limits on this, derived from perceived defects in the ability of humans to accurately process the information present. However, as a broad categorical rule, "settled features" is itself subject to the criticism that it will let in as much unprocessable as processable information, and that the act of admission will invite, if not compel, the jurors to believe they have, and are expected to have, capacities they do not possess. See *generally* cases collected and analyzed in JACK B. WEINSTEIN, ET AL., EVIDENCE: CASES AND MATERIALS 100-03 (9th ed. 1997).

82. It hardly needs citation that the prosecution gets to display the original heroin bags, but if they lose them, they cannot simply substitute identical prop bags. Replica evidence generally requires much more specific authentication to establish dimensions of rationally useable relevance. See *Young v. Price*, 442 P.2d 67 (Haw. 1968). Some cases come close to the line, however. One court allowed display of an axe based solely on the recognition testimony of the victim that he was "pretty sure" the axe was the one used against him. See *United States v. Johnson*, 637 F.2d 1224, 1247 (9th Cir. 1980). In another case, a civil rights action for wrongful shooting of an inmate, the defendant testified that the plaintiff had attacked him with a shank (a homemade knife). See *Davis v. Lane*, 814 F.2d 397, 398 (7th Cir. 1987). Plaintiff denied the attack or that he had ever had a shank. See *id.* at 399. The shank allegedly used in the attack could not be found, and the court allowed the introduction of another shank to show what such weapons look like, as bearing on the reasonableness to responding to an attack with such a weapon by shooting. See *id.* Similar considerations probably explain why judges sometimes more easily exclude autopsy photographs than more gruesome crime scene photos. See Shaffer, *supra* note 72, at 505-08.

83. Professor Graham tends to blame Wigmore's rather unsophisticated treatment of "autoptic proference" for this state of affairs. See WRIGHT & GRAHAM, *supra* note 10, § 5173, at 128-29.

rors' perception of the bags in the courtroom.⁸⁴

Because of this different operational standard of relevance, we allow the proponent lucky enough to be blessed with such relics to display them to the jury, complete with exhibit stamps and the judge's imprimatur, even when they are essentially props which add no rational information for the jury's consideration. And the gusto with which attorneys take advantage of this opportunity suggests that attorneys see advantages in the process, advantages not justifiable, at least in any obvious way, in terms of fostering rational fact reconstruction, and more easily related to the parable of the brick.⁸⁵ Again the question: Why do we allow this?⁸⁶

84. In this regard much relic display is like the parable of the brick:

"My grandfather was a wonderful man, and he had a wonderful cow. That cow could jump like no other cow. One night she jumped over the moon, which upset the man in the moon so much that he knocked her flying, and she fell back to earth and fell on my grandfather's house and broke his chimney to pieces, and I can prove that every word I say is true, because *here's a brick from that very chimney.*"

Now I suppose that one could say some information comes from the brick, since if the speaker then produced a potato, it would destroy whatever corroborative effect is derived from the brick, but in themselves, bricks (and plastic bags and white powder) are so commonly obtainable that it is fair to say that virtually all the information comes from the testimony and none from the exhibit. A brick is not a wall, but sometimes it's not even a brick.

85. See *supra* note 84.

86. The closest anyone has come to addressing this in detail is Professor Graham. In WRIGHT & GRAHAM, *supra* note 10, § 5165, at 62-63, he introduces a concept he calls "psychological relevance." (He attributes the concept to the philosopher William Frankena, but while Frankena coined the term, he himself was rather contemptuously dismissive of resort to evidence with only "psychological" relevance:

As a philosopher, whether as moralist or as logician, I cannot but decry this. In any case, however, I am going to deal only with logical relevance. What is psychologically relevant is something one can learn from experience, from older lawyers, from social psychologists, or from some legal Dale Carnegie's book on how to make friends and influence juries—not from philosophers.

William Frankena, *The Basic Theory of Relevancy*, 35 MICH. ST. B.J., July 1956, at 12, 13. Professor Graham is not so dismissive.) Graham defines it as "relevance based upon intuition and other forms of intelligence centered in the right lobe of the brain, as distinguished from the highly verbalized forms of logic that are employed by the left lobe," and he is generally in favor of it, though "it cannot be explained to the satisfaction of those who reject intuition as a source of knowledge." WRIGHT & GRAHAM, *supra* note 10, § 5165, at 62. He further claims that Rule 401 "would permit psychological relevance to be openly utilized." *Id.* at 63. Whether Rule 401 permits it or not, nothing has stopped it, but for myself, I must say that I am deeply skeptical, perhaps having seen "intuition" often miscarry in the hands of those who claim to have it most. Professor Graham is pre-

One cynical response to this question is that we allow it because, in spite of the polite civic myth reflected in Rule 102, we don't really care as much about rationality in the trial process as we like to claim. Not that rationality is not *a* value, just not a trump value in the face of other more atavistic considerations.⁸⁷ Such a response is most likely to come from those who believe that the "judicial combat" model is the lens that gives the truest picture of the realities of our trial system, and perhaps the one that reflects ultimately appropriate values.⁸⁸ This school of thought holds that accuracy and rationality are at best secondary values in the trial process, and that the true primary value is to give both the parties and the public a stage on which a fair (though not necessarily rational), dramatic, emotionally

pared for such a response, however: "The concept of 'psychological relevance' will undoubtedly be anathema to many judges and lawyers because the legal profession is predominantly peopled with left-lobe thinkers who like to think that the satisfaction they receive in the exercise of a merciless logic is not emotional but intellectual." *Id.* (He must not have known some of the trial lawyers I have known. However, he properly points out that intellectual satisfaction is just "a different emotion." *Id.* at 63 n.82.). Professor Graham continues: "[T]he determination of relevance has always been as much an emotional as an intellectual undertaking To frankly admit that the judge as well as the jury can take inarticulate feelings into account in assessing evidence is not to surrender justice to a salivating mob but to recognize that resolving disputes is a human rather than a mechanical undertaking." *Id.* at 63. I remain not only unconvinced, but fearful. However, apparently Justice Souter is neither. *See infra* text accompanying and following note 133.

87. See Professor Leonard's observations on the "Paradigm of Catharsis." David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 31-42 (1986-87). See also Duane, *supra* note 12, at 432-34.

88. Some can't seem to separate the two paradigms. Consider the following:
The classic view of the trial is that it is a 'search for truth.' In this view, the adversary system is a contest between equals. The role of the prosecutor is to obtain a conviction, while the role of the defense attorney is to obtain an acquittal. If each carries out his role, then the truth will emerge. The goal of this model is to arrive at an accurate result. The search for truth model demands that the 'scales must be evenly held,' so that the parties may be equally armed for adversarial combat.

Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1037 (1987) (footnotes omitted). See also the observations of the Oregon Supreme Court in *State v. Leland*, 227 P.2d 785 (Or. 1951). The defendant admitted the actus reus (murder of a young girl with a knife) and identity, but claimed insanity. *See id.* at 788. Nevertheless, in affirming the propriety of allowing in bloody clothing and other such evidence, the court said that the plea put in formal issue every element of the case, and that the State was therefore free, regardless of defendant's admissions, to prove its case "up to the hilt," limited only by "the rules of fair evidence and the standard of fair play." *Id.* at 799.

satisfying, and decisive mock combat can be played out to a conclusion which will lay the underlying controversy to rest by acceptable catharsis. This contrasts with the official search for truth model reflected in Rule 102, with its goal of maximal rational accuracy within the time constraints of a functional system. We will have occasion to return to this collision *infra*.⁸⁹ Whatever the descriptive or explanatory validity of the judicial combat model, I personally choose to believe that there is sufficient honorable respect for the official ideology⁹⁰ that departures from it in practice must be justified by time efficiency considerations which do not take the system too far from

89. I think the reality of our trial system reflects an uncomfortable amalgam of paradigms and values, neither fully analyzed nor coherent, springing from a collision of the views and interests of a variety of powerful forces often driven by emotions having little to do with "rectitude of decision" or delivering the official promise of the legal system. In addition to the norms reflected by the judicial combat model, we must add the ritual "exorcism of ignorance" when it is too uncomfortable to admit the limits of our rational knowledge. See D. Michael Risinger, Mark P. Denbeaux, & Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise,"* 137 U. PA. L. REV. 731, 781-82 (1989). Additionally, we must consider the external economic interests and political goals of powerful repeat players in the system, which, it has been suggested, includes admission or exclusion of evidence for "protection of the state." See Tanford, *supra* note 72, at 857-58. See also Kenneth W. Graham, Jr., "There'll Always be an England": *The Instrumental Ideology of Evidence*, 85 MICH. L. REV. 1204, 1232-34 (1987) (asserting, essentially, that litigation is a political exercise in which notions of rationality, fairness, and justice are only tools to be used when you can con the other side (or the system) into letting them help you). Furthermore, we must add the need to adopt procedures which will satisfy the public that the judgments issued by the legal system are acceptable, even when such procedures conflict with maximized accuracy. See Charles Nesson, *The Evidence or the Event?: On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985). Apropos of the latter dynamic, Professor Nesson displayed some level of discomfort with accepting the implications of his observations, see *id.* at 1391, and most of the examples he gave were rather benign. The law's response to "heartstrings and gore" in criminal cases, and the more extreme proposals of the victims' rights movement, see *infra* note 108, may be seen as showing the dark side of this idea. Leonard's Paradigm of Catharsis, see Leonard, *supra* note 87, combines elements of trial by combat and the need for public acceptability. Finally, Duane isolates victim dignity as another independent goal which might justify the admission of some otherwise irrelevant information. See Duane, *supra* note 12, at 433.

Perhaps someday, by considering all these things together and in the open, we will be able to work out some coherent hierarchy of trump values. For what might be seen as beginnings, see generally Tanford, *supra* note 72, and Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 523-30 (1983). However, we certainly have nothing very satisfactory in general at present. I predict (and hope) that once we go through the process, we will be forced once again to draw the ultimate trump values from the "rectitude of decision" model.

90. To adopt explicitly an official ideology and then to ignore consciously procedures which violate it turns the ideology into hypocritical window dressing.

maximal rationality, or by appeal to some independent substantive value which will be served by a practice departing from rationality maximization without leading to an unacceptable increase in inaccurate results. I further choose to believe that any practice that cannot be so justified will finally be discarded after it is recognized as such.⁹¹

For the practice of allowing matter-of-course display of original relic exhibits not to be discarded, therefore, it must be justifiable because it arguably does maximize rationality, or because it is so much more time efficient than other modes of proceeding, or because it promotes some value independent of rational accuracy which we are willing to embrace explicitly even at the cost of the marginal increase in inaccuracy it introduces.

I think that we can begin by discarding the latter justification. Mere display of the relics of a past event, no matter how interesting or dramatic, would seem to be an independent value for a wax museum, but not in itself for a judicial system. Such display does not appear to promote such a value as personal dignity, or privacy, or the check on potential abuse of state power, which might justify this practice in the way that other practices admittedly not designed for optimum rationality are justified.

Similarly, we can discard time efficiency as a justification. It would be difficult to construct an argument that admitting exhibits which offer no primary information saves the time of doing anything else. That leaves us with trying to fashion a convincing argument that the practice promotes rational accuracy in some way. Interestingly, a number of such arguments can be made.

1. The "check on cheating" argument. This rationale, or some intuited version of it, probably had a lot to do with the establishment of the unquestioned process of admitting relics in the era before discovery, when the trial was the primary opportunity for both the factfinder and the opponent to examine the case of the moving party. Allowing, and virtually requiring through the weight of expectation, the production of such physical relics as one might reasonably conclude would exist if the proponent's case were as claimed, does two things. It allows the opponent to examine the physical residues of the episode with an eye to rendering their potential relevance actual in a way which is helpful or exculpatory to the opponent, and it cuts down the options of one who would fabricate. Fabrication with attendant props both requires a more abandoned heart, and is more likely to be

91. I also recognize that I may be foolish in choosing to believe as I do.

exposed either through the details of the false relics themselves, or because of the breakdown of the wider conspiracy and cooperation that the fabrication of such relics often necessitates. However, these functions can be adequately discharged today at the pretrial stage of every civil case, and in regard to the State's case, in every criminal prosecution where broad discovery rights have been established in favor of the criminal defendant. The "check on cheating" argument is not a very good justification for the matter of course display of such relics to the jury in today's trial practice.

2. *The "two wrongs make a right" argument.* This justification holds that we show the jury relics because they will infer that they exist, and they are likely to wrongfully infer some nefarious reason for their failure to be displayed, even if we explain why they are not displayed, and forbid the opponent from suggesting the propriety of such an inference in argument. Jurors expect to see such displays for various reasons, not the least of which is their familiarity with their routine display in trials from the popular media, and it is just too unlikely that we can correct for such expectations effectively at this point in the history of trials.

3. *The "it keeps them awake" justification.* This argument says that the jury is inherently interested in relics on a gut level, and their display keeps the jury's attention on the proceedings so that they may be open to pick up, remember, and digest the rationally useful information which they might otherwise miss because their minds were dulled or wandering from boredom.⁹²

4. *The "it's too hard to figure out" argument.* This argument holds that judges have a justified insecurity about both the proponent's ability and their own to describe explicitly the dimensions of an original relic proffer which render it actually relevant for direct jury use. Therefore, they ought to let in any relic for display, unless there is a strong reason not to, just in case the jurors see something

92. Consider the following:

What is called *real* evidence—mostly bullets, bad florins, and nailed boots—is of much value for securing attention. . . . This is true even when these exhibits prove nothing—as is generally the case. They look so solid and important that they give stability to the rest of the story: and so the French call such things *pieces de conviction*. The mind in doubt ever turns to tangible objects. . . . A rusty knife is now to an English jurymen what a *scarabeus* was to an Egyptian of old. I have seen a crooked nail and a broken charity-box treated with all the reverence due to relics of the holiest martyrs.

CHARLES DARLING, *SCINTILLAE JURIS* 75-76 (6th ed. 1914).

that hasn't occurred to either the proponent or the judge. This assumption of useable relevance even when we can't identify any seems to me to go too far, but we will have occasion to return to it in connection with the majority opinion in *Old Chief*.⁹³

It seems likely that an inchoate intuition of all of these rationales plays some part in the continued unquestioned acceptance of relic display. Of these four rationales, the second and third seem to be the most suggestive in going beyond the initial puzzle of relics with purely potential relevance to other trial situations, such as the judicial admission by criminal defendants. If a jury's expectations and interest can justify in-court displays which add no usably relevant information, it would seem to suggest some right to dramatic presentation independent of relevance.⁹⁴

"Drama" as used here is something of a problem to define. It is something beyond the right to present relevant information, or the right to present it coherently and in what the proponent judges to be the most *rational* comprehensive and comprehensible way. Drama is an irrational phenomenon having to do with the fact that there are always a variety of ways to present rationally relevant information coherently, along with a range of supplementary and supporting contexts in which it can be presented, and some of these are simply more emotionally gripping and powerful than others.⁹⁵ As noted, the func-

93. An interesting example occurred recently in New Jersey in the second double-murder trial of Josh Pompey (after one hung jury). A bloody windbreaker allegedly worn by the killer during the murders was introduced into evidence. It contained a tag with badly soiled and faded printing which experts for both sides testified spelled out the letters "Ymay" or "Yaway." In examining his witness, the prosecutor asked, "doesn't Yaway rhyme with Pompey" which the defense used to ridicule the desperation of the prosecution in its closing. However, when jurors examined the label during deliberations, they turned it upside down and came to the conclusion that what it really said was "Josh P." See Christopher Mumma, *Jurors Turned One Exhibit on its Head*, THE RECORD (Bergen County, N.J.), March 10, 1998, at L1. Exactly how ink blots that the expert witnesses for both sides said looked like "Ymay" or "Yaway" could be turned upside down and then look like "Josh P" remains something of a mystery. See also Professor Graham's arguments regarding "psychological relevance," *supra* note 86.

94. I here want to thank Mark P. Denbeaux for a year-long dialogue on what he has always claimed to be an independent "right to drama."

95. Emotions, in all their shades and variety, are value-charged responses, positive or negative. The role of emotion in rational tasks is easy to underestimate, since without some emotional response to the task, there would be no reason to spend the effort to do it at all. There is even some empirical confirmation for this. See DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 52-54 (1995); see also MELVIN J. LERNER, THE BELIEF IN A JUST WORLD 10 (1980). Nevertheless, at some quickly arrived at point, emotional manipulation in the adversary process can be seen as turning the jury from the task the law

tional assumption of our adversary trial process seems to be that dramatic presentation is not intrinsically evil, and may even be intrinsically good. And in keeping with the general party autonomy assumptions of our adversary process, each lawyer is generally free to choose whichever way of presentation is most dramatically effective to make a point. Lawyers love this freedom, because it allows them to view themselves as heavily affecting the outcome of trials through their presentation skill and judgment, not merely as bureaucratic functionaries passing on objective information.

The problem is that the effects of dramatic presentation are not always benign, or even neutral, as far as the rational process of fact-finding is concerned. Drama does not merely serve to highlight rational information, but can also mask or submerge other information of equal or greater rational weight for which there is no equally dramatic means of presentation. The current wisdom derived from experimental psychology is that humans most commonly process evidence about past human occurrences by constructing story narratives,⁹⁶ and more importantly, which narrative account they settle on and how firmly they believe it is heavily influenced by supplementary dramatic factors. In addition, dramatic presentation can provide a powerful if subtle invitation to the factfinder, not so much to be irrational per se, but to substitute its own judgment for the law's judgment about which details of the episode giving rise to the controversy ought to control the outcome, or to change the meaning of the standard of proof that the law says should control the case. It can, in other words, be an unstated but effective invitation to jury nullification in the general sense, on either side of a controversy, in both civil and criminal contexts.

While the system's functional allowance of a broad right of ad-

claims it wants done to some other task desired by the advocate. I do not know how to define the optimal emotional setting and content for delivering the system's truth-finding promise, or which emotions ought best to be engaged. See Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997). However, it is easier to know when something has been taken too far.

96. See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991). However, as Professor Lempert has pointed out, even if the story model is descriptively true of the dominant mode of processing information about human episodes from evidence, it does not mean that this is always a good thing. One appropriate response of the law may be to incorporate rules which ameliorate its potential accuracy-reducing excesses. See Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 572-73 (1991).

versary drama thus creates potential problems in all contexts, it is in its routine utilization by the prosecution against criminal defendants that the most serious issues come into play, at least if we believe what we routinely say about our commitment to the presumption of innocence and the notion of proof beyond a reasonable doubt.⁹⁷ Hence, our interest in *Old Chief*, and judicial admissions in the criminal context, and Wigmore's notion of "legitimate moral force."

It is a commonplace to say that what is meant by proof beyond a reasonable doubt is not capable of exact definition. Nevertheless, despite such perhaps inevitable indeterminacy, there are a few things that can be said confidently about the notion, at least as it is recognized officially and explicitly by our "search for truth" civic mythology.

For one thing, proof beyond a reasonable doubt is a standard of proof explicitly in collision with maximal accuracy of trial results. This is because it explicitly embraces a value extrinsic to accuracy: the decision that an inaccurate conviction is worse than an inaccurate acquittal. The official and explicit recognition of this value judgment has a long history.

Secondly, it is not clear how much worse an inaccurate conviction is officially, beyond being able to say something like "it's a lot worse." Most attempts to express the relative evil of such false positives (convictions) and false negatives (acquittals) have used the well known aphorism "it is better that (blank) guilty people go free than that one innocent person be convicted," but the number in the blank has not always been the same.⁹⁸ In its most common form, the num-

97. A true believer in the "judicial combat" or "fair fight" model can rationalize this easily. It's like two gladiators with different weapons, but sufficiently matched in varying potentials to yield a satisfying, fair fight. I have a trident and net, you have a sword and shield. The defendant has the rhetoric of proof beyond a reasonable doubt, and the prosecution has heartstrings and gore. The outcome is the result of a fair fight. If the defendant is convicted, that is the outcome. This is all we mean by proof beyond a reasonable doubt.

98. The earliest use of the aphorism is by Sir John Fortescue in his 1476 treatise *De Laudibus Legum Angliae*, and his phraseology ("revera" meaning "I would prefer") suggests that it was original to him. Fortescue was a remarkably humane jurist in a tumultuous age. The number he used is twenty. SIR JOHN FORTESCU, *DE LAUDIBUS LEGUM ANGLIE* 65 (S.B. Chrimes trans., Cambridge Univ. Press 1942) (1546).

The aphorism next surfaces in Sir Matthew Hale's *Pleas of the Crown* (written before his death in 1676 but published posthumously), where the number has shrunk to five. 2 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 289 (Sollom Emlyn ed., London, E. & R. Nutt, and R. Gosling 1736). It appears again in Blackstone, where the number is up to ten. 4 WILLIAM BLACKSTONE, *COMMENTARIES* 352 (Oxford, Clarendon

ber used is ten, suggesting a requirement of subjective probability in the low 90s for conviction.⁹⁹ Such empirical research as has been done indicates that the subjective probability number assigned to the notion by judges, students, and other citizens varies significantly within groups and between groups, and is often lower than ninety,¹⁰⁰ though of course such numbers are merely metaphors for non-quantifiable levels of certainty that may not be related operationally to the number given.¹⁰¹ For instance, while judges assign probability numbers to the notion of proof beyond a reasonable doubt as high or higher than the average citizen,¹⁰² there is also some reason to believe that juries may find reasonable doubt more often than judges would on the same evidence.¹⁰³

What is never explicitly suggested, at least in any official source

Press 1769). The reformers of the early 19th century, such as Starkie, raised the number as high as ninety-nine, and Starkie was dissatisfied with that figure: "The maxim of the law is, that it is better that ninety-nine (i.e. an indefinite number of) offenders should escape, than that one innocent man should be condemned." 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE, AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS pt. 3, § 76, at 506 (Theron Metcalf & Edward D. Ingraham eds., 3d Am. ed., Philadelphia, P.H. Nicklin & T. Johnson 1824).

99. The effect of the apparently easy move between ratios and probabilities may be more complex than it would first appear. See Michael L. DeKay, *The Difference between Blackstone-Like Error Ratios and Probabilistic Standards of Proof*, 21 L. & SOC. INQUIRY 95 (1996).

100. See Reid Hastie, *Algebraic Models of Juror Decision Processes*, in INSIDE THE JUROR, *supra* note 60, at 84, 102-03 (summarizing 16 studies on the assignment of probability values to the notion of truth beyond a reasonable doubt).

101. Thus, it might turn out that while Hale assigned the most conservative number to the ratio aphorism, he might actually acquit more readily on a given evidentiary record than Blackstone or Fortescue (if they were all around to be tested). Likewise, persons who assign a probability number in the 1970s to proof beyond a reasonable doubt may be more ready to acquit than persons who assign numbers in the 1990s. There is no necessary operational linkage between outputs and such subjective and essentially metaphorical numbers chosen to describe the standard of proof (though we might not be surprised to find a general attitude correlation at the extremes). This is because the information upon which the decision is based will in large part not carry quantifiable probability information. Its range of meaning will be subject to varying estimates between persons depending primarily, not on the stringency of decision criteria, but on varying base rate assumptions derived from varying life experiences.

102. See Hastie, *supra* note 100, at 102.

103. See HARRY KALVEN, JR. & HANS ZEISSEL, *THE AMERICAN JURY* 55-65 (Univ. of Chicago Press 1971) (1966). This is only in the aggregate. There are likely to be subsets of cases where judges might be less inclined to convict (or prosecutors might think so), and where, therefore, the prosecution would prefer a jury trial. Further, jury tendencies may have changed in the forty years since the Kalven and Zeissel data were collected, as a result of various social changes.

such as a judicial opinion, so far as I have been able to discover, is that the level of certainty represented by the rubric "beyond a reasonable doubt" should vary depending on the type of crime or the horrific details of the individual case.¹⁰⁴ Yet this is what I believe is implicit in Wigmore's notion of "legitimate moral force," and what is at stake in the law's response to judicial admissions by criminal defendants.

My thought here is that what Wigmore saw as "legitimate moral

104. Not that there has not been manifest hostility to the notion from time to time. In 1785, the early utilitarian William Paley attacked Blackstone's version of the aphorism, and insisted that the courts not be deterred from conviction by

every suspicion of danger. . . . They ought rather to reflect, that he who falls by a mistaken sentence, may be considered as falling for his country; whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upheld.

WILLIAM PALEY, *PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* bk. 6, ch. 9, at 455 (n.p., Brett Smith, 5th ed. 1793).

In a similar vein, there is the unsigned 1876 article entitled *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642 (1876), attributed by Wigmore to "Judge May," whose full name is given as "J. Wilder May" in DeKay, *supra* note 99, at 96 n.4. "Judge May" as it turns out, is no fan of proof beyond a reasonable doubt, and would reserve it for capital cases. "[M]ercy to the few may be inhumanity to the many. . . . Our courts should indeed see to it that the innocent do not suffer; but they should also see to it that the guilty do not escape." 10 AM. L. REV. at 662. He ends the article with the Latin aphorism: "*Minatur innocentes, qui parcit nocentibus.*" (He threatens the innocent, who spares the guilty.) *Id.* at 664.

Finally, I must mention John Kaplan's article which has been credited with being the catalyst for much of what has been called the "new evidence scholarship." See John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968). Decision theory, developed to aid in decisions with weak external normative restraints such as management decisions, assumes that it is proper for decision makers to assign their own relative values to outcomes. The almost inevitable result, as Kaplan explicitly acknowledged, would be different standards for different kinds of cases. See *id.* at 1073-74. Further, the standards *properly* would vary from decisionmaker to decisionmaker instead of at least trying to be the product of the law's imposed notions concerning the relative disvalue of false positives and false negatives. Kaplan ultimately disavowed (sort of) the usability of decision theory in modeling legal decisionmaking in most areas for these and related reasons, but said that decision theory might still be utilized "as servant of the system rather than as master." *Id.* at 1091-92. Others have continued to be fascinated. There may be ways to derive and incorporate numerical expressions of the law's assumptions into the theory, see DeKay, *supra* note 99, at 114-17, but to what end? In addition, examining the proof process by getting mock jurors to make subjective utility statements and deriving the associated probabilities almost inevitably ends up with very low numbers assigned to the acceptable probability of guilt. See Hastie, *supra* note 100, at 103-05. (Personally, I never say "relative disutility," but always "relative disvalue," just to keep a little Kantian brake on the implications of notions like decision theory.)

force” was the informationally irrelevant but emotionally gripping concrete realities of the criminal event out of which engaged condemnation could spring. The idea is that to this end the prosecution has an independent right to show concretely the horror of the crime through the drama of in-court evidence.¹⁰⁵ Now, I want to put one idea to rest right at the outset of this discussion. I do not believe that the effect of horrible concrete evidence is to make jurors vote to convict a person they otherwise affirmatively believe is innocent.¹⁰⁶ While this may occur very occasionally, I believe it is rare enough not to be the effect that legitimately drives argument. What I do believe, however, is that the horror of the crime changes the operational notion of what constitutes a reasonable doubt. The standard changes from “Is there a reasonable chance this person did not commit this crime?” to “If there’s a good chance this person did something this horrible, I’m not voting to put them back on the street,” or perhaps, “If I were the victim who had been through that (or her mother), how would I feel about this defendant being turned loose on this evidence?”¹⁰⁷

105. From my perspective, this could as easily be called “illegitimate moral force” or “inflammatory prejudice,” but what do I know?

106. This strawman is set up in Gold, *supra* note 89, at 505.

107. The recent literature concerning the process of inference and its relation to the notion of proof beyond a reasonable doubt is vast. Reid Hastie has collected approaches on the mathematical modeling and social sciences side. See generally INSIDE THE JUROR, *supra* note 60. On the legal commentary side, see, for example, Symposium, *Cardozo Decision and Inference in Litigation Conference*, 13 CARDOZO L. REV. 253 (1991). Happily, we need not review in detail nor choose among the various competing schools of thought for one simple reason: whatever proof beyond a reasonable doubt represents, in theory or in practice, my claim holds if it is the case that juries will convict more easily when exposed to “heartstrings and gore” evidence than if not so exposed. There are two reasons to believe that this is so. First, the conclusion of virtually all players in the system is that juries will so respond. That is why it is generally prosecutors who want such evidence in and defense attorneys who want it out. (I concede there are cases where defendants will seek to make use of analogous evidence, but only to trade on the same assumed effect, to make the defendant appear more sympathetic or the prosecution more odious.) While it is possible that everyone’s clinically-based belief is wrong, it does not seem reasonable to act as if it were so in the absence of other evidence. Second, the formal research that exists tends to confirm the universal instinct. See Saul M. Kassin & David A. Garfield, *Blood and Guts: General and Trial-Specific Effects of Videotaped Crime Scenes on Mock Jurors*, 21 J. APPLIED SOC. PSYCHOL. 1459, 1469 (1991) (“In short, it seems that once jurors are exposed to crime scene videotapes, they abandon their demand for proof beyond a reasonable doubt, and report a willingness to settle for less evidence in order to convict.”); see also Clyde Hendrick & David R. Shaffer, *Murder: Effects of Number of Killers and Victim Mutilation on Simulated Jurors Judgments*, 6 BULL. OF THE PSYCHONOMIC SOC’Y 313 (1975); Denise H. Whalen & Fletcher A. Blanchard, *Effects of Photographic*

Undoubtedly, it is true that this effect cannot be excluded from the courtroom in a high percentage of cases. Very often, perhaps usually, the evidence which precipitates this effect could not be excluded because it is wrapped up inextricably in the real issues of the case. Take as an example a stranger-on-stranger rape case in which the only practically contested issue is identity, and the evidence is eyewitness identification by the victim. Every detail of the episode is likely to be relevant to the probability of accurate identification. The Eumenides¹⁰⁸ in this case will enter the courtroom uninvited, riding on the shoulders of otherwise centrally relevant evidence. However, where they can be excluded, should we recognize their right to a ticket of admission in their own names? My personal answer to this is no, and I believe it is also the only answer consistent with what we claim to be doing when we invoke our commitment to the usual notions of proof beyond a reasonable doubt in a truth-finding system. This is why I say that, even though in *Old Chief* the Court found the trial court's rejection of the judicial admission to be error, the opinion is better regarded as a cup half-empty rather than half-full. To explain this more fully, we must turn to the *Old Chief* case in detail.

Johnny got his gun . . . or did he?: A true crime narrative¹⁰⁹

Johnny Lynn Old Chief was a 30-year-old Blackfoot Indian who lived on the Blackfoot Reservation in northwestern Montana. On the afternoon of October 23, 1993, Stacy Everybody Talks About borrowed a pick-up truck from her friend Marvin England. She then picked up Jess Crawford, with whom she had a relationship, and another couple, Stephanie Spotted Eagle and Johnny Lynn Old Chief. Crawford, a car dealer, had brought a bank bag containing money

Evidence on Mock Juror Judgement, 12 J. APPLIED SOC. PSYCHOL. 30 (1982).

108. The Eumenides, or Furies, were the Greek gods of blood retribution. The more excessive proposals from the victims' rights movement can be seen as attempts to insure the Eumenides a front row seat. See Robert P. Mosteller, Essay, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997).

109. What follows is reconstructed as fairly and neutrally as possible from the statements of fact in the defense and government briefs in the Ninth Circuit, see Brief for Old Chief, and Brief for United States (on file with author and the *Hastings Law Journal*), and in the Supreme Court, see Brief for Old Chief, 1996 WL 279413 at *3, *United States v. Old Chief*, 117 S. Ct. 644 (1997) (No. 95-6656) and Brief for United States, 1996 WL 253321 at *2-3, *United States v. Old Chief*, 117 S. Ct. 644 (1997) (No. 95-6556), and supplemented by trial transcript excerpts as to the events at the baseball diamond and the abandoned gas station (on file with author and the *Hastings Law Journal*).

related to his business and his (legally owned and possessed) 9mm semi-automatic pistol, which was placed under the front seat before Old Chief was picked up. The four spent the afternoon drinking a large amount of beer. Crawford decided he was tired, and Everybody Talks About dropped him off at home, but he forgot to take his gun when he got out. Some time after dropping Crawford off, Spotted Eagle took the gun out from under the seat. The three remaining members of the group then went to a baseball diamond where Old Chief helped Spotted Eagle fire the gun into the air. There was a conflict in the testimony of Spotted Eagle and Everybody Talks About concerning whether Old Chief touched the gun at that time. Everybody Talks About said that Old Chief handled the gun when he showed Spotted Eagle how to fire it, but Spotted Eagle said Old Chief only pointed out to her what to do, without touching the gun. When they ran out of beer, they drove to a bar called Ick's Place to buy more. In the parking lot of Ick's they met Anthony Calf Looking and a friend, who picked a fight with Old Chief. Calf Looking knocked Old Chief down, and in response to this someone (it was not altogether clear who) produced the gun and fired a single shot, which hit no one, but did put a hole in the fender of Calf Looking's Suburban. (Neither Calf Looking nor his friend saw the gun or who fired it. Spotted Eagle testified that she got the gun from the truck and fired it to break up the attack on Old Chief. Everybody Talks About testified that Old Chief fired the gun, but Crawford testified that Everybody Talks About told him the next day that she herself had fired the shot. Old Chief did not testify.) At the sound of the shot, Calf Looking and his friend fled. Old Chief and the two women then got back in the truck and left, with Everybody Talks About still driving.

Several moments later, Everybody Talks About pulled into the parking lot of an abandoned gas station. They were soon joined by Marvin England and Kim Radassa, who were looking for England's pick-up, since it had been hours since Everybody Talks About borrowed it. England and Radassa testified that they heard a shot fired at the gas station, but didn't see who fired it. Spotted Eagle testified that the gun went off when Everybody Talks About took it out of the truck and tried to unload it. Everybody Talks About testified that there was one more discharge of the pistol at the abandoned gas station, but she attributed it to Old Chief. However, she admitted on cross-examination that she had merely heard the shot and not seen it. If Old Chief fired the shot, then he must have returned to the pick-up

and put the gun away for when, after a few more minutes, police officers arrived (responding to an earlier phone call from Ick's Place), they found the pistol in the truck. They arrested Old Chief, and at the station they seized several rounds of 9mm ammunition and a spent 9mm shell casing from Old Chief's pocket. The gun was checked for fingerprints. One useable print was found on the magazine. It was never identified, but it was not Old Chief's. It was never checked against the fingerprints of Everybody Talks About.

This episode of fairly minor drunken hell raising, in which Old Chief apparently initiated no violence and no one was hurt, ended up in federal court and netted Johnny Lynn Old Chief a fifteen-year prison sentence.¹¹⁰

Here's how: law enforcement on Indian reservations in Montana is primarily the responsibility of the tribal police,¹¹¹ but tribal courts have authority to impose only minor sentences.¹¹² The courts of the United States have jurisdiction over serious crimes committed on Indian reservations, even those by one Indian against another, pursuant to and as defined by 18 U.S.C. section 1153.¹¹³ So Old Chief was charged in federal court.

If Old Chief were just *any* defendant, the only arguable felonious act would have been the discharge of the pistol in the general direction of Calf Looking after Calf Looking knocked Old Chief down. That act might be found to be assault with a dangerous weapon, and since the dangerous weapon was a firearm, it might constitute possession of a firearm during a crime of violence (he was charged with both).¹¹⁴ Or, on the other hand, that act might be found to be a le-

110. Old Chief's fifteen-year sentence was later vacated and remanded for failure to articulate the grounds for the five-year upward departure from the sentencing guidelines which it represented. The upward departure seemed related to Old Chief's extensive and violent juvenile record, but this was explained with insufficient clarity. *See United States v. Old Chief*, 121 F.3d 448, 449-52 (9th Cir. 1997) (containing memorandum opinion of the Ninth Circuit, originally unpublished, but now an appendix to that court's order remanding the case to the district court after the Supreme Court's reversal).

111. Congress has provided that a state may assume criminal jurisdiction within Indian territory with tribal consent, *see* 25 U.S.C. § 1321 (1994), but Montana has never done so, *see State ex rel. Flammond v. Flammond*, 621 P.2d 471, 472 (Mont. 1980).

112. *See* 25 U.S.C. § 1302(7) (1994).

113. These include "assault with a dangerous weapon." *See* 18 U.S.C. § 1153 (1994).

114. *See Old Chief v. United States*, 117 S. Ct. 644, 647 (1997). It seems odd that these can be two separate felonies, but it is possible to carry a gun concealed through a crime of violence in a way that could count as the second and not the first. At any rate, when there are convictions on both counts arising from a single act, the two crimes are merged for sentencing purposes under the sentencing guidelines, becoming in effect one

gitimate act of self-defense utilizing non-deadly force (a warning shot) to scare away what might reasonably appear to be two attackers. And, of course, a jury could easily have a reasonable doubt that Old Chief fired the shot at all, given the not implausible testimony of Spotted Eagle, and the impeachment of Everybody Talks About.

Johnny Lynn Old Chief was not an ordinary defendant, however. He had previously been convicted of two felonies as an adult.¹¹⁵ When he was twenty-one, he had (while drunk) attempted to rob a tavern with a pistol and was shot (twice) by the bartender for his efforts. He spent just over three years in prison on that conviction. Not long after his release, he got in a drunken argument at a bar and stabbed the other participant in the back. For that, he was convicted of assault resulting in serious bodily injury and spent a little over four years in prison.¹¹⁶ As a convicted felon, it was a felony for Johnny to possess any firearm that had ever moved in interstate commerce under 18 U.S.C. section 922(g)(1).¹¹⁷ This statute, in its present form, was enacted in 1968. It must have seemed like a great idea at the time. Even many committed Second Amendment fans would have a hard time arguing against making the loss of firearms possession rights a federally mandated disability of felony conviction. In order to sustain a conviction under the statute, three elements must be proved beyond a reasonable doubt, two of which are status elements, and one of which is possessory. The status elements are the status of the gun as a gun which has a connection to interstate commerce, and

crime for sentencing purposes. See U.S.S.G. § 3D1.2 (1996); GERALD T. MCFADDEN, ET AL., *FEDERAL SENTENCING MANUAL* ¶ 6.05 (1997).

115. Details concerning his prior record were derived from the government's proposed sentencing memorandum. See United States's Proposed Sentencing Memorandum, *United States v. Old Chief* (No. Cr. 94-003-GF-PGH) (D. Mont. 1995) and attachments (on file with author and the *Hastings Law Journal*).

116. Old Chief was out on supervised release only a few months before the Ick's Bar incident, and was bound to go back to prison as a result of this episode under any circumstances. It was beyond contest that Johnny and his companions had been drinking extensively and that he was quite drunk. Since a condition of his supervised release was that he avoid being around alcoholic beverages, Old Chief was found to have violated the conditions and returned to prison for two years on that account. See *United States v. Old Chief*, 121 F.3d 448, 449-52 (9th Cir. 1997).

117. See 18 U.S.C. § 922(g)(1) (1994). Even though Old Chief was an Indian allegedly possessing the firearm on an Indian reservation, and the offense is not covered by 18 U.S.C. section 1153, it is nevertheless within the jurisdiction of the federal courts, because it is a general federal criminal statute of unlimited territorial application. See *United States v. Yannott*, 42 F.3d 999, 1004 (6th Cir. 1994); *United States v. Young*, 936 F.2d 1050, 1055 (9th Cir. 1991).

the status of the defendant as a convicted felon within the meaning of the statute. The possessory element is the possession of the gun by the defendant.

Of course it is possible for a defendant to be charged with this crime alone, and it occasionally happens in circumstances where a convicted felon is discovered in possession of a gun but has committed no other federal crime. However, it is at least as common, especially in the context of the federal role regarding primary criminal jurisdiction on Indian reservations (and also in regard to other areas of federal criminal concern, such as drug trafficking), for the felon-in-possession charge to be combined with other charges regarding some other offense which was the primary reason for the defendant's apprehension. This was, of course, the case with Old Chief.

Now consider again, in this concrete context, what a benefit it is for the government to be blessed with a chargeable predicate felon count in such a case. Ordinarily, Rule 404(a) would prohibit the introduction of a defendant's prior criminal convictions if the defendant did not choose to testify. The rationale has particular force when the previous convictions are for crimes which are of the same kind as the crime now charged. However, assuming nothing is done to divert the system from its normal course, in a case like Old Chief's the prosecution will be allowed to show the jury at least one such conviction, and even if limited to one, the prosecution is free to select the conviction most similar to the other crime or crimes charged. By the early 1990s such a pattern had become quite common and had provoked a constellation of responses among the defense bar, one of which was the tendering of a judicial admission that the defendant was a convicted felon within the meaning of the statute.¹¹⁸

Put yourself in Old Chief's shoes. He is accused of possession of a gun at some time on October 23, and also of using that gun in such a way that it constituted assault upon Calf Looking. The evidence by no means compels a conclusion that he possessed the gun at any time (though a factfinder could so find), or that his use against Calf Looking (if he did have the gun) necessarily constituted an unjustified assault. If the jury is shown his previous conviction for aggravated assault resulting in grievous bodily injury, that may very well be the piece of information that dispels their doubt about his possession

118. See Susan W. Callan, Note, *Inherent Prejudice of a "Felon-in-Possession" of a Firearm Trial: Bifurcation, Stipulation, and Jury Instruction as Effective but Judicially Rejected Remedies*, 28 RUTGERS L.J. 201, 223 (1996).

of the gun at some time during the day, about his possession of it in the fracas with Calf Looking, and about the purpose and intent with which it was discharged. If it were practically inescapable that he had possessed the gun at some time, he could plead guilty to the felon-in-possession count and totally destroy the government's argument for introducing the conviction into evidence. However, he is cursed (perhaps) in having too good a case in regard to the issue of possession of the gun at all. The evidence all comes from witnesses who were drunk at the operative times, and is itself ambiguous and contradictory concerning his possession of the weapon. Gee, he might even be innocent. If he pleads guilty to the felon-in-possession charge, he is guaranteed a return to prison for a period of at least five years even if he is acquitted on the remaining charges. What to do? A judicial admission regarding his status as a convicted felon within the meaning of the statute.

I trust by now it is becoming clear to the reader why, if one is ever going to recognize that it is sometimes serious error to reject a proffered judicial admission, this is the case. The admission is to an element. The element is a status element having no "res gestae" relation to the activities constituting the other elements of that crime or of the other crimes charged. The evidence thus rendered unnecessary also has no such relation, and the invocation of any arguable relevance to commission of the other elements or the other charged crimes clearly violates a specific and categorical rule of exclusion, backed by a policy widely repeated and deeply embraced. This is doubly reinforced in Old Chief's case, since the conviction the prosecution wanted to show the jury was for virtually the same thing as the other crime charged against Old Chief in the current indictment. It is in this context that four members of the Supreme Court wanted to affirm the conviction.

We need not dwell overlong on the dissent. Justice O'Connor's treatment of the defendant's judicial admission as not formally binding seems disingenuous.¹¹⁹ It is true that the Devitt and Blackmar version of the federal model jury instruction, which she cites,¹²⁰ adopts a permissive inference instruction in regard to mutually agreed stipulations in criminal cases.¹²¹ But the Federal Judicial Cen-

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

120. See *id.*

121. See 1 EDWARD J. DEVITT, ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 12.03, at 332-34 (4th ed. 1992).

ter version (which she fails to cite) adopts a mandatory instruction,¹²² and presumably neither binds the Supreme Court of the United States. It is far from clear that a permissive inference instruction is constitutionally mandated in any context,¹²³ and certainly not when a criminal defendant is requesting a mandatory instruction. The supposed policy behind a permissive inference instruction would be, presumably, the protection of the right of the *accused* to a jury determination. Justice O'Connor compounds the problem by stating that a plea of not guilty is a plea of the general issue, and therefore no binding admission can be made to any particular element. Once again, this sterile formalism overlooks the fact that the general issue effect of the not guilty plea was historically thought to be a benefit to the defendant.¹²⁴ Finally, the dissent cites *Ulster County v. Allen* and other cases to the effect that a "device must not undermine the fact-finder's responsibility at trial, based on the evidence adduced, to find the ultimate facts beyond a reasonable doubt."¹²⁵ However, the dissent again fails to note that the quoted language and the cases sprang from claims by *criminal defendants* that the government had invaded the *criminal defendant's* constitutionally protected jury trial and due process rights. To use these statements as if they were statements of symmetrical adversary rights, to clobber a protesting defendant who is attempting to waive whatever rights these doctrines represent as clearly as possible to prevent harm to himself, may make sense to Justice O'Connor, but not to me. Most importantly, Justice O'Connor seems willing to concede that a *mutually agreed* stipulation can prevent the proffer of evidence by the prosecution, even in the face of whatever problems are represented by the permissive inference instruction doctrine.¹²⁶ So presumably, the "partial plea of

122. See HON. THOMAS A. FLANNERY ET AL., FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS (1988). Instruction 12, says that when a fact is stipulated, the jury is to be told, "There is no disagreement over that, so there was no need for evidence by either side on that point. You must accept that as fact, even though nothing more was said about it one way or the other." *Id.* Without Professor Duane's citation to this language, I probably would have missed the collision of sources. See Duane, *supra* note 12, at 410. The only two circuits whose official manuals of pattern instructions dealt with stipulations, the Eighth and the Ninth, adopted the mandatory instruction. See 1 HON. LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS (CRIMINAL) ¶ 5.02, at 5-18 (1997).

123. See *supra* note 14.

124. See Imwinkelried, *supra* note 10, at 355-56.

125. *Old Chief*, 117 S. Ct. at 659 (1997) (O'Connor, J., dissenting).

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

guilty,” which is so foreign to our jurisprudence, is acceptable if the prosecution agrees to it. Functionally, this is no more than saying that the right to a jury trial on every formal issue belongs to the government as well as the defense, and that the government may insist on it under all circumstances.¹²⁷ And this is no more than saying that the government has a plenary right to insist on unnecessary formal proof, even when there is no legitimate probative reason for it and an illegitimate gain to be gotten from it. In the end, this is what the dissent’s position reduces to.

Lurking in the background of the dissent is the fear that the *Old Chief* decision might begin to invade the untrammelled functional discretion of the prosecution to introduce “heartstrings and gore.” The dissenters, unfortunately, probably need not worry. The majority is at extreme pains to separate the “predicate felon” context from all others, at least all others not involving propensity problems.¹²⁸

127. The dissent’s prominent reliance on *Singer v. United States*, 380 U.S. 24 (1965), and Federal Rule of Criminal Procedure 23(a) also seems misplaced. *Singer* upheld the validity of Rule 23(a), allowing the government to insist on a jury trial instead of a bench trial even when the defendant wanted to waive his jury trial right and have a bench trial. See *Singer*, 380 U.S. at 26. Whatever the wisdom of that rule, the result by itself has no real denial of due process implications, since a jury trial on a contested issue meets due process requirements. There is a world of difference between allowing the government to elect a jury over a judge to try contested issues, and allowing it to elect to proffer evidence to a jury on uncontested issues. To extend the language of Rule 23(a) to the latter situation seems more than a stretch.

128. Since the text emphasizes the “half empty” aspects of the majority opinion in *Old Chief*, it should be pointed out that there are significant “half full” aspects as well. First, the majority makes reasonably clear that inartfully worded admissions which can be fairly easily cured cannot automatically be used as an excuse to reject the defendant’s judicial admission. *Old Chief* “offered to stipulate” that he had been convicted of a “crime punishable by imprisonment for a term exceeding one year” and failed to add “and not otherwise falling within any exception allowed by the statute” or some similar language (to cover convictions classified by the state as misdemeanors and punishable by less than two years imprisonment, or certain business crimes). See *Old Chief*, 117 S. Ct. at 648. Nevertheless, the Court did not view this fixable problem as dispositive. See *id.* at 648 n.2. Further, the Court makes abundantly clear that, under Federal Rule of Evidence 403, any reliance on an assumed general absolute right of the prosecution to reject “offers to stipulate” is wrong, at least in relation to propensity evidence. See *id.* at 651-52. Even more important, perhaps, is the general recognition that the availability of equally probative but non-problematical “evidentiary alternatives” is always to be taken into account under Rule 403, see *id.* at 652, though the impact of this is substantially diluted by the parts of the opinion discussed in the text, and by the Court’s functional treatment of the proposed judicial admission as a mere evidentiary admission. See *id.* at 653. The Court stated that *Old Chief*’s offer to stipulate would result in “alternative, relevant, admissible evidence.” *Id.* This move avoided facing the “permissive inference instruction” prob-

Justice Souter offers what can be analyzed as five intertwined justifications for the traditional “plenary discretion” rule in any non-propensity context. In terms so sweeping as to foreclose or discourage more detailed analysis, he says that the prosecution can rely on probable juror expectations to justify introduction of evidence otherwise not analyzably relevant, at least in the face of a proffered judicial admission.¹²⁹ While it is true, as noted previously,¹³⁰ that avoidance of jury speculation under a “two wrongs make a right” principle can provide a justification for much non-inflammatory irrelevant normal context information, that is far removed from the sweeping formulation set out in the opinion. Juries expect to see in large part what we have taught them to expect to see, or what various narrative forms of popular culture suggest is the expected way to tell a story.¹³¹ I read a lot of true crime books, and I too am very disappointed when there are no gory pictures of the body to be compared with pictures of the victim in life. In most cases, I don’t think their absence changes the information on the guilt or innocence of the defendant, however, and I don’t think jurors will either, at least consciously. To the extent they do so unconsciously, we are back to the operative meaning of proof beyond a reasonable doubt. To use these sensational desires and expectations as a general reason to continue practices as usual, especially where technology continues to increase our

lems, at least directly, but it also (perhaps intentionally) deprived the opinion of clarity regarding the alternatives available to both the prosecution and court when an “offer to stipulate” is made. See *id.* at 655 n.10. Where does all this leave the *Molineux*-type propensity cases upon which the circuits are split? See *supra* note 37. It would seem clear that the four dissenters would vote against the *Molineux* principle, with or without an explicit judicial admission. It seems equally clear that the explicit distinction noted in the text was directed primarily toward “heartstrings and gore.” Would all five majority votes hold if presented with a *Molineux*-type case such as *United States v. Hadley*, 918 F.2d 848 (9th Cir. 1990) (discussed *supra* note 37) for instance? I would not like to be forced to bet. However, in January of 1997, the Supreme Court did vacate and remand, supposedly “in light of” *Old Chief*, one *Molineux*-type case in which the defendant had prevailed on appeal based on a *Molineux* violation. See *U.S. v. Crowder*, 87 F.3d 1405 (D.C. Cir. 1996), *rev’d en banc*, 141 F.3d 1202 (D.C. Cir. 1998). On May 1, 1998, the D.C. Circuit, en banc, reversed *Crowder* 7-4. At least one court has contemplated whether the remand should be read as a rejection of the *Molineux* principle. See *United States v. Spence*, 125 F.3d 1192, 1194-95 (8th Cir. 1997).

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

130. See *supra* notes 91-92 and accompanying text.

131. For an examination of those archetypes, see Ben Harrison’s excellent introduction to BEN HARRISON, TRUE CRIME NARRATIVES: AN ANNOTATED BIBLIOGRAPHY at xv-xli (1997).

ability to bring ever more graphic and impactful representations into the courtroom,¹³² strikes me as going much too far, especially when the responsibility for depriving the jury of the “heartstrings and gore” can be placed on the defendant as part of the instructions on any judicial admission.

But the juror expectations argument is probably secondary. In a passage of real eloquence heavily influenced, but hardly dictated, by contemporary narrative theory, Justice Souter intertwines four perhaps more basic rationales. Before commenting, it is only fair to set out the passage completely:

The “fair and legitimate weight” of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of the offense, but tells a colorful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of the shooting that establishes capacity and causation may tell just as much about the triggerman’s motive and intent. Evidence thus has a force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another to prison, as it is for another to hold out conscientiously for acquittal. When a juror’s duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law’s moral underpinnings and a juror’s obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant’s legal fault. *Cf. United States v. Gilliam*¹³³

132. See Curriden, *supra* note 44.

133. *Old Chief*, 117 S. Ct at 653-54. For a discussion of *Gilliam*, see *supra* note 19.

Eloquent, indeed, but unfortunately also falling into the near mystical excess of some contemporary narrative theorists. "Evidence thus has a force beyond any linear scheme of reasoning . . ." Conceding this to be true, whatever it means,¹³⁴ the question is whether the force is legitimate? Justice Souter seems to think so. As noted above, the passage seems to combine elements of four previously met arguments: the evidence keeps the jury awake and engaged, the evidence lays the foundation for them to intuit truths accurately in ways we cannot analyze or describe (at least with confidence), the evidence is necessary to forestall jury nullification, and most importantly, the evidence "tells a story of guiltiness" as much as "supporting an inference of guilt."

As to the first two of these arguments, keeping the jury interested and engaged is a value, but it would seem weak to justify the excesses of our usual "heartstrings and gore" practices. Like the juror expectations argument, it quickly comes closer to bread and circuses (or Christians and lions) than our usual claimed notions of proper judicial procedure would comfortably embrace. As to the notion that it helps intuit accurately the truths the law says it cares about, though we can't say how it works, that mystical formula can be applied to anything, and as such it is globally unpersuasive.¹³⁵

As to anticipation of jury nullification, Justice Souter apparently has no faith that juries will be up to convicting obviously guilty persons without substantial irrelevant and often inflammatory concrete context to establish human significance.¹³⁶ I guess I have more faith

134. This argument appears to be similar to Professor Graham's right brain "psychological relevance." See *supra* note 86. I am perhaps being unfair to Professor Graham, and I can hear him saying, "That isn't what I meant at all." (Another manifestation of the law of unintended consequences, perhaps.) Certainly his pungent observations on many of the cases admitting heartstrings and gore evidence in the supplement to Wright & Graham, *supra* note 72, indicate that he is not a fan of the current general admissibility of such evidence in favor of the prosecution. But, given his notion of psychological relevance, I am not sure what he can say in objection, in any statable, i.e. linear or left brain, way, beyond saying that it just takes the joke too far.

135. Any attempt to argue against this notion will be attacked as the product of a mind that is just too linear. I am reminded of the last line of Wittgenstein's *Tractatus Logico-Philosophicus*: "Whereof one cannot speak, thereof one must be silent." LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 189 (C.K. Ogden ed. and trans., 1949) (1922).

136. I understand the argument that the defendant will inevitably be humanized by the jurors, since they will be in the defendant's physical presence, sometimes for extended periods, and that the system needs a mechanism to communicate parallel humanity for the victims of the charged crime to insure that the jury does not perceive its decision to be

in juries than Justice Souter. More troubling, he seems to embrace the widest possible version of the “anticipation of nullification” argument, that is, he applies it generally as an assumption to the trial of every case. As previously noted,¹³⁷ one would think that the prosecution ought to be required at least to make out some more particular and substantial reason to fear jury nullification in fact, before such an argument would even be entertained.¹³⁸

Those three arguments are, in form, instrumental. If we could finally show that jurors would maintain attention without such evidence, or that it does not affect or decrease factual accuracy of result, or that jurors would do their (rational) duty without such evidence, the arguments would fail. The last argument, however, is normative. It asserts the propriety of telling a story of guiltiness as well as of guilt for its own sake. As such, it would appear to sanction “heartstrings and gore” as an end in itself. Well, perhaps not. In describing what constitutes a “story of guiltiness” Justice Souter concentrates on “an account of what a defendant has thought and done.” Since “heartstrings and gore” usually is not relevant to “what the defendant has thought and done,” at least in the context of pure identity cases (unless you assume the defendant is guilty), perhaps the passage was not directed toward such evidence generally. I wouldn’t bet on this argument, however. The last line of the passage goes on that it is proper to offer evidence “to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant’s legal fault.”¹³⁹ Here is Wigmore’s “legitimate moral force,” and the Eumenides’ ticket of admission in their own right. This, apparently, is the truth we seek. The dissenters need not

one choosing between a human and other merely non-human policies. The current practices that are protected by the quoted language, however, go far beyond anything necessary for such a function. No beginning on restructuring our ideas of proper presentation can occur as long as appellate courts shirk their responsibility to supervise that restructuring by invoking notions of trial court discretion and justify current practice with passages such as the one quoted in the text.

137. See *supra* note 64.

138. Even such a limiting principle is capable of easy abuse, as the prosecution might routinely claim to fear “jury nullification” simply as the result of a (rationally) weak case. The result of such an argument, if accepted, would be to exclude “heartstrings and gore” except in close cases, which would seem the exact opposite of the proper result. A similar circumstance already prevails in some courts where the “probative value” of uncharged misconduct evidence is reinforced by the “need” of the prosecution, so that it comes in *more easily* in close cases. Most courts appear generally to reject this argument. See IMWINKELRIED, *supra* note 11, § 8:17.

139. Old Chief v. United States, 117 S. Ct. 644, 653-54 (1997).

have worried.¹⁴⁰

Which finally brings us back to the McVeigh case, and to the end. The popular conception of the McVeigh trial was that it was a perfect paragon of the way trials should be run, in contrast to the O.J. Simpson trial. For example, Rikki Klieman of Court TV, an experienced and intelligent defense attorney in her own right, continually referred to the prosecution as “poetry in motion” and to the presiding judge as “a judge’s judge.” Citations could be multiplied. I watched numerous panel discussions during the trial, all involving at least some defense attorneys, and each had references to the prosecution’s “brilliant” presentation, especially its beginning the case playing an amplified taped phone call which caught the actual explosion, and the alternation of what I might call the relevant evidence with victims’ relatives called for the sole purpose of establishing the undisputed death of loved ones in the explosion. The fact that Judge Matsch put some solomonic limits on how extensively they could testify in the guilt phase seemed to satisfy everybody. Well, not me. I dissent. However, first let me say that I think the actual evidence against McVeigh was overwhelming, and these public morality play excesses were harmless error. Be that as it may, what if the evidence of McVeigh’s participation had been weaker, the case a closer one in regard to tenable reasonable doubt? How should we regard a conviction then? Would it not be much more defensible if obtained without “heartstrings and gore” evidence irrelevant to the defendant’s participation in the bombing? But, you may counter, he might not have been convicted then. My point exactly.¹⁴¹

140. So the circuits have understood the case. See *United States v. Rezaq*, 134 F.3d 1121, 1137-38 (D.C. Cir. 1998); *Gonzalez v. DeTella*, 127 F.3d 619, 621-22 (7th Cir. 1997). Even felon-in-possession defendants with improperly rejected admissions have not fared well in cases decided after *Old Chief* – three quarters of these appeals have been affirmed on harmless error grounds – only three of twelve have resulted in reversals. For harmless error, see *United States v. Daniel*, 134 F.3d 1259 (6th Cir. 1998); *United States v. Cunningham*, 133 F.3d 1070 (8th Cir. 1998); *United States v. Harris*, 130 F.3d 829 (8th Cir. 1997), *vacated on reh’g* No. 97-1812, 1998 WL 86555 (8th Cir. Mar. 3, 1998); *United States v. Moore*, 129 F.3d 989 (8th Cir. 1997); *United States v. Taylor*, 122 F.3d 685 (8th Cir. 1997); *United States v. Horsman*, 114 F.3d 822 (8th Cir. 1997); *United States v. Armstrong*, 112 F.3d 342 (8th Cir. 1997); *Redding v. United States*, 105 F.3d 1254 (8th Cir. 1997); *LaForce v. United States*, 976 F. Supp. 402 (W.D. Va. 1997) (motion to vacate dismissed). For reversals, see *United States v. Parrish*, No. 96-5756, 1997 WL 650921 (6th Cir. Oct. 16, 1997) (unpublished disposition); *United States v. Hernandez*, 109 F.3d 1450 (9th Cir. 1997); *United States v. Blake*, 107 F.3d 651 (8th Cir. 1997).

141. The trial of Terry Nichols for the Oklahoma City bombing was closer to this situation. In that case, Nichols’ motion in limine did not tender a formal judicial admis-

Appendix 1

Criminal cases between 1905 and 1923 dealing with the effect of formal or practical judicial admission by a criminal defendant:

State v. Lewis, 116 N.W. 606 (Iowa 1908). Defendant hit victim with a pick during an argument at work. Defendant admitted striking deceased in head with pick and wanted to exclude the pick and a portion of deceased's skull showing hole. Evidence properly admitted.

State v. Young, 96 P. 1067 (Or. 1908). Defendant admitted shooting down unarmed victim (whom he suspected of having an affair with his estranged wife) in a barroom "to prevent the felony of adultery." His objection to evidence concerning the nature of the wounds overruled. Court said prosecution is always free to reject admissions. (His claim that the defense of prevention of felony applied in these circumstances was likewise rejected.)

State v. Moore, 102 P. 475 (Kan. 1909). Defendant waylaid his estranged wife on the way home from church and shot her. His defense was temporary insanity. Wife's bloody jacket was introduced and left hanging in view of the jury for "five or six days." No error, State not bound by defendant's admissions.

Williams v. State, 136 S.W. 771 (Tex. Crim. App. 1911). Homicide. The cause of death and nature and position of wounds not being in dispute, error to admit victim's bloody clothes. This is one of the line of Texas cases based on *Cole v. State*, 75 S.W. 527 (Tex. Crim. App. 1903).

Lacoume v. State, 143 S.W. 626 (Tex. Crim. App. 1912). Assault with intent to murder growing out of altercation with policeman. Striking of policeman on head admitted, defense of self defense. Error to admit policeman's bloody clothes since volume of blood on them was irrelevant and they did not show the position of any wounds. Also based on *Cole v. State*.

sion and did not seek to exclude all evidence of the fact of death of each victim, but merely to limit it very narrowly. See generally Nichols' Motion in Limine Concerning Victim Identification Testimony, United States v. Nichols, No. 96-CR-68-M, 1997 WL 677321 (D. Colo. Oct. 24, 1997). Judge Matsch did not grant the motion in the terms sought. However, motivated presumably at least in part by the fact that the case against Nichols was closer than that against McVeigh, Judge Matsch allowed less latitude for heartstrings and gore in the Nichols trial. As Michael Christian of Court TV, who was in the courtroom at both trials, reported on December 2, 1997, Judge Matsch "cut back" substantially on the emotional evidence. Still, plenty was allowed in.

Chapman v. State, 147 S.W. 580 (Tex. Crim. App. 1912). Assault with intent to murder. Defendant admitted that he had shot the victim three times in the back and that each shot produced a grievous wound. It was error to allow physician to use the victim's living body as a prop for illustrating testimony concerning wounds. Another in the *Cole v. State* line of cases.

Corley v. State, 155 S.W. 227 (Tex. Crim. App. 1913). Aggravated assault. Plea of self defense. Since the nature and location of victim's wound was undisputed, it was error to introduce victim's bloody coat. Another *Cole v. State* case.

Commonwealth v. Wendt, 102 A. 27 (Pa. 1917). Defendant shot a police officer in the woods, admitted shooting, and claimed self defense. Prosecution was allowed to put in uncharged misconduct to show motive for the shooting. The court bases its decision on the assertion that the prosecution is not bound by a defense admission, though it could easily have decided as it did without that reasoning.

Dozier v. State, 199 S.W. 287 (Tex. Crim. App. 1917). Murder prosecution. Victim was killed by a single shot in the back. Nature and location of wounds undisputed. Error to allow display of victim's bloody clothes to illustrate testimony, even if they were not formally admitted in evidence. Another *Cole v. State* case.

State v. Stansberry, 166 N.W. 359 (Iowa 1918). Murder trial. Defendant admitted manner of death and nature and location of the wounds, wanted to keep out the bloody clothes of deceased. Court explicitly rejects the Texas cases growing out of *Cole v. State*, finds "no abuse of discretion" in admitting clothes.

State v. Weaver, 166 N.W. 379 (Iowa 1918). Charge was attempted rape of 12-year-old, applied *Molineux* principle, excluded prior incidents to prove intent. This case is factually similar to *State v. Vance*, 94 N.W. 204 (Iowa 1903).

White v. State, 202 S.W. 737 (Tex. Crim. App. 1918). Assault with intent to murder. The nature and extent of stab wounds being undisputed, it was error to exhibit the bloody clothing of the victim to illustrate testimony on the point. Another *Cole v. State* case.

State v. Gilligan, 103 A. 649 (Conn. 1918). Murder by poison. Facts very much like *Molineux*. Uncharged misconduct to prove intent excluded. (No formal admission.)

Alexander v. State, 204 S.W. 644 (Tex. Crim. App. 1918). Defendant charged with bootlegging. He admitted transferring liquor to the investigator, but claimed he only did it as an accommodation to the investigator's instigation (entrapment). Court found that it was

error to allow introduction and display of the sixteen bottles one by one. This is another *Cole v. State* case.

State v. Campbell, 104 A. 653 (Conn. 1918). Defendant charged with perjury in previous criminal case. Prosecution wanted to admit a lot of surrounding testimony (which independently cast defendant in a bad light) to show “materiality” of the asserted perjury. Defendant admitted materiality and stood on the defense of truth. Prosecution not bound by defense admission.

State v. Strum, 169 N.W. 373 (Iowa 1918). *Molineux*-type case. Charge was receiving stolen goods. Defendant denied ever having goods, but admitted that if he ever had the goods, he had them “intentionally and knowingly” as far as their stolen status. Such admission prevents introduction of uncharged misconduct to show intent and knowledge.

State v. Porter, 207 S.W. 774 (Mo. 1918). Court finds that lower court should not have admitted bloody clothes after admission of cause of death and nature of wounds, but concludes that it was harmless error.

State v. Morgan, 176 N.W. 35 (S.D. 1920). Incest case. Defendant admitted knowing that victim was his niece, marrying her, and living together with her under the same roof in an attempt to keep out letters bragging about his relationship. The letters were admitted anyway. The opinion properly distinguished this situation from *State v. Strum*, saying that the admission, though it went pretty far, did not actually admit the intercourse that the letters were introduced to show.

People v. Munday, 127 N.E. 364 (Ill. 1920). Fraud case. Defendant admitted insolvency and knowledge. Uncharged misconduct admitted anyhow. Court generally rejected *Molineux* rationale applied to admissions, and said that State was free to put in its proof.

State v. Kappen, 180 N.W. 307 (Iowa 1920). Chutzpah award case. Charge was possession of burglar’s tools. Defendant denied possession, but admitted that if he possessed them, they were possessed “designedly.” On that basis, the trial court kept out uncharged misconduct evidence, over the prosecution’s objection, but defendant was convicted anyhow. On appeal, he argued that the admission was insufficient to make out the required intent. The court ruled that it was not, but took the occasion to overrule *State v. Strum* and *State v. Weaver*.

People v. Sindici, 201 P. 975 (Cal. Ct. App. 1921). Prosecution for forgery. Defendant admitted forged nature of note, but claimed

he did not sign it and admitted that whoever signed the note was a knowing forger. Prosecution nevertheless proceeded to show defendant's other forgeries to show "intent." Court said prosecution had absolute right to reject such an admission. Case rejected *Molineux* approach in identification cases.

Maddox v. State, 189 N.W. 398 (Neb. 1922). Murder case. Farm hand shot farmer after not being rehired. Defense of insanity. Defendant wanted to exclude all eyewitnesses to the actual shooting, whose testimony was admitted. This would clearly be unjustified, as the quality of his actions during episode was relevant on the issue of insanity. However, the court relied on the flat statement that the prosecution was not bound by the admissions of the defense.

NOTE: The admission of bloody clothes on uncontested issues in Texas was found to be "not ordinarily considered error justifying a reversal" in *Trigg v. State*, 269 S.W. 782, 783 (Tex. Crim. App. 1925). *Cole v. State* has not been cited in a Texas case since 1940.