Note

Maximizing the Min-Max Test: A Proposal To Unify the Framework for Rule 403 Decisions

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In *United States v. Jamil*, evidence expert and Federal District Judge Jack Weinstein was squarely hoisted by his own petard.[1] The Court of Appeals for the Second Circuit applied a test that Weinstein's own treatise helped promote[2] to reverse Judge Weinstein's evidentiary ruling.[3] Using Rule 403 of the Federal Rules of Evidence, Judge Weinstein had suppressed an audio recording of the defendant speaking to some business associates.[4] Rule 403 provides that the trial judge "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[5] In reviewing the decision, the Second Circuit declared that it must "look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect."[6]

This is the min-max test, as propagated in Judge Weinstein and Professor Margaret Berger's treatise on evidence

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1. 707 F.2d 638, 638–39 (2d Cir. 1983).

2. *E.g.*, 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[03] (1975) (Rel. 56-6/96); *see also infra* Part I.D.

3. *Jamil*, 707 F.2d at 642–45.

4. *Id.* at 641.

5. FED. R. EVID. 403.

6. *Jamil*, 707 F.2d at 642.

law.[7] The application of the min-max test has spread to most circuits since *Jamil* but has split into varying manifestations.[8] As this split continues to expand and deepen, the time is ripe for a unification of the treatment of Rule 403 balancing tests. This Note is the first to independently review the application of the min-max test in the federal courts.

Rule 403 has been called the "cornerstone" of the Federal Rules of Evidence[9] and "the trial judge's friend."[10] But some have criticized the rule for the "unbridled discretion" it affords to trial judges.[11] The broad applicability of Rule 403 magnifies its scope; the rule applies to virtually every piece of relevant evidence.[12] The steep threshold for exclusion under Rule 403, juxtaposed with the expansive language of its neighbor, Rule 402,[13] establishes a strong presumption of admissibility.[14] This presumption is consistent with the so-called "liberal thrust" of the Federal Rules of Evidence.[15] Courts and scholars agree that Rule 403 was designed to be used sparingly, as an exceptional remedy for uniquely dangerous or problematic evidence.[16] Yet this same desire for flexibility and facts-driven application mo-

7. *E.g.*, 1 WEINSTEIN & BERGER, *supra* note 2; 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 403.02[2][d] (2d ed. 1997) (Rel. 112-3/2015); *see also* 22A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5221, at 350 n.26 (2d ed. 2005).

8. *See infra* Part I.D.

9. Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used To Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 906 (1988).

10. William O. Bertelsman, *What You Think You Know (but Probably Don't) About the Federal Rules of Evidence: A Little Knowledge Can Be a Dangerous Thing*, 8 N. KY. L. REV. 81, 86 (1981).

11. *E.g.*, 22A WRIGHT & GRAHAM, *supra* note 7, § 5214, at 172 ("[S]ome readers will conclude with us that the Advisory Committee's attempt to structure discretion to check 'unbridled discretion' has failed . . . .").

12. *See infra* Part I.A. The rules do include a narrow exception to Rule 403. Some forms of prior criminal convictions evidence, produced to impeach a witness's character for truthfulness, must be admitted regardless of Rule 403 balancing. FED. R. EVID. 609(a)(2); *see, e.g.*, United States v. Collier, 527 F.3d 695, 700 (8th Cir. 2008) (reaffirming that Rule 403 does not apply to evidence admissible under Rule 609(a)(2)).

13. FED. R. EVID. 402 ("Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court.").

14. *See, e.g.*, United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979).

15. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988).

16. *E.g.*, United States v. Stone, 702 F.2d 1333, 1340 (11th Cir. 1983); United States v. McRae, 593 F.2d at 707; Imwinkelried, *supra* note 9.

tivated the courts to impose only abuse of discretion review for evidentiary decisions, including those based on Rule 403.[17] Abuse of discretion is a highly deferential standard of review by which the appellate court will uphold the trial judge's decision unless it was clearly abusive, irrational, or arbitrary.[18]

Thus, Rule 403 embodies two discrete interests in evidentiary law: a liberal presumption of admissibility and a broad deference to trial court discretion. When the trial court declines to exclude evidence under Rule 403, these interests are in harmony. In the eyes of the reviewing appellate court, the presumption of admissibility and deferential abuse of discretion review both lead to the same result: affirming the ruling.[19] When the trial judge employs Rule 403 to exclude evidence, however, these interests may clash.[20] Judges who apply their discretion to overstep the boundaries of Rule 403 may be shielded from reversal by the forgiving standard of review.[21] When Rule 403 is employed to exclude evidence, which interest should win out?

This Note posits that, when they conflict, Rule 403's presumption of admissibility should trump deference to discretion. Further, the best way to achieve that aim is through universal and unequivocal adoption of the min-max test, the application of which is fragmented and variable under the status quo. Part I introduces Rule 403, its competing interests, and the circuit split surrounding the min-max test. Part II critiques trial court discretion as implicated by Rule 403 and identifies the circumstances in which deference to discretion clashes against the presumption of admissibility. Part III isolates the min-max test's role in resolving the internal tension of Rule 403 decisions. It concludes that Rule 403 ought to be amended to expressly incorporate the min-max test, such that it governs decision-making at both the trial and appellate levels. A universal and explicit application of the min-max test would strike the

17. 22A WRIGHT & GRAHAM, *supra* note 7, § 5212, at 149–52; *see also* United States v. Abel, 469 U.S. 45, 54 (1984); Spring Co. v. Edgar, 99 U.S. 645, 658 (1878).

18. *E.g.*, United States v. Kelley, 305 F. App'x 707, 707 (2d Cir. 2009) (citing United States v. Salameh, 152 F.3d 88, 110 (2d Cir. 1998)).

19. *See infra* Part II.B.

20. *See* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 413 (1989).

21. *See* United States v. Mehanna, 735 F.3d 32, 59 (1st Cir. 2013) (describing abuse of discretion review as permitting reversal "[o]nly rarely—and in extraordinarily compelling circumstances").

most favorable balance between the competing interests of admissibility and deference in the application of Rule 403.

I. RULE 403 IN PRINCIPLE

Rule 403 of the Federal Rules of Evidence serves as a broadly applicable method by which a trial judge may exclude relevant evidence. While its lopsided balancing test creates a strong presumption of admissibility, the abuse of discretion standard of review for evidentiary decisions operates to protect most trial judge evidentiary decisions from appellate reversal. To reconcile these interests, most circuits have applied some variation of Weinstein and Berger's min-max test. Section A surveys the relevance rules of the Federal Rules of Evidence and outlines the elements of Rule 403. Section B describes Rule 403's strong presumption of admissibility and the policies underlying it. Section C similarly examines the deference associated with abuse of discretion review for Rule 403 decisions. Finally, Section D introduces the min-max test, its history, and the circuit split in its application.

A. THE RELEVANCE RULES

The Federal Rules of Evidence dramatically simplified evidence law in the United States. The Rules were drafted over the course of eleven years, from 1961 to 1972, by a committee appointed by Chief Justice Earl Warren of the Supreme Court.[22] Intended to provide for prompt and economic ascertainment of truth,[23] the rules "deemphasize technical objections to admissibility and emphasize the discretion of the trial judge."[24] The drafters succeeded in reducing "what eventually took Wigmore nine volumes of text . . . to what Chairman [of the Advisory Committee Albert] Jenner called 'a handy pamphlet.'"[25]

This scaling back reduced the relevance requirement to a mere handful of rules.[26] Rule 401 broadly defines relevant evi-

22. *See* Bertelsman, *supra* note 10, at 85; *see also* 21 WRIGHT & GRAHAM, *supra* note 7, § 5006, at 171.

23. FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

24. Bertelsman, *supra* note 10.

25. Mengler, *supra* note 20, at 427.

26. FED. R. EVID. 401–415.

dence as evidence having "any tendency to make a fact more or less probable than it would be without the evidence" when the fact is "of consequence in determining the action."[27] Rule 402 declares that relevant evidence is admissible unless the rules or governing law specifies otherwise.[28] These two rules create a simple presumption of admissibility for relevant evidence, displacing those doctrines, such as remoteness and collateralness, which permitted exclusion of evidence that was only loosely attached to a fact at issue.[29]

Rule 403 and the rest of the relevance rules temper the broad definition of relevant evidence by identifying circumstances in which the disproportionate risk or disadvantage of a piece of evidence merit its exclusion. Rule 403 is the most widely applicable of these relevance exclusions and encapsulates the main purposes of evidence law by weighing the right of a party to make proof against the interests of fairness and economy.[30] The remaining relevancy rules, often called the special relevance rules, address a set of narrow circumstances for balancing probative value and prejudice. Rule 404, for example, issues a blanket prohibition on evidence of a person's character or personality trait when offered to prove action in accordance with that trait.[31] The reasoning behind the rule is that a jury tends to give character evidence more weight than it deserves, such that the evidence is usually too prejudicial to justify its minimal probative weight.[32] Thus, the federal rules preempt the 403 balancing that a trial judge might otherwise conduct for character evidence; outside a narrow set of exceptions, the rules assume that the balance requires the exclusion of character evidence.

27. FED. R. EVID. 401.

28. FED. R. EVID. 402.

29. *See* Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 262–65 (1976).

30. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). *See generally* 22A WRIGHT & GRAHAM, *supra* note 7, §§ 5212–5213 (describing the policy and scope of Rule 403).

31. FED. R. EVID. 404.

32. *Id.* at advisory committee's notes ("Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion." (citation omitted)).

Unlike the special relevance rules, Rule 403 applies to every piece of evidence, with the idiosyncratic exception of evidence of a witness's prior crimes involving dishonesty.[33] Rule 403 spells out a complex balancing test with a weighted scale.[34]

On one side of the scale, the judge must place the probative value of the evidence, a measure that goes beyond mere relevance.[35] In a broad sense, probative value is a measure of the worth of the evidence to its proponent; probative value encompasses the evidence's tendency to support or undermine a material fact, but also accounts for the importance of that fact to the proponent's case.[36] Additional considerations along this side of the scale include the availability of alternative evidence of the same fact[37] and the persuasiveness or strength of the evidence.[38]

On the opposite side of the scale, the trial judge must place the disadvantages of the proposed evidence: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.[39] These six factors could be divided into two categories: evidence that suggests the wrong conclusion (because of the "danger" of prejudice, confusion, or misleading the jury), and evidence that misuses the court's time (because of "considerations" of time waste, delay, or unnecessarily cumulative evidence).[40] Because neither party has too significant of a stake in the exclusion of overly cumulative or time-consuming evidence, most strongly disputed

33. FED. R. EVID. 609(a)(2).

34. *See* 22A WRIGHT & GRAHAM, *supra* note 7, § 5214, at 169 ("[T]he proper balancing requires thought. If the lawyers do not work their way through this complexity, the judge will probably not master it on his own.").

35. *See* Dolan, *supra* note 29, at 233.

36. *Id.*

37. *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 174, 183–84 (1997); 22A WRIGHT & GRAHAM, *supra* note 7, § 5214, at 170.

38. While the trial judge should not weigh the credibility of witnesses when making a Rule 403 decision, Imwinkelried, *supra* note 9, at 884–89, immediate impressions about the strength of the evidence unavoidably contribute to the measure of its probative worth, *see* 22A WRIGHT & GRAHAM, *supra* note 7, § 5214, at 168–69.

39. FED. R. EVID. 403.

40. *See* 22A WRIGHT & GRAHAM, *supra* note 7, § 5211, at 138–39. In fact, the earliest version of Rule 403 was bifurcated along these lines. *See id.*

Rule 403 decisions turn on a balance of prejudice, confusion, or tendency to mislead against probative value.[41]

To briefly sketch the outlines of each of these dangers, prejudice might be defined as a general tendency to suggest decision on an improper basis, such as bias, inferential misstep, or emotion.[42] Confusion of issues results when the inferential path from the evidence to a permissible and relevant conclusion is bizarre or attenuated.[43] Finally, evidence with a tendency to mislead the jury could be described as evidence that is "seductively persuasive," inviting greater weight than it is reasonably due.[44] These three factors are different flavors of the same concern, though, and are often lumped together by the courts.[45] Further, defining prejudice is inherently difficult because Rule 403 is designed to be applied flexibly to unexpected sources and forms of challenging evidence.[46] For the purposes of this Note, "prejudice" as measured in the min-max test will be considered to encompass the dangers of unfair prejudice, confusing the issues, or misleading the jury.

When a judge considers the weight of the prejudice side of the Rule 403 balance, she attempts to peek into the mind of the juror, to anticipate improper inferences or decisions that might result from exposure to the disputed evidence.[47] The judge considers the demographics of the jury and their answers to voir dire questions to anticipate any prejudices or biases that the proposed evidence could trigger.[48] The judge must then estimate the likelihood that the jury will draw an improper inference from the evidence, as well as the degree of damage that such an inference would inflict upon the party asserting prejudice.[49] Finally, Rule 403's advisory notes encourage the trial

41. *Cf. id.* § 5218, at 317 ("The Advisory Committee's policy supports giving lesser weight to the 'considerations' than to the 'dangers.' The 'dangers' threaten the integrity of the court's factfinding while the 'considerations' only impair its efficiency.").

42. *See* Victor J. Gold, *Limiting Judicial Discretion To Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 63 (1984).

43. *See* Dolan, *supra* note 29, at 241–42.

44. *Id.* at 242.

45. *See id.* at 240–42.

46. *See id.* at 239–40 ("It would be a mistake . . . to compartmentalize one's thinking about prejudice. Counsel have shown extraordinary skill in conjuring up new ways to smear the opponent or to present themselves as 'widows and orphans.'" (citation omitted)).

47. *See* 22A WRIGHT & GRAHAM, *supra* note 7, § 5214, at 170.

48. *See id.*

49. *See* Gold, *supra* note 42, at 84.

judge to consider whether a special jury instruction might mitigate the perceived prejudicial risk of the evidence.[50] After evaluating factors on each side, the judge must determine whether the prejudice outweighs the probative value and, if so, whether the disparity may be properly characterized as "substantial."[51] Even if the prejudicial impact substantially outweighs the probative value, the trial judge retains the discretion to admit the evidence anyway.[52]

B. THE PRESUMPTION OF ADMISSIBILITY

The presumption of admissibility is apparent from the plain language of Rule 403 and from the realities of the weighted balancing test. That the prejudicial impact outweighs the probative value of a piece of evidence is not enough to render it excludable. The prejudicial impact must be *unfair*, and it must *substantially* outweigh the probative value.[53] The trial judge has discretion to exclude the evidence *only* if it fails to meet a balancing test that is pre-weighted towards admissibility.[54] For this reason, courts have regarded the rule as providing an "extraordinary" remedy to be used "sparingly."[55]

Several pragmatic interests underlie the inclusion of such a strong presumption of admissibility in Rule 403. The rule is meant to address the unique circumstance where evidence is dangerous in some way that has not been specifically addressed or anticipated by the drafters, or where evidence "of scant or cumulative probative force [is] dragged in by the heels for the sake of its prejudicial effect."[56] In this way, Rule 403 operates like a catch-all: the other rules of evidence should adequately address most evidence that a party could seek to admit, but Rule 403 covers the wild cards. In *Commonwealth v. Serge*, for

50. FED. R. EVID. 403 advisory committee's notes.

51. FED. R. EVID. 403.

52. *Id.* ("The court *may* exclude relevant evidence . . . ." (emphasis added)); *see also* Dolan, *supra* note 29, at 232. This discretion, of course, has boundaries. *See infra* Part I.C.

53. FED. R. EVID. 403; *see also* United States v. Long, 574 F.2d 761, 767 (3d Cir. 1978).

54. *E.g.*, Dolan, *supra* note 29, at 232.

55. United States v. Joseph, 530 F. App'x 911, 922 (11th Cir. 2013) ("The mere fact that evidence will damage the defendant's case is not enough. The evidence must be unfairly prejudicial."); *see also, e.g.*, PBM Prods., L.L.C. v. Mead Johnson & Co., 639 F.3d 111, 124 (4th Cir. 2011) (commenting on the rarity of the usage of the remedy, which Congress intended); Imwinkelried, *supra* note 9.

56. United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979).

example, the Supreme Court of Pennsylvania applied a state evidence rule modeled on Rule 403 to evaluate the admissibility of a computer-generated reenactment, something that the drafters of the rule had little reason to anticipate.[57] Applying Rule 403 to this novel courtroom technology, the court determined that the animation was admissible.[58] Because Rule 403's weighing mechanism encapsulates the essential aim of the federal rules, to preserve maximum admissibility while avoiding undue prejudice to parties, courts can apply Rule 403 to novel or otherwise challenging evidence that the federal rules did not otherwise anticipate.[59]

Additionally, the U.S. Supreme Court has cited the protection of narrative integrity as a reason to preserve highest possible admissibility in Rule 403 decisions.[60] Narrative integrity is a party's freedom to tell an entire story at trial without conspicuous gaps or omissions that could arouse the suspicion of the jury.[61] The interest of preserving narrative integrity can give a piece of evidence "force beyond any linear scheme of reasoning."[62]

Finally, the presumption of admissibility demonstrates trust that the jury is capable of overcoming certain degrees of prejudice. As one California judge said in the context of admission of gruesome photos under Rule 403, "[M]any . . . tend to underestimate the stability of the jury. A juror is not some kind of a dithering nincompoop . . . exposed to the harsh realities of life for the first time in the jury box."[63] The Federal Rules of Evidence as a whole tend to put more evidence before the jury than the common law did, and Rule 403 embodies that tendency.

57. 896 A.2d 1170, 1182–87 (Pa. 2006). The Pennsylvania Rules of Evidence, like many state schemes, borrow extensively from the federal rules. *See, e.g.*, Grady v. Frito Lay, Inc., 839 A.2d 1038, 1051 (Pa. 2003).

58. *See Serge*, 896 A.2d at 1187.

59. *See* 22A WRIGHT & GRAHAM, *supra* note 7, § 5212, at 154–59.

60. Old Chief v. United States, 519 U.S. 172, 187–89 (1997).

61. *See id.*

62. *Id.* at 187.

63. People v. Long, 113 Cal. Rptr. 530, 536 (Ct. App. 1974). *But see* Dolan, *supra* note 29, at 226 ("The misdecision goal [of Rule 403] recognizes that judges must deal with the inevitable biases of jurors against classes of people, particular phenomena, and the like.").

C. THE PRINCIPLE OF DEFERENCE TO DISCRETION

Appellate courts have applied abuse of discretion review to evidentiary rulings since long before the Federal Rules of Evidence.[64] In theory and practice, abuse of discretion is a highly deferential standard; Judge Maurice Rosenberg has characterized judicial discretion as "a right to be wrong without incurring reversal."[65] Even when the reviewing court disagrees with the outcome of the trial court's balancing, it must affirm unless it determines that the trial judge has acted irrationally or arbitrarily.[66] One state court, applying a parallel rule, went as far as to hold that the appellate court must find the trial judge manifestly unreasonable in order to reverse a Rule 403 decision.[67] Generally, an appellate court will overturn the trial court's Rule 403 decision "[o]nly rarely—in extraordinarily compelling circumstances."[68] An empirical study comparing appellate reversal rates based on several factors, including the standard of review, found that the application of one or more deferential standards (in this study, abuse of discretion and/or clear error) caused the reversal rate to drop from 31% to 14–22%.[69] The high deference of the abuse of discretion review will usually provide adequate grounds for appellate affirmation of Rule 403 decisions.

Employing a deferential standard of review for evidentiary rulings serves several purposes. First, it preserves judicial economy. A trial judge might make hundreds of evidentiary rulings before and during a trial, and stringent review of those decisions would impose a significant burden on judicial re-

64. *See* Spring Co. v. Edgar, 99 U.S. 645, 658 (1878) ("Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous.").

65. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1970).

66. *E.g.*, United States v. Salameh, 152 F.3d 88, 110 (2d Cir. 1998).

67. State v. Martin, 699 P.2d 486, 490 (Kan. 1985) ("Judicial discretion is abused when judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only when no reasonable person would take the view adopted by the trial court. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.").

68. United States v. Devin, 918 F.2d 280, 286–87 (1st Cir. 1990) ("[Rule 403] determinations are, within wide parameters, grist for the trial judge's mill.").

69. Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 24–25.

sources.[70] Further, rigorous review of evidence decisions would necessitate promulgating rules with more detailed guidance for the trial judge, and thus more hair-splitting than the federal rules' "handy pamphlet" approach allows.[71] Second, the trial judge faces the difficult prospect of making on-the-spot decisions that comport with the unique circumstances of the case. The appellate court, viewing only the cold record, would struggle to put itself precisely into the shoes of the trial court at the time of that decision.[72] In addition, trial judges may be better prepared to make these decisions than appellate judges, because they conduct trials on a regular basis.[73] Finally, the lower rates of reversal from deferential review preserve institutional legitimacy, morale among lower court judges, and a sense of finality for litigants.[74]

D. THE MIN-MAX TEST CIRCUIT SPLIT

Judge Weinstein and Professor Berger's treatise is frequently cited as support for the Rule 403 min-max test, which requires that evidence be viewed "in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect."[75] The min-max test's bias toward admission "results from the general thrust of the federal rules in favor of admissibility."[76]

The min-max test is, or has been, applied in most circuits, but significant variations have emerged in two areas. The first area of variation is at the appellate level: whether the test is

70. *See* Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 29 (1994).

71. Mengler, *supra* note 20, at 427. *Compare id.*, *with* Anderson, *supra* note 69, at 46 ("The cost of formulating detailed rules about procedural and evidentiary matters exceeds the benefit, so deference here is a form of rational abstention."), *and Proposed Rules of Evidence: Hearings Before the Subcomm. on Reform of Federal Criminal Laws of the H. Comm. on the Judiciary*, 93d Cong. 91 (1973) (statement of Edward W. Cleary, Advisory Comm. on Rules of Evidence, Judicial Conf. of the U.S.) ("Style would strike a middle course between vague generalities and constricting particularity . . . .").

72. *See* Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384 (2008); *Devin*, 918 F.2d at 286–87; Mengler, *supra* note 20, at 414.

73. *See* Kunsch, *supra* note 70, at 19–20; *see also* United States v. Long, 574 F.2d 761, 767 (3d Cir. 1978).

74. *See* Kunsch, *supra* note 70, at 19–20.

75. *E.g.*, United States v. Brady, 595 F.2d 359, 361 (6th Cir. 1979) (citing 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 403(03) (1977)).

76. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL STUDENT EDITION § 6.02[2], at 6-23 (9th ed. 2011); *see also* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988).

applied to evaluate Rule 403 exclusions *in addition to* admissions. A minority of circuit courts of appeals has only applied the min-max test when reviewing decisions to admit evidence, while most circuits also apply the test when reviewing Rule 403 exclusions. The second source of variation is which courts are bound to apply the test. A minority of circuits explicitly binds district courts, as well as appellate courts, to the min-max test, while the majority of circuits applies the test only in appellate review. The circuit split on both of these dimensions deepens as time goes on, creating a different version of Rule 403 in each circuit. The interests of unity in application of the Federal Rules of Evidence favor resolving this split before the gap widens further.

1. Recognition of the Min-Max Test

Four circuits have never applied the min-max rule to Rule 403 decisions. The Courts of Appeals for the First,[77] Eighth,[78] and Ninth[79] Circuits have not applied the min-max test in any capacity. They employ no built-in minimums or maximums in the weighing test, and evaluate the evidence by weighing an estimation of the probative value against an estimation of the prejudicial impact.[80] The Third Circuit is fairly unusual among federal circuits in that it has applied an alternative to the min-max test, which one might describe as a "middle-max" test.[81] The middle-max test "places on one side [of the equation] the maximum reasonable probative force for the offered evidence," and on the other side of the equation, "the *likely* prejudicial impact of the evidence."[82] This test places less emphasis on the presumption of admissibility, because it affords the foreseeable prejudicial impact of the evidence greater weight in the balancing test than the min-max test would. The Third Circuit has

77. *E.g.*, Espeaignnette v. Gene Tierney Co., 43 F.3d 1, 8 (1st Cir. 1994) ("The question is not whether we would strike the balance differently in the first instance, but whether the balance actually struck is so egregiously one-sided that it requires reversal.").

78. *E.g.*, United States v. Counce, 445 F.3d 1016, 1018 (8th Cir. 2006) (applying a simple abuse of discretion review to uphold the lower court's exclusion of relevant evidence under Rule 403).

79. *E.g.*, United States v. Wiggan, 700 F.3d 1204, 1210 (9th Cir. 2012) (citing United States v. Hankey, 203 F.3d 1160 (9th Cir. 2000)) (reviewing the lower court's Rule 403 weighing with "considerable deference").

80. *See supra* notes 77–79 and accompanying text.

81. Coleman v. Home Depot, Inc., 306 F.3d 1333, 1344 (3d Cir. 2002).

82. *Id.* (emphasis added in first) (citing FEDERAL RULES OF EVIDENCE MANUAL 242 (Stephen A. Saltzburg et al. eds., 7th ed. 1998)).

only applied this test in one case, however, so the middle-max test is more an intellectual curiosity than a circuit-wide precedent.[83]

The remaining circuits—the Second, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh—have applied the min-max test in at least some circumstances.[84] The District of Columbia and Federal Circuit both have applied the min-max test, but not in recent years.[85]

The history of the min-max test as applied in the federal courts begins in the Sixth Circuit, with *United States v. Green*.[86] In *Green*, the Sixth Circuit considered a trial court's admission of expert testimony in a drug manufacturing conspiracy trial. The government had offered, and the trial judge admitted, expert testimony of the hallucinogenic and psychological effects of the controlled substance that the defendant was charged with producing.[87] On appeal, the Sixth Circuit resolved to "follow the 'better approach' recommended by United States District Judge Jack B. Weinstein and Professor Margaret A. Berger in their treatise" and "tip the scales in favor of the proponent of the evidence by seeking to maximize its legitimate bearing upon the issues while minimizing its potentially abusive overtones."[88] The Sixth Circuit concluded that the trial court abused its discretion by admitting testimony on the "bizarre physiological effects" of the drug because the testimony "did not tend to prove a conspiracy charge" and "could only serve to prejudice the jury."[89]

The Sixth Circuit reiterated the importance of the min-max test by applying it again in *United States v. Brady*, citing to

83. *See id.*

84. *E.g.*, United States v. Lopez, 649 F.3d 1222, 1247 (11th Cir. 2011); Shepard v. Dallas Cty., 591 F.3d 445, 457 (5th Cir. 2009); Deters v. Equifax Credit Info. Servs., 202 F.3d 1262, 1274 (10th Cir. 2000); United States v. Russell, 971 F.2d 1098, 1106 (4th Cir. 1999); United States v. Rubin, 37 F.2d 49, 53 (2d Cir. 1994); United States v. Moore, 917 F.2d 215, 233 (6th Cir. 1990); United States v. Khorrami, 895 F.2d 1186, 1194 (7th Cir. 1990).

85. *See* Abbott Labs. v. Brennan, 952 F.2d 1346, 1352 (Fed. Cir. 1991) (applying the min-max test to uphold lower court's exclusion); United States v. Moore, 732 F.2d 983, 989 (D.C. Cir. 1984) (applying the min-max test to uphold lower court's admission); United States v. Day, 591 F.2d 861, 878–79 (D.C. Cir. 1978) (applying the min-max test to reverse lower court's exclusion).

86. 548 F.2d 1261, 1268–70 (6th Cir. 1977).

87. *See id.*

88. *Id.* at 1268.

89. *Id.* at 1269.

Green and Weinstein in the opinion.[90] From the early Sixth Circuit adoption, the min-max test slowly spread to most of the other circuits. Several courts adopted the test by citing to *Brady*,[91] while others cited to Weinstein directly.[92] Most circuits recognize and apply the min-max test, but the application of the test varies in two ways: direction of ruling and level of court.

2. Direction of the Ruling

The first variation among circuits that apply the min-max test is the *direction* in which they apply it to review district court decisions. This variation comes to play only at the appellate level, after a trial judge has issued a ruling on a Rule 403 objection. Among the circuits that apply the min-max test, a minority has never applied the test to review a lower court's decision to exclude evidence. This minority consists of the Seventh Circuit and, probably, the Fourth Circuit. Though the Seventh Circuit employs the min-max test in review of challenged Rule 403 admissions,[93] it has not applied the test to review challenged Rule 403 exclusions.[94] The Fourth Circuit has only very recently applied the min-max test to exclusions.[95] Reluctance to apply the test to exclusions is perhaps understandable, as the min-max test necessarily minimizes the likelihood that the balancing will support exclusion. This creates tension

90. 595 F.2d 359, 361 (6th Cir. 1979).

91. *See* United States v. Russell, 971 F.2d 1098, 1106 (4th Cir. 1992); United States v. Finestone, 816 F.2d 583, 585 (11th Cir. 1987); United States v. Jamil, 707 F.2d 638, 642 (2d Cir. 1983); United States v. Brown, 688 F.2d 1112, 1117 (7th Cir. 1982).

92. *See* United States v. Moore, 917 F.2d 215, 233 (6th Cir. 1990); K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148, 1155 n.9 (10th Cir. 1985); F & S Offshore, Inc. v. K. O. Castings, Inc., 662 F.2d 1104, 1107–08 (5th Cir. 1981); United States v. Day, 591 F.2d 861, 878–79 (D.C. Cir. 1978).

93. *E.g.*, United States v. O'Brien, No. 92-2451, 1993 WL 288371, at *2 (7th Cir. July 29, 1993).

94. *E.g.*, McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1559 (7th Cir. 1987) ("Where as [sic] here the judge explains the reasoning process behind his exclusions, they will rarely be overturned.").

95. Until 2013, the Fourth Circuit applied the min-max test as its "deferential review of Rule 403 *admissions*." United States v. Nwanze, No. 92-5415, 1993 WL 375787, at *3 (4th Cir. Sept. 24, 1993) (emphasis added). In *E.I. DuPont De Nemours & Co. v. Kolon Industries*, 564 F. App'x 710 (4th Cir. 2013), however, the circuit considered the minimum prejudicial effect of the proposed evidence to reverse an exclusion. *Id.* at 715. It is too soon to tell on which side of the split the Fourth Circuit belongs.

with the abuse of discretion standard of review, which will be explored below.[96]

The majority of federal circuit courts of appeals applying the min-max test uses it to review district court Rule 403 decisions in either direction. The Second,[97] Fifth,[98] Sixth,[99] Tenth,[100] and Eleventh[101] Circuits have applied the min-max test in Rule 403 review of both exclusions and admissions by the lower court. Interestingly, the Third Circuit's sole application of the middle-max test was in review of a Rule 403 exclusion.[102] At the appellate level, a small minority of min-max circuits has yet to apply the test to review lower court exclusions.

3. Level of Application

A few circuits have specifically identified the min-max test as a duty of the trial court as well as the appellate court. This trial and appellate application split emerged more recently and is likely to continue developing. The Tenth Circuit was the first to split. In *Deters v. Equifax Credit Information Services*, the circuit held that, because "the district court is clearly in a superior position to perform [the min-max test]," the appellate court would afford it broad discretion in that decision.[103] The Fourth Circuit has cited *Deters* to hold that "[w]hen a *district court*

96. *See infra* Part II.B.2.

97. United States v. Rubin, 37 F.3d 49, 53 (2d Cir. 1994) (applying the min-max test to uphold lower court's admission); United States v. Jamil, 707 F.2d 638, 642 (2d Cir. 1983) (applying the min-max test to reverse lower court's exclusion).

98. Shepard v. Dallas Cty., 591 F.3d 445, 457 (5th Cir. 2009) (applying the min-max test to uphold lower court's admission); United States v. Schmidt, 711 F.2d 595, 599 (5th Cir. 1983) (applying the min-max test to uphold lower court's exclusion).

99. United States v. Moore, 917 F.2d 215, 233 (6th Cir. 1990) (applying the min-max test to uphold lower court's exclusion); Finch v. Monumental Life Ins. Co., 820 F.2d 1426, 1432 (6th Cir. 1987) (applying the min-max test to uphold lower court's admission).

100. United States v. Roberts, 417 F. App'x 812, 820–21 (10th Cir. 2011) (applying the min-max test to uphold lower court's admission); SEC v. Peters, 978 F.2d 1162, 1171 (10th Cir. 1992) (applying the min-max test to reverse lower court's exclusion).

101. Aycock v. R.J. Reynolds Tobacco Co., 769 F.3d 1063, 1066 (11th Cir. 2014) (applying the min-max test to reverse lower court's exclusion); United States v. Dodds, 347 F.3d 893, 897 (11th Cir. 2003) (applying the min-max test to uphold lower court's admission).

102. Coleman v. Home Depot, Inc., 306 F.3d 1333, 1344 (3d Cir. 2002) (applying the middle-max test to uphold lower court's exclusion).

103. 202 F.3d 1262, 1274 (10th Cir. 2000) (citing 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[3], at 403-25 to 403-26 (1982)).

conducts a Rule 403 balancing exercise, ordinarily it should 'give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.'"[104] The Eleventh Circuit has also recently extended the min-max test to bind district courts as well as appellate courts.[105] District courts in the Sixth,[106] Tenth,[107] and Eleventh[108] Circuits have followed this appellate guidance and applied the min-max rule. It should be noted that trial court application of the min-max test might be less apparent than appellate application, because trial courts are not bound to address Rule 403 issues in a written opinion.[109]

Disparate federal application of the min-max test has created a multilayered circuit split. Circuit approaches range from not applying the test at all (such as in the First Circuit) to compelling application in both directions by both the trial and appellate judges (such as in the Tenth Circuit). In the following Part, these different approaches will be juxtaposed against the dueling interests of Rule 403 balancing: admissibility and discretion.

II. RULE 403 IN APPLICATION

Strong policy considerations undergird both the presumption of admissibility and the deferential standard of review for Rule 403 decisions. When appellate courts review trial court decisions to exclude evidence under Rule 403, however, these dual interests can clash. When an appellate judge must choose between the strong presumption of admissibility and the deferential standard of review, which interest should win out? This Part begins to answer that question.

Section A of this Part critiques the merits of deference to discretion when applied to Rule 403 decisions, especially deci-

104. E.I. DuPont De Nemours & Co. v. Kolon Indus., 564 F. App'x 710, 715 (4th Cir. 2013) (emphasis added).

105. United States v. Lopez, 649 F.3d 1222, 1247 (11th Cir. 2011) ("Rule 403 requires a court to 'look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact.'").

106. Donathan v. Orthopaedix & Sports Med. Clinic, P.L.L.C., No. 4:07-CV-18, 2009 WL 3584263, at *2 (E.D. Tenn. Oct. 26, 2009) (citing *Deters* in application of the min-max test); *see also* United States v. Sain, No. 07-20309, 2009 WL 136910, at *2 (E.D. Mich. Jan. 16, 2009).

107. *See* Peshlakai v. Ruiz, No. CIV 13-0752 JB/ACT, 2014 WL 4104674, at *50 (D.N.M. Aug. 8, 2014).

108. *See* Ostrow v. GlobeCast Am. Inc., 825 F. Supp. 2d 1267, 1274 (S.D. Fla. 2011).

109. *See* 22A WRIGHT & GRAHAM, *supra* note 7, § 5224.1, at 387–89.

sions to exclude evidence. The inherent subjectivity of Rule 403 decisions, the right to a trial by jury, and a comparative lack of informational asymmetry all counsel against excessive deference to trial court discretion in Rule 403 decisions. Section B describes how the decisional structure of appellate review can cause the two interests of Rule 403 to clash; an appellate court reviewing a lower court's decision to exclude evidence under Rule 403 may find itself forced to choose between deferring to appropriate trial judge discretion and upholding the strong presumption of admissibility.

A. A CRITICAL ANALYSIS OF DEFERENCE TO DISCRETION IN RULE 403 DECISIONS

Rule 403's breadth, the complexity of its weighing test, and the vague language of the rule can run counter to the advantages of abuse of discretion review, especially when the rule is employed to exclude evidence. The balancing of Rule 403 factors depends on a multitude of subjective impressions. These subjective factors cloud the Rule 403 balancing test. Further, a deferential standard protecting against unwarranted exclusion of relevant evidence could encroach on the parties' constitutional right to trial by jury. Finally, evidentiary decisions may not give rise to the kind of informational asymmetry that necessitates highly deferential review.

1. Subjectivity in the Rule 403 Balancing Test

Rule 403's complex balancing test involves a collection of factors that are vaguely defined and dependent upon subjective estimations. Commentary suggests that the language of some Federal Rules of Evidence is so "amorphous" that appellate judges struggle to evaluate lower court decisions on their merits; the broad language of the rule could be applied to support almost any result.[110] The more vaguely defined and experience-dependent the weighing factors of a test, the more reasonable minds could differ and the more likely it is that abuse of discretion review is too deferential for the purposes of evidence law.

110. *See id.* § 5212, at 149–54; *cf.* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE § 93 (2d ed. 1994) (noting that trial judges have broad discretion in weighing these factors).

The Rule 403 balancing test is hardly simple,[111] and as one California court put it, "[p]robative value and prejudice . . . are not commodities subject to quantitative measurement."[112]

a. Estimating Probative Value

Measuring probative value might seem like a simple task, but closer examination reveals that it is more complex. To determine the probative value of a piece of evidence, the trial judge must evaluate how well the proffered evidence supports a material fact and the importance of that fact to the central issues of the case.[113] How does a judge decide how important a piece of evidence is to the proponent's case, especially if the trial is far from over? Surely she cannot take the party's word for it, for the proponent has an incentive to inflate the value of the evidence in order to defeat the Rule 403 objection. Further complicating the matter, the Supreme Court instructs judges not to consider the evidence "as an island," but rather in light of the availability of substitute sources of proof, and of the other proof offered in the case.[114] So the judge must not only weigh the proffered evidence, but must also place it into the context of other evidence in the case and the web of inferences springing from that evidence.

To demonstrate the difficulty of estimating probative value, consider an example. The Federal Rules of Evidence permit the entrance of a witness's prior inconsistent statement, offered to impeach the witness's credibility.[115] Say that the plaintiff in a personal injury case has called Tori, an eyewitness to the car crash, to testify that she saw the defendant run a red light in his van before hitting the plaintiff's truck. The defendant wants to call the bartender at Tori's neighborhood tavern to testify that he overheard Tori, after a few margaritas, telling her friends, "That truck went right through the red light. No wonder it got hit!" The statement cannot be offered for the truth of the matter asserted, unless it properly falls within a hearsay

111. 22A WRIGHT & GRAHAM, *supra* note 7, § 5214, at 172 ("The reader who compares this litany of matters trial judges must consider in doing the balancing test with appellate opinions reviewing Rule 403 rulings will likely see an immense gap between the ideal and real. Indeed, some readers will conclude with us that the Advisory Committee's attempt to structure discretion to check 'unbridled discretion' has failed . . . ."); *see also supra* Part I.A.

112. People v. Schader, 457 P.2d 841, 849 (Cal. 1969).

113. *See supra* notes 35–38 and accompanying text.

114. Old Chief v. United States, 519 U.S. 172, 182–84 (1997).

115. FED. R. EVID. 613.

exception.[116] So the defendant instead offers the prior inconsistent statement to demonstrate that Tori lied or misrepresented the truth, either at the bar or on the witness stand. From that the defendant wants the jury to infer that Tori cannot be trusted to speak honestly and, consequently, that they should discount her testimony entirely.[117] The plaintiff objects under Rule 403.

For each step in this inferential chain, the trial judge must weigh the probative utility. In order for the judge to quantify the probative value of the bartender's testimony, she must estimate the degree to which the prior inconsistent statement implicates Tori as a liar, the likelihood that the jury will accept the implication that Tori is a liar, the likelihood that the jury will apply those doubts about Tori's credibility to discount Tori's testimony generally, and how important it is to the defendant's case that Tori's testimony be undermined in the eyes of the jury. With each step in this inferential chain requiring estimation, the final determination of probative value could vary enormously depending on the judge's perception.

b. Estimating Prejudicial Impact

If determining the probative value of a piece of evidence requires subjective evaluations, then determining the danger of unfair prejudice is a shot in the dark. The danger of prejudice can spring from juror bias, confusion about the inference that the jury should draw from the evidence, evidence that overpersuades, or some other flaw suggesting decision on an improper basis.[118] All of these are effects that occur within the mind of the juror. As Professor Imwinkelried describes it, "[d]rawing on his knowledge of juror psychology, the judge tries to forecast the probable response of the typical juror to the item of evidence."[119] So when the trial judge evaluates the danger of unfair prejudice, she attempts to peek into the minds of the jury to predict their logical missteps. This is troublesome for two main reasons.

116. FED. R. EVID. 801–802. For the purposes of this hypothetical, assume that the statement is inadmissible to prove the truth of the matter asserted.

117. *See generally* 28 CHARLES ALAN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6202 (2d ed. 2012) (describing the policies underlying Rule 613).

118. *See supra* Part I.A.

119. Imwinkelried, *supra* note 9, at 895.

First, the judge has little more information about the jury than the parties in the case. She presides over voir dire and can observe the body language of the jury during trial proceedings.[120] But voir dire questions are often cursory,[121] and the trial judge does not have access to each juror's life story. The trial judge may be forced to rely on generalizations or stereotypes, sometimes based on race, social class, or gender, to estimate the effects from bias, prejudice, or inferential misstep that certain kinds of evidence could trigger.[122] A rule of evidence that encourages such stereotyping and permits the judge to exclude evidence on the basis of demographic generalizations should not be so robustly shielded from appellate review.

The second problem with asking the trial judge to draw conclusions about the prejudicial impact of the evidence in the minds of the jury is that trial judges have variable experience with, and impressions of, juries generally. What can a new judge do to estimate the reaction a juror will have to potentially prejudicial evidence? She might draw from her experience in practice, but depending upon the judge's prior practice area, this experience could be tainted with bias for or against plaintiffs or corporations, prosecutors or defendants, etc. Further, even experienced judges are unlikely to possess a deep understanding of juror psychology, "something they were not taught in law school."[123] Judges can have profoundly varying impres-

120. *See* 22A WRIGHT & GRAHAM, *supra* note 7, § 5214, at 170 n.11.

121. *See* John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1239–41, 1258 (2001) (suggesting that voir dire is often too cursory to adequately protect capital defendants); G. Steven Henry, *The Scope of Voir Dire in Civil Cases: An Alabama Perspective*, 9 AM. J. TRIAL ADVOC. 279, 292 (1985) (noting that "[t]oo often voir dire is somewhat cursory in civil cases"); *cf.* Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879, 884 (8th Cir. 2006) (stating that voir dire is "proper" only if "there is an adequate inquiry to determine any juror bias or prejudice").

122. For an example of an expert advising judges to rely on generalizations in Rule 403 balancing, see 22A WRIGHT & GRAHAM, *supra* note 7, § 5214, at 170 ("The judge should reflect on the jury selected to hear the case. A jury dominated by upper-class men may believe that women cannot commit crimes of violence or more likely to believe that bank tellers will dip into the till. A jury that contains significant numbers of minority groups will be less susceptible to racial stereotypes than an all-white jury."). Reliance on conventional wisdom and amateur psychology provides at best a shaky foundation for quantifications of prejudicial impact. *See* Gold, *supra* note 42, at 85.

123. Gold, *supra* note 42, at 85 ("In fact, the courts have frequently resolved Rule 403 issues by relying upon their lay assumptions about juror psychology . . . . Unfortunately, many of the assumptions made by the courts seem at best unproven and all too frequently unsound.").

sions of the rational capacities of the average juror.[124] The variances in judge perceptions of juror psychology and behavior will result in broadly diverging estimations of prejudicial impact.

c. Reasoning from Moral Judgments

In many Rule 403 decisions, the judge will be required to make a moral conclusion, or at least perform some moral-adjacent reasoning. Frequently, proposed evidence draws a Rule 403 objection because a party regards it as liable to incite moral indignation in the jury.[125] To evaluate the prejudicial impact, the trial judge must recognize something in the evidence that invites a moral judgment and estimate the strength of that moral judgment's effect on the reasoning of the jury. This requires the judge to weigh the significance of the moral value implicated, a subjective impression that will necessarily change with the experiences and perspectives of the particular judge.[126] Consider, for example, the case of *United States v. Weisz*, in which the lower court judge described a video of a congressman accepting a bribe as "a disgusting, revolting sight."[127] While the lower court judge ultimately decided not to exclude the evidence,[128] his severe reaction to it was likely influenced by his individual experiences and impressions about politicians.

Returning to the personal injury hypothetical from above, suppose that the bartender testified that Tori had been drinking in a seedy casino for an entire Tuesday afternoon when he overheard her statement. The plaintiff objects and claims that the jury will judge Tori for her lifestyle choices: for being intoxicated in the middle of the day and for the association with gambling. This, the plaintiff argues, will cause the jury to doubt her credibility because of her lifestyle instead of her in-

124. *Compare* People v. Long, 113 Cal. Rptr. 530, 536–37 (Ct. App. 1974) ("A juror is not some kind of dithering nincompoop . . . . Jurors are our peers, often as well educated, as well balanced, as stable, as experienced in the realities of life as the holders of law degrees."), *with* United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982) (finding that the general exclusion of past bad acts is justified by the risk that a jury will "convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment").

125. *See* Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47, 73–74 (2011).

126. *Cf.* Dolan, *supra* note 29, at 225 ("A judge's perceptions of the goals and values of the prejudice rule, of course, will influence greatly a decision in any phase of a prejudice rule determination during trial.").

127. 718 F.2d 413, 431 (D.C. Cir. 1983).

128. *See id.*

consistent statement, an improper inference. A person's reaction to legal but socially disfavored activities like alcohol consumption and gambling could depend considerably upon upbringing, religion, family experience, and other factors. The weight that the trial judge gives to plaintiff's argument, and thus the judge's estimation of the danger of prejudice, will depend more upon her own opinions toward alcohol and gambling than on any of the jurors' voir dire answers.[129]

Anytime a judge considers the likelihood that a piece of evidence will incite moral indignation, she must measure it, at least to some degree, against her own moral code. This is inevitable because she cannot look at the evidence through the eyes of the jury, only her own. Yet there is no way to know how closely the moral perceptions of the jury track with that of the judge, especially when the evidence never reaches the jury. When moral impressions are a part of the Rule 403 balancing test, the judge's particular experiences and background add an additional layer of subjectivity.

Vagueness, malleability, and subjectivity creep into Rule 403 from all directions. Determining the probative value, prejudicial impact, and moral implications of a piece of evidence requires a judge to make determinations from very little objective information about the proceedings, parties, or jury. When the judge decides to exclude otherwise relevant evidence on the basis of such a vaguely defined set of weighing factors, the appellate court should not overestimate the deference that abuse of discretion review requires.

2. The Right to Trial by Jury

Recognizing that entrusting factual determinations to a single person posed a danger of injustice, the Framers enshrined the right to a jury trial in the Bill of Rights.[130] One of the jury's roles is to safeguard against "the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[131] But the unwarranted exclusion of evidence from the

129. While voir dire questions may contribute to the judge's estimation of the jury's morality, the purpose of voir dire is to ensure the selection of an impartial jury, not to catalog the ethics and worldview of each juror. Consequently, the questions are often general, and the trial judge has considerable discretion to limit them. *E.g.*, Nanninga v. Three Rivers Elec. Coop., 236 F.3d 902, 906–07 (8th Cir. 2000).

130. U.S. CONST. amends. VI, VII.

131. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

jury's view undermines that safeguard,[132] and abuse of discretion review can operate to shield the choice of a "biased . . . or eccentric judge" to keep pertinent and appropriate evidence away from the jury.[133]

In light of this constitutional right, there is something counterintuitive about the judge keeping evidence away from the jury for the jury's own good. The constitutional right to a trial by jury places great trust in the jury, yet the evidence rules are sometimes employed as though the average juror is a "low grade moron[]."[134] Scholarly work has pointed out that the right to a jury trial well preceded the Federal Rules of Evidence.[135] When evaluating a Rule 403 objection, the trial judge must determine not only the importance of the evidence to the ultimate issue, but also the likelihood that the jury will accept the evidence as probative of the fact it is offered to prove. Thus, the judge does the jury's reasoning for them predictively to evaluate a Rule 403 objection. While it is clear that Rule 403 serves an important function, it should not be so robustly protected by deference to discretion that the exclusion of evidence begins to infringe on the right to trial by jury.

3. Information Asymmetry in Appellate Review

A reviewing court will inevitably have less access to pertinent information than the trial court did when it made the contested decision. The appellate court can read the words that were spoken but cannot read the faces and demeanor of witnesses or attorneys like the trial judge could.[136] Additionally, the time that an appellate court must spend becoming familiar with the record can be a considerable drain on judicial resources.[137] This barrier between the appellate court and the factual basis for the trial court's decision is an information asymmetry.[138]

132. *See generally* Kenneth S. Klein, *Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077 (2013) (questioning Rule 403's constitutionalty given Sixth and Seventh Amendment guarantees to a trial by jury).

133. *Duncan*, 391 U.S. at 156.

134. Klein, *supra* note 132, at 1080 (quoting Edmond M. Morgan, *Foreword* to MODEL CODE OF EVID. 8–10 (AM. LAW INST. 1942)).

135. *Id.* at 1082–94.

136. *See supra* note 72 and accompanying text.

137. *See supra* note 70 and accompanying text.

138. Anderson, *supra* note 69, at 44–47.

When it comes to evidentiary and procedural decisions, however, the information divide between the trial and appellate court is frequently less pronounced than it would be for factual findings. Generally, an evidence dispute will center on the particular characteristics of a single piece or source of evidence; this is simply the way that the evidence rules are written. Due to the narrow scope of evidential and procedural questions, "[t]he appellate court can generally inform itself of all relevant information about the trial court's procedural and evidentiary rulings at relatively low cost."[139] When estimating prejudicial impact, the trial judge does have the advantage of seeing the reactions of the jury to evidence of the case. But common sense would suggest that such observation is of limited aid. Unless the jury was liable to audibly gasp or swoon at inflammatory evidence, jury observations are unlikely to provide much concrete information. At the very least, the problem of information asymmetry is less pronounced for review of Rule 403 decisions than it is for other trial court decisions entitled to deferential review.

B. THE INTERNAL TENSION OF RULE 403 EXCLUSIONS

Appellate review of lower Rule 403 rulings juggles the two main policies of the rule: a strong presumption of admissibility and a deferential standard of appellate review.[140] Depending upon the nature of the lower court decision, these interests could either clash or harmonize. This Section examines the way that deference and the presumption of admissibility are in harmony when an appellate court reviews decisions to admit evidence, and the way that these interests can conflict when an appellate court reviews decisions to exclude evidence.

1. Reviewing Decisions To Admit

Most Rule 403 decisions should be decisions to admit the contested evidence. Given the broad applicability of the rule,[141] a savvy litigator has little to lose from raising the objection now

139. *Id.* at 17; *cf.* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1040 (1986) ("The number of pages in the record relevant to procedural rulings also should ordinarily be fewer than those relevant to determinations going to the merits. Hence, the time required for free review of procedural questions will not ordinarily be as great as for substantive ones.").

140. *See supra* Part I.

141. *See supra* Part I.A.

and then during the course of a trial. But the steep presumption should result in many more overruled Rule 403 objections than sustained ones.[142] Accordingly, most appellate review of Rule 403 decisions should be for decisions to admit evidence.[143] In these reviews, the appellate court must decide if the trial court abused its discretion in preserving the rule's presumption of admissibility.

The appellate court could come to one of three conclusions, in each of which the twin interests of Rule 403 are in harmony. First, the appellate court could decide that the lower court made the correct decision to admit the evidence. The decision does not implicate discretion because the appellate court agrees with the trial court. Second, the appellate court could find that the risk of prejudice justified excluding the evidence, but that the trial court's decision to admit it was not so irrational that it abused its discretion.[144] In this case, the appellate court will affirm, protecting both the trial court's discretion and the Rules' strong preference for admissibility. The third option is to find that the trial court exceeded its discretion in admitting the evidence because the evidence was so prejudicial as to clearly overcome the presumption. In this last circumstance, the trial judge's decision is not entitled to support from the deferential standard of review or from the presumption of admissibility. Neither governs because the trial court's decision has exceeded the scope of reasonable discretion and, as a result, is not entitled to the deference, and because the prejudicial impact of the evidence has overcome the presumption of admissibility. The appellate court, when reviewing a Rule 403 admission, will never be forced to choose between the interests of discretion and admissibility; the trial court will have violated neither or both.[145]

142. *See* 1 WEINSTEIN & BERGER, *supra* note 2, ¶ 403[01], at 403-9 (Rel. 47-7/93) ("Since trial judges are granted such a powerful tool by Rule 403, they must take special care to use it sparingly."); *see also supra* Part I.B.

143. Another reason that more appeals will challenge the admission of evidence concerns the dynamics of criminal prosecution. A criminal defendant is more likely to be damaged by a decision to admit damning evidence than a decision to exclude helpful evidence and is also more likely to pursue every reasonable opportunity to appeal (because of a personal stake in the outcome). *Cf.* Anderson, *supra* note 69, at 26 ("[C]riminal defendants tend to appeal using a kitchen sink approach.").

144. *See supra* Part I.C.

145. See *infra* Figure 1 for further illustration.

2. Reviewing Decisions To Exclude

Appellate review of trial court decisions to exclude evidence under Rule 403 is more complicated. Once again, the appellate court could come to one of three conclusions. First, the appellate court could find that the trial court made the correct decision to exclude the evidence. In that case, the two interests do not clash because the appellate court agrees with the trial court that the presumption of admissibility was rebutted.

The second possibility is that the appellate court thinks that the trial court acted irrationally and unreasonably in excluding the evidence and thus abused its discretion. In this case, the presumption of admissibility is not in direct conflict with discretion, because the trial court abused that discretion and is no longer entitled to deference. This will be a rare occurrence, however, because abuse of discretion review is highly deferential.[146]

The final possibility, and the most troublesome one, occurs if the appellate court concludes that the danger of prejudice has not properly overcome the presumption of admissibility, but fails to find an abuse of discretion in the trial court's decision to exclude. This means that the appellate court, were it in the shoes of the trial judge at the time of decision, would have admitted the evidence. However, the appellate court does not find that the trial judge acted irrationally; the decision to exclude was within the scope of reasonable choices.[147] In this circumstance, the two interests of Rule 403 clash. The appellate court must choose either to uphold the presumption of admissibility or to adhere to the principle of deference to trial court discretion. As described below, this third scenario becomes impossible if the appellate court, but not the trial court, applies the min-max test. If that is the case, then the two courts are looking at a different range of options.[148] If the trial judge makes a decision that falls outside of the min-max framework but still reasonably balances the factors, the reviewing court must choose either to respect the trial judge's discretion or to respect the presumption of admissibility, with little guidance of which should trump.

Considerations of subjectivity, right to a trial by jury, and informational symmetry undermine the value of deference to

146. *See supra* Part I.C.
147. *See supra* Part I.C.
148. *See infra* Figure 2.

discretion in Rule 403 decisions. When appellate courts review trial court decisions to exclude evidence, however, appellate courts may be forced to choose between honoring the principle of deference to discretion and preserving the strong presumption of admissibility. In those circumstances, this Note posits that the presumption of admissibility should win out.

III. RULE 403 MAXIMIZED

This Part describes the effect of the min-max test on the internal tension of Rule 403. As described above, the possibility of a clash between the twin interests of Rule 403 arises when appellate courts review trial court decisions to exclude evidence under the rule. Depending upon the pattern of its application, the min-max test could either instruct appellate courts to preserve the presumption of admissibility over deference to discretion, or it could provide no meaningful guidance while causing the appellate court to view the evidence from a wholly different framework than the trial court. The former of these options would best serve the interests of the Federal Rules of Evidence. The latter is irrational. Accordingly, the federal rules ought to be amended to require the former result; the most logical formulation of the min-max test should be uniformly adopted by statute.

A. APPLYING THE MIN-MAX TEST TO THE INTERNAL TENSION OF RULE 403

When an appellate court reviews a trial court decision to exclude evidence under Rule 403, the presumption of admissibility can clash with the principle of deference to trial court discretion.[149] Depending upon the circumstances in which a circuit applies the min-max test, the test may provide guidance to the reviewing court regarding which of the two interests should trump. The following Section examines the impact of different min-max test configurations on appellate review of only decisions to *exclude* evidence.

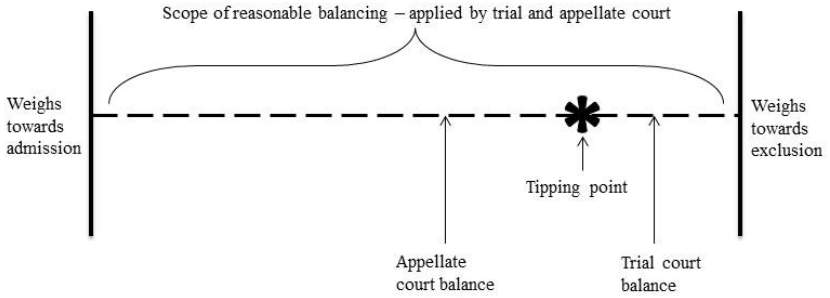
149. *See supra* Part II.B.

1. Appellate Application to Admissions Only

When the appellate court applies the min-max test only to review admissions of evidence, and not to review exclusions,[150] the result is that deference to discretion will trump the strong presumption of admissibility. The trial court is only required to perform the balancing test within the bounds of reason, a measure that could diverge drastically from the appellate court's application of the same test. Even if the trial and appellate courts come down on different sides of the "substantially outweighed" tipping point, abuse of discretion review instructs the appellate court to affirm.

The following original graphic represents the range of permissible conclusions for each court:

Fig. 1



In the circumstance that Figure 1 represents, the trial court's decision to exclude the evidence was still within the range of reasonable balancing, even though the appellate court would have struck the balance differently. Because the trial court did not act irrationally as defined by the framework of reasonable balancing, the appellate court must defer to its discretion.

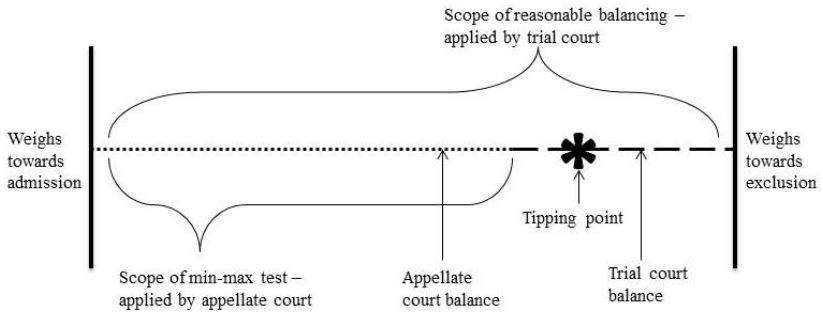
2. Universal Appellate Application

When the appellate court applies the min-max test to both admissions and exclusions of evidence under Rule 403, but the

150. The Seventh Circuit applies this permutation of the test. *See supra* notes 93–94 and accompanying text. It is unclear whether the Fourth Circuit applies the min-max test to both exclusions and admissions, or only to admissions. *See supra* note 95 and accompanying text.

trial court does not apply the min-max test,[151] the result is muddled. The trial and appellate courts could miss each other, because they are using a different set of scales to evaluate the evidence. The min-max test narrows the scope of reasonable conclusions by strengthening the presumption of admissibility. Instead of estimating the prejudicial impact within the scope of reason, the judge must estimate the *minimum* prejudicial impact within the scope of reason. The same goes for the probative value—the scope of reasonable conclusions on the maximum probative value is narrower than the scope of reasonable conclusions on the possible probative value. A perplexing disconnect results when *only* the appellate court applies the min-max test. The following graphic illustrates that disconnect.

Fig. 2



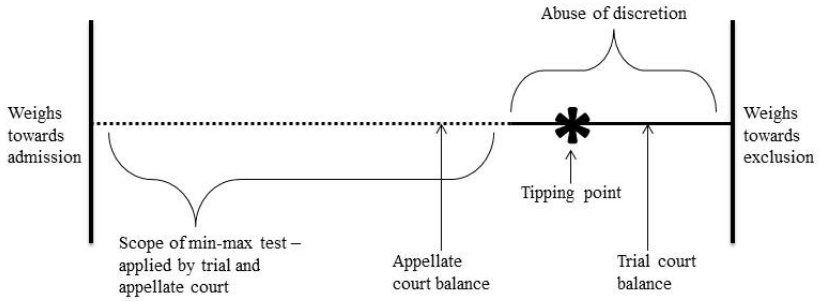
How should the appellate court resolve this? The answer is not immediately apparent. The trial court's decision, viewed through the lens of the min-max test, was unreasonable and thus constitutes an abuse of discretion. But the trial court was not applying the min-max test, and its resolution of the balancing test is not unreasonable if viewed outside the confines of that test. So can it really have abused its discretion? The clash between deference and the presumption of admissibility is most apparent and troubling when the appellate court, but not the trial court, applies the min-max test.

151. The Second and Fifth Circuits meet this description. *See supra* notes 97–98, 102 and accompanying text. The Sixth Circuit might also be placed in this category, but its precise classification is unclear as at least two district courts from the Sixth Circuit have also applied the min-max test at the trial level. *See supra* note 106 and accompanying text.

3. Universal Trial Court and Appellate Application

When both the trial and appellate courts apply the min-max test,[152] they are once again viewing the evidence on the same plane. Both courts will employ the test to tilt the Rule 403 balancing towards admission, thereby respecting the presumption of admissibility created by the rule. But the narrow scope of reasonable outcomes under the min-max test reduces the likelihood that the appellate court will find itself torn between deference and admissibility. When both the appellate court and trial court apply the min-max test, the conflict caused by appellate review of Rule 403 decisions is minimized. Illustrated:

Fig. 3



The appellate court in this circumstance does not have to decide between honoring deference and honoring the presumption, because the trial court has violated the scope of discretion. The min-max test narrows the scope of reasonable choices so that the appellate court is less likely to disagree with the trial court's reasonable exercise of discretion.

B. UNIFYING THE FRAMEWORK OF RULE 403 DECISIONS

The multilayered circuit split in application of the min-max test unduly complicates the structure of appellate review of Rule 403 decisions. The problem is most salient when an appellate court reviews a lower court's decision to exclude evidence

152. The Tenth and Eleventh Circuits, and possibly also the Fourth and Sixth Circuits, have followed this approach. *Compare supra* notes 95, 99–101 and accompanying text (noting that these circuits have applied the min-max test to both exclusions and admissions under Rule 403), *with supra* notes 103–04, 106, 108 and accompanying text (suggesting that these circuits may apply the min-max test at both the trial and appellate level).

under Rule 403.[153] If the appellate court, but not the trial court, views the decision through the lens of the min-max test, then the two courts are trying to answer fundamentally different questions. The appellate court could be forced to choose between upholding the liberal thrust of the Federal Rules of Evidence and adhering to the abuse of discretion standard of review. In its current formulation, Rule 403 provides little guidguidance to the appellate court on which principle to choose.

This Note posits that the strong presumption of admissibility should trump the principle of deference to discretion in those circumstances where they strongly conflict. Rule 403 is an "extraordinary" solution that should be used "sparingly."[154] When the trial judge uses the rule to exclude evidence, then more stringent appellate review is warranted. The abuse of discretion standard of review often underserves the interests of justice when applied to review of Rule 403 decisions.[155] Unique characteristics of Rule 403, such as its relative lack of information asymmetry and its tendency to require moral-adjacent reasoning, invite greater scrutiny of the trial judge's subjective impressions.[156] The min-max test, when applied at both the trial and appellate levels, appropriately directs the reviewing court to uphold the presumption of admissibility over deference to discretion.

Universal and unequivocal adoption of the min-max test would resolve the ideological clash in appellate review of Rule 403 decisions without unduly undermining traditional trial judge discretion. It is an apt compromise. Most circuits have recognized the advantages of the min-max test in some form, but the wide disparities in application unnecessarily confuse the issue.[157] The solution is to amend the Federal Rules of Evidence to explicitly endorse the min-max test. The Rules Enabling Act, by which Congress authorized the creation of the Federal Rules of Evidence, lays down a procedure for amending

153. *See supra* Part II.B.2.

154. United States v. Joseph, 530 F. App'x 911, 922 (11th Cir. 2013) (quoting United States v. Elkins, 885 F.2d 775, 784 (11th Cir. 1989)); *see also* PBM Prods., L.L.C. v. Mead Johnson & Co., 639 F.3d 111, 124 (4th Cir. 2011); Imwinkelried, *supra* note 9.

155. *See supra* Part II.A.

156. *See supra* Parts II.A.1, II.A.3.

157. *See supra* Part I.D.

such rules.[158] After the advisory committee on the Rules of Evidence votes to initiate an amendment, the proposed amendments undergo several rounds of public notice and comment.[159] After notice and comment, the amendment requires final approval by a series of committees and a waiting period during which the Supreme Court or Congress could intervene in the amendment process.[160] The process takes a few years and has been used several times to amend the Federal Rules of Evidence since their original adoption, most recently in 2014.[161]

Amending Rule 403 could be as simple of a matter as adding a sentence to the advisory committee notes, specifically encouraging courts to always assume the maximum reasonable probative value and minimum reasonable prejudicial impact of a piece of evidence.[162] Because the advisory notes are designed to clarify the intention behind the rules, this approach may be less controversial and easier to effect. A more robust option is to amend the text of Rule 403 itself to structure the balancing around the min-max test:

> **Current text:** The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.[163]
>
> **Proposed text:** The court may exclude relevant evidence if its <u>maximum reasonable</u> probative value is substantially outweighed by the <u>minimum reasonable</u> danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

158. James C. Duff, *How the Rulemaking Process Works: Overview for the Bench, Bar, and Public*, U.S. COURTS, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Mar. 22, 2016); *see also* Rules Enabling Act of 1934, 28 U.S.C. §§ 2071–2077 (2012).

159. Duff, *supra* note 158.

160. *See id.*

161. *See id.* For a comprehensive list of past and pending amendments to the Federal Rules of Evidence, see *Amendments to the Federal Rules of Evidence*, FED. EVIDENCE REV., http://www.federalevidence.com/changing-rules#background (last visited Mar. 22, 2016), and *FRE Legislative History Overview Resource Page*, FED. EVIDENCE REV., http://www.federalevidence.com/node/638 (last visited Mar. 22, 2016).

162. The sentence might read: "When applying Rule 403, all courts should assume the maximum reasonable probative value of the evidence and the minimum reasonable prejudicial impact of the evidence."

163. FED. R. EVID. 403.

Regardless of how it is implemented, universal adoption of the min-max test would serve the interests of the Federal Rules of Evidence.

Universal adoption of the min-max test is an efficient way to balance the dueling interests of liberal admissibility and deference to trial court discretion, because it reaffirms the liberal thrust of the Federal Rules of Evidence by building upon a growing trend. Further, it will unify the application of the rule, remedying the split that continues to divide the circuits. Appellate review best serves its purpose when the appellate court and the trial court are on the same page. Unifying the application of the min-max test in one fell swoop by amending the text of Rule 403 would quickly and efficiently guide trial and appellate courts to the same page in Rule 403 balancing. The best way to serve the interests of Rule 403, and the Rules of Evidence overall, is to codify an appropriately weighted version of the balancing test: the min-max test.

CONCLUSION

Rule 403's strong presumption of admissibility embodies the liberal thrust of the Federal Rules of Evidence. The rule gives the trial judge discretion to exclude evidence if its probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Rule 403's robust presumption of admissibility can come into conflict with the deferential abuse of discretion standard that appellate courts must apply when reviewing evidentiary decisions. To reconcile this conflict, several circuits have adopted the min-max test, as developed in Weinstein and Burger's treatise. Applying the min-max test, a court balances the maximum reasonable probative value against the minimum reasonable prejudicial impact of a piece of evidence. The min-max test stays true to the liberal thrust of the Federal Rules of Evidence, but a multilayered circuit split undermines its impact.

When appellate courts review lower court decisions to exclude evidence under Rule 403, the twin interests of admissibility and deference conflict. This is especially true when the appellate court, but not the trial court, applies the min-max test. In that circumstance, the appellate court looks at the probative value and prejudice of the evidence from a narrower framework than that of the trial court. The best way to resolve that tension, and to stay true to the liberal thrust of the Federal Rules

of Evidence, is to require both the trial and appellate court to apply the min-max test. Amending Rule 403 to explicitly bind all trial and appellate courts to the min-max test would preserve the federal rules' spirit of broad admissibility while maintaining the appropriate amount of trial court discretion; it is a worthy and necessary compromise between the dueling interests of Rule 403.