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### Sentencing, the Dilemma of Discretion

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## SENTENCING: THE DILEMMA OF DISCRETION

By Jerold Israel

Professor of Law, The University of Michigan

[The following excerpts are taken from Professor Jerold Israel's revision of the late Hazel B. Kerper's *Introduction to the Criminal Justice System* (West Publishing Co. 1979), with permission of the author and publisher. Footnotes have been omitted.]

As we have seen, judges usually have substantial discretion in sentencing. Most states give them considerable leeway in choosing between probation and imprisonment, in setting the term of imprisonment under either an indeterminate or determinate sentencing structure, in deciding whether a young offender will be given the special benefits of a youthful offender statute, and in determining whether to impose consecutive or concurrent sentences for multiple convictions.

In some jurisdictions, judges even have the final say as to whether an extended term will be imposed under a habitual offender charge. Judicial discretion in sentencing is one of the most hotly debated subjects in the criminal justice field today. Few experts are satisfied with the present system, but there is a sharp division among critics as to what reforms are needed. Some argue that extensive judicial discretion is basically correct, but minor modifications would be valuable so as to more carefully control the exercise of that discretion. Others argue that the discretion must be taken away from the judges and either placed elsewhere or largely eliminated from the sentencing process.

To fully appreciate the issues in this crucial debate, one must have some answers to at least three questions. Why did we give judges extensive sentencing discretion in the first place? What have been the advantages and disadvantages of judicial discretion? What alternatives are available, and what are their advantages and disadvantages? After lengthy discussions, experts remain in disagreement as to the appropriate response to these questions. We will attempt merely to summarize some of the more substantial points they have made.

### **Individualizing Sentences: The Need for Discretion**

We note in Chapter Five that the movement toward indeterminate sentences (and judicial discretion) reflected an interest in accommodating the several objectives of punishment. Indeterminate sentencing was designed to achieve rehabilitation as well as deterrence, to avoid needless incapacitation while still obtaining a punishment sufficient to serve the legitimate needs of retribution. The development of probation reflected these same concerns, although the primary emphasis here clearly was on rehabilitation. The overall objective of our sentencing philosophy was to make the punishment fit the offender as well

as the offense. This was an objective that required individualized sentencing based upon the facts of the individual case. It was an objective that lent itself naturally to broad judicial discretion.

There are those today who contend that our emphasis on rehabilitation has been misplaced -- not because it is an inappropriate goal, but because it remains largely beyond our capacity. Yet even if this controversial premise is accepted, the need for individualized sentencing hardly disappears. If one looks to incapacitation, deterrence, or even retribution, there is still need for individualization. Let us consider, for example, five cases of kidnapping. No. 1 is a woman whose baby died, and who took another woman's baby from the hospital. No. 2 is a young man whose girlfriend said she was breaking up with him. He put her in a car and drove her around for 24 hours trying to persuade her to change her mind, while her frantic parents tried to locate them and the girl did everything she could to get away. No. 3 is a divorced man who took his own child from its mother who had legal custody and refused to tell the mother where the child was. No. 4 is a kidnapper for ransom who kept a young woman buried in a box fitted with air tubes for breathing in order to make it impossible for searchers to find her, and who demanded \$200,000 from her wealthy father. No. 5 is a woman accomplice of the kidnapper for ransom. She assisted in the kidnapping because she was in love with the kidnaper and was also threatened by him. She did everything she could to keep the kidnapped girl alive when it was possible for her to do so.

The offense charged in each of our five cases is identical -- kidnapping. The legislature has drawn some general distinctions in defining that crime, but it can hardly take into consideration all of the factors that distinguish one kidnapping from another and one person's participation from that of his accomplice. Even if one were concerned only with retribution, somebody must be given authority to distinguish between these five cases. The evil in each is hardly equivalent to the others even though the same crime is involved. A sanction as severe as imprisonment should not be imposed without drawing more careful lines that relate to our retribution objective. Of course, once we add consideration of deterrence and some degree of rehabilitation, we must consider more factors and there is even greater need for individualization. In sum, individualization probably would not be as essential if we had fewer punishment objectives and they did not so frequently clash, but even if we shifted our focus so that deterrence or retribution became the dominant theme -- as some say we should -- a certain amount of individualization (and hence discretion) would still be needed.

### **Factors Affecting Judicial Discretion**

How in fact have judges utilized the discretion they have received? Have they emphasized factors that relate to the several goals of punishment? Most experts believe that they have done so, although many would say that there has been too much emphasis on one factor or another. While the weight given to

particular factors varies with the judge, almost all judges have tended to look to the same basic elements. The first, and probably the most significant, is the seriousness of the offense as it was carried out. As we saw in our five kidnaping cases, the gravity of the actor's wrongdoing is not always revealed simply by the punishment category in which the legislature places the particular crime. A sentencing court will want to know if the case involved special aggravating circumstances that made the defendant's conduct more serious than that of other offenders who commit the same crime. Though a violent act is not a formal element of the crime charged, did the defendant here actually threaten harm to his victim? Did he involve minors in the commission of the crime? Did he pick upon a victim who was particularly vulnerable? Did the planning, sophistication or professionalism of the crime indicate premeditation? On the other side, the court also will want to know if the case involved special mitigating factors that suggest a lower sentence: the defendant may have been a passive participant or may have played a minor role in committing the crime; the defendant may have exercised special caution to avoid harming the victim; the defendant may have acted under the influence of alcohol or extreme emotional stress; or the victim may have been an initiator or provoker of the incident. Our list of mitigating and aggravating factors is not complete, but only illustrative. As we have noted, several of the recently adopted determinate sentencing provisions include lists of specific aggravating and mitigating factors to be considered by the judge.

Judges also will look to the character and background of the defendant. Has he been convicted of previous offenses? Has he "served time" before? Has he engaged in a pattern of violent conduct which suggests that he poses a serious danger to society? What is his attitude towards this crime -- has he pled guilty, made restitution to the victim, assisted the police in convicting his accomplices? Does he have a social stability indicating that he may be able to stay out of trouble? Relevant factors here include his family ties, employment record, possible addiction to drugs, and the character of his friends and associates. Many judges are concerned that such factors tend to discriminate among socio-economic classes, favoring in particular the defendant from a middle-class community. However, available evidence suggests that such offenders are less likely to repeat certain types of offenses (e.g., burglaries) than other prisoners who have far less to look forward to when they are returned to the community.

Another factor likely to influence the judge is the community attitude toward the crime and the offender. If there is special community fear of the particular type of crime, or outrage as to the particular case before the court, the judge may feel that the community's demand for retribution or deterrence should be reflected in his sentence. Reviewing a sentence of two years imprisonment and five years suspended sentence for two counts of forcible rape, the Supreme Court of Alaska rejected that sentence because it failed to give sufficient weight

to “community condemnation of the offender’s anti-social conduct.” The trial court had relied primarily upon the defendant’s potential for rehabilitation, but the Alaska Supreme Court stressed that the interest did not justify ignoring the need for “the reaffirmation of societal norms, for the purpose of maintaining respect for the norms.” In light of that need, the sentence was too lenient: “A substantially longer period of actual confinement was called for ...[so as to] bring home to [the defendant] the serious nature and consequences of his crime and to reaffirm society’s condemnation of violent and forcible rape.”

The judge’s exercise of discretion in sentencing also is likely to be influenced by his perspective of the state’s corrections system. The nature of prison life and prison programs may be a deciding factor in choosing between probation or imprisonment or in setting the term of imprisonment. When there still is some hope for rehabilitation, and the judge views the prison system as almost inevitably having a negative impact on an offender, the judge is more likely to turn to probation. Where the judge has decided on imprisonment, the conditions under which time will be served may influence his determination as to the appropriate minimum term. Life in an antiquated, maximum security prison obviously is somewhat different than life in a modern, minimum security institution. The judge may be impressed (or depressed) by the prison system’s rehabilitative programs. Where he has some confidence in those programs, he may hesitate to impose a high minimum for fear that it will interfere with the parole of the prisoner at that point when he is most likely to achieve a successful return to the community. Judges are aware that holding a prisoner beyond that point may be counterproductive. It can lead to bitterness and a reinforcement of the attitudes which led the offender to prison in the first place. On the other hand, if the judge believes that the corrections system offers little hope of rehabilitation or that the parole board takes too many unjustifiable risks, he may be inclined to impose a higher minimum sentence.

Judges also take into consideration the impact of the sentence upon the administration of an overburdened criminal justice system. They recognize that if concessions are not given for guilty pleas, the backlog of cases to be tried may grow so heavy as to almost cause the system to collapse. They also recognize that, where prisons are overcrowded and new prisons are not being built, the parole board may be in a position where it is forced to release a prisoner for every new prisoner it receives. In such situations, high maximum terms are meaningless. Prisoners will be released long before their full terms are served (even without consideration of liberal good time allowances). Indeed, a high minimum may be unwise even though the judge is confident that this offender should be incapacitated for a substantial period of time. The judge has no way of comparing this offender to others that the parole board also must consider for possible release. Assuming that overcrowding will require the parole board to release some prisoners who are far from good risks, the judge may hesitate

to tie the board's hands with a high minimum, thereby possibly forcing it to take an even greater risk in paroling a less deserving prisoner.

## THE THEORY OF DISCRETION IN THE FEDERAL RULES OF EVIDENCE

By Thomas M. Mengler

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This is one of those issues, of which there are so many during a trial, where a judge is within legal boundaries no matter what he does. The authorities support a ruling for either side.

Scott Turow, *Presumed Innocent*

Few commentators have examined the theory of judicial discretion in the Federal Rules of Evidence and that theory's implications for the roles of trial and appellate courts. The few who have examined the issue claim that the Federal Rules' policy granting the trial court substantial flexibility is somehow tied to the overriding philosophy of the rules, which favors admitting all relevant evidence. Indeed, one commentator regards judicial discretion and broad admissibility as causally linked: "Three words describe the direction in which the Federal Rules of Evidence have taken us: *discretion*, *creativity*, and *admissibility*. The codes give abundant discretionary power to the trial courts. The judges add a sizable measure of interpretive creativity. Greater admissibility has resulted."

Undoubtedly, the drafters of the Federal Rules of Evidence were guided in part by a policy favoring the admission of all relevant evidence. On its face, however, the linking of discretion and liberal admissibility seems misguided. Given a decent amount of flexibility, a trial judge may exclude--as easily as admit--evidence.

Other reasons motivated the drafters to build flexibility into the Federal Rules. Their views on trial court discretion derive, not from any thoughts about admissibility, but from an awareness of limitations concerning trial judges, codified rules of evidence, and the trial process itself. First, the drafters believed that evidence, arguably more than any other field of the law, calls for trial judges to make quick decisions. One consequence of ruling on the run is that evidence law must be simple and accessible. Another consequence is that regardless of the specificity or the generality of a particular rule, a trial judge, however knowledgeable and well-intentioned, will sometimes make the wrong call under the time pressure of an ongoing trial.

Second, the drafters believed that the trial process itself and the traditional rules of evidence are imperfect tools in getting at the truth of a particular controversy. Each trial tells its own tale, raises unique evidentiary concerns, and consequently calls for individual treatment. All things considered, trial procedures,

including evidentiary rules, provide litigants with an acceptably fair means for resolving their dispute. But few believe--least of all the drafters of the Federal Rules--that detailed evidence rules can be devised which, if mechanically applied, would be appropriate for every controversy.

Third, the drafters understood that evidence decisions frequently call for a delicate balancing of the probative value of an item of evidence against its prejudicial effect. Most, though certainly not all, rules of evidence are designed to limit the prejudicial effect of certain evidence in the minds of jurors or to prevent them from overvaluing it. But the rules accomplish these goals only imperfectly; because of the stronger value favoring admissibility of relevant evidence, sometimes a great amount of prejudice is injected into a trial. Moreover, assessing the possible prejudicial effect of evidence is often a difficult task. At best, this nebulous inquiry into the minds of a handful of lay people involves a great deal of guesswork. The drafters understood, therefore, that trial judges need some guidance here, but additionally require the flexibility to mitigate and apportion among the litigants the harmful effects of prejudicial evidence.

Taken together, these considerations argue for an evidence code that strikes "a middle course between vague generalities and constricting particularity." These are the words of Professor Edward W. Cleary, the Reporter to the Advisory Committee on the Federal Rules of Evidence, and they describe well the style of those rules. This Article contends that the architects of this "middle course" intended to give some guidance, through specific rules, to trial courts and litigants so that the trial process would be sufficiently predictable. Nonetheless, the drafters sought to provide enough play in the joints to permit the trial court to consider the cumulative effect of the close prejudice and reliability rulings and to split them fairly among the parties. In a civil trial, fair apportionment may simply mean evenhanded treatment of all litigants. In a criminal trial, fair apportionment may mean more than splitting the close calls; it may require sensitivity to the criminal defendant's opportunity to present his case. In both situations, the Federal Rules envision the trial judge as umpire or referee, trying to keep fair a fast-paced and hotly contested adversary match. Finally, a code of general guidelines like the Federal Rules, while permitting an appellate court to forgive the occasional trial error, also gives appellate judges some sound doctrinal basis for checking whether the trial judge has run an acceptably fair trial....

### **The Policy Of Discretion In The Federal Rules**

Professor Rosenberg has taught us that we should think about judicial discretion in two senses. In one sense, the focus is on the range of alternatives available to the trial judge. If a rule legitimately grants to the trial judge two or more alternatives, the trial judge retains decision-liberating discretion. In the second sense, the focus is on the appellate court's review power. If the appellate court's review power is narrow, the trial court's discretion consequently is

great. In Rosenberg's words, when the appellate court is precluded from reviewing the trial court, or does so only under an abuse of discretion standard, the trial court has been granted "a right to be wrong without incurring reversal." Thus, a trial court may have discretion either because a rule provides a range of choices or because, although the rule itself seems not to provide alternatives, the appellate court's review of the trial court's interpretation is narrow.

Of course, both senses of discretion--the trial court's decision-liberating discretion and the appellate court's review-limiting discretion--vary in degree. Some rules on their face may not limit a trial court's discretion in any way. For example, Rule 49(a) of the Federal Rules of Civil Procedure grants the trial court unbridled discretion to require a jury to return, not a general verdict resolving liability and fixing damages, but only a special verdict in the form of written answers to specific questions. The Rule provides absolutely no guidance regarding whether and when a trial court should employ special verdicts, and thereby implies that a court can employ special verdicts whenever it wants.

Other rules provide what might be called guided discretion to the trial judge. A rule that provides guided discretion grants some flexibility to the judge, but restrains the choices by somewhat specific guidelines to which the judge must adhere. Rule 15 of the Federal Rules of Civil Procedure, for instance, provides that a party usually can amend a pleading only by leave of court, and "leave shall be freely granted when justice so requires." One might quarrel with whether use of the word "justice" provides much, if any, guidance. It is more than nothing, however, and although Rule 15's vagueness gives some discretion to the trial court, it also affirmatively directs the court generally to allow the parties to amend their pleadings.

Similarly, the standards of appellate review also may vary greatly in the amount of discretion afforded the trial court. On purely legal issues, the appellate court does not defer at all to the trial court. On issues of fact or mixed law and fact, the trial court can afford to be "wrong" as long as it is not clearly erroneous or abusive. On a few issues, the appellate court will not review the trial court's decision at all.

On questions of admissibility, the Federal Rules of Evidence--considered individually and as jointly applied--provide substantial discretion to trial judges. Their generality alone gives trial courts some discretion by creating at their fringes a penumbra of debatable meaning. Further, the harmless error rule enhances trial court discretion by directing the appellate courts to give the trial court a limited right to be wrong without incurring reversal. As following sections of this Article reveal, the drafters of the Federal Rules infused flexibility into trial court decision-making in other ways. Uniformly, however, the court's discretion is guided. Even the most general rules--the relevancy rule and the unfair prejudice rule--provide standards for admissibility. Thus, Chairman Jenner's description of the Federal Rules as providing play in the joints is accurate. While the Rules contain a good measure of flexibility, they nonetheless provide

principles or guides on which the trial court can rest a ruling--even if, as in Rule 406, those guidelines sometimes point in different directions. In so doing, the Rules guide litigants and trial courts, by infusing some predictability into evidence rulings. The Rules also provide a handle by which appellate courts can get a feel for the fairness of the trial.

In the following discussion, this Article shows that the Advisory Committee selected the form of a general code in order to provide a broad measure of discretion and demonstrates how the drafters implemented this policy in a variety of ways. The section therefore buttresses this Article's suggestion that Rule 406's flexibility might be deliberate and, more generally, that the policy of judicial discretion under the Federal Rules is motivated by wholly different concerns than the Rules' policy in favor of admissibility.

### A Handy Pamphlet: The Rules' Form

One of the Federal Rules' most striking features is that they encompass about two hundred pages--if the Advisory Committee Notes and pertinent legislative history are included--and under forty pages if they are not. What eventually took Wigmore nine volumes of text is reduced to what Chairman Jenner called a "handy pamphlet." It is equally striking that neither the Advisory Committee Notes nor the legislative history contains any extensive discussion or debate concerning the Advisory Committee's choice of this general form. However, close examination of these materials and two earlier codification attempts--the 1942 Model Code of Evidence and the 1953 Uniform Rules of Evidence--demonstrates that the Advisory Committee chose the form of a general code for the same reasons as the drafters of the Model Code and Uniform Rules: to address the proper balance of trial court discretion and appellate review. . . .

### A Limited Right to be Wrong

The harmless error rule underlines the imperfections of the trial as truth promoter. The rule acknowledges that some evidence rulings are inherently difficult calls, both because evidence rules are imperfect tools and because a trial court must make evidence rulings quickly. By making evidentiary errors grounds for reversal only if they affect a substantial right of the party, the harmless error rule tells losing litigants they have no cause to complain if they were able to present the core of their case fairly to the factfinder, without too much prejudice poisoning their presentation.

The rule also speaks to appellate courts by cautioning them to give trial courts some right to be wrong, except perhaps for constitutional error. The rule urges them to evaluate the strength of the evidence on each side and the trial's outcome to determine whether any error may have affected the final judgment. This is the appellate court's straightforward task when the trial court has wrongly excluded a litigant's evidence. To determine if the exclusion mattered at trial,

the appellate court must evaluate whether the evidence addressed significant issues in the case and, assuming the evidence went to an important issue, whether other evidence adequately presented the issue to the jury. Similarly, when the trial court wrongly has admitted unreliable evidence or reliable evidence that is inadmissible on policy grounds extrinsic to the trial, the appellate court must check whether the error affected the final judgment.

When the alleged error is the trial court's admission of unfairly prejudicial evidence, the appellate court's task is significantly different. The appellate court must review the alleged error, other evidence admitted on the same issue, and the trial court's other prejudice rulings--to the extent they are present in the record. Unfair prejudice cannot be weighed in a vacuum, but requires the appellate court to look at all of the prejudice injected into the trial by both litigants. The appellate court must try to obtain from the cold record some feel for whether the trial court tried to minimize the prejudice suffered by the complaining litigant and sought to apportion the prejudice fairly among the litigants.

If the trial court made the majority of its prejudice rulings in accordance with Rule 403's balancing formula, rather than under specific exclusionary rules, the appellate court's ability to review suffers because of the court's remoteness from the heat and fury of trial. In these circumstances, because of the trial court's closer perspective, the appellate court frequently is reduced to affirming the trial court in blind faith. Reversal is typically possible only if the appellate court can ascertain that the trial court showed bias by uniformly opening the door to prejudice against one of the litigants, without doing the same for the other litigant when presented with a similar opportunity. The appellate court in other words may be unable to assess the fairness of a single Rule 403 ruling, but may be competent to evaluate a handful of them, especially if the trial court resolved all or most of them against one side. The Fifth Circuit's decision in *H.E. Collins v. Wayne Corp.* is noteworthy in recognizing this obligation to consider the cumulative effect of evidentiary errors. There the court acknowledged that "the combination of several errors may require reversal even though each error by itself may have been harmless."

The appellate court may have a better handle if the trial court's rulings allowing the infusion of prejudice or unreliability into the case are based on specific exclusionary rules like the character, habit, hearsay, and impeachment rules. As noted previously, each of the Federal Rules, though vague at the edges, has a core of meaning. To the extent the trial court clearly misreads a specific exclusionary rule's core of meaning, the trial court has committed error. Under these circumstances, the appellate court can reverse if the error by itself is egregious in prejudicing the litigant or is one of several such errors indicating that the trial court failed to run an acceptably fair trial either through ignorance or bias. The appellate court, having identified one clear but not egregious error, can also legitimately reverse if it finds that the trial court on all or most of the other close prejudice rulings, ruled against the complaining litigant--even if, viewed singly,

those rulings could not be regarded as erroneous. Here again, the appellate court may be able to determine, from the totality of rulings, that the trial court was not fair or evenhanded in overloading one litigant with all the prejudice.

Each of these scenarios is rare, and they were intended to be rare. They jointly convey that the drafters of the Federal Rules envisioned a limited appellate role. Only when a trial court commits constitutional error did the drafters envision that appellate review might be plenary. These scenarios also jointly convey that appellate court rulings are unreliable indicators as to which objections will prevail on appeal. Because the harmless error rule tells the appellate courts to base their decisions on a *gestalt* view of the overall fairness of each trial, appellate evidence decisions usually do not tell third parties what counts as reversible error. By its operation, the harmless error rule consequently takes some of the ruleness out of the Federal Rules.

Because the harmless error rule tells appellate courts to look chiefly at whether the trial court has run an acceptably fair trial, the principal message to trial courts is the same. The notion of harmless error does not mean that trial courts have free rein to make evidence rulings capriciously without regard to the language of specific rules. But it does convey that on those discretionary issues in which a trial court may be within legal boundaries no matter what it does, the trial court's chief concern should be whether each litigant has had an opportunity to present the core of her case and has borne only her fair share of the prejudice that frequently accompanies probative evidence. By so doing, the trial court runs a fair trial under the Federal Rules and avoids reversal.

### The Federal Rules' Overall Policy

This Article has shown that the drafters adopted the middle course in order to set the appropriate balance for trial court discretion and appellate review. That balance--which overwhelmingly tips in favor of trial courts--is found in a variety of places; not only in the Federal Rules' loosely textured style, but also in Rule 403's discretionary weighing, the pick-and-choose options provided in a few rules, particularly Rule 406, the catchall exception, and the harmless error rule. As this Article has shown, the flexibility of the Federal Rules--in all its various costumes--provides trial courts with the means to distribute fairly among the litigants the close prejudice and reliability decisions.

The Federal Rules' middle course raises at least three other implications for trial court discretion and appellate review. First, the Federal Rules of Evidence are intended to provide some guidance to trial courts and litigants, but cannot be consulted for the definitive answers to many questions. Jointly the Rules lend some predictability to the trial process, probably more so than the common law of evidence had done. But their predictability quotient is not high. Litigants typically come to court uncertain about the admissibility of at least some of their critical evidence. As this Article has shown, a number of factors contribute to that unpredictability.

Second, the drafters intended that the Federal Rules' generality and flexibility should perpetuate. In part, the drafters' flexibility choice was based on their understanding that evidence issues call for quick decision-making. Even if acceptable, detailed rules could be discovered, the drafters understood that their sheer volume would undermine both a trial's efficiency and accuracy. In part too, the drafters' choice was based on their belief that each trial is unique and calls for discrete resolution. As this Article has shown, the Advisory Committee intended to give trial courts the maneuverability to craft its rulings to do individual justice. To that extent, the Committee members were not platonic rationalists. The members did not believe there can be ideal evidence rules that trial courts can apply mechanically. The Committee was comprised of former and practicing trial lawyers who understood the nature of jury trials and believed that drafting acceptable specific rules to answer most evidence questions was impossible.

Third, the drafters intended a minor role for appellate courts in deciding evidence questions. The harmless error rule conveys this message most clearly. But for its duty to scrutinize closely for constitutional errors, the appellate court's proper role under the Federal Rules is limited to checking the trial's overall fairness. The Rules seek to accomplish that purpose by marking a few bright lines by which appellate courts can gauge the trial's fairness, and by encouraging reversal only when the appellate court is convinced that the evidentiary errors, considered collectively, have affected the outcome of trial. Further, the drafters did not intend for the appellate courts to become rulemakers themselves by establishing binding precedents that narrow or focus the Federal Rules' general language. Appellate fine-tuning of the Federal Rules is inconsistent with the drafters' purpose. It undermines the loosely textured style of the Rules and the trial court's flexibility afforded by that lack of rigidity. Additionally, taken to its extreme, appellate narrowing undermines the "Handy-pamphlet" notion and creates an elaborate and unworkable common law of evidence. Finally, appellate fine-tuning bespeaks a rationalism about the trial process not shared by the drafters who believed a fair but imperfect trial was all that was possible. Thus, appellate judges who see their function under the Federal Rules as equivalent to their interpretive, gap-filling function under substantive statutory schemes are mistaken.

### A Defense Of The Federal Rules' Policy

The only viable alternative to the Federal Rules' middle course is a more detailed code that restricts trial court discretion by containing specific answers to all or almost all evidence questions. We have grown either too wise or too distrustful to place unfettered discretion in trial judges. Thus, Charles Clark's proposal of a creed, if seriously considered in 1940, deserves no consideration less than fifty years later.

Like the Advisory Committee, we probably also are too wise to consider even attempting a more detailed evidence code like the one supported by

Dean Wigmore. Foremost among the reasons is the impossibility of the task. Given the enormous variety of possible evidentiary situations, drafting a code addressing even most evidence issues is probably impossible. Moreover, addressing only most of the issues would be insufficient. If the goals are to provide mechanical answers to evidence questions and to reduce trial court discretion, a code claiming to be complete, but in reality falling short of completeness, would succeed only partly on both scores. Arguably, such a code would create a greater evil by providing absolutely no guidance to the trial court on the unanswered questions. Thus, the project itself is a chimera. For that reason alone, the Advisory Committee's choice of a loosely textured code seems a wise one. Even assuming, however--against our best intuitions--the theoretical possibility of a closed and complete evidence code, it is far from obvious that such a code would be more effective than the Federal Rules in promoting the pertinent values of truth promotion, predictability, or fairness. The following sections examine the extent to which a loosely textured code effectively promoted these values.

### Truth Promotion

Looking back at the historical experience of the common law's categorical exclusionary rules, the drafters of the Federal Rules had no reason to accept the empirical claim that detailed evidence rules promote the truth more effectively than flexible, loosely textured rules. Less than fifteen years later, there is no good reason to question the drafters' judgment. As a general matter, rules allowing room for a trial judge's sensitivity to the complexity and uniqueness of a particular case necessarily should promote truth more than rules providing for only mechanical application of a closed and complete system. Mechanical rules restrain a trial judge's access to factors that might lead to the best resolution of a particular case. This general maxim about the dangers of formalism is particularly true for evidence law. Most, though not all, evidence issues raise concerns either about the reliability of an item of evidence or about its probative value balanced against its prejudicial effect. This inquiry is necessarily trial specific. No closed and complete system can promote truth as well as rules that allow judges to consider all the legal issues and factual evidence, the unique emotional aura of the trial, the jurors' intelligence, and the peculiar identities of the parties, who frequently bring to court the prejudicial baggage of their lives. No closed and complete system can accommodate a trial judge's cumulative assessment of the total prejudice injected into a particular trial against one or both litigants.

The foregoing discussion assumes that excellent judges, wisely sensitive to the complexity of a case and capable of considering its features, are making the evidence calls. But even if one assumes instead that mediocre judges are applying an evidence code, the outcome is not obviously different. No empirical evidence exists to suggest that a mediocre judge does better under a closed and complete system of rules than under one allowing some discretion-

ary weighing. It is hard to know how to assess this question without any empirical evidence, in part because of the difficulty of imagining how detailed a code would have to be in order to be closed and complete. But given the enormous variety of evidence issues, one reasonably can assume that even a code that restricted a trial court's discretion only substantially, not entirely, would contain hundreds of rules. On that assumption, we can consider some obvious problems with an enormously detailed code.

One problem is that mediocre judges could make at least as many errors interpreting specific language as they would applying loosely textured language. Another problem is that mediocre judges also commit errors of misapplication; sometimes, because sophisticated lawyers lead them astray by intentionally mispackaging an offer of evidence, judges apply the wrong rule. The more detailed the code, the more opportunities there will be for attorney mislabeling, thereby making judicial misinterpretation and misapplication errors more likely. Thus, it is not clear that a closed and complete evidence code promotes the truth better than a loosely-textured code—even with mediocre judges.

One might object, however, on grounds that the discretionary balancing which the Federal Rules frequently require is often guesswork; there is no reason to think that trial judges, whatever their intellectual capacities, *ever* can balance accurately the probative value of one item of evidence against its prejudicial effects, much less weigh and apportion fairly a number of items. Indeed, one empirical study has claimed that judges, as well as lawyers and jurors, have widely disparate views about what constitutes prejudicial evidence. Thus, the argument goes, because we have so little confidence in judges' abilities to engage in this kind of balancing, mechanical rules setting the balance, however imperfectly, are preferable to discretionary rules.

Even assuming, however, that sometimes different people balance differently, the nihilistic claims advanced above prove too much. The same concerns over whether individual judges can balance accurately also necessarily question whether a small group of rulemakers could frame acceptable rules. If the empirical studies suggest that no one can agree on prejudice, as between a judge who misbalances and a rule that does the same, we are left with no good choice. More importantly, however, there is no reason to accept this nihilistic perspective. Balancing is not so unfathomable. Balancing probativeness against prejudice is about fairness and evenhandedness. If we are that dubious about judges' intellectual capacities to be fair, we need to rethink our entire jurisprudence, not just our rules of evidence.

Thus, those who argue for more detail in the Federal Rules cannot justify their proposals on grounds that a more detailed code necessarily fosters greater accuracy. Proponents for more detail must argue that a closed and complete code enhances other values—chiefly, increased predictability and greater fairness at the trial court level through enhanced appellate review. But a detailed

evidence code fails as a panacea for the uncertainties of trial or the dangers of an evil trial judge.

### Predictability

Some predictability necessarily flows from a code of rules that is both accessible and uniform. By being understandable to litigants, as well as to courts, and by providing that courts should treat similar instances in a similar way, such a code allows parties to know ahead of time how a trial court will decide their cases. The importance of predictability in the law should be obvious. In substantive areas, for example, in order to decide whether to enter into a transaction or engage in certain behavior, people need to know beforehand the consequences of their actions, including the legal consequences of those actions. Some commentators believe that strong predictability in evidence law is also important. Indeed, as noted previously, the alleged unpredictability of Morgan's 1942 Model Code was principal cause of Wigmore's dissenting vote.

### Settlement Promotion

One might regard the primary value of predictability in evidence rules to be its capacity to promote settlement. Litigants, civil or criminal, need to understand the trial process ahead of time in order to decide whether to litigate. The decision to litigate or to settle is based in part on the likelihood of prevailing at trial. If the parties are uncertain about the probable outcome of litigation, they will be less likely to settle.

The Federal Rules of Evidence are not without some predictive value. Litigants, for example, know ahead of trial that all relevant evidence generally will be admissible, and that prejudicial material generally will be excluded only if its prejudicial effect substantially outweighs its probative value. Litigants also know the core meaning of some of the specific Federal Rules. The drafters marked some bright lines. But this Article has demonstrated that on many of the close prejudice or reliability rulings, the trial court has wide discretion to admit or exclude. The effect of this discretion is that sometimes a litigant cannot reasonably surmise ahead of trial whether the trial court will admit or exclude the evidence. A reasonable question to ask is whether the Federal Rules' unpredictability matters, and if so, whether a detailed code might enhance predictability.

The answer to both these questions is probably not. First, the unpredictability of the Federal Rules of Evidence arguably does not inhibit settlement in more than a *de minimis* degree. The presence of a variety of factors more significantly contributes to a litigant's uncertainties about the outcome of trial. Disputes over the legal issues in the case and their resolution under the substantive law, disagreement among the parties about the real facts of the case, and uncertainty about the idiosyncrasies of the factfinders contribute more substantially to the unpredictability of trial than the uncertainties associated with federal evi-

dence law. Moreover, some commentators have shown that a little uncertainty about the likely result of litigation actually may induce parties to settle. Thus, even assuming that the vagueness of the Federal Rules contributes to the uncertainties of trial, it is an open question whether that degree of uncertainty actually inhibits settlement. Finally, given that the vast majority of cases settle without going to trial and that this figure has remained constant over time, our society appears not to be deterred from settling due the flexibility of the Federal Rules.

Second, even assuming that the unpredictability of the Federal Rules does inhibit settlement to some extent, a detailed evidence code may not foster settlement any more effectively. As previously noted, a detailed code would be many times longer than the Federal Rules. A code so elaborate might make it difficult for litigants and courts to identify certain items of evidence as instances of a given rule, and it would provide lawyers with opportunities to mispackage certain evidence in the guise of something else. The effect of greater detail, given the haste with which a trial court must make an evidence ruling, would be more interpretive error. Further, assuming that the goal of the trial process under the detailed code would still be a fair trial, not a perfect trial, appellate courts would be required either to overlook a technical misinterpretation or to forgive it under a harmless error standard. Under a detailed code then, predictability would be undermined by frequent trial court errors--at least more frequent than a flexible code like the Federal Rules--and by the appellate court's forgiveness of trial court errors. Even assuming that greater predictability in evidence might enhance settlement, it is not intuitively obvious that a detailed evidence code would increase the amount of predictability in the trial process substantially more than the Federal Rules.

### Efficient Adjudication

One might argue that a second reason for predictability in evidence rules is to promote pretrial adjudication. Greater detail in rules might allow trial courts to resolve more cases at the summary judgment stage. Because the trial court could assess more easily what evidence would count at trial, it could more easily decide whether any material facts would be in dispute.

But the efficiencies are doubtful here because of the number of cases in which the evidence admissible at trial does not raise a material fact dispute. Moreover, encouraging the trial court routinely to make preliminary evidentiary rulings at the summary judgment stage will cut significantly into the court's limited time. Most likely the trial court's total expenditure of time spent making evidence rulings on unsuccessful summary judgments would be excessive. Any efficiencies gained by promoting pretrial adjudication would be offset at least, and probably outweighed, by fruitless rulings on unsuccessful summary judgment motions.

Additionally, it could be argued that detailed rules might reduce trial time by reducing the number of evidentiary objections. The assumption here would be that if evidence rules speak to all possible contingencies, there should be fewer objections. But fewer objections will result only if the rules are clear and accessible. Because, as noted, a closed and complete evidence code would be voluminous, the misapplication opportunities would be great. Our collective experience should persuade us that good lawyers will find ample litigation opportunities with detailed, as well as with general, codification.

### Fairness in the Trial Court

Behind some of the demands for detailed procedural rules and less trial court discretion is the specter of an evil genius, the biased to unprincipled trial judge. The pat, but nonetheless sound, response to these demands is that procedural rules should not be drafted with the most incompetent or evil judge in mind. Rulemaking is about ordering society in the best way possible. Even if rulemaking is not grounded entirely on hope for a better way, it proceeds, as it should, on the assumption that people charged with implementing the rules will do so in a responsible way. Moreover, no evidence rules can impede a trial judge bent on mistreating a litigant. Particularly in the context of an ongoing trial, a biased judge can abuse a litigant in a variety of subtle and largely unreviewable ways. The judge's demeanor, tone of voice, and facial expressions toward the party and the jury, as well as toward the party's counsel and witnesses, can poison that person in the jurors' minds. A trial judge also can mistreat a litigant by intentionally reaching erroneous rulings. Indeed, a federal district court is not harmed in any way by the occasional reversal. The losing litigant, however, is forced to undertake a costly appeal and second trial, often before the same judge. No rules, however detailed, can prevent unethical trial judges from treating litigants unfairly.

This does not mean that our procedural rules should place blind faith in trial judges; nor do they. Indeed, as the Federal Rules of Evidence themselves provide, rules should contain detail sufficient to enable reviewing courts to evaluate whether litigants have received a fair shake. By containing some specific rules and by allowing appellate courts, in accordance with the harmless error rule, to evaluate the effect of all errors on the trial's outcome, the Federal Rules seek to ensure that litigants will not suffer either from a trial court's ignorance or from its bias. Although the appellate courts cannot always prevent the evil jurist from mistreating a litigant, they should be able to reverse the trial court's misconduct to the extent it is on the record. The premise of the Federal Rules is that there is enough specificity to allow appellate courts to evaluate whether the trial court has run an acceptably fair trial.

No more should be expected of an evidence code. Some might quibble with whether the Federal Rules provide enough detail to allow appellate courts to evaluate a trial's fairness. But the absence of any loud roar from the litigation

community suggests that the Federal Rules of Evidence generally promote a fair, but perhaps not perfect, trial.

### The Wisdom of the Drafters' Choices

Defending an existing code, warts and all, against an alternative, unrealized dream is speculative at best. [This article] has attempted to do so by questioning the theoretical possibility of the alternative and by showing that the purported advantages in having a more detailed evidence code are not intuitively obvious. The burden, of course, is on the proponents of more systematic detail. We have little reason to believe that a closed and complete code is even possible. Nor do we have any reason to believe that such a code, even if possible, would be more likely to promote settlement or enhance a trial's search for an accurate, efficient, and fair outcome. Until proponents of more precision and less trial court discretion demonstrate their value, we should feel comfortable that the Advisory Committee made a sound choice in opting for a flexible, middle course.

### Conclusion

Sometimes trial judges appear to distribute the close prejudice and reliability rulings fairly among the parties. This Article has attempted to show that when a trial court balances its rulings to ensure that both litigants have had an opportunity to present their cases fairly, it acts in accordance with the intent of the Federal Rules of Evidence. For above all, the Federal Rules intended to give trial judges considerable leeway in making evidentiary decisions.

Sometimes appellate judges appear to give relatively short shrift to evidence issues, by finding no error in summary fashion or by forgiving a trial court's error as harmless. When the appellate court paints with this conclusory brush from a belief that the trial court has run an acceptably fair trial, the appellate court adopts its proper role. Indeed, the appellate court's typical brief digression from the substantive issues in the case rightly conveys to trial courts and litigants that the Federal Rules of Evidence are a flexible guide of principles, not a code etched in granite.