

Atomism, Holism and the Law of Evidence

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DRAFT -- As you shall see, this is very much a work in progress.

One of a trial judge's primary functions is to rule on the admissibility of items of evidence. The Federal Rules of Evidence are replete with both particularistic rules and more general guidelines delineating the admissible and the inadmissible. But how are judges supposed to think about evidence? When making a particular admissibility determination, are they to focus on that item of evidence by itself, in isolation? Or should they evaluate it in relation to the rest of the evidence – that which has already been put in the record, that which is expected to be offered, and even that which could have potentially been offered? When do judges think about the admissibility of evidence in an item-by-item manner, and when do they approach it contextually?

It would be frequently be possible for judges to evaluate evidence piece by piece, applying the appropriate evidentiary rules and principles to the particular item without regard to other pieces of evidence. This approach I shall call atomism. By contrast, we could imagine judges evaluating evidence relationally – considering the item's admissibility explicitly in conjunction with all of the rest of the evidence that was expected to be presented. This approach I shall call holism.

As I survey a variety of areas within evidence, it will become clear, perhaps unsurprisingly, that in some circumstances, an implicit atomism dominates, while in

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others, at least a partial holism is the norm. However, despite the enormous variations in approach across kinds of evidence (as well as within evidentiary categories), our current system lacks any coherent justification for why judges seem to take an atomistic approach to certain questions and a holistic approach to others. Still worse, at present, this tension between atomism and holism is largely unrecognized and unanalyzed. Remarkably little attention has been paid to the issue. Indeed, because of the enormous discretion trial judges are granted with regard to evidentiary decisions, the tricky and important issues that this tension raises are often papered over, or even invisible. And yet, the tension at times bubbles awkwardly to the surface: indeed a number of currently difficult issues within the law of evidence, both practical and scholarly, can usefully be recast as controversies over atomism versus holism.

So recast, these controversies reveal atomism versus holism to be a central – perhaps the central – tension pervading judicial determinations of evidence. And they also reveal why a coherent, theoretically sound justification for atomism or holism, or a coherent approach to determining when the one and when the other, may remain elusive: Our evidentiary system lacks what we might call an epistemology of bifurcation. Bifurcation, the divided power of the judge and jury, stems from the need to blindfold the jury from prejudicial information and the need to curtail the strategic behavior of the attorneys within a system committed to both jury factfinding and adversarial advocacy, but the relation between kinds of evidentiary inputs and justified knowledge is left (perhaps intentionally) vague. To put it differently, behind the tension between atomism versus holism two further tensions lurk : first, that between the adversarial system with its ethos of party and attorney control, and an alternative vision of an managerial, umpireal,

perhaps even inquisitorial judge, and second, and relatedly, a tension between judicial control and the power of the factfinder. The core dilemma is that as an intellectual matter, holism may often be more satisfying than atomism, and yet to take holism seriously would drastically reconfigure the trial, fundamentally transforming the balance of power between judge and attorney on the one hand, and judge and jury on the other. The current state of affairs is a result of these tensions combined. What we see, in short, is a flaccid, de-clawed holism, often avowed, but rarely implemented in a thoughtful or thorough manner.

Atomism and Holism: An Introduction

First, what exactly *are* atomism and holism, in the context of making admissibility determinations?¹ Atomism is the assessment of a piece of evidence in a relative vacuum. It involves treating each piece of evidence as an ‘island’ unto itself, evaluating its admissibility in (at least relative) isolation.² An atomistic approach to a piece of evidence means that admissibility does not depend on what other evidence may or may not be available to prove the point for which the evidentiary item is offered; alternative methods for proving the point at issue are not understood to affect the admissibility of this particular piece of evidence. The more a judge breaks admissibility determinations into separate constituent parts, assessing them as much as possible

¹ Atomism and holism (or their equivalents discussed in a different vocabulary) have recently received some attention in the context of jury decisionmaking: scholarship in recent years has emphasized the ‘story’ theory of the trial, in which the factfinder creates for itself a compelling narrative of what happened rather than assessing each item of evidence in a linear and isolated fashion. See Reid & Hastie, Twining, Taslitz, Damaska, Tillers, Pardo, etc. However, jury inference has been the near-exclusive focus of this scholarship, and there has been virtually no attention paid within this literature to either the structure of the Rules or to judicial assessments of evidence.

² Souter invokes the image of an ‘island’ in *Old Chief v. United States*, 519 U.S. 172, though with respect to Rule 403 in particular, rather than admissibility determinations more generally.

individually and separately, rather than seeing them as interrelated and intertwined, the more atomistic the approach. Atomism privileges a narrow, localized frame rather than a broad and inclusive one. It involves assessing the applicability of various rules of evidence with respect to the item of evidence, standing, as much as is feasible, alone. And it may involve breaking down an item of evidence into smaller pieces – for example, parsing a statement sentence by sentence or clause by clause, rather than evaluating it as a whole.

To be sure, no admissibility determination can be purely atomistic. The admissibility of a piece of evidence can never be assessed completely acontextually, for in order to be admissible, any item of evidence must be relevant, and relevance determinations are themselves necessarily context-dependant. For a piece of evidence to be relevant it must be relevant to something that matters in the case, either directly or through a chain of potential inferences; or, as the language of Rule 401 puts it, “relevant evidence” is “evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”³ Thus a judge cannot evaluate the admissibility of a piece of evidence without considering the elements of the crime charged or the nature of the claim, or the implicit or explicit theory that links the piece of evidence at issue to something of legitimate concern within the case, be it the whereabouts of the defendant on the night in question or the credibility of a witness, or the possibility of a causal link

³ FRE 401.

between the defendant's action and the plaintiff's harm.⁴ Relevance is inherently at least *somewhat* relational.⁵

Absolute atomism, may, therefore, not exist. But even if extreme points are fictions and the categories blur somewhere in the middle, atomism and holism can certainly be distinguished in practice. The two are better understood as opposite ends of a continuum rather than as discrete evidentiary approaches; the issue is less pure atomism versus pure holism than one of tendencies and emphases. A more atomistic approach keeps to a minimum the degree to which matters apart from the piece of evidence itself are seen to affect its admissibility. As much as possible, an atomistic approach evaluates the piece of evidence within its own four corners, rather than seeing admissibility as being greatly affected by other evidence already in the record, or evidence that might be offered later in the case. Admissibility determinations are seen to be relatively discrete and independent of one another.

By contrast, a holistic approach embraces the notion that admissibility determinations are contextual. Holism views meaning and significance as inherently relational. Holism prohibits artificially delineating evidence into independently assessed subparts; instead, the admissibility of a particular piece of evidence is determined in full recognition of how it fits into the entire evidentiary puzzle. A holistic approach acknowledges and accepts interdependence, and aspires to situate evidence into its broader context before evaluating its admissibility. A holistic approach views atomism as asking a judge to wear blinders, asking the judge to pretend that the item in question

⁴ Lempert et al on Reality Hypotheses. As the Advisory Committee's note to Rule 401 says, "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between the item of evidence and a matter properly provable in the case." Advisory Committee's Note, Rule 401.

⁵ I shall argue below that this makes relevance analysis holistic only in quite a narrow sense. See *infra* notes ___ and accompanying text.

stands alone when in fact it is but one moment embedded inextricably within a broader tale. Like atomism, holism can never be absolute, at least not in a bifurcated system in which power is divided between judge and jury – the judge’s role is to determine what matters are fit for the jury to hear, rather than to assess the evidentiary merits herself. Moreover, the mere fact of temporality – that evidence determinations are made seriatim, one after another rather than all at once – places additional limits on holism. Still, holism aims to broaden the set of reference points the judge examines when she makes any particular admissibility decision. Holism calls for examining particular items in relation to both their context and their evidentiary equivalents or substitutes.

We see then, that an atomistic approach parses and particularizes, while holism embraces connection and context. Another way to capture the distinction is as an issue of the appropriate ‘frame’ for evidentiary determinations⁶: should an admissibility determination be made within the narrowest possible frame, in which the appropriate rules are applied to the smallest possible unit of evidence? Or should the frame be purposefully expanded, broadened, so that other pieces of evidence are taken explicitly into consideration and their admissibility determined conjointly or relationally rather than individually?

To bring the distinction between atomism and holism into clearer focus, the following section will briefly survey several evidentiary rules. The purpose here is twofold: first, to make more concrete what I mean by atomism and holism by examining particular evidentiary rules and doctrines through this lens. Second, this section will make clear that our current rules, both as written and as fleshed out by judicial opinions, are a hodgepodge of both approaches: at times, explicitly holistic, and at other times

⁶ See Levinson, *Framing Transactions*; see also Kelman.

extremely atomistic. We shall see that for some kinds of inquiries, judges are explicitly required, either by the language of the rules themselves or by the rules as interpreted by appellate courts, to take a particular approach, sometimes a relatively atomistic approach and in other circumstances a more holistic one. By contrast, in other areas, there is little settled determination of how atomistic or how holistic judicial assessments are supposed to be. After this brief overview of a number of areas of evidence, the paper will turn to three areas in more depth.

Atomism in the Federal Rules of Evidence

Relevance

The first place we can see a relatively atomistic approach to evidence is in the definition of relevance itself. As we have already seen, there is something inherently relational in the idea of relevance: relevance does not inhere to a piece of evidence, but rather exists as a relation between the item and something that needs to be established in the case. But apart from this necessarily relational aspect to relevance, the Federal Rules takes a strikingly atomistic approach to determining whether an item is relevant under Rule 401 and hence presumptively admissible under Rule 402. The threshold for determining relevance is extremely low: it is evidence that has ‘any tendency’ to change the probability of some matter that is at issue. In order to be relevant, a piece of evidence need not do very much work at all; it may nothing more than a very small piece of a very large puzzle. As McCormick famously put it, “A brick is not a wall;” each and every brick is relevant, even standing alone.⁷

⁷ Commentators frequently emphasize that evidence need not be *sufficient* to be *admissible*. See generally Wigmore, Thayer, Weinstein.

Such an understanding of relevance makes relatively atomistic assessments possible. Because the contribution of any individual piece of evidence need not be great in order for it to be deemed ‘relevant,’ a judge may rule on its relevance without yet having a deep sense of just how much probative value it might have once other pieces of evidence are taken into account. So long as the proponent can assert some connection, even if tenuous, between the item and something at issue in the case, the relevance threshold is met. Practically speaking, this low threshold permits judges to determine relevance item-by-item in most circumstances, even without fully understanding how an individual item will link up with other proffered evidence. Thus determinations can be made one-by-one as the trial proceeds, rather than requiring a mass of evidence to be presented before any judgments of legal relevance are deemed possible. By contrast, John Henry Wigmore argued that legal relevance should require something more than pure logical relevance, something he called a ‘plus value’: “Legal relevancy denotes, first of all, something more than a minimum or probative value. Each single piece of evidence must have a plus value.”⁸ The higher the probative value we require in order to deem a piece of evidence relevant, the more intertwined its assessment must be with the rest of the evidence in the case. A higher test thus invites a more holistic approach.

⁸ Wigmore on Evidence s. 28 (1923 ed.). There is now in the literature a classically described dispute between Thayer and Wigmore on this topic, where Thayer is thought to advocate a pure logical relevance approach and Wigmore something more; Thayer’s approach is generally seen as superior. See, e.g., Herman L. Trautman, Logical or Legal Relevancy – A Conflict in Theory, 5 Vand. L. Rev. 385 (1952). However, it is not clear the two were actually so far apart. For while Wigmore does describe legal relevancy as something more than pure logical relevance, the relevant treatise sections, read in full, suggest Wigmore believed that more than a mere minimum of probative value was required for *admissibility*; the real issue was for the judge ‘to select only such material as is worth laying before the jury.’ Id. at s.29. It is not clear that what Wigmore envisioned doing through a slightly elevated relevancy test is, in practical terms, any different from what we now do through Rule 403’s provision that evidence can be excluded even if relevant if it risks the waste of time. Whether we call such evidence relevant but not sufficiently probative to be worth hearing, or legally irrelevant may not make very much concrete difference.

Even with a minimal relevance threshold, in order for an item to be relevant, there may be a need for additional inferences to be made. But often these inferences do not require additional evidence; they may be plausible experience-based generalizations about how the world works, or at least how the world might have worked in this instance. For example, suppose the prosecutor in a case introduced testimony that a gun belonging to the defendant was found three feet away from the victim of a gunshot wound. Presumably the existence of this piece of evidence increases the probability that the defendant was the person who shot the victim. Of course, standing alone, this piece of evidence does not in any strong sense prove that the defendant shot the victim, and even less does it prove the defendant's culpability under the law. In order to conclude that the defendant in fact shot the victim, a reasonable jury would require additional evidence; indeed, this piece of evidence ought by itself to be insufficient as a matter of law to meet the prosecution's burden of proof. However, based on our collective experience, we would probably all be willing to acknowledge that first, the fact someone testifies to some matter of fact increases the probability the matter of fact is true. Second, we would probably agree that a gun found in the close vicinity of a shooting has a not inconsequential probability of having been the weapon used, and further, that there is a reasonably high chance that the person who operated a gun in a particular instance is the gun's legal owner. Put differently, even without any additional evidence, testimony that the defendant's gun was found in that particular place at that particular time, even by itself, makes it more likely that the defendant committed the crime than it was prior to the receipt of that specific piece of evidence. Thus even without considering any other piece of evidence – that is, even assessed atomistically – the testimony about the gun is

relevant. If, however, we believed that there was no correlation at all between ownership of a particular gun and use of that same gun, that is to say, we believed it to be no more likely that a gun owner discharged his own weapon than that a random member of the population discharged that very weapon, then the testimony of the gun owner would not meet even the low threshold of relevance. It would not have any tendency to make a fact at issue about more likely than it was before that piece of evidence was introduced.⁹ I offer this illustration to make what I hope is a simple point: though assessing the relevance of evidence requires further inferences and even armchair assumptions about empirical reality, that only makes such assessments holistic in a quite limited sense. They cannot be made by examining nothing more than the four corners of the piece of evidence, to be sure, but typically, they need not be *made in relation to other pieces of evidence*.¹⁰ It is in this sense that the low threshold for relevance makes relevance determinations atomistic: additional admissible evidence supporting the inferences invited by the item's proponent is generally not a prerequisite to deeming the original item relevant in the first place.¹¹ To be sure, a party might well introduce evidence on such matters to strengthen the case and to make a particular piece of evidence more compelling. Still, while the meaning and significance of a particular piece of evidence may eventually be considered holistically by the factfinder, the structure of Rule 401 envisions relevancy determinations by the judge to be atomistic.

⁹ The analysis here is implicitly Bayesian; I am drawing on Richard Lempert, Modeling Relevance,

¹⁰ In fact, one critique of the Federal Rule's liberal definition of relevance is precisely that literally **any** piece of evidence, even standing alone, can be argued to be relevant, via chains of experiential claims and invited inferences. See, e.g., David Crump, On the Uses of Irrelevant Evidence, 34 Hous. L. Rev. 1, 12 (arguing that Rule 401 "is perfectly indiscriminate" and "literally admits any arguable factual proposition in any case," even say, a Shakespeare play or an apple introduced in an assault case.)

¹¹ I use here the hedge word 'usually' because of the issue of conditional relevance, discussed below at infra notes ____ and accompanying text.

Moreover, courts have asserted that items of evidence can and sometimes should be broken down into subparts, particular pieces or statements, for the purpose of assessing relevance, thus making relevance inquiries even more atomistic. For example, the Court writes in *Old Chief v. United States*, “ Viewing evidence of the name of the prior offense as relevant, there is no reason to dwell on the Government's argument that relevance is to be determined with respect to the entire item offered in evidence (here, the entire record of conviction) and not with reference to distinguishable subunits of that object (here, the name of the offense and the sentence received). We see no impediment in general to a district court's determination, after objection, that some sections of a document are relevant within the meaning of Rule 401, and others irrelevant and inadmissible under Rule 402.”¹² To be sure, the obligation to break a statement or document into its relevant and irrelevant portions, may attach to the parties rather than the court. In practice, this is a matter on which trial courts are given a great deal of discretion; there are no generally applicable canons that govern how fine a sieve a judge should use to separate the relevant from the irrelevant portions of a statement or document.¹³ Should analysis of relevance take place phrase by phrase, sentence by sentence or paragraph by paragraph? While no clear doctrinal answer exists, the point is simply that our conception of the appropriate unit for determining relevance is frequently not a document or statement or other piece of evidence taken as a whole; a more atomistic approach is, if not required, at least permitted. In practice, judges do frequently divide statements into smaller subparts to determine relevance, though they do so

¹² 519 U.S. 172, 179.

¹³ In fact, this issue raises difficult questions which have received remarkably little attention in the context of relevance itself, though similar questions arise with respect to numerous other provisions of the Federal Rules, such as statements against interest, the limits of *res gestae*, the scope of hearsay exceptions, etc. (See *infra* notes ___ and accompanying text.)

intuitively rather than based on clearly expressed guidelines. Indeed, in an inchoate and not particular theorized way, the need to do so is even taken for granted.¹⁴

Statements against Interest

We have seen that the extremely low threshold for defining relevance makes atomistic determinations possible. We have seen, further, that atomistic delineation of a piece of evidence into relevant portions and irrelevant portions is also allowed under the rules and the cases interpreting them, though such atomistic analysis is generally a matter of discretion rather than mandated. I turn now to an area where the current jurisprudence in fact mandates a hybrid approach, explicitly atomistic in part, and simultaneously overtly holistic: the hearsay exception permitting the use of statements against penal interest made by unavailable declarants, codified in Rule 804(b)(3). As we shall see, 804(b)(3), as interpreted by courts, requires that judges atomistically evaluate the content of statements under the rule, but also requires that they determine the trustworthiness of the statement contextually.

Rule 804(b)(3) states, in relevant part, that “A statement which . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true,” is excepted from the general ban on hearsay. The rationale behind the rule is, simply, that people are unlikely to fabricate statements that are genuinely against their interest at the time the statement is made. Out of court statements that potentially subjected the speaker to criminal liability are thus thought to be sufficiently reliable that, in those instances

¹⁴ For example, that part of an extensive document is relevant does not mean that the document is relevant in its entirety; the same would hold true for a conversation, a statement, or an eyewitness’ report.

when the speaker is unavailable to testify in person at the time of trial, the earlier statements are permitted even though they are hearsay. If a reasonable person would not have made such a statement in such circumstances unless she believed it were true, it passes muster under this hearsay exception.

Such a rule raises a serious issue about how narrowly to define a ‘statement.’ In *United States v. Williamson*, the Supreme Court explicitly avowed a narrow definition, requiring parties to sift through statements carefully, separating the genuinely inculpatory aspects of the statement from those parts that were self-serving, or even simply neutral.

As the Court wrote,

One possible meaning [of the word ‘statement,’], "a report or narrative," connotes an extended declaration. Under this reading, Harris' entire confession -- even if it contains both self-inculpatory and non-self-inculpatory parts -- would be admissible so long as in the aggregate the confession sufficiently inculpatory him. Another meaning of "statement," "a single declaration or remark," would make Rule 804(b)(3) cover only those declarations or remarks within the confession that are individually self-inculpatory.

Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.¹⁵

The Court reasoned that if the rationale for the exception was that people would generally not fabricate genuinely self-inculpatory statements, the exception should apply to those truly inculpatory statements and to no others. It rightly recognized that the mere fact that part of someone’s narrative was self-inculpatory did not invite any particular inference

¹⁵ *Williamson v. United States*, 512 U.S. 594, 599-600 (1994).

that the other parts were also reliable: “The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest, should be treated any differently from other hearsay statements that are generally excluded.”¹⁶ The Court’s particular concern in the case was inculpatory remarks intertwined with exculpatory ones; when someone partly takes responsibility but also lays blame on a collaborator, there is no particular reason to believe that their description of the other’s responsibility is accurate. Especially when the statement is made to an interrogator or investigating authority, there may be every reason for someone to minimize her own role and aggrandize others’ participation, so the mere fact that the statement, taken as a whole, is inculpatory is thought to be an inadequate protection against falsehood.¹⁷

Thus the Court calls on lower courts to be atomistic in analysis. The right question according to the Court is not whether the statement as a whole is self-inculpatory, or rather, that is only a preliminary question. Even if the entire statement is, self-inculpatory overall, implementing the exception requires a court to take another step, and break the statement down into individual statements (presumably sentence by sentence, though the court is not clear on this point). The court must examine whether each sentence is self-inculpatory, exculpatory, or neutral. Only those that are genuinely inculpatory (and, despite the court’s seeming rejection of the use of neutral collateral

¹⁶ Id. at 600.

¹⁷ Of course, in that circumstance, one could equally argue that the entire statement failed the basic test under 804(b)(3) – would a reasonable person not make such a statement unless true? When a statement includes both inculpatory portions and exculpatory portions, it will sometimes be the case that, fairly assessed given the circumstances, the statement as a whole is not actually inculpatory – the speaker may be disavowing responsibility to the maximum extent she deems credible.

statements, presumably some accompanying statements that are necessary for understanding and context and are not exculpatory) should be admitted under the exception.¹⁸

That this approach – parsing a statement sentence by sentence – is atomistic is beyond dispute. However, two other aspects of our current approach to statements against penal interest invite significantly more holistic analysis. First, *Williamson* makes clear that the assessment of whether a statement was in fact against interest at the time it was made is supposed to be contextually determined – it is to be made not simply by evaluating the words spoken, but rather, the circumstances in which it was spoken.¹⁹ Second, Rule 804(b)(3) requires that if a statement against penal interest is offered to exculpate the defendant, there must be “corroborating circumstances [that] clearly indicate the trustworthiness of the statement.”²⁰ Corroboration under 804(b)(3) can either be independent evidence confirming aspects of the statement itself, or it may be simply that the circumstances in which the statement was made, or the person by whom the statement was made suggest its credibility.²¹ Just as a turn to context for the purpose of evaluating whether a statement is actually against the speaker’s penal interest is a holistic move, either form of a corroboration requirement is also holistic: it asks judges to look beyond the piece of evidence in isolation, and to make a judgment only once other evidence has been taken into account. Thus we see that the application of 804(b)(3)

¹⁸ A holist might point out that this degree of atomism means that the admitted statement becomes one that was never actually made. Parsing a statement and extricating from the whole only those self-inculpatory sentences might produce a statement with a meaning quite different from the original statement, perhaps even misleading or downright fictional.

¹⁹ *Id.* at 604 (noting that the question of whether a reasonable person would not have made the statement unless believing it true “can only be answered in light of all the surrounding circumstances”).

²⁰ Rule 804(b)(3).

²¹ See, e.g., *United States v. Barone*, 114 F.3d 1284 (1997) (stating that corroboration required by 804(b)(3) need not be “independent evidence supporting the truth of the matters asserted by the hearsay statement”).

requires judges to undertake both an atomistic inquiry and a holistic one before admitting a statement under the hearsay application.

Dishonesty Crimes Offered to Impeach Credibility

Another place in the Federal Rules where judges are required to assess evidence atomistically is Rule 609(a)(2). This Rule governs the admission of evidence showing that a witness has been convicted of a crime that involved dishonesty or false statement. It is an unusual rule, in that it is one of the few – indeed perhaps the only – place in the Federal Rules that denies judges any discretion in deciding whether or not to admit evidence that falls within the rule’s purview. Typically, Rule 403, permitting judges to exclude evidence if its probative value is substantially outweighed by its prejudicial affect or its potential to mislead the jury or waste time, is an envelope around the rules; it wraps around them, permitting judges to exclude under Rule 403 a piece of evidence that is admissible under some other rule. But Rule 609(a)(2) declares that evidence of conviction of a crime of dishonesty or false statement “*shall* be admitted.”²² Courts have interpreted this strong language as a mandate, meaning that the balancing provisions of Rule 403 do not apply to this rule.²³ Thus, even if the judge believes the conviction in question is substantially more prejudicial than probative, she *must* admit it under the rule. Or, to put it differently, the judge is simply not permitted to analyze the piece of evidence holistically. Even if the evidence is cumulative, or its probative value is reduced to nearly zero because of the existence of other evidence, a judge has no choice but to admit the

²² Rule 609(a)(2)

²³ See, e.g., *Green v Bock Laundry*, 49 U.S. 504, 525 (1989) (With regard to subpart (2), which governs impeachment by *crimen falsi* convictions, it is widely agreed that this imperative, coupled with the absence of any balancing language, bars exercise of judicial discretion pursuant to Rule 403”); *United States v. Kuecker*, 740 F.2d 496, 501 (1984).

evidence. She may not take either other evidence or the potentially prejudicial effect of this evidence into account. The inquiry is squarely atomistic: does this conviction, evaluated in isolation, fit the contours of the rule? If so, it must be admitted.

Holism in the Federal Rules of Evidence

Conditional Relevance

Two of the most clear-cut loci for holistic analysis in the Federal Rules will be discussed in detail in the following Part of the paper; therefore here I shall mention them only in passing. First, Rule 104(b), governing the admissibility of matters that are conditionally relevant, is an inherently holistic rule. The idea behind the rule (much criticized by scholars) is that sometimes, relevance is contingent on sufficient proof of some preliminary condition of fact, and thus, such items should be admitted only subject to adequate proof of the conditional matter. This is clearly and obviously holistic: the judge is to determine the relevance of one piece of evidence in *relation* to another on which it depends. The difficulty with conditional relevance, put simply, is how to reconcile the Rule's claim that some matters are conditionally relevant with the generally atomistic approach to relevance embodied in the low relevance threshold already discussed. Further exploration of this issue will be postponed until Section ___; notice for the moment merely that conditional relevance, as a concept, requires a holistic approach.

The Residual Exception

Another extremely holistic approach can be seen in the wording of Rule 807, the residual exception to the hearsay rule. This rule, designed as an escape valve to allow judges to admit reliable hearsay even if it fails to fit squarely in any other delineated

exception, requires that the proffered statement be “more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.”²⁴ Thus, the judge is explicitly required to compare: how does this item’s probative value stack up to any other form of available proof on this question? Indeed, this is the one place in the rules where judges are explicitly called on to imagine what the available forms of proof might be, what diligent investigation might have produced, what careful investigation would have shown – that is, judges are invited even to go beyond the expected record in imagining evidentiary alternatives. In the Section below on reliability assessments, this hearsay exception will be discussed in more detail; the point here is simply to identify its strongly holistic contours.

Admissions by Agents and Co-conspirators

Another explicitly holistic requirement in the Rules can be seen in Rule 801(d)(2), which exempts from the hearsay rule admissions made by a party and offered against her at trial. Such statements can include not only the party’s own statements, but statements by agents as well, so long as they were made during the agency relationship and concern matters within the scope of agency. Similarly, statements by co-conspirators are also permitted as admissions, so long as the statement was made “during the course and in furtherance of the conspiracy.”²⁵ Implementing the Rule raises an obvious question: how can the agency relationship or the existence of the conspiracy be proved? The statement is only admissible if such a relationship in fact exists; can the statement itself be taken as evidence of the relationship? Or would proving through the statement itself the very

²⁴ FRE Rule 807.

²⁵ FRE 801(d)(2).

matter that permits the statement to be admissible be an illegitimate form of bootstrapping?²⁶ The current Rule clearly answers that question, drawing on and extending the Supreme Court’s reasoning in *Bourjaily v. United States*: according to the Rule, “The contents of the statement shall be considered but are not alone sufficient” to establish the agency relationship or the existence of the conspiracy.²⁷ This requirement of some evidence going beyond the contents of the statement makes the rule holistic – admissibility cannot be determined simply from the atomistic contents of the statement alone. The Advisory Committee Notes make clear that there need not be genuinely independent evidence of agency or conspiracy: merely the context in which the statement was made or even just the identity of the speaker may be sufficient.²⁸ Permitting context alone to suffice is less holistic than a requirement of independent additional evidence, but it nonetheless represents at least a weak form of holism. More generally, any corroboration requirement²⁹ or any requirement of foundational evidence³⁰ is at least a partial form of holism.

Numerous additional examples of both atomism and holism could be described, but these suffice, I hope, to illustrate that in a number of places in the Federal Rules of Evidence, judges are permitted or required to take an atomistic approach, while in other places, an implicit or explicit holism is expected. Judges are called on to examine certain kinds of evidence in isolation, while in other places, they are encouraged or invited to undertake a more comparative approach. Whether the choice of the Rules and

²⁶ This was the issue faced in *Bourjaily v. United States*, 483 U.S. 171 (1987).

²⁷ FRE 801(d)(2)(E)

²⁸ Advisory Committee Notes, 1987 Amendment.

²⁹ For example, the dominant approach to statements of intent under 803(3) and the Hillman doctrine, involving a *third party*’s actions in accordance with the *speaker*’s claimed intent requires corroboration as a prerequisite to admission.

³⁰ For example, Rule 901’s authentication requirement.

courts to require atomism or holism in each of these circumstances is either practical or improved the accuracy of trial outcomes has not thus far been my point; I merely wanted to show through relatively straightforward examples that we could see aspects of both approaches throughout the rules as written and as implemented.

This next section will look more closely at three conceptual categories where issues of atomism versus holism not only arise but also pose both practical and theoretical problems. I will look first at the problems of assessing prejudice, and whether the prejudice and probative value of an item of evidence should be evaluated atomistically or holistically. Here I will focus primarily on Rule 403, a centerpiece of the Federal Rules that is potentially implicated in nearly every admissibility decision judges make. Then I will turn to the problem of assessing reliability, and whether reliability should be determined atomistically or holistically. Here I will look at two concrete areas: expert evidence, a currently much-discussed topic in evidence circles; and hearsay, especially focusing on the difficult problem of what standard should be used to evaluate hearsay under the residual, or catch-all exception. Then I will turn to the problem of conditional relevance, which has captured the attention of a number of evidence scholars in recent decades. When should relevance be seen as depending on other evidence, or some kind of evidentiary foundation, and is the idea of conditional relevance – an explicitly holistic conception – coherent?

Assessing Prejudice and Probative Value: The Quagmire of ‘Evidentiary Alternatives’

Rule 403 is a keystone of the Federal Rules of Evidence. This rule grants the trial judge to exclude relevant evidence on a variety of grounds, the most important of which

is that the item’s “probative value is substantially outweighed by the danger of unfair prejudice.”³¹ Rule 403 calls for judges to perform a balancing test, weighing probative value against a variety of other factors, including, in addition to unfair prejudice, the risk of misleading the jury, wasting time, or needlessly presenting cumulative evidence. Rule 403 applies to nearly all evidence – even if the evidence is admissible under another rule, with a few exceptions, judges are permitted and indeed expected (upon objection) to consider also whether it passes muster under Rule 403.

But, focusing on the balance between prejudice and probative value, how should judges apply Rule 403? Should they assess a piece of evidence’s probative value, and then examine its potential prejudice, looking in both instances to the piece of evidence standing alone? Or should both prejudice and probative value be assessed holistically, contextually, in relation to other evidentiary alternatives? The Supreme Court confronted precisely this issue in the recent case of *Old Chief v. United States*.³²

Old Chief involved a defendant, Johnny Lynn Old Chief, who was charged with assault with a dangerous weapon and with using a firearm for a crime of violence.³³ Because the defendant had previously been convicted of another felony, assault causing serious bodily injury, he was also charged with being a felon in possession of a firearm, a violation of 18 U.S.C. §922(g)(1).³⁴ The defendant wished to stipulate that he had indeed been convicted in the past of a felony of the sort delineated in the felon-in-possession statute. He offered such a stipulation in an effort to prohibit the government

³¹ Rule 403

³² 519 U.S. 172 (1997).

³³ *Id.*

³⁴ *Id.*

from introducing any specific facts about the prior felony, including its name.³⁵ His concern was that if the jury learned the name or details of the earlier crime of which he had been convicted, it might take this prior conviction as evidence that he had a propensity to commit assaults, and hence think it more likely that he committed the assault of which he was now charged.³⁶ Alternatively, the jury might take the details of the prior crime as evidence that Johnny Old Chief was simply a bad man with a bad character, deserving of punishment or preventative incarceration, regardless of his factual guilt or innocence in the present case.³⁷ Evidence offered directly in support of either such inference would have been excluded under the Rules as impermissible character evidence.³⁸ Using a stipulation instead of naming the earlier felony would have established one of the matters that the prosecution had to prove – namely that the defendant had the status of ‘felon’ and hence would be guilty of unlawful possession of a firearm if found to have had a firearm in the present instance – without subjecting him to the unfair prejudice that could result from the presentation of any descriptive details of the earlier crime.³⁹

³⁵ Id. In fact, there is every reason to believe in this case that the knowledge of the name of the prior felony could have had a significant improper influence on the jury in the particular case. The facts of Old Chief – glaringly missing from the Court’s opinion – are rather astonishing. Basically, Old Chief and a couple of friends were drinking and went to a bar, where someone else and Old Chief got into a fight, with the other man the undisputed aggressor. During the course of the fight, a gun (not belonging to Old Chief) was fired into the air, and the testimony was in dispute about whether Old Chief or another member of his party shot it. No one was injured. Knowing that Old Chief had previously used a firearm and that he had previously violently assaulted someone might well have made the jury more persuaded that he was the one who fired the shot in this instance, even though the previous conviction could not have been legitimately admitted for this purpose. See appellate opinion, WL trial court, Risinger.

³⁶ Old Chief, 519 U.S. at 179-180.

³⁷ Id.

³⁸ FRE 404(a).

³⁹ The Advisory Committee’s Notes to Rule 403 define unfair prejudice as “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” In a detailed exploration of Rule 403, Victor Gold claims “evidence is unfairly prejudicial to the extent it has a tendency to cause the trier of fact to commit inferential error.” Victor J. Gold, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 Wash. L. Rev. 497, 503. See also Victor J. Gold, Limiting Judicial Discretion to Exclude Prejudicial Evidence, 18 U.C. Davis L. Rev. 59, 73 (1984).

The U.S. Attorney refused to join in the stipulation, and the trial court ruled that the prosecution had the right to prove its case in the way it saw fit. At trial, over Old Chief's renewed objection, the prosecutor introduced the judgment of conviction, which included a one-sentence description of the prior crime and the punishment imposed.⁴⁰ The Court of appeals affirmed the trial court ruling, finding that "the government is entitled to prove a prior felony offense through introduction of probative evidence," and the trial court had not abused its discretion by permitting the introduction of the prior conviction.⁴¹

Thus, the narrow issue before the Supreme Court was whether the admission of the judgment of conviction, including the name of the crime, was an abuse of discretion, given the defendant's willingness to stipulate to the existence of a prior felony conviction. But the broader question, never before addressed by the Supreme Court, was, how ought courts to understand the application of Rule 403? Should they evaluate the prejudice and probative value of an item of evidence atomistically, or should they look beyond the particular item, and assess both prejudice and probative value contextually? Though Souter did not use the vocabulary of atomism and holism, this is precisely the issue he confronted:

As for the analytical method to be used in Rule 403 balancing, two basic possibilities present themselves. An item of evidence might be viewed as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded. Or the question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case as the court understands it when the ruling must be made.⁴²

⁴⁰ *Old Chief*, 519 U.S. at 177.

⁴¹ 1995 U.S. App. LEXIS 13541, *3-4.

⁴² *Old Chief*, 519 U.S. at 182.

For purposes of Rule 403 analysis, is a piece of evidence an atomistic island, or ought it to be assessed more holistically, evaluated through comparison and in relation to the entire evidentiary record? The majority concluded that the holistic approach was superior, calling on judges to “evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well.” If some other item of evidence was equally probative or nearly so, but less prejudicial, “sound judicial discretion would discount” the probative value of the first piece of evidence, and “exclude it if the discounted probative value were substantially outweighed by unfairly prejudicial risk.”⁴³ Thus the Court thought that it was the *marginal* probative value of an item of evidence that court should assess in undertaking a Rule 403 analysis, not the inherent probative value analyzed in the absence of all other evidence. The opinion implies that assessing *relevance* under Rule 401 is appropriately an atomistic inquiry.⁴⁴ If an item is relevant, it remains so no matter what other evidence is available to prove the same point. But unlike relevance, *probative value* (and, though the opinion is less explicit on this point, prejudice too) is relational, and ought to be evaluated looking holistically at the entire (available) evidentiary spectrum.

Souter’s justification for the superiority of a holistic approach to Rule 403 is the need for controlling adversary excesses and reigning in unduly strategic behavior. He writes that an atomistic approach to the rule “is open to a very telling objection. That reading would leave the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance. He could choose the available alternative carrying the greatest threat of improper

⁴³ Id. at 183.

⁴⁴ Id. at 179.

influence, despite the availability of less prejudicial but equally probative evidence. . . . This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.”⁴⁵

This analysis is worth examining in somewhat more detail. Parties will often want to introduce evidence that is prejudicial to the opposing party, to whatever extent they are permitted to do so. But even an atomistic approach to Rule 403 could limit parties’ efforts to maximize the quantity of prejudicial evidence offered. After all, if a party attempted to introduce prejudicial evidence of only slight probative value, the trial judge would clearly have the power to exclude it, even applying Rule 403 to that item in isolation. The Court’s concern is that when a party might prove a relevant matter in multiple ways, it might strategically choose the most prejudicial form of proof, not because it is any more probative on the relevant point than some alternative way of proving the same thing, but precisely because it might prejudice the factfinder against the opposing party. Indeed, the claim that the piece of evidence has legitimate probative value may be little more than pretext – the party may desire admission not at all for the permitted inference, but specifically in order to prejudice the jury against its opponent. Souter therefore wants to forestall parties from choosing prejudicial evidence – evidence that encourages the factfinder inappropriately to make a decision based on emotion, or invites the factfinder to make a prohibited inference – in lieu of perfectly adequate alternatives that are *not* unfairly prejudicial. If, given the availability of alternative evidence, the marginal or incremental probative value of the new item of evidence approaches zero, why should the jury be allowed to hear it if it risks unfairly prejudicing them? Surely if we take the

⁴⁵ Id. at 183-84.

concern about prejudice at all seriously, a holistic approach to the rule strikes a better balance.

Under the facts of *Old Chief*, holism is easy. Johnny Lynn Old Chief’s stipulation or (since the stipulation was not agreed to by the prosecution) an admission by him that the prior conviction element was satisfied would have been, as the Court put it, “seemingly conclusive evidence” on that element.⁴⁶ Given such an admission, the added probative value of introducing the name of the prior crime was nil, because the only relevant aspect of the name of the prior offense was that it showed defendant’s ‘status’ as a felon. However, alerting the jury to the prior crime’s name did risk unfairly prejudicing the defendant, especially given the substantial overlap between the prior crime and the present charges that might have encouraged the jury to make an inference about Old Chief’s propensity to assault, an inference explicitly prohibited by our evidence law. Therefore, the Court was faced with a positive potential for prejudice and a marginal probative value approaching zero: under a holistic analysis, exclusion was clearly appropriate.

While the opinion explicitly embraces the appropriateness of a trial court’s examination of evidentiary alternatives for the purposes of evaluating a Rule 403 objection, the holding in *Old Chief* was actually drawn in exceedingly narrow terms: “While our discussion has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon status,” Souter wrote in a footnote.⁴⁷ In fact, nothing in his basic defense of holistic Rule 403 reasoning suggests a justification for this limitation. And yet, as the remarkable second half of the opinion makes clear,

⁴⁶ Id. at 186.

⁴⁷ Id. at 183 fn.7.

something about holism made the Court anxious; indeed, the latter part of the opinion comes close to unraveling the first.

By the end of the opinion, the holism the Court appeared to support has been tremendously eroded, transformed from a general approach to Rule 403 into a rare judicial intervention into a party's right to choose its evidence, almost an anomaly. The final part of the opinion is an eloquent paean to parties' evidentiary autonomy. Souter emphasizes the critical need for parties to be permitted to structure and present evidence in the matter they deem fit. He insists upon the importance of ensuring that a party is allowed to tell the jury a complete and convincing narrative, and he positively celebrates the affective and moral dimension of narrative. A party may legitimately present evidence as much "to tell a story of guiltiness as to support an inference of guilt."⁴⁸ Judges should thus intervene in parties' evidentiary choices with great caution, and they should respect the power of the robust, the concrete and the particular to persuade, and the "legitimate moral force" of stories well told.

Old Chief, then, ends up sending a very mixed message to trial courts: apply Rule 403 holistically, but with great respect for a party's power to choose the specific, concrete ways she wants to prove her case. *Old Chief's* Janus-like approach at best leaves trial courts with a heightened appreciation of two aspects of their role in assessing Rule 403 objections – on the one hand, the need to curb strategic and possibly pretextual use of unfairly prejudicial evidence, and, on the other hand, the need to recognize the importance of narrative relevance⁴⁹ and to respect parties' own decisions about how best to prove their case – without providing any particular advice on how to reconcile the

⁴⁸ Id. at 188.

⁴⁹ On narrative relevance, see Lempert.

tension between these two goals. Perhaps unsurprisingly, outside of the context of status offenses like ‘felon-in-possession,’ *Old Chief* does not seem to have prompted significant changes in how judges make assessments under Rule 403.⁵⁰

What would it mean to take holism seriously in the context of Rule 403? What would be the consequences of taking Souter’s logic of holism to its natural conclusions? What kinds of evidence would judges find themselves analyzing, how would they go about it, and what would the effects be on the dynamics of the trial?

1. Cumulative evidence that has some risk of prejudice

One category of evidence that would be affected by a holistic approach to Rule 403 would be evidence whose probative value significantly or completely overlaps with evidence already introduced, and which also carries with it some danger of unfair prejudice. This is, of course, simply a generalization of what happened in *Old Chief* itself: the prosecution wished to introduce evidence that, while relevant, was cumulative given Johnny Old Chief’s admission. In cases like these, if a judge analyzes the evidence holistically, at some point the marginal probative value becomes low enough that it is outweighed by the danger of prejudice.

By generalizing this category beyond *Old Chief*, we can see that it could apply even in situations where the probative value of the additional item of evidence did not approach zero; that is, it could apply even when the multiple pieces of evidence were not near-perfect substitutes for one another, as they were in *Old Chief*. For example, suppose that a defendant in an grand larceny case has six prior convictions for an array of

⁵⁰ There are a couple of exceptions; see e.g., *Nachamie*, *US. v. Merino-Balderrama*, 146 F.3d 758 (9th Cir. 1998).

felonies. If the defendant testifies on her own behalf, the prior convictions become relevant for the purpose of impeaching the defendant's credibility as a witness. They simultaneously create the risk of unfair prejudice, as the factfinder might believe that the prior felonies suggest the defendant has a propensity for criminal activity and hence was more likely to have committed the crime for which she stands trial; this risk of prejudice increases the more similar the prior crimes are to the one presently charged. If the judges assessed the admissibility of the prior convictions atomistically, she would evaluate them one at a time, and her decision to admit or exclude one would have no impact on her analysis of the next.

For simplicity's sake, suppose that the six prior convictions were each for identical crimes; in this instance, an atomistic analysis would mean that all six were admitted or all six were excluded, for the balance between prejudice and probative value would be identical for each; to reach anything other than the same admissibility decision for each would be irrational. By contrast, for six identical prior convictions, a holistic approach might yield different results, but not necessarily. A judge could decide that the incremental probative value of, say, the fourth, fifth and sixth convictions were extremely low, for the judge might conclude that whatever evidentiary 'work' the prior crimes did for helping the factfinder assess credibility was done simply by alerting the jury that the defendant was a recidivist felon, while emphasizing again and again defendant's criminal past might intensify the character inference. Thus, a judge might admit some but not all of the convictions under Rule 609(a)(1). On the other hand, a judge might reason that while the incremental probative value of the last few convictions was very low, so was the incremental prejudice, for arguably the jury might not view the defendant's propensity

for criminal activity any differently knowing that she'd been convicted six times before rather than three. Thus, for multiple identical crimes, a holistic approach would change the frame of analysis, but it might or might not change the admissibility result.

If we complicate the example somewhat, and make the six prior convictions for different crimes from one another⁵¹, a holistic analysis might increase the likelihood that the judge would exclude any convictions that were for crimes substantially similar to the one presently charged. To be sure, a judge might do this even under an atomistic inquiry, finding that standing alone, the probative value of, say, an earlier grand larceny conviction was outweighed by the danger of prejudice even without taking the other convictions into account.⁵² But if the main legitimate purpose for admitting prior crimes evidence to attack a testifying defendant's credibility is only to indicate to the jury that this witness, because of a prior criminal record, may be less likely to be *credible* than a witness who lacks a criminal record, then, once a judge has admitted one or several of the defendant's criminal convictions, the incremental probative value of another conviction for the legitimate inference is slight, whereas the prejudice is high, precisely because the similarity between the prior crime and the present charges invite the jury to make the prohibited propensity inference. Thus a holistic approach ought to lead judges to exclude more similar crimes evidence under Rule 609(a)(1) than they would if they approached the question atomistically.

Similarly, when judges rule on the admissibility of questions under Rule 608(b), questions about specific acts that suggest a character for dishonesty, asked on cross-

⁵¹ Assume for ease of explication that none is a dishonesty crime for which admission is mandated under Rule 609(a)(2).

⁵² Note that under Rule 609(a)(1) defendants are entitled to the benefit of a special balancing test in which probative value must be outweighed by prejudice; this test is explicitly tilted more in favor of exclusion than is the traditional Rule 403 test.

examination to impeach a witness, a holistic approach should lead to judges to exclude more than she would under an atomistic approach, especially when the testifying witness is the accused.⁵³ Just as with evidence of prior crimes under Rule 609(a)(1), evidence of specific acts that suggest dishonesty may also risk unfairly prejudicing the defendant by suggesting to the factfinder that the defendant has a generally bad character and hence is not simply more likely to be lying on the stand (a permitted inference) but also is more likely to have committed the underlying act (a prohibited inference). Though reasonable judges could disagree about incremental probative value and incremental prejudice, an approach that focuses on the relative values rather than the absolute ones is more likely to curtail the prosecution's questioning sooner; if the specific act suggesting untruthfulness bears any resemblance to the alleged facts in the present charge, this would, of course, increase the prejudicial value and make exclusion still more likely under a holistic approach.

Thus we see that one consequence of taking a holistic approach to Rule 403 would be to increase, at the margin, judicial limits on certain kinds of impeachment evidence, especially when offered in relation to testifying defendants. Note that for repetitive evidence that is not prejudicial, another prong of Rule 403 permits exclusion: both "waste of time" and "needless presentation of cumulative evidence" are legitimate grounds for deeming evidence inadmissible under Rule 403. Note, further, that this

⁵³ For both Rules 608 and 609, a similar analysis could apply to a non-party witness; however, the prejudice accruing to the defendant from the witness' prior crimes or prior bad acts is clearly lower. It may not be zero, however, for a jury might infer that if the witness has a propensity to commit bad acts or crimes (or, even more strongly, a propensity to commit crimes or bad acts similar to the ones with which defendant is charged), so might the defendant, for the defendant befriends such criminals, or at least calls them to testify on her behalf.

second ground in particular is inherently and necessarily holistic; evidence cannot be cumulative unless it is assessed in relation to that which has already been introduced.

Finally, even with these simplistic examples, we can see that a party that expects a judge to make these determinations holistically might strategically try to ‘game’ the timing or content of its evidence. For example, suppose the defendant has been convicted of six prior crimes, only one of which bears a strong similarity to the present charges. The prosecution might attempt first to introduce the prior conviction with the most similarity to the present charges, precisely because this is the point when its incremental probative value would be highest. If the judge nonetheless excludes this conviction as excessively prejudicial, the prosecution can move on to the next one. If the judge allows the first conviction, the prosecution has succeeded in gaining admission for the conviction likely to most influence the factfinder, even though some of the influence is technically prohibited (and subject to a limiting instruction upon request); if some of the other convictions are excluded, at least the prosecution been allowed to introduce the most harmful one. Similarly, a prosecutor might introduce the most damaging questions about prior bad acts suggesting untrustworthiness first, in order to maximize the chances they are allowed. Presumably, a defendant’s response to both of these moves would be to attempt to get admissibility resolved *in limine*, but judges are often not amenable to making determinations about precisely what impeachment evidence they will allow prior to hearing the actual trial testimony.⁵⁴ Thus, we can see that the temporal sequence of a

⁵⁴ See *Luce v. United States*, 469 U.S. 38 (1984). *Luce* involved a defendant who wanted to know whether his prior convictions would be admissible before deciding whether to testify; the Court held that if the trial court chose not to rule in limine, the only way to preserve the Rule 609 issue for appeal was for the defendant to take the stand. Relevant for our purposes, the Court held that judges could well choose to wait until trial to make Rule 609 rulings, as the reviewing court “must know the precise nature of the defendant’s testimony, which is unknowable, when, as here, the defendant does not testify.” *Id.* at 41.

trial will have an effect on how holism can be implemented. Unless a judge insists upon hearing *all* of the potential evidence before ruling on any piece of it – in essence trying the case before she tries the case – holistic analysis by the judge will inevitably be partial, as it will depend upon what has already been introduced, and parties will sequence their evidence accordingly.

2. Evidence of Undisputed Facts and Issues

Taking holism seriously in the context of Rule 403 would also recast in significant ways the judicial treatment of prejudicial evidence offered to prove issues not in dispute. In *Old Chief*, the majority opinion takes great pains to emphasize that despite its holding, “a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.”⁵⁵ This issue arises whenever a defendant might want to admit some element of what needs to be proved in order to forestall the prosecution from adducing proof on that point that might prejudice the jury against her. For example, in a child pornography case, a defendant might want to admit that the materials in question are obscene, while denying possession, and thus preclude the jury from viewing the materials themselves.⁵⁶ Or, when charged with a violent crime, a defendant might want to admit that the perpetrator, whoever it might be, had the requisite intent, while denying identity, in order to block the prosecution from offering detailed, gory images of the violence done to the victim in order to establish intent.⁵⁷

⁵⁵ *Old Chief* at 186-87.

⁵⁶ For recent cases where the defendant has unsuccessfully attempted such a maneuver, see, e.g., *U.S. v. Becht*, 267 F.3d 767 (8th Cir. 2001); *U.S. v. Campos*, 221 F.3d 1143 (10th Cir. 2000); *U.S. v. Hay*, 231 F.3d 630 (9th Cir. 2000); *U.S. v. Caldwell*, 1999 U.S. App. LEXIS 7417 (6th Cir. 1999). But cf. *U.S. v. Merino-Balderrama*, 146 F.3d 758 (9th Cir. 1998).

⁵⁷ In an insightful piece on *Old Chief*, D. Michael Risinger makes a similar argument. Examining both evidence of elements not in dispute and, more generally, evidence of ‘heartstrings and gore,’ Risinger

If the judge assesses the evidence under Rule 403, proceeding atomistically, the evidence may well pass muster. After all, the prosecution has an obligation to prove every element of the crime, and a right to do so, within the constraints of the rules of evidence, in whatever manner it sees fit. In fact, this is generally what occurs: while judges sometimes make a holistic gesture and exclude some fraction of the proffered gory photographs as cumulative or excessively prejudicial, they most typically admit many such images, either without any clear relevance rationale at all, or on the theory that the images show that the crime was committed with the requisite intent, even if the perpetrator's mens rea is undisputed.⁵⁸

The situation would look different if Rule 403 were interpreted holistically. The added probative value of the evidence would be zero or extremely low, given a strongly-worded, unambiguous admission on the part of the defendant on whatever element the evidence tended to prove. The potential for prejudice, however, would be substantial; especially in the case of the gory crime-scene photographs, the jury's disgust might lead them, at worst, simply to want someone, anyone to pay for the crime guilty or not, or, more realistically, to lower their regret matrix; that is, to think that because the crime was so dreadful, the requisite burden of proof should be lowered.⁵⁹ There is a practical problem: because the prosecution presents its case first, it will often may not be entirely clear whether or not intent is in dispute. But if the defendant offered to stipulate, or made

criticizes the second half of the majority opinion in *Old Chief* and argues that there is no satisfying or satisfactory justification for permitting either evidence on issues not in dispute, or evidence with no rational probative force, into evidence. However, because he focuses substantially on the second half of the opinion, Risinger does not explore the way that a holistic approach to Rule 403 would address this problem. See generally D. Michael Risinger, John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force" – Keeping The Courtroom Safe for Heartstrings and Gore, 49 *Hastings L. Rev.* 403 (1998).

⁵⁸ Cites.

⁵⁹ On the notion of a regret matrix, see Lempert, *supra* note _____. See also Risinger, *supra* note _____.

a binding judicial admission, then, when examined holistically, the marginal probative value of such evidence would frequently be lower than its potential for unfair prejudice.⁶⁰

More generally, holism would increase judicial control over the introduction of evidence and process of proof. Rule 403 would become a still more powerful tool through which judges would exercise control over parties' decisions about how to prove their cases. Whether this increased control would be helpful or harmful depends largely on the extent to which we suspect that parties' evidence introduction frequently is strategically designed to evade the constraints imposed by the rules of evidence. The more we fear that parties regularly introduce purposefully prejudicial evidence precisely in order to invite prohibited inferences by the jury – whether to suggest bad character, to play to emotion in an unreasonable way, to invite inferences that are not in fact supported by other evidence, or to mislead juries in any other way – the more attractive a greater holism will be. By contrast, the more we think that judicial holism risks keeping genuinely probative evidence from the jury as the judge substitutes her judgment about probative value for the factfinders, the less attractive holism will be. More generally, greater holism in the context of 403 might have a transforming effect on what we might loosely call the judicial cast of mind. If judges were to take Old Chief to its extreme, it might invite a quite different kind of judging. Whether a more activist judiciary would lead to better outcomes – either in the sense of more accurate outcomes or in the sense of a process that participants, or the polis, subjectively perceived as fairer – depends, frankly, on both prior assumptions and speculation. Still, for those who are critical of the

⁶⁰ This raises the issue of whether binding stipulations or judicially admissions are constitutionally permissible in criminal cases; if not, a prosecutor might legitimately claim that she should be able to present specific evidence on the issue, in case the jury might decide, in the absence of such concrete, particular evidence, to disavow the stipulation.

potential irrationality of jury decision-making but recognize the practical political difficulties of eliminating or even reforming the jury process, holism could offer an attractive approach, a judicial procedural change that has no formal relation to the power of juries, and yet, in practice, increases the judicial power to control evidence and thus transforms the inputs that jurors have available to them for making decisions.

3. Prior Bad Acts Under 404(b) Offered for a Purpose other than Character

[This section will look at the effects of a holistic approach to Rule 403 on Rule 404(b) determinations. More than in earlier examples, holism here begins to require judges to compare apples to oranges – say, evidence of motive or identity stemming from defendant’s prior bad acts, compared with evidence on motive or identity coming from other sources and testimony in the case. Still, holism would suggest that the more other evidence is available on, say, motive, the more willing judges should be to exclude 404(b) evidence given the dangers of the propensity inference. But this quickly starts to become complicated: what if the other evidence is strong, if believed, but is offered by a less than fully credible witness? Even if there is nothing inherently suspect about the witness’ credibility, the judge cannot know whether the jury will believe her. Should the judge make assumptions about jury assessment of witness’ credibility in order to compare evidentiary alternatives; how can she compare evidentiary alternatives in a serious way without doing so? More generally, what if the other evidence is strong but not conclusive? Frequently there will be circumstances where the incremental value of the 404(b) evidence is well above zero and yet the prejudicial risk is real; how does holism help us in this circumstance?

We continue to see how holism, seriously implemented, begins to require judges to take an ever more managerial, inquisitorial role. Judges start to choose among the various evidentiary alternatives, even when they are far from perfect substitutes of one another. This section will show how holism, taken to an extreme, requires judges to second-guess attorney judgments, and to become far more active in the process of controlling proof. Simultaneously, holistic judges, through this increasingly active management of the proof process, begin to limit further the evidence jurors hear, as holism does not allow for a clear-cut distinction between admissibility and weight. Thus we see two tensions generated (or better, exacerbated) by holism: the power of attorneys to structure their proof in the manner see they fit versus the judge’s legitimate effort to promote accurate factfinding through a holistic approach to the rules, and second, the judge’s power to control what information is funneled to the jury versus the jury’s power to weigh the evidence.]

Assessing Reliability: Experts, Hearsay, and the Problems of Context

[This section will look at atomism and holism in the context of judicial determinations about reliability. It will focus, first on Daubert/Kumho and the judge’s gatekeeping obligation with respect to expert evidence, which requires judges to assess the reliability

of expert evidence before admitting it. It's a much-discussed issue, but there has not been any examination of how atomistic or holistic judges' approaches to the questions are supposed to be. Most important, can or should judges compare the reliability of the expert evidence at issue to the reliability of the non-expert alternative forms of proof that would be likely to be introduced on the same point? What happens if there is a category of expert evidence of genuinely problematic reliability if assessed atomistically under Daubert, but that is simultaneously arguably more reliable than its non-expert substitutes? (This is probably the case with handwriting identification, expert versus lay; it is arguably the case with fingerprinting, at least if one compares partial smudged prints to, say, eyewitness identification).

This section will also turn to reliability assessments in the hearsay context, especially examining 807 (the residual exception) both under the hearsay rules and under Confrontation Clause jurisprudence. This rule invites an odd mixture of holism and atomism. As for holism, the rule requires that the statement be more probative on the point for which it is offered than any other evidence that could be procured by the proponent through reasonable efforts. This is incredibly holistic if taken seriously – it requires the judge not only to assess evidentiary substitutes within the evidence presented, but it invites the judge imaginatively to establish (or to speculate) on the evidence that could have been acquired through reasonable effort – thus looking not only at what is available, but at what could have been made available. But another part of the rule has been interpreted atomistically by courts. The statement must have “circumstantial guarantees of trustworthiness” equivalent to those of the other hearsay exceptions, and this has been interpreted, both under the rule itself and under the Confrontation Clause, as requiring a focus on the statement itself and the totality of circumstances in which it was made (an approach mostly atomistic), rather than corroboration by other independent evidence (which would have been more deeply holistic). This atomistic approach to the problem has blinded courts to the differences between kinds of corroboration, which a holistic approach to the problem would have brought into clearer light. More generally, examining reliability issues through the lens of atomism and holism forces direct attention to complex issues of evidence assessment that are generally ignored and buried.]

Assessing Relevance: Atomism and the Problems of Conditional Relevance

[This section will look more closely at the relation between atomism and holism in relevance determinations, focusing on the doctrine of conditional relevance, long enshrined in the rules but criticized as incoherent by several academics. The purpose of this section will be first, to revisit the issue of conditional relevance and its coherence, through the lens of atomism and holism. We shall see that the dividing line between an atomistic approach to relevance (simple relevance) and a partially holistic approach (conditional relevance) is necessarily arbitrary. However, we will also find that because the chains of inference required to make a conditionally relevant piece of evidence admissible are delineated explicitly by its proponent, this form of holism generates less tension between the twin goals of accuracy of adjudication and adversarial control than most other forms of holism; it is also possible to reconcile conditional relevance with the desire to have minimal interference with the jury's power to adduce facts. Thus,

somewhat ironically, the doctrinal place where the problems of atomism versus holism (in a different vocabulary, to be sure) have received the greatest attention, turns out to be precisely the place where the issue and its practical resolution least generates fundamental tensions between competing values.]