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Burying Evidence's Dead Hand

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Essay

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ABSTRACT

When the Rhode Island Rules of Evidence were adopted, they displaced all inconsistent case law existing at the time. Though the Rules retain a great deal of the evidence practice that preceded them, there is much in evidence practice that changed with their adoption. Rhode Island courts have consistently applied Rule 403 in a manner that comports with practice as it existed before the enactment of the Rhode Island Rules of Evidence. That practice, though, is inconsistent with the plain language of the Rule. These doctrines must be discarded.

INTRODUCTION

Law reform is a hard business. It took more than a century for American pleading and practice to complete codification efforts begun by David Dudley Field, II, in the mid-nineteenth century.[1] Evidence reform proceeded along similar paths, but took even longer at both the state and federal levels.[2] Rhode Island's work, as we will see, remains incomplete. What happens when old

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1. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1002 at 9–17 (4th ed. 2015).

2. *See generally* Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437 (2000).

precedents survive the adoption of a new code? The hand of the past pushes the law in directions opposite to those intended by reforming jurisdictions. And in Rhode Island, that dead hand has pushed courts into misstating the law of one particular rule of evidence. Rule 403 of the Rhode Island Rules of Evidence is consistently applied by courts in a way that typifies the ad hoc and case-specific evidentiary rulings of the past, a pattern at odds with the purpose of codified evidentiary rules. The application of these doctrines is an error of law that the bench and bar should put a stop to.

THE BACKGROUND OF CODIFICATION EFFORTS

Rhode Island codified its evidence law a little over a decade after the United States Congress did the same for federal courts.[3] The Supreme Court of the United States originally sought to promulgate federal rules of evidence under the power granted to it by the Rules Enabling Act.[4] That statute, which created the unified federal procedural structure we now take for granted, eliminated the cumbersome process dictated by the Conformity Act of 1872 and marks the point at which modern practice began to take shape.[5]

Rhode Island had its own mid-century law reform movement that paralleled federal efforts. First, in 1966, Rhode Island practice underwent a revolution similar to the one caused by the Federal Rules of Civil Procedure when the adoption of the Rhode Island Rules of Civil Procedure.[6] Shortly after this procedural reform was accomplished, the Supreme Court of the United States shifted its focus to evidence reform, and sought to complete its codification efforts in 1972.[7]

In the heady atmosphere of the Watergate scandal, though, Congress was unwilling to let the Supreme Court effect wholesale changes to evidence without the opportunity for input, specifically

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3. The Rhode Island Supreme Court created the Rhode Island Rules of Evidence on July 23, 1987, twelve years after Congress enacted the Federal Rules of Evidence in 1975. *See* Order, *In re* Rhode Island Rules of Evidence, No. 0915e (R.I. July 23, 1987). The General Assembly later passed a law codifying the Rules of Evidence. *See* 9 R.I. GEN. LAWS § 9-19-42 (2012).

4. *See* 28 U.S.C. §§ 2071–77 (2012).

5. *See* WRIGHT & MILLER, *supra* note 1, at 9–12.

6. Robert B. Kent, *Rhode Island Interest: Rhode Island Civil Procedure—Some Problems*, 9 ROGER WILLIAMS U. L. REV. 429, 429 n.2 (2004).

7. *See* Jaffee v. Redmond, 518 U.S. 1, 8 n.7 (1996).

regarding the issue of evidentiary privileges.[8] Following procedures set forth in the Rules Enabling Act, Congress passed a law staying the adoption of the Federal Rules of Evidence, and then revised and passed the Rules as legislation, which was ultimately signed into law by President Gerald Ford.[9]

Not long after, Rhode Island embarked on its own evidence reforms. The Rhode Island Supreme Court convened an advisory committee in 1980, the work of which led to the final adoption of the Rhode Island Rules of Evidence in 1987.[10] Though the Rhode Island General Assembly passed an enabling act empowering civil procedure reform, the creation of the Rules of Evidence would take a different path.[11] Rather than promulgating the Rules of Evidence through powers conferred by an enabling act, the Rhode Island Supreme Court promulgated its Rules of Evidence through the general power conferred upon it by the General Assembly and through the Supreme Court's inherent constitutional and supervisory powers.[12]

Though the General Assembly did not seize control of evidence codification in the way Congress did, it played its own part. It sought to legislatively enshrine the conclusion that the new rules of evidence wholly displaced previous practice, wherever and whenever they might be inconsistent: "The rules of evidence as adopted by the Rhode Island [S]upreme [C]ourt shall be controlling and take precedence over any statutory or case law in effect at the time of the adoption that is inconsistent with the Rhode Island rules of evidence."[13] This language mirrors a provision of the federal Rules Enabling Act.[14]

And yet, case law inconsistent with the Rules of Evidence continues to hold precedential value in Rhode Island courts today.

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8. To understand why evidentiary privileges were of particular interest to Congress at that exact moment, see *United States v. Nixon*, 418 U.S. 683, 703–16 (1974).

9. *See* INS v. Chadha, 462 U.S. 919, 935 n.9 (1983).

10. ERIC D. GREEN & ROBERT G. FLANDERS, JR., RHODE ISLAND EVIDENCE MANUAL xxv (2005) [hereinafter RHODE ISLAND EVIDENCE MANUAL].

11. *See* 8 R.I. GEN. LAWS § 8-6-2(a) (2008).

12. Order, *In re* Rhode Island Rules of Evidence, No. 0915e (R.I. July 23, 1987).

13. *Id.*

14. *See* 28 U.S.C. § 2072(b) ("All laws in conflict with [the federal rules of procedure and evidence] shall be of no further force or effect after such rules have taken effect.").

Rule 403 is widely recognized as a critical component of evidence law, one so important that it cuts across all other rules of evidence.[15] By its own familiar terms, Rule 403 requires the exclusion of evidence that, though of some probative value, finds that value substantially outweighed by the danger of unfair prejudice which would inure to a party by its admission.[16]

The goal of codification was to create a uniform, predictable, accessible, consistent, and rational statement of the law.[17] The product of the advisory committee's efforts to meet those goals led to the text of the rule. Rule 403 is a general rule; it does not contain a list of exemplar scenarios, such as the exceptions to hearsay,[18] nor does it apply to only a narrow category of evidence.[19] It is intended to be applied in the same manner across all circumstances. But it is undercut in two ways that sap its vitality in cases where it is most closely at issue.

RULE 403 AND CRIME SCENE PHOTOGRAPHY

The application of Rhode Island's Rule 403 is modified in one particular context: crime scene photography. Crime scene photographs or video, especially those of murder victims or the victims of other violent crimes, have their own rules for admission. Rhode Island courts apply two tests when evaluating the admissibility of crime scene photographs.[20] First, "with respect to highly prejudicial crime-scene photographs or pictures of murder victims, [the Rhode Island Supreme] Court has consistently held that 'when such evidence is probative, the trial court's admission of explicit photographs is not an abuse of discretion and will not be disturbed on appeal.'"[21] These holdings are not the result of general

15. State v. Gaspar, 982 A.2d 140, 147–48 (R.I. 2009).

16. R.I. R. EVID. 403.

17. *See* RHODE ISLAND EVIDENCE MANUAL, *supra* note 10, at xxvii–xxviii (discussing codification objectives and inconsistent nature of evidence rulings prior to adoption of rules).

18. *See* R.I. R. EVID. 803, 804.

19. *See, e.g.*, R.I. R. EVID. 404(b), 609.

20. *See, e.g.*, State v. Patel, 949 A.2d 401, 412–13 (R.I. 2008); State v. O'Brien, 774 A.2d 89, 107 (R.I. 2001). "It is only evidence that is marginally relevant and enormously prejudicial that must be excluded. Because 'the ultimate determination of the effect of evidence lies in the discretion of the trial justice,' we will not disturb such a determination on appeal absent an abuse of discretion." *Patel*, 949 A.2d at 412–13 (internal citations omitted).

21. *O'Brien*, 774 A.2d at 107 (quoting Hughes v. State, 656 A.2d 971, 972 (R.I. 1995)).

or waived objections; the Court has applied these doctrines to direct challenges under Rule 403.[22] Second, when confronted with crime scene photographs, Rhode Island law requires an inquiry into the proponent's purpose for offering the evidence: "'Indeed, only when such evidence is offered *solely* to inflame the passions of the jury should a photograph' or other visual images of a crime victim be excluded."[23]

These two doctrines conflict with Rule 403 in several ways. For starters, there is no balancing under either standard. The relative weights of probative value and unfair prejudice are never assessed, nor compared against each other. The first test essentially reduces a two-step balancing test to a one-step inquiry: does the photograph or video have probative value? If it does, then the evidence is admissible.[24] Balancing does not appear to be necessary at all; so long as there is probative value, a trial judge's decision to admit the evidence cannot be wrong.[25]

The second test departs from examining the evidence on its own merits entirely. This intent-focused inquiry bears no resemblance to the careful balancing and weighing that Rule 403 calls for. Instead, a trial judge must look at the evidence and try to divine the mind of the evidence's proponent, asking whether they offer the evidence for the *sole* purpose of unduly influencing the jury.[26] This second test effectively turns an evidentiary issue into a *Batson* challenge in miniature.[27] It shifts the reviewing court's focus from the evidence to the proponent; it asks about intent, rather than the balance between probative value and unfair prejudice; it requires a judge to scry the motives in a lawyer's heart rather than assess evidence.

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22. *See* State v. Garcia, 140 A.3d 133, 144–45 (R.I. 2016); *see also O'Brien*, 774 A.2d at 106–07.

23. *O'Brien*, 774 A.2d at 107 (emphasis in original).

24. *Hughes*, 656 A.2d at 972.

25. *See* State v. Fry, 130 A.3d 812, 830 (R.I. 2016) (discussing trial judge's findings of probative value without mention of possible unfair prejudice); *see also id.* at 832 (Flaherty, J., dissenting) ("It does not appear from the record that the trial justice articulated, either expressly or impliedly, the balancing test required by Rule 403.").

26. *O'Brien*, 774 A.2d at 107.

27. *See* Batson v. Kentucky, 476 U.S. 79, 96–98 (1986) (establishing the test to examine peremptory challenges of jurors for discriminatory intent).

THE DOCTRINAL ORIGINS OF THE RULE

These special tests for crime scene photographs and videos are an anomaly. It does not appear that any other types of evidence have unique, case-made rules that contravene the Rhode Island Rules of Evidence. Nor do any other categories of evidence have extratextual tests that modify the application of relevant Rules of Evidence by omitting part of the text, which happens here with the elision of the balancing half of the Rule 403 test. Nor does it appear that judicial evaluation of any other evidentiary issue necessitates inquiry into the mental state or motive of the proponent of the evidence. Why, exactly, does this one narrow species of evidence have such an individualized rule?

There appear to be two independent sources, which have been synthesized in modern decisions into the full rule. The first line of cases, which created the substance of the rule in which crime scene photographs or videos are only assessed for relevance and probative value, not potential for unfair prejudice, appears to trace back nearly a century in Rhode Island case law.[28] By 1971 the rule was well settled in a form easily recognizable to modern practitioners: "[W]here a photograph constitutes competent evidence and reasonably tends to prove or disprove some material facts in issue, it is admissible in evidence even though it may have an influence beyond the strict limits of the purpose for which it was admitted."[29] The rule is applied in essence the same today.[30]

The second half of the equation, the "sole purpose" language, appears to have its origins in a case decided about twenty years before the adoption of the Rhode Island Rules of Evidence. *State v. Winston* involved, as many crime scene photograph cases do, a particularly gruesome and terrible crime.[31] Police responded to a home in southern Providence at 1:38 a.m. on Christmas morning; inside, they found the body of a two and one-half year-old girl.[32] She had been stabbed, and there was visible evidence of a sexual

28. *See* State v. Greene, 60 A.2d 711, 715 (R.I. 1948); *see also* State v. Miller, 161 A. 222, 224 (R.I. 1932).

29. State v. Danahey, 274 A.2d 736, 741 (R.I. 1971).

30. *See Fry*, 130 A.3d at 831 ("[T]his Court has consistently held that 'when such evidence . . . is probative, the trial court's admission of explicit photographs is not an abuse of discretion and will not be disturbed on appeal.'" (quoting State v. Carter, 744 A.2d 839, 847 (R.I. 2000))).

31. 252 A.2d 354, 355 (R.I. 1969).

32. *Id.*

assault.[33]

The victim's seven-year-old brother notified police that a neighbor, who lived just four houses down the street, had been at the house the night before.[34] That neighbor was brought into police headquarters, where he admitted to returning to the victim's home after midnight and committing the sexual assault and murder.[35] At trial, he sought to preclude the admission of crime scene and autopsy photographs showing the condition of the victim.[36] The trial court did not agree with him and admitted the photos.[37]

The Rhode Island Supreme Court agreed with the trial judge.[38] It recited the various ways in which such photographs possess probative value:

> proof of the corpus delicti, the extent of injury, the condition and identification of the body or for their bearing on the question of the degree of atrociousness of the crime, even though such photographs may tend to have an influence beyond the strict limits for which they were introduced.[39]

The court then looked at the photos for their prejudicial effect: "We have examined the photographs in dispute and find them not to be as offensive as they are portrayed by defendant."[40] This examination should be familiar—it presages, without using the same terms, the analysis called for by Rule 403. The seed of the change comes after this substantive discussion: "[w]hile this court will not countenance the use of photographs whose sole purpose is to inflame a jury, defendant has failed to show us that the use of the disputed evidence amounted to an abuse of the trial justice's discretion."[41]

This statement comes after the discussion on the merits of the case and is not essential to the court's holding—it is not precedential.[42] The adoption of this dictum as a new substantive

33. *Id.*
34. *Id.* at 356.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 356–57.
42. *See Obiter Dictum*, BLACK'S LAW DICTIONARY (8th ed. 2004) ("A judicial

rule of law was not long in coming, though. By 1972 the court, in *State v. Pombo*, was already applying it as the determinative test, stating that "[t]he defendant has failed to persuade us that the sole purpose of offering this photo into evidence was to inflame the jury[.]"[43] And a definite shift is apparent: in *Winston*, the court is saying that it would not accept evidence offered solely to inflame the jury; in *Pombo*, the court is saying that it will *only* exclude evidence if it is solely offered to inflame the jury. This is the transformation of a sufficient condition into a necessary one. The tests were thus settled in their current forms before the creation of the Rules of Evidence.

THE ADOPTION OF THE RULES OF EVIDENCE

The Rhode Island Rules of Evidence were adopted on October 1, 1987.[44] The General Assembly simultaneously made several previous statutory provisions dealing with evidence self-repealing on the date of the adoption of the rules.[45] And it included a new provision, passed to coincide with the adoption of the rules: "The rules of evidence as adopted by the Rhode Island supreme court shall be controlling and take precedence over any statutory or case law in effect at the time of the adoption that is inconsistent with the Rhode Island rules of evidence."[46]

The two rules for crime scene photographs are plainly inconsistent with the text of the rule. Rule 403 requires a trial court to weigh probative value against the potential for unfair prejudice.[47] The case law on crime scene photography evidence varies substantially from the Rule 403 balancing test in the two ways described above. The substantive elements accept crime scene photographs when they are relevant and probative, without any regard to unfair prejudice; there is no balancing, as the rule requires. And the intent inquiry has no basis in the text of the rule

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comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).").

43. 290 A.2d 855, 857 (R.I. 1972) (citing *Winston*, 252 A.2d 354, 354 (R.I. 1969).

44. Order, *In re* Rhode Island Rules of Evidence, No. 0915e (R.I. July 23, 1987).

45. *See id.* 9 R.I. GEN. LAWS §§ 9-19-16–18, *repealed by* P.L. 1987, ch. 381, § 7; *cf.* RHODE ISLAND EVIDENCE MANUAL, *supra* note 10, at xvi n.2.

46. *Id.* § 9-19-42.

47. R.I. R. EVID. 403.

at all. Rule 403, by its very terms, assumes that there is a proper basis for introducing the evidence. That is why it "cuts across" all other rules of evidence: it applies to evidence that would otherwise be admissible but still should not be admitted because of extraordinary circumstances.[48]

The case law is inconsistent with the Rule, and a statute precludes reliance on those two earlier tests. They must, then, give way to the text of Rule 403. But that has not happened. There do not appear to be any reported cases analyzing the impact of section 9-19-42 of the Rhode Island General Laws on this evidence doctrine. In fact, there are few reported decisions that even cite that statute.[49] The Rhode Island Supreme Court has, though, recognized the force of section 9-19-42 previously, and used it to eliminate reliance on inconsistent decisions predating the Rules of Evidence for expert testimony.[50] It seems evident that reliance on case law predating—and inconsistent with—the Rules of Evidence is misplaced.

PUTTING A GLOSS ON THE RULE?

If the Rule is inconsistent with existing case law, prior decisions must give way to the Rule, and the Rhode Island Supreme Court has said as much. But can the Rhode Island Supreme Court, as the font of authority for the Rules of Evidence, diverge from the text of the Rule on its own initiative, essentially re-adopting former law by implication? While the court likely possesses the constitutional authority to do so, a recent decision suggests that the court would (and should) refuse to do so.

The Rhode Island Rules of Evidence were not, as noted above,

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48. *See* State v. Gaspar, 982 A.2d 140, 147–48 (R.I. 2009).

49. A search of reported Rhode Island decisions reveals just three Rhode Island Supreme Court cases addressing the statute: *Flanagan v. Wesselhoeft*, 712 A.2d 365, 369 (R.I. 1998); *Owens v. Payless Cashways, Inc.*, 670 A.2d 1240, 1243 (R.I. 1996); and *Martinez v. Kurdziel*, 612 A.2d 669, 673 (R.I. 1992).

50. *Flanagan*, 712 A.2d at 369.

> By virtue of § 9-19-42, Rule 702 took "precedence over any statutory or case law in effect at the time of its adoption" that was "inconsistent with the Rhode Island [R]ules of [E]vidence." Rule 702 effectively has served to trump *Richardson* [*v. Fuchs*, 523 A.2d 445 (R.I. 1987)], *Young* [*v. Park*, 417 A.2d 889 (R.I. 1980)], and *Schenck* [*v. Roger Williams Gen. Hosp.*, 382 A.2d 514 (R.I. 1977)], all relied upon by the trial justice for her exclusion of Dr. Brand's deposition testimony.

Id.

promulgated under enabling legislation passed by the General Assembly.[51] The law governing the Rules of Civil Procedure, section 8-6-2(a) of the Rhode Island General Laws, grants the power to amend those rules, but distributes that power across the courts.[52] The members of each bench may vote on rules of procedure, and then submit them to the Rhode Island Supreme Court for final approval.[53] No such procedure is required by any statute for the Rules of Evidence. As the supreme court relied on the broad supervisory authority it holds by law from the General Assembly, augmented by the inherent constitutional power it holds as the state supreme court, there does not appear to be any required procedure for amending the rules.

If the court desired, it likely could amend the rules on its own initiative, even by decision. But the court has firmly stated that it recognizes prudential limits on the exercise of its plenary power, and specifically will not seek to vary from a plain language interpretation of a rule. *Cashman Equipment Corp., Inc. v. Cardi Corp., Inc.* presents the unenviable scenario where practice norms diverge from the text of a rule.[54] The dispute centered on work performed in constructing the Sakonnet River Bridge. The particular issue before the court was the discoverability of computer models and draft reports used by the defendant's expert in the course of formulating his opinion.[55] The trial court denied a motion to compel discovery, holding that it was constrained in this scenario by the Rules of Civil Procedure.[56]

The plaintiff, the party seeking discovery, offered a comprehensive argument indicating that general practice saw the materials sought as discoverable, and that the Federal Rules of Civil Procedure made the material discoverable.[57] The defendant responded, however, that Rhode Island's rule varied in its text from the federal rule; it allowed only for expert discovery via interrogatories or depositions of the expert themselves—not the

51. Order, *In re* Rhode Island Rules of Evidence, No. 0915e (R.I. July 23, 1987) ("The rules are promulgated pursuant to the powers conferred upon this Court by G.L. 1956 (1985 Reenactment) § 8-1-2, and also pursuant to its constitutional and inherent powers.").

52. 8 R.I. GEN. LAWS § 8-6-2(a).

53. *Id.*

54. 139 A.3d 379 (R.I. 2016).

55. *Id.* at 380.

56. *Id.* at 381.

57. *Id.*

discovery of underlying documentation.[58] Because the language of the Rule of Civil Procedure was plain and unambiguous, the end result was inescapable: the material was not discoverable.[59] More important here, the court acknowledged the basic premise of the plaintiff's argument—that the court should read the rule to include what it was seeking as a practical concession—and rejected it outright. "To determine otherwise would require this Court to alter the present rule by judicial fiat, a practice in which we will not engage."[60]

The court did rest its decision in part upon the amendment procedure for the Rules of Civil Procedure, which requires a vote of the members of the relevant court, as described above, precluding the Rhode Island Supreme Court from acting unilaterally.[61] But it nonetheless began its discussion by stating emphatically what it considers to be prudential limits on the exercise of its powers. The court's position on rule changes is sensible and absolute: it will not do so absent an appropriate process, and it will not decree new rules on its own accord.[62] We are left here: statutory authority forecloses judicial reliance on common law doctrine inconsistent with the Rules of Evidence, and the Rhode Island Supreme Court has a strong institutional preference against unilateral action to vary the text of its rules.

JUST THE TEXT

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[63] This is the appropriate test to apply to an evidentiary challenge under Rule 403. This test does

58. *Id.* at 382.
59. *Id.* at 383.
60. *Id.* (citing Capital Props. Inc. v. City of Providence, 843 A.2d 456, 460 (R.I. 2004)).
61. *Id.* at 383 ("As Cardi points out, the process for amending the Superior Court Rules of Civil Procedure is provided by statute.").
62. In the evidence context, this process would likely repeat the convening of an advisory committee, which then investigates case law and the impacts of the rules and then proffers revisions to the Rhode Island Supreme Court for review and finalization. *See* RHODE ISLAND EVIDENCE MANUAL, *supra* note 10, at xxv-xxvi, xxvii-xxix.
63. R.I. R. EVID. 403.

not countenance evaluating crime scene photographs only in terms of relevance and probative value, nor does it turn upon an inquiry into the intent animating an evidentiary proffer. The other doctrines cannot lawfully be applied to cases in light of section 9-19-42, as that statute "effectively [serves] to trump" them.[64]

This change will not lead to upheaval in the courts. "It is only evidence that is marginally relevant and enormously prejudicial that must be excluded."[65] No defendant is entitled to a "sanitized version of the state's evidence against him."[66] And trial judges are well aware that the discretion afforded to them to exclude evidence under Rule 403 must be exercised sparingly.[67] The proper application of the Rule 403 balancing test will not disrupt the mine run of cases, as it should not.

Granted, the stakes, in terms of practical effect, are low. This will not be a sea change in the law, revolutionizing criminal practice in the state. But in every case, courts should apply the law as it exists, and not be contented with uncritically applying the dead doctrines of the past. What matters is that the test as applied *is not the law*. If the legal profession can be said to have any basic duty, it is the duty to accurately state the law.

Beyond this fundamental concern, the application of these tests frustrates the intention of the rule. Application of old and superseded law can, and does, lead to courts resolving Rule 403 challenges on discarded doctrine rather than on the plain text of the Rules of Evidence.[68] The two collateral doctrines make it all too easy to elide the rule as written and apply judicial innovations rather than the text upon which the bench and bar are supposed to rely. Reliance on these tests distorts outcomes in a way that

64. Flanagan v. Wesselhoeft, 712 A.2d 365, 369 (R.I. 1998).

65. State v. Patel, 949 A.2d 401, 412–13 (R.I. 2008).

66. State v. Pona, 66 A.3d 454, 468 (R.I. 2013).

67. State v. Virola, 115 A.3d 980, 996 (R.I. 2015) (citing State v. Brown, 42 A.3d 1239, 1244 (R.I. 2012)).

68. *See, e.g.*, State v. Garcia, 140 A.3d 133, 144–45 (R.I. 2016) (holding autopsy photographs admissible under Rule 403 because they are "'unquestionably relevant'" without weighing possibility of unfair prejudice); State v. Fry, 130 A.3d 812, 830 (R.I. 2016) ("[W]e cannot conclude that the video was offered 'solely to inflame the passions of the jury[,]' as would be required to prevent its admission." (quoting State v. O'Brien, 774 A.2d 89, 107 (R.I. 2001))); State v. Brown, 88 A.3d 1101, 1121 (R.I. 2014) ("We are unable to conclude that the trial justice abused his discretion when he ruled that the state did not present these photographs solely to inflame the passions of the jury . . . .").

diverges from the Rules of Evidence, defeating their purpose. It is difficult to envision a scenario in which a crime scene photograph would be irrelevant, or one in which surrounding circumstances would offer sufficient proof of a prosecutor's improper intent. It is not just that the doctrines continue to exist after the adoption of the Rules of Evidence, it is that they tear the heart out of one of the most important of them.

CONCLUSION

The Rhode Island Supreme Court promulgated its Rules of Evidence on October 1, 1987.[69] Since then, the dead hand of old law has prevented the Rules from operating as they should. The bench and bar should take the opportunity to recognize this fact and challenge the application of this disavowed precedent. If the extratextual evidence doctrines applied by Rhode Island courts are to be preserved, they should be formally added to a revised edition of the Rules of Evidence; rewriting rules by judicial fiat is something the Rhode Island Supreme Court strenuously refuses to do. Notwithstanding its aversion to doing so, that revision by fiat is exactly what has been happening to Rule 403. The proper means to preserve these doctrines is to convene an advisory committee to recommend rule revisions to the Supreme Court. But until and unless that happens, the Rules of Evidence must mean exactly what they say, and no more or less.

69. Order, *In re* Rhode Island Rules of Evidence, No. 0915e (R.I. July 23, 1987).