

Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay

Eleanor Swift *

I. INTRODUCTION

"State of mind" is an important disputed element in criminal trials when defendants seek to prove affirmatively that they did not have the "guilty" state of mind required by the charged crime. One type of exculpatory evidence they offer is hearsay statements, made by the defendants themselves, expressing their own then-existing state of mind. Such statements, if relevant to prove the defendant's mental state at the time of the alleged crime, are putatively admissible under Federal Rules of Evidence (FRE) 803(3). As this Article will demonstrate, however, courts are consistently re-interpreting FRE 803(3) to exclude defendants' own exculpatory state of mind statements that are "post-crime," made any time after the charged crime was committed.

This Article critiques the practice of excluding defendants' post-crime state of mind hearsay. It does so by applying the basic principles of narrative theory, a theory of jury decision-making which is explored in this Symposium. Part II describes how state of mind hearsay, including the allegedly "untrustworthy" statements made by criminal defendants, is admissible under the categorical definition of FRE 803(3). Parts III and IV present the basic principles of narrative theory. These principles demonstrate that defendants' state of mind hearsay can have high probative value and can be important for defendants in constructing a plausible alternative to the prosecution's narrative of guilt and guiltiness. Part V critiques the "timeliness test" that courts have added into FRE 803(3) and presents the results of case law research which shows how this test can exclude virtually all criminal defendants' post-crime state of mind hearsay. Part VI uses specific cases to illustrate how exclusion of such hearsay statements

* Professor of Law, School of Law, University of California, Berkeley.

can impoverish the defense and put criminal defendants at a disadvantage within the framework of narrative theory.

This Article assumes that the principles of narrative theory are a valid explanation of a crucial aspect of jury decision-making. Under this assumption, these principles are used here to shed new light on a specific problem of evidence law. Part VII concludes this Article by exploring larger questions about narrative theory: whether it simply casts old arguments about evidence law into new terms; whether its insights into jury decision-making contribute new understanding of how best to regulate the admission of evidence; or whether this theory demands a radical re-conception of the law of evidence itself.

II. THE CATEGORICAL APPROACH TO STATE OF MIND HEARSAY UNDER FRE 803(3)

FRE 803(3), the hearsay exception for statements of then-existing state of mind and physical condition, reads as follows:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

.....

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.¹

The exception appears to be "categorical," requiring courts to admit a hearsay statement when it falls within the exception's category of admissible statements, defined by relatively bright-line terms. One attribute of this categorical approach is that it curtails the "discretion" of trial court judges to admit or exclude hearsay on the basis of the judge's opinion of the trustworthiness of individual witnesses or hearsay declarants. Thus, if a criminal defendant offers evidence of her own out-of-court statement about her then-existing state of mind, the statement should be admitted if it is relevant.²

¹ FED. R. EVID. 803(3).

² FRE 403 should not be used to exclude hearsay based on judicial assessment on the hearsay declarant's lack of trustworthiness. Assessment of the declarant's testimonial qualities, particularly sincerity, is "a function reserved for the trier of fact." MICHAEL H. GRAHAM, *FEDERAL PRACTICE & PROCEDURE: EVIDENCE* § 7044, at 440 n. 15;

A defendant's exculpatory statements of state of mind made during the commission of an alleged crime might be relevant to prove that the defendant had an "innocent" mental state at the crucial time—when the crime was committed. They could reveal, for example, lack of intent, lack of knowledge, and lack of agreement. In addition, statements made either before or after the commission of the alleged crime could also be relevant to prove the defendant's mental state when the crime was committed. Courts admit such statements for this purpose based on a reasonable inference of continuity of the mental state forward or backward in time.³ When the state of mind issue is important in a criminal case, given the difficulty of rebutting a factfinder's assumption that most people intend the consequences of their acts, a defendant's own statements expressing her then-existing state of mind could be pertinent, perhaps even powerful, data for the jury.

The classic case employing the categorical approach to FRE 803(3) involves a criminal defendant's proffer of his own statement of then-existing state of mind, made during or immediately after the alleged crime. *United States v. DiMaria*,⁴ an opinion written by Judge Henry Friendly, concerned a statement made by defendant DiMaria when he was arrested in possession of a half-case of stolen cigarettes. The crime charged required proof that the defendant "knew" the cigarettes were stolen; the defendant claimed that he thought they were "bootleg," from a low tax state, rather than stolen. His statement to the arresting FBI agents was: "I thought you guys were just investigating white collar crime; what are you doing here? I only came here to get some cigarettes real cheap."⁵ This statement was interpreted by the court as the equivalent of "I am here" to get cheap cigarettes, "a statement of what he was thinking in the present."⁶ Judge Friendly's opinion reversed DiMaria's conviction, based on the finding that the district court's exclusion of this statement under FRE 803(3) was error. The government had objected to admission of DiMaria's hearsay, contending that it was "an absolutely classic false exculpatory statement."⁷ Judge Friendly rejected this contention as

see also 2 MCCORMICK ON EVIDENCE § 270, at 248 (Kenneth S. Broun et al. eds., 6th ed. 2006).

³ MCCORMICK, *supra* note 2, § 274, at 270–71.

⁴ 727 F.2d 265 (2d Cir. 1984).

⁵ *Id.* at 270.

⁶ *Id.* at 271. The prosecution conceded the validity of this interpretation. See *id.*

⁷ *Id.*

grounds to exclude the statement and endorsed the categorical approach of the Federal Rules of Evidence as follows:

False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that Rule are read to mean what they say, its truth or falsity was for the jury to determine

. . . The Advisers' Introductory Note: The Hearsay Problem, endorses Professor Chadbourn's criticism of § 63(4)(c) of the Commissioner's proposed Uniform Rules of Evidence, saying, "For a judge to exclude evidence because he does not believe it has been described as 'altogether atypical, extraordinary'"

It is doubtless true that all the hearsay exceptions in Rules 803 and 804 rest on a belief that declarations of the sort there described have "some particular assurance of credibility" But the scheme of the Rules is to determine that issue by categories; if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge, save for the "catch-all" exceptions of Rules 803(24) and 804(b)(5) and the business records exception of Rule 803(6) . . . even though this excludes certain hearsay statements with a high degree of trustworthiness and admits certain statements with a low one. This evil was doubtless thought preferable to requiring preliminary determinations of the judge with respect to trustworthiness, with attendant possibilities of delay, prejudice and encroachment on the province of the jury. There is a peculiarly strong case for admitting statements like [defendant's], however suspect, when the Government is relying on the presumption of guilty knowledge arising from a defendant's possession of the fruits of a crime recently after its commission.⁸

Judge Friendly's opinion is a strong statement of hearsay policy in favor of the categorical approach to the admission of hearsay. I have previously endorsed the categorical approach to FRE 803(3), as opposed to a judicially-created doctrine permitting judges to exclude criminal defendants' post-crime state of mind hearsay on grounds of untrustworthiness.⁹ My critique of this judicially-created doctrine, which I call the "timeliness test," is discussed in Part V.

This Article presents a new argument in favor of the categorical approach to FRE 803(3). It is that the narrative theory of jury decision-making, including the story model, the Supreme Court opinion in *Old Chief v. United States*,¹⁰ and the relative plausibility theory,

⁸ *Id.* at 271–72 (internal citations omitted).

⁹ See, e.g., Eleanor Swift, *The Problem of "Trustworthiness" in the Admission of State of Mind Hearsay Under California and Federal Evidence Law*, 36 SW. U. L. REV. 619 (2008).

¹⁰ 519 U.S. 172 (1997).

strongly support the admission of defendants' post-crime hearsay statements of state of mind. Admission increases the probative value of a defendant's narrative, helps to satisfy the criteria that determine the jury's choice of the "best" story, and fulfills the need for competing stories that increase the efficacy of decision-making according to the story model. Had Judge Friendly been guided by the precepts of narrative theory, his decision on the admissibility of DiMaria's statement would have been exactly the same, although justified in very different terms.

III. STATE OF MIND IS "CONSTRUCTED" WITHIN A NARRATIVE FRAMEWORK AT TRIAL

A criminal defendant's state of mind at the time of the alleged crime—defendant's "past mental state"—is a "constructed fact" because it can be known only through acts of interpretation by the decision-maker. Its "factual status is epistemically different from (and less clear than) exterior 'facts in the world,' and [is] generally inseparable from normative evaluations of responsibility and guilt."¹¹ Contributors to this Symposium agree.¹² The mental states that are salient in criminal prosecutions illustrate why this is so. According to Professor Christopher Slobogin, proving the routine state of mind elements in criminal law, not even counting insanity and other forms of diminished capacity, poses some very difficult questions:

Did the defendant "know" or "appreciate" that his conduct at the time of the offense was wrong? Was he "compelled" to commit the criminal act? Did the defendant "premeditate" the crime? Was she aware of the risks her conduct posed? Did the defendant really feel that harm was imminent and that violence was the only way to prevent it?¹³

¹¹ D. Michael Risinger, *Introduction*, 38 SETON HALL L. REV. 885 (2008).

¹² Professor Keith Findley calls these "softer questions of truth" that are "normative, value-laden judgments." Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 894 (2008). Professor Christopher Slobogin asserts that past mental states are not objective facts that can be proved in the way that occurrences of acts can be. CHRISTOPHER SLOBOGIN, *PROVING THE UNPROVABLE* 43 (2007). "[N]arrative thinking dominates attempts to reconstruct mental state." *Id.* at 44. And Professor Andrew Taslitz describes the process of narrative thinking: "When jurors name a mental state as 'premeditation,' 'heat of passion,' or a 'belief in the imminent need to use deadly force in self-defense,' they are crafting an interpretation that partly embodies their own assumptions, attitudes, and beliefs." Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 26 (1998).

¹³ SLOBOGIN, *supra* note 12, at 44.

The normative content of the state of mind element is obvious in crimes such as “knowing and willful preparation of false tax returns,” “knowing and voluntary furtherance of a conspiracy to bring aliens into the United States,” “predisposition to engage in criminal conduct,” and “conspiracy to possess drugs with intent to distribute.”¹⁴ Fact finding about such states of mind requires a “contextually rich environment”¹⁵ of evidentiary facts, including detail about the crime, the events leading up to it and about the defendant herself. And because the state of mind issue encompasses normative evaluations of responsibility and guilt, the use of “narrative context” and “partisan adversary rhetoric”¹⁶ to prove it can be justified.

Proving the state of mind issue within a narrative context is not only epistemically effective, it is currently understood to be a necessary part of decision-making in criminal trials. There is considerable agreement that jury members construct facts and make determinations of “what happened” by evaluating evidence within the framework of a story, or narrative account, of the events central to the charged crime. This “narrative theory” of jury decision-making is founded on empirical work of social scientists, and it has been further investigated and refined by researchers and commentators who accept this basic view of how juries make decisions within the adversary system.¹⁷

¹⁴ These examples are drawn from the cases discussed in Part V, in which defendants’ post-crime hearsay statements of state of mind were excluded as untrustworthy. See *infra* note 74.

¹⁵ D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 Hous. L. Rev. 1281, 1295 (2004).

¹⁶ *Id.* at 1299, 1301. See also W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 57–61 (1981) (using two cases to illustrate how normative understandings and aesthetic judgments of excusable and inexcusable behavior are based on contextual facts).

¹⁷ There is a vast literature on narrative and the law in general which is not directly pertinent to this Article. Much of it is cited in John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 599, 608–13 (2005). I use the term “narrative theory” to refer to a limited portion of that literature which focuses on how narrative framework shapes decision-making at trial. Major sources include ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110–42 (2000); BENNETT & FELDMAN, *supra* note 16; ROBERT P. BURNS, A THEORY OF THE TRIAL (1999); REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 22–23, 163–64 (1983); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); Doron Menashe & Mutal E. Shamash, *The Narrative Fallacy*, 3 INT’L COMMENT. EVID. 6–8 (2006); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004) (presenting cognitive theories derived from an emerging body of research called coherence-based reasoning).

Different commentators use different terms to describe their explanation of narrative theory: the story model (Pennington & Hastie), a theory of story construc-

What is a “narrative” or “story” in the context of a criminal trial? Put simply by Nancy Pennington and Reid Hastie, authors of a series of articles and books presenting their research and conclusions about the “story model” of juror cognition and decision-making:

Stories involve human action sequences connected by relationships of physical causality and intentional causality Stories appear to be organized into units that are often called *episodes* [E]pisode[s] should contain events which fulfill particular roles and are connected by certain types of causal relationships.¹⁸

Jurors construct stories from “case specific information acquired during the trial, . . . [generalized background] knowledge about events similar in content to those that are the topic of dispute, . . . and generic expectations about what makes a complete story.”¹⁹ At the end of this process of evaluating the evidence, jurors will usually accept one story as the “best” account of “what happened.”²⁰ Finally, at the decision-making stage, jurors will learn from judicial instructions the verdict definitions that are available to them. They will then “match” the story they have accepted with the verdict definitions. This is “a

tion and social judgment (Bennett and Feldman), narrative (Amsterdam & Bruner). There is, however, strong consensus on how a narrative framework works to enable jurors to make sense of the information presented to them at trial and how competing narratives frame their decisions about “what happened.” It is this consensus that I rely on in this Article and that I refer to as “narrative theory.” When commentators’ individual views are discussed in this Article, I refer to them specifically.

¹⁸ Pennington & Hastie, *supra* note 17, at 525. Amsterdam and Bruner offer the following description of the “inherent structure” of stories:

[H]uman-like characters . . . capable of willing their own actions, forming intentions, holding beliefs, having feelings . . . a plot with a beginning, a middle and an end [which] requires . . . (1) an initial steady state . . . (2) that gets disrupted by Trouble . . . (3) . . . evoking efforts at redress or transformation, which succeed or fail, (4) so that the old steady state is restored or . . . transformed

Stories conclude by drawing out a relationship between the tale that was told and the act of telling it, for example a “moral of the story.” AMSTERDAM & BRUNER, *supra* note 17, at 113–14.

Bennett and Feldman describe the function of stories as follows:

Stories are everyday communication devices that create interpretive contexts for social action [P]eople use stories as a means of conveying selective interpretations of social behavior to others The overriding judgmental tasks in a [criminal] trial involve constructing an interpretation for the defendant’s alleged activities and determining how that interpretation fits into the set of legal criteria that must be applied to the defendant’s behavior.

BENNETT & FELDMAN, *supra* note 16, at 7–8.

¹⁹ Pennington & Hastie, *supra* note 17, at 522.

²⁰ *Id.* at 527.

classification process in which the best match between the accepted story's features and verdict category features is determined."²¹

According to Professors Lance Bennett and Martha Feldman, "This theory of stories . . . explains how ordinary persons can make sophisticated judgments about complex information even in situations, like the courtroom, in which there are few familiar formal cues to guide the process."²² The framework of a story provides an analytical device that is necessary to the basic tasks of the decision-maker, which are as follows: to "organize and reorganize large amounts of constantly changing information" that is presented through "conflicting testimony, disorienting time lapses, . . . the perspectives of many witnesses and experts, and a confusing array of subplots"; to keep "the focus of attention on the alleged criminal behavior in a case and . . . [to bring] the bulk of the supporting information to bear on the interpretation of that behavior"; to "enable people to make systematic comparisons between stories" that can satisfy the normative standards of fairness, objectivity, and the test of reasonable doubt"; and to "produce interpretations that can be categorized easily within the legal statutes that apply to a case."²³

²¹ *Id.* at 530. The story model has been broadly accepted within cognitive psychology, although much of its theorizing remains untested:

The model is an extension of basic research on the cognitive representation of narrative information The story model is a psychologically plausible account of juror decisionmaking, and it is the only model in which serious consideration is given to the role of memory processes during trial, but more research is needed to establish its predictive validity and heuristic value for generating testable hypotheses.

Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 244 SCI. 1046, 1047 (1989). According to Professor Dan Simon, "[c]oherence research fits with the story model Inferences . . . are based on constructed representations of coherence, and it is these constructed representations that ultimately determine the verdicts." Simon, *supra* note 17, at 563. Professor Simon also contends that coherence theory is more broadly applicable than the story model insofar as it extends beyond narratives of "human intentionality" to which, he asserts, the story model is confined. *Id.* at 564.

Other researchers believe that the final stage of verdict selection may not be as simple as that portrayed in the story model. They have developed a theory of "parallel constraint satisfaction modeling of deliberative coherence" which allows jurors to "attempt to address multiple goals that compete to be satisfied. Verdict options [in civil cases] . . . may be used by legal decision makers . . . simultaneously to fulfill compensatory, expressive, punishment, deterrence, distributive justice and moral cleansing goals along with other normative and non-normative goals." Jennifer K. Robbennolt, John M. Darley & Robert J. MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1154, 1157 (2003).

²² BENNETT & FELDMAN, *supra* note 16, at 64.

²³ *Id.* at 8–10.

When defendants offer their own state of mind hearsay statements to prove that they had an “innocent” state of mind at the time of the alleged crime—that is, a state of mind that did not satisfy the legal definition of a “guilty” state of mind—typically this state of mind fits within a larger story of “what happened.” The *DiMaria* case exemplifies this. The relevance of DiMaria’s state of mind hearsay (“I only came here to get cigarettes real cheap”) is that it tends to show that he believed the cigarettes in his trunk were bootleg, not stolen, which would then decrease the probability that he “knew” they were stolen, an essential element of the crime charged. The probative value of DiMaria’s hearsay statement for the jury would depend on how it related to the entire body of evidence admitted at trial. DiMaria’s story that he thought the cigarettes were bootleg might have been buttressed by other facts indicating what DiMaria “knew,”²⁴ other statements of DiMaria’s intent, or his past behavior regarding bootleg cigarettes. Under narrative theory, the probative value of his statement would not be evaluated atomistically. Within the context of the larger narrative, DiMaria’s exclamation to the FBI might not have seemed like a “classic false exculpatory statement.”²⁵ Part IV explains why this is so.

IV. BASIC PRINCIPLES OF NARRATIVE THEORY

SUPPORT THE ADMISSION OF DEFENDANT’S STATE OF MIND HEARSAY

Three basic principles underlie the successful functioning of the narrative theory of decision-making. First, effective story construction requires specific, concrete facts. Then, the criteria for choosing the “best” story assume that the decision-maker has access to a rich array of evidence. Finally, objective and fair outcomes are more likely to be achieved when there are alternative competing stories which the de-

²⁴ The prosecution’s case against DiMaria was circumstantial. See *United States v. DiMaria*, 727 F.2d 265, 267–68 (2nd Cir. 1989). Eight days after a truckload of cigarettes had been stolen, DiMaria was seen at his social club walking and talking with men who the FBI knew had custody of the stolen truckload. *Id.* at 267. The stolen cigarettes were transferred into a series of trailers which were finally stored and guarded in a truck yard. *Id.* at 268. On the afternoon of DiMaria’s arrest, he arrived at the yard and helped unload the cigarettes from the trailers into a van. *Id.* This is DiMaria’s only observed incriminating act before he drove out of the yard with the half-case of cigarettes in his trunk and was immediately arrested. *Id.* More incriminating was a document seized from another co-defendant which indicated that DiMaria may have received fifty cases of the cigarettes as they were being transferred between trailers the day before the arrest. *Id.* The Second Circuit opinion does not describe any defense evidence other than the statement DiMaria made to the arresting FBI officer. See *id.* at 270.

²⁵ *Id.* at 271.

cision-maker tests against each other in determining which story fits best with the available evidence. All three principles demonstrate the high probative value of defendants' state of mind hearsay and justify its admission into evidence.

A. *Specific and Concrete Evidentiary Facts Have Probative Value Beyond the Linear Proof of an Essential Element*

Justice Souter's majority opinion in *Old Chief v. United States*²⁶ has been interpreted as an implicit acknowledgement that a narrative framework underlies jury decision-making in criminal trials. Commentators agree that the opinion places the Supreme Court's imprimatur on the prosecution's ability to use evidence in order to help "tell an involving and coherent story."²⁷ The opinion itself discusses two reasons why effects on narrative increase the probative value of proffered items of evidence.

Justice Souter calls these narrative effects "evidentiary richness" and "narrative integrity."²⁸ In explaining evidentiary richness, Justice Souter makes two points: (1) a single specific, concrete item of evidence can increase (or decrease) the probability of several issues and/or essential elements in a case, and thus has probative value "beyond any linear scheme of reasoning";²⁹ (2) specific and concrete items of evidence have probative value simply by telling a more colorful story, thereby adding to the momentum of the narrative, and, more controversially, increasing "the willingness of the jurors to draw the inferences . . . not just to prove a fact but to establish its human significance . . . and so to implicate the law's moral underpinnings."³⁰ Justice Souter concludes that evidence may be used by the prosecution "as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault."³¹

²⁶ 519 U.S. 172 (1997).

²⁷ John H. Blume, Sheri L. Johnson & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1100 (2007); Richard O. Lempert, *Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research*, 21 ST. LOUIS U. PUB. L. REV. 15, 16 (2002); Menashe & Shamash, *supra* note 17, at 37, n.133; Mitchell, *supra* note 17, at 606–07; Risinger, *supra* note 15, at 1306; 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.J. 403, 456 (1998); Simon, *supra* note 17, at 565–67.

²⁸ *Old Chief v. United States*, 519 U.S. 172, 183 (1997).

²⁹ *Id.* at 187.

³⁰ *Id.* at 187–88.

³¹ *Id.* at 188.

An evidentiary fact's "narrative integrity" also enhances its probative value because, according to the *Old Chief* opinion, jurors come to the courthouse with a storehouse of expectations "about what proper proof should be."³² Justice Souter asserts that evidence describing "a train of events *naturally* related" will raise jurors' expectation that they should learn about "every ingredient of that *natural* sequence the same way."³³ Although the "trains" or "sequences of events" that prosecutors prove to juries are by no means *natural*,³⁴ they may raise expectations based on the *narrative* sequence that the prosecution constructs at trial. Jurors have expectations that a "complete" story is based on socially constructed narratives about human goals and motivations, crimes and crime detection, etc., and it is these frameworks by which jurors attach significance to the prosecution's lines of proof. Gaps in such frameworks would disappoint jurors and, under the reasoning in *Old Chief*, would weaken the probative force of the prosecution's case. Items of evidence may thus take on added value under narrative theory simply because they add narrative integrity; they help to tell a "complete" story that has a better chance of satisfying the jury's expectations.³⁵

In the *Old Chief* opinion, this discussion of evidentiary richness and narrative integrity had as its foil a criminal defendant's request to stipulate to his status as a convicted felon. The Court rejected the prosecution's argument that it should be able to prove that status through specific evidence of the type of crime committed by the defendant and held that the stipulation as to status had to be accepted.³⁶ Ironically, therefore, Justice Souter's opinion rejected the application of the concepts of evidentiary richness and narrative integrity that it had just described.

However, the broadened definition of probative value set forth in such detail in *Old Chief*, and the opinion's implicit reliance on narrative theory to support it, have potentially far-reaching consequences for evidence law that have begun to be explored in legal commen-

³² *Id.* at 188.

³³ *Id.* at 188–89 (emphasis added). I emphasize the Justice's use of the word *natural* to underscore my disagreement with it. See *infra* note 34.

³⁴ A party's proof of a sequence of events certainly does not exist in *nature*; it is highly constructed by the demands of the adversary system, the rules of evidence, and the availability of evidentiary material. Nor do sequences of events trigger expectations in the minds of jurors because *nature* has planted them there.

³⁵ The importance of "completeness" in the theory of how jurors choose the best story of "what happened" is described in Part IV.C., *infra*.

³⁶ *Old Chief*, 519 U.S. at 190–92.

tary.³⁷ Creative legal arguments are being mounted that take both of these concepts beyond the application of FRE 403.³⁸ This Article contends that a defendant's post-crime state of mind hearsay adds both evidentiary richness and narrative integrity to a defendant's version of "what happened" in addition to its linear effect on the state of mind element of the crime. Thus its heightened probative value justifies admission under narrative theory, as well as under the categorical approach of FRE 803(3), despite the prosecutor's concern that it appeared to be "a classic false exculpatory statement."

DiMaria's specific statement ("I only came here to get cigarettes real cheap") would bring "evidentiary richness" to the defense narrative. In *Old Chief*, Justice Souter identified the core issues in a criminal case as "the natural sequence of what the defendant is charged with thinking and doing to commit the current offense."³⁹ It is on these core issues, according to the opinion, that the prosecution is free to offer evidence that forms an eventful, colorful narrative, full of rich descriptive detail. DiMaria's statement addresses the same core issues—what he is charged with knowing and thinking. It is his own statement, proved through the testimony of the arresting FBI officer. It is specific, colorful and adds detail ("I thought you guys were just investigating white collar crime; what are you doing here?") that humanizes DiMaria. Were the hearsay statement excluded, DiMaria's story would be impoverished. Whether its ultimate effect would be to DiMaria's benefit or detriment is up to the jury.

A defense story also requires narrative integrity and should have the opportunity to meet the expectations of the jury. If DiMaria really believed the cigarettes were bootleg, a jury might well expect that he would have said so when he was arrested. Were the hearsay statement excluded, the jurors' expectations might be disappointed. DiMaria's own explanation of his mental state would either be erased (if he did not testify), or rendered less convincing because of this narrative gap.

³⁷ Courts have not, however, read the opinion to require the prosecution to accept a stipulation other than the "convicted felon" status issue involved in *Old Chief* itself.

³⁸ See, e.g., Blume, Johnson & Paavola, *supra* note 27, at 1099–1103 (incorporating the right to tell a plausible story into the right to present third party guilt evidence); Mitchell, *supra* note 17, at 620 (proposing that appellate courts "evaluate the impact of withheld information [in violation of *Brady v. Maryland*] by assessing the additional and/or alternative stories which could have been told in closing argument with the withheld information").

³⁹ *Old Chief*, 519 U.S. at 191.

B. *The Story Model's Criteria for Choosing the Best Fitting Story*

The story model of jury decision-making, developed primarily by Professors Nancy Pennington and Reid Hastie, posits that during and after story construction at trial, factfinders choose the story that best fits the evidence presented since “[m]ore than one story may be constructed by the juror.”⁴⁰ Their research has revealed several criteria that factfinders use to make this choice, and that also determine factfinders’ level of confidence in that story. These criteria include coverage (the extent to which the story accounts for the evidence), coherence (consistency, plausibility, and completeness), and uniqueness (more than one coherent explanation reduces confidence in any one story).⁴¹ Plausibility means that the factfinder is likely to accept a story that “corresponds to the decision maker’s knowledge about what typically happens in the world.”⁴² Completeness means that the expected structure of the story “has all of its parts.”⁴³ If there is “[m]issing information, or lack of plausible inferences,”⁴⁴ or if a story’s episodes fail to hang together due to the jury’s lack of belief in an actor’s “motives, plans and intentions,”⁴⁵ a story will be less complete and less convincing.

The criteria of plausibility and completeness support the analysis of probative value made in *Old Chief* discussed above. To persuade the jury to choose their story, the adversaries need to offer detailed facts, including background and context about the central events and central actors. It could not be known for certain ex ante what evidence would satisfy the factfinder’s expectations of a “complete” story, nor which facts would trigger those inferences which correspond to the ways in which the factfinders view, and have experienced, events in the real world. Therefore, evidence that passes a

⁴⁰ Pennington & Hastie, *supra* note 17, at 527.

⁴¹ Nancy Pennington & Reid Hastie, *The O.J. Simpson Stories: Behavioral Scientists’ Reflections on The People of California v. Orenthal James Simpson*, 67 U. COLO. L. REV. 957, 960–61 (1996). A related theory of story selection—the “parallel constraint satisfaction model of explanatory coherence”—is presented in Robbennolt, Darley, and MacCoun, *supra* note 21, at 1151–52: “[D]ecision makers ‘construct an interpretation that fits with the available information better than alternative interpretations.’” (quoting PAUL THAGARD, COHERENCE IN THOUGHT AND ACTION 16 (2000)). The authors note that this theory “is consistent with psychological understanding of juror decision making” such as the story model, and that their “[c]onnectionist model[] provide[s] a formal structure for the mechanism by which the coherence of different stories is evaluated.” *Id.* at 1152–53.

⁴² Pennington & Hastie, *supra* note 17, at 528.

⁴³ *Id.*

⁴⁴ Pennington & Hastie, *supra* note 41, at 961.

⁴⁵ *Id.*

minimum threshold of probability to affect jurors' expectations of a complete and plausible story should be admitted under narrative theory.⁴⁶

DiMaria's statement to the FBI agent could be the kind of thing a juror would expect an innocent person to say upon arrest. Conversely, the statement could strike some jurors as self-serving and likely to be false. It would diminish the effective operation of the story model if courts admitted evidence supportive of only one side's story for evaluation by the jury.

C. Narrative Theory Assumes that Factfinders Will Decide Between Competing Narratives or Stories

The adversary system structures adjudicatory decision-making such that, in most litigated cases, there are at least two competing narratives offered to the factfinder during the course of a trial. These narratives are made up of conflicting ways to view the evidence presented and alternative inferences drawn from that evidence. Narratives among jurors can differ because jurors bring with them differing experiences and generalized knowledge about how the world works and about what makes a complete narrative. Competing narratives can be triggered by contradictory arguments made by the party opponents, or can be developed by the jurors themselves.

Commentators emphasize the function that conflicting narratives perform in jury decision-making. They require the jury to choose, and thus to employ the selection criteria discussed in Part IV.B.

In trials . . . jurors generally confront a body of undisputed evidence which has been contextualized within two competing stories about the crime (the central action) in dispute. The jurors know that both of the stories cannot be true, and their task is to find the one that assimilates the known facts more completely, more consistently, and with fewer problematic inferences. The "facts" . . . may impose some limits on what a structurally adequate story can look like, but . . . there is a remarkable margin of freedom available for the symbolization of competing stories about the disputed action.⁴⁷

The competition between stories is seen as crucial to the jury's role in adjudicatory fact finding:

There is not just one story, or theory of the case, but at least two. The doubling of competing stories alerts the jury to the gap be-

⁴⁶ See *infra* note 110 and accompanying text.

⁴⁷ BENNETT & FELDMAN, *supra* note 16, at 90.

tween any human event and the telling of it. It allows the jury to begin to assess the relative power of those stories. One of the axes of comparison is which story is more likely to be *true*, which is most consistent with the empirical generalizations that partially constitute common sense.⁴⁸

Not all criminal defendants are able to mount a defense based on an alternative story that competes with the prosecution. Under their theory of story construction, Professors Bennett and Feldman have identified three defensive strategies for the criminal defendant to use at trial. Only one, the “reconstruction” strategy, requires the defendant to tell a story of his own, using his own evidence to provide an entirely different explanation for, or “reconstruction of,” his conduct.⁴⁹ The defendant places “the central action in the context of an entirely new story to show that it merits a different interpretation.”⁵⁰ The advantage of this strategy, Bennett and Feldman assert, is “that it often makes judgment in a case dependent on both the structural adequacy of the original prosecution story and the ability of the prosecution to demonstrate structural problems in the defense case.”⁵¹

Professor Ronald Allen has described the choice between competing narratives as determining “the relative plausibility of the par-

⁴⁸ Robert P. Burns, *Fallacies on Fallacies: A Reply*, 2 INT’L COMMENT. EVID. (2006) [hereinafter Burns, *Fallacies on Fallacies*]. In other writing, Professor Burns emphasizes that all of the structures of the adversarial trial—two theories of the case, two opening arguments, cross-examination, rebuttal cases, and closing argument—“recognize that it is only *relative weight* that needs to be determined during trial.” Robert P. Burns, *Notes on the Future of Evidence Law*, 74 TEMP. L. REV. 69, 74 (2001) [hereinafter Burns, *Notes on the Future of Evidence Law*].

⁴⁹ Bennett & Feldman, *supra* note 16, at 98–107. The other two strategies, challenge and redefinition, may not require the defendant to put on an affirmative case. Using the “challenge” strategy, the defendant challenges the coherence of the prosecution’s story, typically by showing that key story elements are missing or by showing that the evidence only poorly supports these elements. For example, in cases where the only disputed issue is the identity of the perpetrator, the defendant does not offer a complete, highly contextualized narrative of “what happened” but instead attempts to demonstrate the weakness of the prosecution’s story of “who done it.” This strategy, Bennett and Feldman write, “seldom requires the defense to put on a case, and it is generally developed through cross-examination and closing statements.” *Id.* at 98. Using the “redefinition” strategy, the defendant reinterprets an ambiguous element in the prosecution’s story that is closely related to the “meaning of the central action.” *Id.* at 102. Redefinition permits a different story meaning—innocence—to emerge. For example, the defendant’s presence at the scene of a crime might be redefined simply by a different explanation. The key to this strategy is the presence of real ambiguity in the story element and its centrality to the story of guilt.

⁵⁰ *Id.* at 104.

⁵¹ *Id.* at 105.

ties' cases." ⁵² In his view, the jurors' choice of the most plausible story is always comparative; it is not a matter of "cardinal probability, conceived as a relative frequency or a subjective belief state, of a certain state of affairs." ⁵³ Professor Allen's discussion of how a juror might determine relative plausibility has much in common with the criteria for choosing the story with the best fit developed by Pennington and Hastie:

The fact-finder is then left with a finite number of stories on the field that may be probed for the variables indentified above [coherence, consistency, completeness, uniqueness, economy and . . . [probability] (and surely others, maybe many others). That probing will employ both the evidence and arguments presented, but also the background knowledge of the fact-finder. One hypothesis will emerge as more plausible than the others or the fact-finder will identify yet another hypothesis that it believes to be the most plausible of the possibilities it considers. ⁵⁴

The important point of the narrative and relative plausibility theories for this Article is that both assume there will be competing stories for the decision-maker to compare and to test against each other. The use of the word "best" here is thus not intended to carry the meaning involved in the epistemological/legal debate over the "inference to the best explanation" theory as a stand-in for the civil and criminal standards of proof. ⁵⁵ In cases such as *DiMaria* and those discussed in Part VI, defendants offer their own state of mind hearsay to prove their innocent state of mind. They exemplify Professors Bennett and Feldman's reconstruction strategy by presenting competitive, comparative narratives. According to Professors Bennett and Feldman, the existence of competing narratives is crucial because the

⁵² Ronald J. Allen, *Rationality, Algorithms and Juridical Proof: A Preliminary Inquiry*, 1 INT'L J. EVID. & PROOF 254, 273 (1997) [hereinafter Allen, *Rationality*]. The relative plausibility theory asserts that a criminal defendant cannot "do nothing" at trial and hope to be exonerated. At the very minimum, the defendant needs to provide a "plausible case of innocence (even if it is less plausible than that of guilt)." Ronald J. Allen, *The Narrative Fallacy, the Relative Plausibility Theory, and a Theory of the Trial*, 5 INT'L COMMENT. EVID. (2005). Otherwise the factfinder will convict, as "the only story on the field typically will be one of guilt." *Id.* Presumably Bennett and Feldman's challenge and redefinition strategies could provide the defendant's "plausible case of innocence." *Id.* at 5.

⁵³ Allen, *Rationality*, *supra* note 52, at 273. Research on coherence-based reasoning also supports the relative plausibility theory's explanation of juror decision-making. See Simon, *supra* note 17, at 562.

⁵⁴ Allen, *Rationality*, *supra* note 52, at 274.

⁵⁵ See Larry Laudan, *Strange Bedfellows: Inference to the Best Explanation and the Criminal Standard of Proof*, 11 INT'L J. EVID. & PROOF 292, 296 (2007) ("The meaning of 'best' here is hotly contested among IBE modellers.").

factfinder's "testing the result against the other side's story is what we mean ordinarily by being objective and fair."⁵⁶

DiMaria's story tested the prosecution's theory of the case. It contradicted the government's story that he knew that the cigarettes were stolen. With his statement, perhaps DiMaria had "a plausible case of innocence" to offer the jury. Without the statement, apparently, he did not. DiMaria was fortunate that his appeal was decided by a court that adhered to the categorical approach to Rule 803(3). Criminal defendants in many other federal courts are unable to present their own state of mind hearsay to the jury, as Part V will show.

V. IN PUBLISHED CASE LAW, CRIMINAL DEFENDANTS'
POST-CRIME HEARSAY STATEMENTS OF STATE OF MIND ARE
VIRTUALLY ALWAYS EXCLUDED UNDER FRE 803(3)

Suppose that DiMaria had been arrested by the FBI one week after he had picked up the allegedly stolen cigarettes. He might have said to the FBI agent, "What are you arresting me for? I've only got bootleg cigarettes in my trunk!" This statement would be offered by the defense to prove DiMaria's then-existing state of mind of "knowledge or belief" that the cigarettes were bootleg, not stolen. It would fit within the terms of FRE 803(3).⁵⁷ The statement would be relevant to prove that DiMaria had that same mental state one week earlier as well, based upon an inference that mental states have continuity both forward and backward in time.⁵⁸ And, just like the actual statement in the *DiMaria* case, it would be exculpatory on the state of mind issue and would support DiMaria's narrative of innocence.

However, in most federal courts, DiMaria's post-crime statement of his then-existing state of mind would now be inadmissible. The categorical approach to Rule 803(3) approved in *DiMaria* has been rejected by most federal Circuit Courts of Appeal. These courts have instead adopted a "trustworthiness" approach to FRE 803(3), based upon a requirement of "timeliness," and they apply it to post-crime state of mind hearsay of criminal defendants. It is applied in addition to the requirement of contemporaneity between the defendant hav-

⁵⁶ BENNETT & FELDMAN, *supra* note 16, at 64.

⁵⁷ The statement would not be offered to prove the truth of this belief, that the cigarettes were in fact bootleg. Thus, it would not be inadmissible hearsay under the exclusionary clause of FRE 803(3).

⁵⁸ "The duration of states of mind or emotion varies with the particular attitudes or feelings at issue and with the cause . . ." MCCORMICK, *supra* note 2, § 274, at 271. The cases cited in the *McCormick* treatise for this proposition have upheld the use of inferences of continuity lasting for several months, but not for years. *Id.* at 270-71.

ing the mental state and making a statement about it, enforced through the “then existing” term of Rule 803(3). The “timeliness” goes further. It requires contemporaneity among the defendant’s alleged crime, the defendant’s state of mind, and the defendant’s statement.

Courts adopting this trustworthiness approach have articulated the “timeliness” test as permitting no time for reflection or “no time to [reflect and possibly] fabricate or misrepresent . . . thoughts”⁵⁹ about the alleged crime. The “time to reflect” referred to is any time lapse between the alleged crime and the making of the hearsay statement. “[T]he passage of time may prompt someone to make a deliberate misrepresentation of a former state of mind [T]he requirement [of timeliness ensures] that hearsay evidence be reliable in order for it to be admissible under Rule 803(3).”⁶⁰

The significance of applying the timeliness test to post-crime hearsay statements is clear: it permits courts to exclude, as untrustworthy, defendants’ post-crime state of mind hearsay that otherwise fits within FRE 803(3). Since its first articulation in 1980, this test has been adopted by a majority of Circuits in cases that have excluded criminal defendants’ post-crime hearsay statements of state of mind.⁶¹ These courts justify their approach based on language in the Advisory Committee Note to FRE 803(3) which states that Exception (3) “is essentially a specialized application of Exception (1), presented separately to enhance its usefulness and accessibility.” The Advisory Committee Note to Exception (1), covering “present sense impressions” of “an event or condition,” states that it requires “substantial contemporaneity of event and statement [in order to] negative the likelihood of deliberate or conscious misrepresentation.”⁶²

⁵⁹ *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001) (citing *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986)).

⁶⁰ *United States v. Naiden*, 424 F.3d 718, 722–23 (8th Cir. 2005).

⁶¹ See *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005); *United States v. Newell*, 315 F.3d 510, 523 (5th Cir. 2002); *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir. 2001); *United States v. Carmichael*, 232 F.3d 510, 521 (6th Cir. 2000); *United States v. LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995); *United States v. Macey*, 8 F.3d 462, 467–68 (7th Cir. 1993); *United States v. Neely*, 980 F.2d 1074, 1083 (7th Cir. 1992); *United States v. Harvey*, 959 F.2d 1371, 1375 (7th Cir. 1992); *United States v. Harris*, 942 F.2d 1125, 1130 n.5 (7th Cir. 1991); *United States v. Carter*, 910 F.2d 1524, 1530–31 (7th Cir. 1990); *United States v. Faust*, 850 F.2d 575, 585–86 (9th Cir. 1988); *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986); *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980). The petition for certiorari in *Cianci v. United States*, 378 F.3d 71, 97 (1st Cir. 2004) raised the split of authority interpreting Rule 803(3). The petition was denied, *Cianci v. United States*, 126 S.Ct. 421 (2005).

⁶² FED. R. EVID. 803(3) advisory committee’s note.

I have written elsewhere why I think that adding the timeliness test to FRE 803(3) is bad law and bad policy.⁶³ It is bad law because it rejects the Federal Rules' general categorical approach to admitting hearsay. It is bad policy because it in effect adopts its own categorical rule excluding criminal defendants' post-crime statements. The federal circuit court opinions first adopting the timeliness test involved no other type of hearsay declarant and no other type of statement.⁶⁴ In the cases decided during the past ten years, courts assume without discussion that criminal defendants have compelling motives to fabricate and to make untrustworthy "self-serving" statements both post-crime and even while the crime is ongoing.⁶⁵

It appears from the cases that exclusion of criminal defendants' statements as failing the timeliness test, as untrustworthy because of a motive to fabricate, or as self-serving, is based on categorical generalizations about the credibility of the criminally accused that are not enacted in the FRE. The "self-serving" nature of hearsay statements is not grounds for exclusion under any exception under the Federal Rules,⁶⁶ except for those exceptions that contain an explicit mandate to the court to consider the trustworthiness issue on a case-by-case basis.⁶⁷ With regard to criminal defendants, a presumption of untrustworthiness seems to apply. Most of the major treatises on evidence agree that judgments about the credibility of hearsay declarants, even criminal defendants, should be for the jury, and that judicial power to exclude for untrustworthiness is not a part of the state of mind exception.⁶⁸

⁶³ Swift, *supra* note 9, at 647–55.

⁶⁴ See *supra* note 61.

⁶⁵ See, e.g., *United States v. Bishop*, 291 F.3d 1100, 1110 (9th Cir. 2002).

⁶⁶ MCCORMICK, *supra* note 2, § 270, at 248–49.

"The term 'self-serving' is a misnomer that ought to be interred . . . 'The appropriate rule for the exclusion of a party's declarations offered in his own behalf as evidence of the truth of the facts declared is the hearsay rule.' Whether self-serving, neutral, or disserving, a hearsay statement that does not fit within one of the exceptions to the hearsay rule is inadmissible, and the reverse is true."

Chestnut v. Ford, 445 F.2d 967, 972 (4th Cir. 1971) (citing CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 275, at 588 (1954)).

⁶⁷ See FED. R. EVID. 803(6), 803(8), 804(b)(3), 807.

⁶⁸ Professors Saltzburg, Martin, and Capra acknowledge in their *Federal Rules of Evidence Manual* the concern that underlies the trustworthiness approach but assert that it is "inappropriate to superimpose a trustworthiness requirement on the provisions of Rule 803(3)." STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, & DANIEL J. CAPRA, 4 *FEDERAL RULES OF EVIDENCE MANUAL* § 803.02[4][d], at 803–30 (9th ed. 2006). At the other extreme, *Weinstein's Federal Evidence* ignores the problem of legitimacy when it states flatly that to satisfy Rule 803(3) "[t]here must be no suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his

My previous objections to the “timeliness” test also rested on its unfairness to individual criminal defendants, due to the risk that it could operate as a virtual per se rule of exclusion of any post-crime state of mind statement.⁶⁹ This concern for fairness prompted me to examine how consistently criminal defendants’ statements were excluded under FRE 803(3). The recently published cases that contain significant discussion of FRE 803(3) are analyzed in Tables 1–4.⁷⁰ These results confirm that the presumption of exclusion is fully realized in federal case law.

Of course it is well understood that in criminal cases, appeals are only from judgments of conviction. Convicted criminal defendants challenge the rulings of trial courts that exclude their own hearsay statements. From the published cases, we do not know how often defendants’ post-crime state of mind hearsay gets admitted. The published decisions by both Circuit and District Courts are the proverbial tip of the iceberg. It would be foolish to think that we could extrapolate directly from these cases to understand what trial judges are generally doing.

And yet, we have to consider the impact that published case law has on the conduct of trials. Where do District Court judges, prosecutors, defense attorneys, commentators, and treatise writers turn to find out what “the law” under FRE 803(3) is? The published cases applying the timeliness test present a remarkable consistency and an unmistakable message: defendants’ post-crime state of mind hearsay is untrustworthy and should be excluded.⁷¹

or her thoughts.” JACK WEINSTEIN & MARGARET A. BERGER, 5 WEINSTEIN’S FEDERAL EVIDENCE SECOND EDITION: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS, § 803.05(2)(a), at 803–29 (Joseph M. McLaughlin ed., 2008). This treatise’s discussion of existing case law ignores the Second Circuit’s strongly and consistently articulated view, beginning with *DiMaria*, that categorical application of the state of mind exception is required. Further, MCCORMICK, *supra* note 2, § 274, at 267–68 n.8, and CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.38, at 819 (3d ed. 2003), report accurately on the case law conflict between the strict categorical approach of *DiMaria* and the trustworthiness approach exemplified by the timeliness test. Both struggle with the problem of legitimacy and resolve it somewhat equivocally in favor of the categorical approach.

⁶⁹ My previous research on cases applying California Evidence Code sections 1250–1252 shows that these rules, which explicitly permit discretionary exclusion of state of mind hearsay on grounds of lack of trustworthiness, operate as a per se rule of exclusion of criminal defendants’ post-crime state of mind hearsay. Such hearsay is excluded even when offered as mitigation evidence in the penalty phase of death cases. See Swift, *supra* note 8, at 628–32.

⁷⁰ This research encompassed the last ten years of federal cases in which discussion of Rule 803(3) merited a Westlaw Headnote. The Westlaw search yielded 115 citations, including both appellate and district courts.

⁷¹ I have made this same point in Swift, *supra* note 9, at 627–28.

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TABLE 1
APPELLATE CASES⁷²

Cases Read	Criminal Cases	State of Mind Offered by Criminal Defendant	Criminal Defendant's Own Hearsay Statement Excluded ⁷³	Exclusion of Criminal Defendant's Own Hearsay Statement Upheld	Exclusion Was Reversible Error or Possible Error But Harmless
58	41	26	22	18	1 reversible 3 harmless

The following Table shows the grounds upon which exclusion of criminal defendants' own post-crime state of mind hearsay was upheld.

⁷² This total includes five criminal cases from military courts of appeal discussing state of mind hearsay under the Military Rules of Evidence, which have a state of mind hearsay exception identical to FRE 803(3).

⁷³ Of these twenty-two statements, sixteen were made post-crime. Four other statements were statements of future intent, one was a pre-crime statement of fear, and only one was made during the commission of the alleged crime itself.

TABLE 2
APPELLATE CASES
GROUNDS UPON WHICH EXCLUSION UPHELD

State of Mind Not Relevant	State of Mind Untrustworthy Including Time-liness Test ⁷⁴	Statement Offered to Prove Past Facts	Implied Assertion of Truth about Past Facts	Reason Unclear in Opinion
1	10	4	2	1

In the District Courts, the published cases included many more civil cases involving the admissibility of state of mind hearsay.

⁷⁴ United States v. Rivera-Hernandez, 497 F.3d 71, 80–82 (1st Cir. 2007) (finding that the defendant's statement to his father as to why he was receiving certain payments offered to show lack of fraudulent intent); United States v. Canales-Fuentes, 176 F. App'x. 873 (9th Cir. 2006) (defendant's custodial statement that his plan was to visit his brother offered to prove lack of intent to distribute marijuana); United States v. Naiden, 424 F.3d 718 (8th Cir. 2005) (finding that the defendant's statement to friend that he did not believe the girl he was in contact with on the internet was underage, offered to show his lack of intent to transport a minor for unlawful sexual purposes); United States v. Cianci, 378 F.3d 71, 105–06 (1st Cir. 2004) (recorded statement showing state of mind not to endorse bribery in his administration, offered to rebut allegations of public corruption); United States v. Secor, 73 F. App'x. 554, 566 (4th Cir. 2003) (statement by defendant to his employee to tell the truth to the IRS offered to prove he had not knowingly and willfully prepared and filed false tax returns on behalf of his client); United States v. Feng, 25 F. App'x. 635, 642 (9th Cir. 2002) (statement by defendant to his sister on boat smuggling illegal aliens after he discovered the human cargo, offered to show he was frightened and shocked and to show he did not knowingly and voluntarily further the conspiracy to bring aliens into the U.S.); United States v. Bishop, 291 F.3d 1100, 1110 (9th Cir. 2002) (defendants' statements of intent to their accountant that they would report money received as income, offered to prove lack of willfulness in conspiring to defraud the IRS and attempted tax evasion); United States v. Giles, 246 F.3d 966, 974 (7th Cir. 2001) (defendant's recorded statement showing an exculpatory state of mind to prove he did not knowingly accept a bribe); United States v. Reyes, 239 F.3d 722, 743 (5th Cir. 2001) (defendant's statement of plan to scam the people entrapping him offered to show lack of intent to accept illegal kickbacks); United States v. Wilson, 103 F.3d 1402, 1405 (8th Cir. 1997) (defendant's pre-crime statement of why he was going to airport offered to show lack of intent to engage in drug dealing). The *Bishop* and *Wilson* opinions demonstrate that courts exclude defendants' statements of intent for being "self-serving" and untrustworthy even when made during an alleged conspiracy, *Bishop*, 291 F.3d at 1110, or before the alleged crime, *Wilson*, 103 F.3d at 1405.

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TABLE 3
DISTRICT COURT CASES

Cases Read	Criminal Cases	State of Mind Offered by Criminal Defendant	Criminal Defendant's Own Hearsay Statement ⁷⁵	Excluded
55	14	7	5	5

TABLE 4
DISTRICT COURT CASES
GROUNDS UPON WHICH STATE OF MIND EXCLUDED

State of Mind Not Relevant	State of Mind Untrustworthy Including Timeliness Test ⁷⁶	Not Statement of "Then-Existing" State of Mind
1	3	1

Tables 1 and 3 show 27 instances of defendants offering their own state of mind hearsay; 20 of these are post-crime statements. Tables 2 and 4 show that while untrustworthiness and the "timeliness" test are not the only grounds upon which defendants' post-crime state of mind statements are excluded, they are the dominant reason. Some mistaken exclusions are inevitable because the application of FRE 803(3) raises challenging analytic issues. The systematic exclusion of state of mind hearsay as untrustworthy because not timely, was made with a motive to fabricate, or was self-serving, is a different phenomenon. It is grounded, in my view, in an unjustifiable inter-

⁷⁵ Four of these five statements were made post-crime; one was a statement of future intent.

⁷⁶ *United States v. Kemp*, 362 F. Supp. 2d 591, 594–95 (E.D. Pa. 2005) (evidence of state of mind offered to show "consciousness of innocence" to rebut government's use of evidence to prove "consciousness of guilt"); *United States v. Davidson*, 308 F. Supp. 2d 461, 480 (S.D.N.Y. 2004) (defendant's self-serving "version of what took place months earlier . . . is not reliable evidence of Davidson's state of mind"); *United States v. Giles*, 67 F.Supp.2d 947, 953–54 (N.D. Ill. 1999) (defendant's recorded statement showing an exculpatory state of mind to prove he did not knowingly accept a bribe).

pretation of FRE 803(3).⁷⁷ And in the published cases, it is an interpretation that applies almost exclusively, and almost without fail, to criminal defendants.

VI. PUBLISHED CASE LAW SHOWS THE
IMPORTANCE OF DEFENDANTS' POST-CRIME
STATE OF MIND HEARSAY WITHIN NARRATIVE THEORY

Parts III and IV have explained in theoretical terms why defendants' own state of mind hearsay would be important evidence at trial. The *DiMaria* case was used to illustrate this explanation. Two brief examples from the cases in Tables 2 and 4 above further demonstrate that exclusion of defendants' post-crime hearsay impoverishes their narrative and places in jeopardy the effective presentation of competing alternative stories for the jury's decision-making.

In *United States v. Secor*, defendant Dougherty, a tax attorney and CPA, was charged with willfully preparing and filing a false tax return for a client.⁷⁸ The defendant offered taped recordings of statements that he had made to an employee, telling the employee "to tell the truth" to the IRS.⁷⁹ These statements, showing his then-existing state of mind of wanting the truth to be revealed, were offered to prove his lack of willfulness in committing the tax law violations charged.⁸⁰ Although the statements were relevant and would have been admissible under a categorical reading of FRE 803(3), the court upheld exclusion of defendant's statements because of his motive to exculpate and lack of timeliness:

[H]e was aware that he was under investigation by the IRS and that his employee had an appointment to meet with IRS agents later that day. Given the circumstances under which [defendant] made these statements, therefore, the district court properly excluded this evidence because [he] had time to reflect and fabricate.⁸¹

In *United States v. Reyes*, defendant Reyes, a city councilman, was charged with accepting kickbacks on city contracts.⁸² The kickback was offered to Reyes as part of an elaborate sting operation mounted

⁷⁷ Justifying the exclusion of statements of *future* intent as harmless because they were "self-serving," or as a general matter of "discretion," is also contrary to the categorical approach of FRE 803(3). See, e.g., *Bishop*, 291 F.3d at 1110; *Wilson*, 103 F.3d at 1406.

⁷⁸ *Secor*, 73 F. App'x. at 566.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *United States v. Reyes*, 239 F.3d 722, 726 (5th Cir. 2001).

against him by the FBI. In addition to an “entrapment” defense, Reyes contended that “the things he did and said during the [FBI] investigation were part of his secret plan to ‘scam the scammers’”—that is, those who were working to lure him into the kickback scheme. He offered into evidence a conversation that had been tape recorded by the FBI between himself and his co-defendant. Reyes claimed that this conversation reflected his continuing state of mind to conduct this plan. The district court’s exclusion of the recording was upheld on appeal on the grounds that the statements were subsequent to Reyes’s acts in accepting the kickbacks and that Reyes’s suspicions about his co-defendant and his likely understanding that his conversations were being monitored “makes it probable that Reyes’s recorded remarks were more self-serving than they were candid, and therefore their probative value is greatly diminished.”⁸³

In both *Secor* and *Reyes*, it may be that the factfinder would have mistrusted the defendants’ evidence showing their innocent state of mind, and might ultimately have chosen the story of defendants’ guilt as more plausible. But under narrative theory, the meaning of defendants’ statements would have been evaluated within the context of larger narrative frameworks. The defendants’ motives to make self-serving statements would not totally disqualify their statements from consideration. The words used in the recorded statements themselves, for example, might have been persuasive due to their immediacy and concreteness, even more persuasive than the defendants’ testimony given in court. In *Secor*, the jury might have wondered what, if anything, Dougherty had said to his employee before the IRS interview. And in *Reyes*, the jury might have wondered if Reyes had ever shared his “scam” plan with his co-defendant. Without the post-crime statements, the plausibility and completeness of defendants’ alternative stories were weakened.

Occasionally courts have recognized the importance that post-crime statements of state of mind can have for the defense. *United States v. Giles* involved the conviction of a Chicago alderman for accepting cash bribes from a government mole and for extorting cash

⁸³ *Id.* at 743. The appellate court also commented that the district court could have concluded that too long a time lapse between the statement and the last criminal act (four months) substantially reduced the probative value “with respect to Reyes’ then-existing mental state,” meaning, I think, there was little likelihood of continuity between past and present state of mind. *Id.* Disruption of the necessary continuity backward or forward in time, because of lapse of time or other events, would be a ground for exclusion independent of trustworthiness. But see MCCORMICK, *supra* note 2; see also *supra* note 58 and accompanying text.

from a company operating in his ward.⁸⁴ The state of mind element required proof that the money was taken “knowing or believing” that it was “in exchange for a specific requested exercise of his official power.”⁸⁵ Defendant sought the admission of taped conversations between himself and the government informant. Giles claimed that the contents of the recording showed an exculpatory then-existing mental state; the District Court excluded the tape because the three-week interval between the act of accepting the first payment and the taped conversation “left too much time for reflection and fabrication by Giles” and was not admissible to show his mental state.⁸⁶ The Circuit Court declined to reverse this ruling as “so outside the zone of reasonableness so as to be an abuse of discretion,” but it did think it would have been better to have admitted the tape:

We think the . . . tape should have been admitted, especially in this case where Giles was going to (and did) testify. The government’s argument that the tape was a product of Giles’ reflection—an attempt to cover his tracks in case he got caught—should have been made to the jury, not the judge. On a close evidentiary call like this, we think it’s best to err on the side on inclusion⁸⁷

Two points are notable in this analysis. The court’s acknowledgment that the trustworthiness of hearsay is for the jury, not the judge, underlies the narrative theory of decision-making.⁸⁸ The court also understands that the fact that Giles testified does not reduce the impact or importance of the post-crime hearsay statement; in fact, it makes the hearsay more important. Giles was not using hearsay to hide from cross-examination but to add to the plausibility of his competing narrative account.

VII. THE LARGER STORY

This Article highlights an obstacle that FRE 803(3) places in the way of criminal defendants trying to construct a complete and plausible narrative for the jury. It has concluded that putting an end to the

⁸⁴ *Unites States v. Giles*, 246 F.3d 966, 968 (7th Cir. 2001).

⁸⁵ *Id.* at 973.

⁸⁶ *Id.* at 974.

⁸⁷ *Id.*

⁸⁸ Making a similar point, the United States Air Force Court of Criminal Appeals overturned the exclusion of defendant’s statement that he was “just kidding,” made three days after a highly inculpatory admission. The court wrote that “arguments that an accused’s exculpatory state-of-mind comments are merely self-serving are better left to the argument of counsel than used to exclude evidence.” *United States v. Benson*, 48 M.J. 734, 741 (A.F. Ct. Crim. App. 1998).

“timeliness test” which courts have injected into this rule would permit criminal defendants to use their own post-crime state of mind hearsay to construct such a story.

Two other Articles in this Symposium share this same concern for defendants’ narratives, focusing on different evidentiary obstacles. Professor Keith Findley presents a compelling argument that many criminal defendants lack the ability to present “serious adversary testing of forensic sciences” due to lack of access to forensic laboratories and lack of adequate resources to conduct rigorous scrutiny of, or challenge to, the prosecution’s data and conclusions.⁸⁹ This impoverishes their ability to construct a competing narrative on the issue of identity, whether that narrative is a fully complete alternative story of “who did it” or a plausible hypothesis of innocence. Professor Christopher Slobogin’s concern is that criminal defendants are also competitively disadvantaged by the difficulty under the *Daubert* standards of obtaining expert testimony on the issue of “state of mind.” He proposes that

we should be willing to contemplate a relaxed evidentiary threshold for opinion testimony about mental states that determine criminal culpability because we simply cannot ascertain what they are, at least in the same rigorous way we can use scientific methods to figure out whether a person committed a particular act.⁹⁰

He grounds this proposal on the argument of necessity⁹¹ and on criminal defendants’ “constitutionally-based right to voice—a right to tell their story in the most effective way possible.”⁹²

⁸⁹ Findley, *supra* note 12, at 929. Professor Findley advocates “less case-by-case, single-judge assessment of complex forensic science, and more reliance on expert panels of scientists” as well as “the creation of a national forensic science institute or advisory committees designed to assist courts in accurately assessing forensic sciences, and in some cases supplanting the adversary case-by-case process for addressing concerns about such sciences.” *Id.* at 897.

⁹⁰ Christopher Slobogin, *Experts, Mental States, and Acts*, 38 SETON HALL L. REV. 1009, 1012 (2008).

⁹¹ The inability to obtain *Daubert*-worthy expertise is based not only on the “constructed” nature of the state of mind issue, but also the flawed ability of science to “measure” these states of mind and to construct any experiments that would test these measurements. *Id.*

⁹² *Id.* at 1017. The basis for the right to voice is the right to testify, which stems from the Fifth Amendment and the due process clause, and on the Sixth Amendment rights to confront accusers, present evidence, and have one’s charges considered by a (fully informed) jury. . . . Others have argued that the compulsory process clause incorporates a fair process rationale that entitles the defendant to present any evidence that is material to her case, and that the right to jury trial would be undermined if lay people are not given

These three evidentiary obstacles—criminal defendants’ lack of access at trial to their own post-crime state of mind hearsay, to adequate testing and adversarial scrutiny of forensic material, and to legitimate expert knowledge pertinent to their past mental states—can be analyzed within the traditional norms of evidence law and due process. Traditional concerns about accuracy of decision-making, adversarial fairness, special regard for the interests of criminal defendants as against the advantages enjoyed by the government, all leavened by increasing demand for efficiency in the prosecution of crime, could be marshaled to persuade the relevant audiences of lawyers, judges, legislators, and academics that something should be done.

If so, what do the insights gained in this Article from the application of basic principles of narrative theory⁹³ to defendants’ post-crime state of mind hearsay accomplish? These insights could be viewed as simply additive, casting in new terms the same traditional concerns: accuracy (freeing the jury’s choice of story from the constraint of judicially-imposed generalizations about criminal defendants’ untrustworthiness), fairness and special regard for defendants’ interests pitted against the advantages enjoyed by the government (ensuring defendants’ ability to participate fully in narrative construction after *Old Chief* opened that door to the prosecution), and efficiency (revealing that post-crime statements can be proved efficiently as they are typically recorded, made to police, or spoken to companions). But to the extent that narrative theory presents us with new and valid understanding of a crucial component of juror decision-making, arguments based on this theory are more than just new words. They can make a significant and persuasive contribution to on-going debates about these core values of evidence law.⁹⁴

the opportunity to consider whether the defendant’s story, however fantastic on the surface, may nonetheless ultimately be plausible.

Id.

⁹³ In Part IV, these basic principles were distilled from the *Old Chief* opinion, from empirically-based descriptions of the use of narrative frameworks at trial, and from the highly theorized writings about relative plausibility.

⁹⁴ Professor Findley suggests that other evidentiary obstacles limit defendants’ ability to construct a complete narrative. For example, impeachment by felony convictions under FRE 609 and the Supreme Court opinions applying it, *see, e.g., Ohler v. United States*, 529 U.S. 753 (2000), keeps criminal defendants off the witness stand. The requirement of corroboration burdens defendants’ use of the “against penal interest” hearsay exception under FRE 804(b)(3) to prove that another person may have committed the charged crime. Findley, *supra* note 12, at 926. These problems could also benefit from scrutiny under the lens of narrative theory.

Taken even further, the insights from narrative theory might fundamentally challenge evidence law and our system of trial. Proposals for restructuring civil and criminal trials have already emerged from understanding and accepting what narrative theory tells us about how juries make decisions. In his writing about relative plausibility, Professor Allen has proposed placing an affirmative burden on civil defendants. They would be required to respond to plaintiffs' specific allegations "with equally specific and affirmative allegations rather than with simple denials."⁹⁵ Parties would be required to assert "what they believe are the most likely sequences of events leading to the event in question" followed by "instructing the jury to choose between them."⁹⁶ Professor Michael Risinger has proposed a tracking system for those criminal cases in which defendants raise only claims of "factual innocence" based, for example, on a claim of mistaken identity.⁹⁷ Special rules of evidence and procedure would be employed for "factual innocence" cases,⁹⁸ precluding the prosecution's use of the kinds of prejudicial evidence that may be justified by narrative theory, and was discussed approvingly in *Old Chief*, when normative issues are at stake.⁹⁹

What about the law of evidence? The conclusion reached in this Article—that criminal defendants' post-crime state of mind hearsay would be viewed as highly probative under narrative theory, whereas a majority of federal courts view it as so untrustworthy that it cannot be admitted at trial—poses two challenges for evidence law. One challenge is that narrative theory may generate arguments for something closer to a "free proof" regime that would require abandonment of many of the exclusionary principles of our current law. The

⁹⁵ Ronald J. Allen, *Theories of Inference and Adjudication: A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 426 (1986).

⁹⁶ *Id.* at 426–27. Allen also postulates that understanding jury decision-making in terms of narrative and relative plausibility theories will lead to "increased juror involvement at trial" and "[b]urdens of persuasion [entering] into the process only as conclusions rather than as the focus of deliberation." Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 633 (1994).

⁹⁷ Risinger, *supra* note 15, at 1311 ("Most criminal trials with a chance of acquittal involve either the binary fact of identity . . . or occasionally the true-fact claim that no actus reus occurred . . .").

⁹⁸ *Id.* at 1311–13. He also proposes the adoption of the "unsafe verdict" standard of appellate review. *Id.* at 1331–33.

⁹⁹ Risinger contends that, in factual innocence cases, "'thick description,' 'narrative context,' and 'partisan adversary rhetoric' are more likely to undermine than to promote both proper decision and legitimacy." *Id.* at 1301. He acknowledges the importance of these types of evidence for "explicitly normative" issues and for those issues, like state of mind, which have "normative warrant" or benefit from factually rich context. *Id.* at 1299–1301, 1306–07.

second challenge is that courts may exclude criminal defendants wholesale from the benefits that evidentiary policies based on narrative theory will bestow on the prosecution. Both challenges will be discussed briefly.

Professor Robert P. Burns asserts that the jury needs more information at trial, rather than less, to particularize, qualify, and refine the common sense generalizations that jurors use in the process of deciding cases:

[T]he use of narrative structures at trial is not only inevitable, but epistemically warranted, and the trial itself contains powerful and flexible means to counter the real limitations of those structures I have also questioned the power of exclusionary rules to counter those limitations in a reliable way.¹⁰⁰

According to Professor Burns, the adversarial structure of trial allows the jury to assess the relative power of competing stories,¹⁰¹ and “[o]ne of the axes of comparison is which story is more likely to be true, . . . [that is,] more consistent with the empirical generalizations that partially constitute common sense.”¹⁰² Therefore, the limits that he would place on the admissibility of evidence are few: only “direct testimony in the language of perception[,] . . . full foundations as to the sources of testimony[,] . . . [and] some concept of materiality.”¹⁰³

This concept of “freer” proof might change evidence law dramatically, but it would not undermine the fundamental premise of our system, that is, that the rules of evidence and structure of trial should vindicate the principles and norms of substantive law. Professor Burns acknowledges, that “[m]ateriality ensures that the evidence presented have some relationship to the norms expressed in the jury instructions and so in the substantive law.”¹⁰⁴ Thus the goals of narrative theory appear to be that jurors make the best use of their generalized knowledge or common sense in understanding the case before them, and that they recognize and respect the “judgment of the community embedded in the law of rules.”¹⁰⁵ These are also the goals

¹⁰⁰ Burns, *Fallacies on Fallacies*, *supra* note 48, at 6.

¹⁰¹ The means of countering the limitations of the jury’s narrative structures include the “two theories of the case” presented in opening statements “in quick succession,” cross-examination, rebuttal cases, and closing argument. *Id.* at 74.

¹⁰² *Id.* at 2.

¹⁰³ *Id.* at 6.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 7.

of current evidence law, although there is significant disagreement about how best to accomplish them.¹⁰⁶

This disagreement is exemplified in the conclusion reached in this Article. Current interpretation of hearsay law excludes defendants' post-crime state of mind hearsay on the theory that the hearsay exceptions promote reliability, whereas narrative theory could find such evidence highly probative. Twenty years ago I advocated a reconception of the problem posed by hearsay evidence and proposed a solution which I called the "foundation fact approach."¹⁰⁷ Although I clearly did not advocate "free proof,"¹⁰⁸ I see now that the theory of "operational accuracy," which I espoused as an alternative to the "reliability" approach of the FRE, has some close ties to narrative theory. As I defined it, operational accuracy "claims that accuracy [in jury decision-making] is maximized by the trier's ability to apply its own generalizations about reality to determine the probative value of evidence."¹⁰⁹ That is, the jury's evaluation of an item of hearsay will be more "accurate" if the jury has more information about the hearsay declarant's perception, memory, and making of the hearsay statement. It is this information that would particularize, qualify, and refine those generalizations about the declarant's credibility that reflect the jury's knowledge and experience of the world. I argued that operational accuracy, rather than filtering hearsay through an external, pre-existing and FRE-imposed or judge-imposed set of substantive generalizations about what kind of hearsay is reliable, should be the goal of hearsay policy.

¹⁰⁶ Critics of "free proof" are concerned about rejecting exclusionary rules that focus on protecting parties from the danger of unfair prejudice. Without such rules, they foresee greater risks of inaccurate stereotyping and of undue reliance on hegemonic stories that would severely disadvantage minority and less powerful segments of society at trial. See Menashe & Shamash, *supra* note 17, at 24–28. These authors contend that the admissibility of evidence should be reviewed atomistically, on an item by item basis, and should exclude "evidence whose probative value is outweighed by its prejudicial effect." Doron Menashe & Hamutal Esther Shamash, *Pass These Sirens By: Further Thoughts on Narrative and Admissibility Rules*, 8 INT'L COMMENT. EVID. (2007).

¹⁰⁷ Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1341 (1987).

¹⁰⁸ The goal of the foundation fact approach was to present hearsay statements to the jury only when certain information about the declarant, provided by a knowledgeable foundation witness, was available. This contextual information about the declarant and her circumstances when perceiving, remembering, and speaking about the content of her hearsay statement, would enable the jury to evaluate the statement more effectively. *Id.* at 1355–61.

¹⁰⁹ *Id.* at 1350–51.

If I were to re-frame the terms of this claim under narrative theory, it would be that the relevance of a hearsay statement is constructed; that information about the declarant's perceiving, remembering and making a statement would provide evidentiary material for one or more narratives about the declarant which would lead to one or more alternative interpretations of the statement itself. These alternative meanings would in turn contribute to, and be evaluated by, the jury's larger developing narrative framework based on all of the evidence available at trial.

I also see now that a significant drawback to the foundation fact approach and its promise of rich and complex narratives about all hearsay declarants is that it threatens information overload. This same drawback applies to the argument for "free proof." And it may well apply to any argument that justifies the admissibility of evidence on the theory of narrative relevance, a theory which seems unbounded. The jury could be overwhelmed with ever more colorful, ever more concrete, and ever more contextual data that will have to be processed at trial. Professor Craig Callen has described this problem:

Research on informal reasoning, the inferential methods based on common experience that human beings employ in litigation as well as everyday life, suggests that it would be a serious mistake to require that courts admit evidence with non-zero probative value as long as the associated costs did not substantially outweigh the value. . . . [M]inimal relevancy sets a standard that is too low. Conceptions of informal reasoning often implicitly assume that we have unrealistic mental abilities and unlimited resources for decision-making.¹¹⁰

So if the project of applying narrative theory to on-going debates about evidence law proceeds, it will be important to consider necessary and effective limits to the admission of more and more evidence on the ground that it makes a complete and plausible story.

For criminal defendants, there is however an antecedent challenge to existing evidence law posed by the findings of this Article—whether courts will use narrative theory, and the concomitant concept of narrative relevance, in the defendant's favor at all. Does *Old Chief* validate the *defendant's* need to tell a "morally" compelling story? Will that opinion's valuation of evidence for its evidentiary richness and narrative integrity be applied even-handedly to criminal defendants?

¹¹⁰ Craig R. Callen, *Rationality and Relevancy: Conditional Relevancy and Constrained Resources*, 2003 MICH. ST. L. REV. 1243, 1258–59 (2003).

Take as an example *United States v. Alexander*,¹¹¹ discussed by Professor Slobogin in his book *Proving the Unprovable*.¹¹² In *Alexander*, defense evidence of the defendant's "rotten social background," and of his community filled with "explosive racial tensions," was held inadmissible under the medical model of insanity and diminished capacity.¹¹³ What if the defense had framed this evidence not within the medical model but simply as evidence of the lack of the requisite state of mind, here "malice"? Would evidence of defendant's background then be admitted to help the factfinder construct a different state of mind, or to tell a more persuasive story of innocence? It seems unlikely. As Professor James J. Duane has pointed out, putting the "human face" of the defendant on the issue of reasonable doubt would not be given serious consideration by any American judge because "it would mark . . . a profound break with our conception of the parameters of a criminal trial."¹¹⁴

This Article has addressed a far narrower issue of even-handed treatment of defense evidence within narrative theory. It has concluded that defendants' own post-crime state of mind hearsay is highly probative and would permit them in many cases to construct a more plausible alternative story of their innocent state of mind. Current case law that rejects defendants' access to such proof denies them the benefits to be gained from narrative theory's insights into how jurors learn from, and make decisions about, evidence at trial. The larger story suggested in this Article and others in this Symposium, that criminal defendants might reap benefits from even-handed judicial recognition of the importance of narrative theory for evidence law, remains to be written.

¹¹¹ 471 F.2d 923 (D.C. Cir. 1973).

¹¹² SLOBOGIN, *supra* note 12, at 30–31.

¹¹³ *Id.*

¹¹⁴ James J. Duane, "Screw Your Courage to the Sticking-Place": *The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L.J. 463, 469 (1998). Criminal defendants are permitted to present their more fully "human faces" to the jury only as mitigation evidence, in the sentencing phase of death penalty cases. And for reasons of fairness, the prosecution is now allowed to present personal impact statements from victims' families in exchange.