

Comments on Swift and Slobogin: Mental State Evidence

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I. INTRODUCTION

Excellent, thought-provoking articles have the capacity to inspire readers to take up their own pens or computers. The Articles published in the *Guilt vs. Guiltiness* Symposium of the *Seton Hall Law Re-*

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*view*¹ are definitely of that quality. They have prompted in me a number of reflections, a few of which I have set forth below, concerning two of the Articles—Christopher Slobogin's² and Eleanor Swift's.³

These two Articles have much in common. Each concentrates its fire on a particular evidentiary exclusionary rule when applied to bar pieces of a criminal defendant's evidence of his state of mind. Professor Slobogin argues that the full *Daubert*⁴ scientific reliability rule should not apply to a criminal defendant's expert psychological evidence of his past mental state because such states are not susceptible of strict scientific proof. Professor Swift deplors what she believes is a defense-evidence-restricting misinterpretation of the hearsay exception for defendant's state of mind.⁵ Both base their arguments on the narrative or story-telling view of trials.⁶ Because juries are in the business of choosing among alternative, plausible stories of guilt and innocence, a criminal defendant should be able to tell, with some degree of richness, his story of what unfolded and the kind of person he is.⁷ The authors allege these rules or rulings prevent a defendant from doing so.

¹ Symposium, *Guilt vs. Guiltiness: Are the Right Rules for Trying Factual Innocence Inevitably the Wrong Rules for Trying Culprability?*, 38 SETON HALL L. REV. 885 (2008).

² Christopher Slobogin, *Experts, Mental States, and Acts*, 38 SETON HALL L. REV. 1009 (2008).

³ Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975 (2008).

⁴ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

⁵ The hearsay exception covering the declarant's state of mind is codified in Federal Rule of Evidence (FRE) 803(3).

⁶ There are various iterations of the story-telling or narrative theory of trials, each with its own particular flavor. See, e.g., ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110–42 (2000); ROBERT P. BURNS, *A THEORY OF THE TRIAL* (1999); REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 22–23, 163–64 (1983); W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981); John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 599 (2005); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI L. REV. 511 (2004); 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. ON EVIDENCE., Dec. 2005, at 6–8, <http://www.bepress.com/ice/vol3/iss1/art3/>. Professors Slobogin and Swift are not necessarily wedded to any one of these, but their basic arguments stem from a general story-telling or narrative-theory foundation.

⁷ Justice Souter, writing for the majority in *Old Chief v. United States*, 519 U.S. 172, 183 (1997), endorsed the theory that at trial a story needs to be told with evidentiary or descriptive “richness.” But in that case it was the prosecution's need to do so that the court was speaking to protect. The evidentiary or narrative richness theory was given by the Court as a reason to ordinarily refuse bare bones stipulations offered by the defense, although in *Old Chief* itself, the Court held that the stipulation, since it was one merely of status of being a convicted felon (in a possession-of-gun-by-

Both Articles are finely nuanced contributions to the field and provide useful perspectives on some vexing problems. But I think they both have implications that go well beyond the particular evidentiary rules they address and well beyond evidence offered by a criminal defendant. Further, they make some assumptions about what present evidentiary law provides, thereby underplaying possible alternative readings of that law.⁸

II. IMPLICATIONS BEYOND THEIR THESES

I want to make clear that I am not faulting Professors Slobogin and Swift for the limits they have placed on their theses. Authors have the right to compose the Article they want to write, not the Article I want them to write. They can treat whatever limited aspects of a potentially broader topic they desire. Such a limited treatment can still be of considerable service to the rest of us, as the Slobogin and Swift Articles attest. I am merely pointing out that the implications of their arguments go further than might initially appear. Other authors can begin where these two seminal Articles have left off.

A. *Implications Beyond Daubert and the State-of-Mind Hearsay Exception*

My point here can be made by a rhetorical question to both authors: why concentrate your fire on just those two rules of evidence? Your logic—that criminal defendants ought to be able to paint a rich picture of who they are and what made them tick—suggests that you would want to reform other evidentiary rules that just as importantly restrict this picture: for example, the character rule (that may prevent showing what kind of person defendant or victim is or was)⁹ and the

convicted-felon prosecution) did not on the facts of that case deprive the prosecution of any evidentiary or narrative richness.

⁸ My critique (*not* a criticism) of these Articles is based on attending their oral delivery at the Association of American Law Schools' (AALS) conference (where I did voice some of my thoughts on the Articles) and reading a subsequent draft that thoughtfully took account of some of the points voiced at the AALS by the assembled group. It is possible that there were further changes just before printing in the symposium issue. Nevertheless, the thrust of the Articles is doubtless the same, and my points herein are largely addressed to the general thrust and emphasis of the authors. My apologies if changes, unbeknownst to me, have blunted some of my points. Further, I am confining myself to these particular Articles of these authors, and do not get into their other also excellent, seminal, and prodigious publications.

⁹ For example, FRE 404(a), as read in the light of FRE 405(a), would not permit a criminal defendant to adduce some fairly powerful exculpatory picture-painting evidence, e.g., *specific instances* of (a) his own character of non-violence or other trait inconsistent with the crime charged, or (b) the victim's past aggressive acts (to help prove current aggression) in a self defense case, unless the specific instances fit the

hearsay rule in general.¹⁰ In fact, Professor Slobogin specifically endorses the character rule.¹¹

Professor Swift admittedly does briefly acknowledge, near the end of her Article, that her view of story-telling might suggest other evidentiary reforms. But most of her Article implicitly accepts that if a standard rule of evidence clearly and expressly provides for the exclusion of a piece of defendant's evidence, then so be it. Her main proposition—a criticism of the cases engrafting a timeliness or trustworthiness requirement onto the state-of-mind hearsay exception (FRE 803(3)) when such a requirement is not there—plainly implies that if Rule 803(3) actually had the requirement written into it, then the requirement would be much more acceptable. Her principle quarrel seems to be that courts have interpolated into the rule such a requirement (that works to the disadvantage of the criminal defendant) when it is not actually in the rule's text. But wouldn't the impediment to story-telling be the same even if it were?

Professor Slobogin goes even further in limiting his target to a particular evidentiary precept. Not only does he fail to target defendant-impacting rules or rulings other than *Daubert*, he specifically endorses full *Daubert* restrictions on defendant's psychological experts when they testify to traits indicating past *conduct* such as a non-aggressive personality to prove non-assault (as opposed to past *mental states* like ignorance of right and wrong or irresistible impulse, which his thesis holds should *not* be subjected to full *Daubert*).¹² Yet apply-

second sentence of Rule 404(b) (permitting other acts only under certain conditions). The story-telling theory extols the need of the jury to see the actors in the story as "human-like characters." See Swift, *supra* note 3, at 981 n.18.

¹⁰ It could be argued that hearsay has some reliability: that jurors are used to evaluating hearsay in daily life, e.g., when they hire a baby-sitter on neighborhood reputation or look at a clock (relying on the absent clock-setter); and that in many cases hearsay evidence may be the only way to fill in important details in the story defendant is trying to tell.

On a more direct note, Professor Swift's criticism that courts are injecting an unwritten trustworthiness requirement into the state-of-mind hearsay exception, would seem also logically to apply to situations where the courts are inserting a trustworthiness requirement into other hearsay exceptions that do not have it. See, for example, the general statement of the "requirements" of the excited utterance exception (FRE 803(2)) in the Third Circuit, set forth in *U.S. v. Brown*, 254 F.3d 454 (3d Cir. 2001). Several treatises indicate that, despite what may be deemed the better view, a number of state and federal decisions disqualify statements from a wide range of hearsay exceptions, pursuant to a variety of rationales, if the statement seems untrustworthy or self-serving. See *infra* notes 26, 30, and 36.

¹¹ See, e.g., Slobogin, *supra* note 2, at 1028 n.70.

¹² In practice, this distinction may prove difficult to administer.

ing full *Daubert* in either instance could adversely impact the richness of defendant's story.

B. Implications Beyond the Criminal Defendant

Further, both authors limit their argument to insuring a *criminal defendant's* right to tell a rich story.¹³ What about civil parties? And prosecutors?¹⁴ The story-telling theory embraces them as well.

¹³ Professor Swift writes as if the timeliness and trustworthiness qualifications on the state-of-mind hearsay exception only apply to bar a criminal defendant's evidence. But surely, if there are such qualifications, they apply against civil defendants, civil plaintiffs, and prosecutors as well. The exact piece of evidence Professor Swift addresses, which she thinks should be admissible, is a seemingly self-serving out-of-court statement by a criminal defendant such as "I believe the property wasn't stolen" when used in evidence by the defendant to suggest that the same state of mind (state of belief) was held by defendant at an earlier time when the property was possessed by defendant (the crime charged being knowingly possessing stolen property). Professor Swift decries rulings that bar the evidence by using essentially two grounds of exclusion, either separately or in combination: (1) timeliness—the state of mind being evidenced is past rather than contemporaneous with the statement (or, put another way, the statement and state of mind it expresses are not contemporaneous with the crime); and (2) trustworthiness—the statement is not trustworthy (being so self-serving). Although the occasions would admittedly be rarer, there are instances where the same two doctrines could exclude evidence of parties other than the criminal defendant. For example, the prosecutor might want to use the exact reverse of the example statement ("I believe the property *was* stolen") said by a partner of defendant to a friend and offered by the prosecution to help show defendant probably also knew. If said by defendant, it would have an independent basis for admissibility as a party admission. Also, assume in my example that the partner is not unavailable, so it would not be a declaration against interest. Or, for another example, suppose there is a civil case by O.J. Simpson against the purchaser, based on the recent flap in which Simpson alleges that his sports memorabilia were stolen or defrauded from him and perhaps resold to a purchaser. When O.J. sues this allegedly guilty possessor/purchaser for conversion and punitive damages, the latter might say, "What are you talking about? I believe those memorabilia belonged to the dealer I bought them from." This statement might be offered by the civil defendant in order to establish status as an innocent, bona fide purchaser for value without notice. Further, in O.J.'s prosecution for his somewhat forceful efforts to get the memorabilia back, suppose he alleged the victim (purchaser) took measures to hide the memorabilia from him. The same statement by the purchaser (victim) might be offered by the prosecution to rebut that there were evasive measures taken by the victim. In each of these instances, though they do not involve evidence offered by the criminal defense, the doctrines deplored by Professor Swift might bar the evidence. (If the "trustworthiness" criterion is considered separately from the "timeliness" criterion, it could be used to bar lots more evidence from all sorts of parties other than the criminal defendant, in myriads of situations.) Professor Swift does not decry the two requirements as applied against these other parties, and she writes as if the requirements are motivated by animus toward criminal defendants. She may be right about this, but the case is not made that the requirements are not applied against others on facts equally implicating the timeliness and trustworthiness criteria. Admittedly, it does seem that most of the occasions where the two doctrines would ap-

Professor Slobogin does not ignore this issue. He very briefly ventures a couple of intriguing reasons for so limiting his proposal and recognizes a few salient exceptions. Towards the end of her Article, Professor Swift acknowledges but does not endorse the possibility of a less rule-bound evidentiary system apparently in the interests of story-telling by everyone in the trial. But the thrust of both Articles is to guarantee the *criminal defendant's* right to tell his story. The story-telling model itself is not so limited.

Personally, I agree that the criminal defendant has the greatest claim to broadened admissibility to tell a richer story, but the reasons why are not self-evident. They require more support and discussion if anyone not of my persuasion is to be convinced. Admittedly, the Symposium that Slobogin and Swift are writing for is entitled *Guilt vs. Guiltiness* and obviously is confined to the subject of criminal defendants. So, I emphasize again, I do not fault the authors for limiting their theses. I am merely underlining that there are greater implications.

III. ASSUMPTIONS ABOUT WHAT CURRENT LAW PROVIDES

Both Articles make some assumptions about current law. While this may be justifiable, I would like to clarify that theirs are not the only possible readings of current law.

ply in combination to bar evidence would involve evidence tending to exculpate a criminal defendant.

Regarding the Slobogin Article, I am not convinced that the prosecutor is not equally handicapped by the application of full *Daubert* to past-state-of-mind evidence; or that there are not as many pressing issues concerning past state of mind in civil cases on both sides. All the intentional torts involve intention (much like crimes), and also many jurisdictions have versions of tort insanity defenses (although they are not always identical to the criminal defense). Past state of mind can be very important in negligence cases as well. The very concept of negligence has many state-of-mind aspects; and in addition, in many jurisdictions there are special allowances made in negligence cases for various mental impairments or handicaps, particularly, but not only, in the contexts of contributory or comparative negligence. In cases involving children, tort law often requires the jury to compare the child's actions to those of a child of "like age, intelligence, experience, and maturity" or other similar standard. This requires evidence of some very subjective matters. Further, the concepts of aggravated negligence, degrees of negligence, last clear chance, and assumption of risk (which requires voluntariness and knowledge of the risk) involve past mental state. The torts of infliction of mental distress undeniably have difficult issues of past mental state both before and after the infliction of the tort. The damages for almost all torts can include mental and emotional damages. Causation often includes mental-state evidence. Finally, in many tort cases, the issue of punitive damages engenders its own inquiry into past state of mind.

¹⁴ Professor Swift hints that *Old Chief* may take care of the problem for prosecutors. But, of course, *Old Chief* does not relax any rules of evidence.

A. *Professor Slobogin on the Daubert Test for Admission of Scientific Evidence*

Professor Slobogin makes the very sensible suggestion that a full-blown *Daubert* inquiry is inappropriate on certain “softer” psychological evidence—that which relates to the defendant’s past state of mind. Such evidence, he rightly says, could not survive a strict *Daubert* analysis because rigorous studies to support this kind of evidence would be very hard to come by. Yet he recognizes, again perceptively, that the evidence might be quite useful and important in giving the jury the full picture of the alleged criminal, his act, and its accompanying mental state. Slobogin proposes a new test for such evidence, which he calls in short-hand “*Daubert-lite*.”¹⁵ He describes it more extensively as follows:

I propose[] . . . the “generally accepted content validity” test, which consists of two parts, general acceptance and content validity. The general acceptance concept is well-known to lawyers because it comes from . . . *Frye* Expert testimony passes the *Frye* test if it is based on theories and methodology accepted by most or many practitioners in the relevant field. Content validity is a concept well-known to social scientists. It is to be distinguished from criterion validity and construct validity, both of which are also means of measuring accuracy. Criterion validity requires having objective criteria against which to measure a finding, and construct validity requires identifying a valid outcome measure of constructs . . . so that comparisons can be made. Because . . . good criteria and comparable outcomes are not readily available for past mental state findings, content validity is probably the best we can do for now in this setting. Content validity asks whether the content of an assessment *looks like* it addresses the relevant issues.

So, in combination, “generally accepted” “content validity” requires that expert testimony assess factors that knowledgeable and experienced experts in the field consider important in the type of

¹⁵ Critics will undoubtedly point out that there is something wrong with saying that when evidence cannot meet reliability standards then courts should lower the standards. They will say that this is reminiscent of the argument that military tribunals are needed because one cannot get convictions of terror suspects if the normal rules of evidence are applicable—an argument made frequently in current times. I am not necessarily in agreement with these critics. But perhaps there is something overlooked by Professor Slobogin’s proposal. It is that juries may think experts are extremely reliable and may not realize that there are two tiers of psychological experts: those that testify to things that are susceptible to rigorous verification, and those that are not. Perhaps a jury instruction could take care of this. But then, critics might ask, why have the latter experts at all? Professor Slobogin would say they are better than no experts.

case at issue. In practical effect, it would require that experts evaluating mental state at the time of the offense use standardized interview protocols similar to those developed in related evaluation settings.¹⁶

Thus, Professor Slobogin assumes that, under current law, the rigorous *Daubert* reliability test would bar the valuable soft psychological evidence he identifies, and a new “*Daubert-lite*” approach is necessary.

But it may well be that a new *Daubert-lite* test is not needed. The law already has a test that, with proper argument, could be applied to this evidence with effect similar to Slobogin’s. Instead of *Daubert-lite*, the test is called *Kumho*.¹⁷ *Kumho* states:

Federal Rules [of Evidence] 702 and 703 grant expert witnesses testimonial latitude . . . on the “assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline” [quoting *Daubert*] There are many different kinds of experts and many different kinds of expertise [The inquiry] is a flexible one We agree . . . that “the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of the testimony” [quoting the brief of the Solicitor General]. . . . [I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable. . . . [The] gatekeeping requirement is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the court-

¹⁶ Slobogin, *supra* note 2, at 1019. Shortly after *Daubert* but prior to *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), we made a suggestion looking in a somewhat similar “*Daubert-lite*” direction:

The applicability of *Daubert* to social science evidence is unclear Probably a sensible view is to view *Daubert* as holding that if evidence purports to be scientific, it had better live up to that appellation [But] evidence that promises less need deliver less. . . . In other words, only the degree of rigor expected of the expert . . . in his or her own field [would be] required. Different areas of human endeavor may have standards analogous to, but less rigorous than “the scientific method” (which latter method they could not fairly be expected to live up to). Yet they may still have something to contribute to a trial. . . . Requirements of admissibility should be tailored accordingly.

PAUL F. ROTHSTEIN, MYRNA S. RAEDER & DAVID CRUMP, EVIDENCE IN A NUTSHELL 364–65 (3d ed. 1997) (owing to the subsequent decision of *Kumho*, with which it was somewhat redundant, this passage was deleted by the time of the book’s present 5th ed. 2007).

¹⁷ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

room the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.¹⁸

This sounds very like the “generally accepted content validity” test of Professor Slobogin, or at least might accommodate it. The *Kumho* test could amount to Slobogin’s *Daubert*-lite when applied to expert testimony on topics—like past mental state—that are not susceptible to a strict or literal application of the *Daubert* factors of reliability. In my view, the primary value of Professor Slobogin’s article is that it powerfully and cogently points the way to how *Kumho* could be applied to psychological, past mental state evidence.

B. *Professor Swift on FRE 803(3): The State-of-Mind Hearsay Exception*

Professor Swift takes aim at the exclusionary rulings in cases that are all essentially variations of the following fact pattern: defendant in a criminal case is charged with a crime that involved guilty knowledge at the time of the commission of the crime. For example, defendant might be charged with the crime of reselling goods known by him to have been stolen by a third-party. When approached by the police after his resale, the defendant says, “What’s the big deal? These goods are perfectly legitimate.” At trial, defendant proffers that he said this, as evidence that he did not know the goods were stolen at the time he was caught. He hopes the jury will infer that if he indeed thought the goods were legitimate when he made the statement, i.e., when he was caught, then (1) he did not know they were stolen at that time, and (2) that same ignorance probably existed at the earlier time as well, i.e., when he resold the goods.

In Professor Swift’s examples, real-case decisions which she criticizes, the court holds defendant-statements, like the one above, inadmissible under Federal Rule of Evidence 803(3) (state-of-mind hearsay exception) or analogous state rules, because of requirements that she believes the courts are injecting into the rule, requirements that are unsupported by its text or intent. They are as follows: (1) a requirement that the statement must have been made at the time of the reselling, reflecting an ignorant state of mind at *that* time (a “timeliness” requirement); and (2) a requirement that the statement be trustworthy, which it is not because it is so self-serving (a “trustworthiness” requirement).

I am in total agreement with Professor Swift that it would be better policy if juries got to hear the statement and decide for them-

¹⁸ *Id.* at 148–52.

selves whether it is credible and what it means in terms of the overall story. Further, I am grateful to her for bringing this problem to light. That is an enormous service. But I think the courts' application of the timeliness and trustworthiness requirements to exclude are not as legally off-base or unsupported by law as Professor Swift contends (although I wish it were). Let's examine the two requirements.

i. Timeliness

Rule 803(3) (state-of-mind hearsay exception) on its face and pursuant to its drafting history and commentary requires that the "state of mind" being reported by declarant in the offered out-of-court statement (here, the state of mind of ignorance of the stolen nature of the goods) be contemporaneous with the statement of it. Everyone agrees this is required by the rule.¹⁹ Swift, however, believes this requirement is satisfied in our reselling stolen property case because (assuming the jury believes it) the statement is concurrent with the ignorance the statement reports. The inference backward, that the same state of mind (ignorance) was held when the defendant resold the goods, is just that—an inference. It is not something that the jury is asked to believe because the statement *said* it (i.e., *said* he had that state of mind at the time of the reselling). The statement *did not* say that. It is only an inference. Therefore, Professor Swift reasons, the timeliness requirement in the rule is met and the statement should be admissible, contrary to the holdings of the courts she criticizes.

But Professor Swift's way is not the only way to look at the matter. There are at least two other rationales that would justify the result reached by these courts—that timeliness is violated.

First, it is clear that if the defendant said, when caught, *not* that he currently believed the goods were legitimate, but rather that he *believed when he resold them* that they were legitimate, even Professor Swift agrees that *that* statement would not be within the hearsay exception and therefore would be inadmissible.²⁰ This is because the rule expressly excludes "statement[s] of memory or belief [offered] to prove

¹⁹ See PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 570–71 (3d ed. 2008).

²⁰ One may query why Professor Swift does not object to *this* exclusion of evidence. This statement would seem to be as necessary to defendant's story as the other statement. For example, one reason she gives as to why the other statement should come in is that the jury may wonder why nothing was said if the defendant believed the goods were not stolen. The same could also be said about *this* statement. In fact, the same could be said for any number of matters of defense that might be excluded by any number of rules of evidence.

the fact remembered or believed.”²¹ Might not the statement defendant *actually* made when caught (“I believe the goods are legitimate”) be viewed as an *implied* statement that “I believed *at the time of the resale* that the goods were legitimate”? (By *legitimate* we mean *un-stolen*.) An implied statement under Federal Rule of Evidence 801 is whatever the declarant meant to convey.²² It is not a great stretch to find that a “caught” defendant, when he says he *thinks* the goods are legitimate means to convey (perhaps cleverly) that he *thought* they were legitimate when he was handling them. At least a judge could so find and FRE 104 entrusts this finding to the trial judge.²³ Perhaps, in an imprecise way, this is what the judges that Professor Swift excoriates are doing.

A second way to look at the matter, also justifying those judges, would be to recognize that the defendant’s statement comes within the principle that a statement of currently existing state of mind cannot be used if its only relevance is to reflect or indicate the existence of some past fact (here, the past state of mind).²⁴ Again, in an imprecise way, this may be what the judges are saying in Professor Swift’s examples.

Both of these alternate ways of justifying the exclusionary ruling are in accord with the general underlying justification for the state-of-mind hearsay exception and its concurrency requirement: that while one has peculiar access to (and is unlikely to be mistaken about) one’s present state of mind, the same cannot be said about statements reflecting past states of mind or fact from which one is removed in space and/or time and which are therefore susceptible to errors of memory and/or perception.²⁵

²¹ FED R. EVID. 803(3).

²² “A ‘statement’ [for purposes of the hearsay rule] is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” FED R. EVID. 801(a). The Advisory Committee Note to this provision could be read to suggest that this intention test applies to implying one assertion from another, as well as from nonverbal conduct. See ROTHSTEIN, *supra* note 19, at 511–12.

²³ This is a Rule 104(a) determination not a Rule 104(b) determination. See ROTHSTEIN, *supra* note 19, at 512. Cf. ROTHSTEIN, RAEDER & CRUMP, *supra* note 16, at 394–96.

²⁴ ROTHSTEIN, RAEDER & CRUMP, *supra* note 16, at 513; *United States v. Samaniego*, 345 F.3d 1280 (11th Cir. 2003) (an interesting case involving the noted boxer, Roberto Duran, whose real name is Samaniego).

²⁵ See ROTHSTEIN, RAEDER & CRUMP, *supra* note 16, at 511. Because of such potential for error when the state-of-mind evidence is offered to reflect something that was past, Rule 403 might be invoked for exclusion as well.

ii. Trustworthiness

A number of the courts criticized by Professor Swift exclude the statement on grounds of trustworthiness. The statement is said to be self-serving and therefore remarkably untrustworthy. Professor Swift says there is no trustworthiness requirement in the state-of-mind hearsay exception contained in Federal Rule of Evidence 803(3), as there is in other hearsay exceptions contained within the Federal Rules of Evidence.²⁶ She says that when there is no trustworthiness requirement in a hearsay exception, trustworthiness is assumed.²⁷

But conclusively assumed? What about Federal Rule of Evidence 403, allowing judges to weigh the probative value of a piece of evidence against countervailing factors such as misleadingness, time consumption, prejudice, and the like? Rule 403 is the “great override,” meaning that it can be applied in the judge’s discretion to rule out almost any evidence, even if another rule seems to say the evi-

²⁶ That is, the hearsay exceptions for business records (FRE 803(6)), public records (FRE 803(8)), declarations against interest (FRE 804(b)(3) containing an “against interest” requirement and in some situations a corroboration requirement), and the catch-all or residual exception (FRE 807).

What Professor Swift might have overlooked, however, is that at common law and continued in the law of a number of states today, and even in some federal courts, there is a judicially imposed requirement for many hearsay exceptions that there be no motive to fabricate. *See, e.g.*, *United States v. Brown*, 254 F.3d 454 (3d Cir. 2001); *see* 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1732, at 159–60 (James H. Chadbourn ed., 1976); *infra* notes 30 and 36.

²⁷ It is not clear that all courts would agree with this. Further, as a matter of general legal theory, it is usually an acceptable argument that if the underlying rationale behind some legal category (here, that a particular category of evidence is trustworthy) is not satisfied in a particular case, then the category need not be applied. Indeed, when I was advising Congress concerning the alteration and adoption of the Supreme Court draft of the Federal Rules of Evidence, it became clear to me that many members of congress were under the impression that trustworthiness is a factual issue in every case under all the hearsay exceptions. It does seem to me personally, however, as it seems to Professor Swift, that this flouts the whole “category” theory of hearsay exceptions and is inconsistent with the fact that some hearsay exceptions have a trustworthiness requirement and some do not, and that a specific trustworthiness provision in the earlier Uniform Rules was rejected by the drafters of the Federal Rules. However, our personal perceptions on this are not universal. Specific trustworthiness provisions in certain hearsay exceptions may be explained on the illogical but practical grounds that the drafters wanted to accommodate, or call attention to, particular disqualifying matters from the case law, such as (in business records) the *Palmer v. Hoffman*, 318 U.S. 109 (1953), problem (self-serving business records offered in own behalf) and the *Johnson v. Lutz*, 170 N.E. 517 (N.Y. 1930), problem (information supplied by outsiders), which can have permutations that defy specific codification.

dence is admissible.²⁸ In particular, Rule 403 applies to evidence admissible under exceptions to the hearsay rule.²⁹ Would it not be proper for a judge to consider, pursuant to Rule 403, the trustworthiness of the declarant's statement in the case we are examining, and for the judge to conclude that the statement is so self-serving as to be almost worthless from a probative value standpoint—so that its reception into evidence would be unduly time consuming and misleading?³⁰ Perhaps, in an inarticulate way, this is what the judges criticized by Professor Swift are doing.³¹

²⁸ See PAUL F. ROTHSTEIN, MYRNA S. RAEDER & DAVID CRUMP, EVIDENCE: CASES, MATERIALS & PROBLEMS 57 (3d ed. 2006). An exception to this may be made where the other rule seems to expressly so provide. See, e.g., FRE 609(a)(2).

²⁹ See FED. R. EVID. 803 advisory committee's note; ROTHSTEIN, RAEDER & CRUMP, *supra* note 28, at 466–68.

³⁰ McCormick recognizes that FRE 403 can and is used in this fashion under hearsay exceptions. See 2 MCCORMICK ON EVIDENCE §§ 270, 274 at 248–49, 267–68 n.8 (Kenneth S. Broun ed., 6th ed. 2006) (“Circumstantial or direct evidence revealing a self-serving motive should logically have a place” under a judge’s Rule 403 computation as applied to any evidence including statements coming within hearsay exceptions; and with relation to our 803(3) statements specifically, “[i]t is through [Rule 403] that the self serving nature of the statement . . . may provide a basis for exclusion.”). Other treatises are to similar effect. For example, surveying current case law, Weinstein states that to satisfy Rule 803(3) “[t]here must be no suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his or her thoughts.” 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS § 803.05(2)(a), at 803–29 (Joseph M. McLaughlin ed., 2d ed. 2008); see also CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.38, at 819 (3d ed. 2003). These books acknowledge conflicting decisions on both sides of the divide even as regards this particular hearsay exception. All of them are somewhat equivocal concerning their own preferred view.

Older treatises are similar. See, e.g., 4 WEINSTEIN & BERGER, WEINSTEIN’S EVIDENCE ¶ 803(3)[04] (1990); 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE §§ 441, 442, at 538–39, 551–53 (1980).

The material in McCormick is ambivalent about whether the author *personally* approves of the use of Rule 403 to appraise trustworthiness in all cases under hearsay exceptions. The author generally approves such use but raises a question about it when the evidence is crucial or the jury is as capable of assessing the issue as the judge.

The McCormick material also states an additional ground for exclusion of the statements we are dealing with: that the passage of time combined with arrest and consultation with counsel may render the statement *irrelevant* because the usual presumption that an expressed, concurrently held state of mind continued backward to the time of the crime would not apply in that situation. This ground, which endorses both the timeliness and the trustworthiness arguments, might be the subject for another article.

³¹ It is interesting to note that in *United States v. DiMaria*, 727 F.2d 265 (2d Cir. 1984), the one case Professor Swift cites as a laudable maverick (in that it admits the evidence), the evidence on the facts is much more trustworthy than in the others. This kind of factual discrimination is characteristic of Rule 403-type rulings.

In answer, Professor Swift would characterize this trustworthiness computation as a credibility determination. She would then point to cases that say credibility of a witness is not to be considered by the judge under Rule 403 and should be left to the jury.³² She would say that the same principle should be applied to the credibility of a *declarant* whose statement is admitted under a hearsay exception.³³

Admittedly, I with co-authors, have argued that credibility of witnesses is primarily a jury function in our system, and that Rule 403 computations should proceed on the assumption that the witness is telling the truth—that the judge under Rule 403 should merely weigh the strength, deceptiveness, prejudice, and worth of the inferences to be drawn from what the witness is saying, as if it were true.³⁴

However, jurors have less ability to gauge the credibility of an absent *declarant*, which we have here, than of a *witness* who appears before them. And, in contrast to a judge, jurors have little experience in the mendacity of defendants when they are caught red-handed.

³² See *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147 (1981).

³³ In addition to *DiMaria*, she cites some commentators to this effect, although they each reflect there is a division of authority and are somewhat equivocal about their own preference.

³⁴ ROTHSTEIN, RAEDER & CRUMP, *supra* note 28, at 8–9 nn.7–8, states the following: Personal credibility of witnesses . . . is almost always considered something we trust jurors to be able to gauge properly The idea is that reasonable people can almost always disagree over whether a witness is believable. In our jury system, facts that reasonable people could disagree over are for the jury. The upshot of this is that ordinarily, the balancing of relevance or probative value against the counterweights like prejudice, misleadingness, and time consumption, which the judge is to perform in order to decide admissibility, in most cases must be done assuming the evidence is true [T]he question of how credible the witness is should not figure into the probative value side of the equation. In other words, the balancing should be done by the judge based on the assumption the witness is telling the truth. Thus the only thing that is weighed is whether, assuming the witness is telling the truth, the inference arises strongly enough to outweigh the negative counterweights. [There are cases that dissent from this.]

The authors also raise a question as to whether some courts are merely paying lip-service to this notion.

Anyway, what Professor Swift and I are talking about in these Articles is a matter of what inference should be drawn from the statement, and should not be classified as merely a matter of credibility. Because it is a matter of whether the inference can be drawn reliably (probative value) and without exaggeration (prejudice or misleadingness), it is squarely within Rule 403.

More importantly, a number of courts seem to believe that gauging credibility, even of *witnesses*, is *not* excluded from the judge's balancing under Rule 403.³⁵

Bottom line, while I agree that as a policy matter it would be preferable in our example for jurors to hear the defendant's statement of ignorance and draw their own conclusions as to self-servingness, I do not think the decisions Professor Swift criticizes are as off-base or out of step with the law as she suggests. In my view, she will have to procure an amendment of the written rule in order to insure the result we both want, which is to preclude the judges' discretion to exclude in these cases. This is because existing principles of law, on one defensible reading, can be properly deployed to support judicial consideration of the trustworthiness of the statement or to justify the timeliness requirement.³⁶ Nevertheless, Professor Swift has

³⁵ See, e.g., *United States v. Shepherd*, 739 F.2d 510 (10th Cir. 1984) (uncorroborated testimony of an accomplice offered to establish an "other crime" under the permissible purposes clause of FRE 404(b) was not very credible; therefore, the "other crime" was inadmissible). See also *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983). This was the case dramatized in *Fatal Visions*. It excluded under Rule 403, as not very credible, numerous extrajudicial statements of someone other than defendant, that suggested, exactly as defendant had alleged, that a third party rather than defendant committed the killing. The defendant was ultimately convicted. This seems like a prime candidate for Professor Swift's cross hairs if she did not limit herself to the hearsay exception for state of mind. See also *United States v. Calvert*, 523 F.2d 895 (8th Cir. 1977) (stating that the "convincingness of the evidence that the other crimes were committed and that the accused was the actor" is one of the factors to be considered in whether the "other crime" is admissible); *Drackett Products v. Blue*, 152 So.2d 463 (Fla. 1963) (statement on stand by personal injury plaintiff that she would not have stored drain cleaner where it could get wet if she had been warned on the label that it might explode from water was excluded as too self-serving).

It may be that gauging credibility under Rule 403 is more defensible in some areas, such as the admissibility of other crimes, wrongs, or acts, pursuant to Rule 404(b), than in others. Perhaps the potential for prejudice from the evidence should be a factor. But that is a subject for another article.

It might be painting with too broad a brush to speak of "credibility" as a discreet issue. Rolled up within the concept of credibility are a number of different inferences, depending on the situation. There are many reasons for "incredibility" and a number of different ways in which something can be incredible. We mean different things by "incredible" in different situations. The jury may be the appropriate appraiser of some of these issues and not others. But once again, this is not the proper time or place to treat this.

³⁶ For example, the Weinstein treatise summarizes current case law thusly: to satisfy Rule 803(3) "[t]here must be no suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his or her thoughts." 5 WEINSTEIN & BERGER, *supra* note 30, § 803.05(2)(a), at 803-29. See also 2 MCCORMICK, *supra* note 30, §§ 270, 274, at 248-49, 267-68 n.8; MUELLER & KIRKPATRICK, *supra* note 30, § 8.38, at 819. These treatises acknowledge conflicting decisions on both sides of the division of authority, equivocating about their own preferences.

focused us on an important problem and has pointed the way to solving it.

IV. CONCLUSION

The Articles of Professors Swift and Slobogin are truly seminal articles, setting the stage for continuing discussions and, hopefully, eventual law reform. These two scholars have once again given us important food for thought, and I look forward to more from them in the future and from the many other scholars whom they have doubtlessly inspired.