

Further Thoughts on the Critique of the “Timeliness” Test Under FRE 803(3)

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I. INTRODUCTION

In his *Comments on Swift and Slobogin: Mental State Evidence*,¹ Professor Paul Rothstein poses some questions about the Article that I wrote for this Law Review’s *Guilt vs. Guiltiness* Symposium.² I appreciate this opportunity to respond to Professor Rothstein and to contribute to the ongoing dialogue about the Symposium. This dialogue began at a panel presentation to the Evidence Section of the Association of American Law Schools in January 2008. Surely one indication of a successful panel is that it spawned not only the Symposium articles but also thoughtful commentary, in this case from Professors Paul Rothstein and Robert Burns.

My Symposium Article, *Narrative Theory, FRE 803(3), and Criminal Defendants’ Post-Crime State of Mind Hearsay*,³ analyzed the past ten years of published federal court opinions applying the hearsay exception for state of mind, Federal Rule of Evidence (“FRE”) 803(3).⁴ I identified cases applying a requirement of “timeliness” that is not in-

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¹ Paul Rothstein, *Comments on Swift and Slobogin: Mental State Evidence*, 38 SETON HALL L. REV. 1395 (2008).

² Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants’ Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975 (2008).

³ *Id.*

⁴ FRE 803(3) provides that statements of then existing mental, emotional, or physical condition are not excluded by the hearsay rule under the following terms:

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 . . . declarant’s will.

FED. R. EVID. 803(3). My data set included all cases containing discussion of FRE 803(3) significant enough to warrant a Westlaw Headnote. See Swift, *supra* note 2, at 993.

cluded in the express terms of that Rule.⁵ The Article focused on hearsay statements that expressed a “then existing” or current state of mind, as required by FRE 803(3), made by criminal defendants after the commission of the crime with which they were charged. Defendants offered these statements as exculpatory evidence to show their current “innocent” state of mind and to generate an inference that they had held the same mental state, lacking criminal intent, at the time of the alleged crime.

These statements fit within the express terms of FRE 803(3) and would have been admitted into evidence were it not for the “timeliness” requirement that courts have injected into the exception. The “timeliness” test requires that there be no lapse of time between the alleged crime and the making of the hearsay statement.⁶ If there is such a time lapse, courts adopting the test assume that there is time for the defendant to reflect and to fabricate the “innocent” state of mind statement. Thus, they require contemporaneity of crime and statement in order to “negate the likelihood of deliberate or conscious misrepresentation.”⁷ Since post-crime statements by definition suffer from some lapse of time, they are excluded.

However, Rule 803(3)’s express terms require contemporaneity only between the declarant’s then existing state of mind and his statement. The Symposium Article argued against the court-imposed additional requirement of timeliness based on the policy underlying the FRE’s categorical hearsay exceptions, pursuant to which satisfying the express terms of the exception “is enough.”⁸ The Symposium Article further argued against the resulting impoverishment of criminal defendants’ ability to prove their own “not guiltiness” under the “narrative theory” of jury decision making, which was the particular subject of the panel and Symposium.⁹

In his *Comments*, Professor Rothstein seems to agree that excluding defendants’ post-crime state of mind hearsay under the court-imposed timeliness test is undesirable.¹⁰ He also agrees that narrative theory supports broader admissibility of defendants’ state of mind hearsay in order to permit the criminal defendant “to tell a richer

⁵ The case law research results are reported in Swift, *supra* note 2, at 994–97.

⁶ For an in depth discussion of the “timeliness” test see *id.* at 990–93.

⁷ *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005).

⁸ CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE § 8:71, at 613 (3d ed. 2007); see also Swift, *supra* note 2, at 976–78.

⁹ Swift, *supra* note 2, at 983–90, 997–99.

¹⁰ See Rothstein, *supra* note 1, at 1403–04 (“I am in total agreement with Professor Swift that it would be better policy if juries got to hear the statement and decide for themselves whether it is credible and what it means in terms of the overall story.”).

story.”¹¹ His objections are that my Article was limited to discussing only FRE 803(3) and the timeliness test’s impact on criminal defendants, and that it did not consider whether other evidence doctrines might justify the exclusion of defendants’ statements on grounds actually unstated by the courts.¹²

II. THE FOCUS OF THE SYMPOSIUM ARTICLE

Focusing narrative theory only on FRE 803(3), and the timeliness test only on criminal defendants, was impelled by my approach to critiquing evidence law, by the subject of the AALS panel and ensuing Symposium, and by the federal case law itself.

A. *There Are Different Approaches to Critiquing Evidence Law*

Academic critique of evidence law can proceed from the bottom up or from the top down. I chose to proceed from the bottom up, to use narrative theory to critique a specific evidence rule. I applied the theory’s abstract terms—evidentiary richness and narrative integrity,¹³ juror selection of the story with the “best fit” to the evidence at trial,¹⁴ and the necessity of competition between “plausible alternative” stories¹⁵—to show how the timeliness test undermines the theory’s goals in specific and concrete cases.¹⁶

Other commentators, including Professors Robert Burns and Ronald Allen, have used narrative theory to show the need for fundamental changes in evidence law, such as abolishing all of the principal exclusionary rules of evidence in favor of a system of “free proof,” or revising the burdens of proof.¹⁷ There is value in my approach as well as theirs. Significant change in evidence law will be a product both of critiquing the old, as my Article did, and charting the new. Professor Rothstein does not suggest otherwise.

¹¹ *Id.* at 1400.

¹² *See id.* at 1397, 1403, 1404, 1409.

¹³ *See* Swift, *supra* note 2, at 983–86.

¹⁴ *Id.* at 986–87.

¹⁵ *Id.* at 987–90.

¹⁶ *Id.* at 997–99.

¹⁷ *Id.* at 989, 1002–03. More recent work by Professors Burns and Allen further develops their views. *See* Robert P. Burns, *A Short Meditation on Some Remaining Issues in Evidence Law*, 38 SETON HALL L. REV. 1435 (2008); Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 L. & PHIL. 223 (2008).

B. *The Symposium Focused on Narrative Theory in Criminal Cases*

As to why I concentrated on cases in which state of mind hearsay was offered by criminal defendants, the answer is pretty obvious, as Professor Rothstein acknowledges.¹⁸ Professor Michael Risinger, the moderator of the AALS panel, chose the topic of *Guilt vs. Guiltiness* for the panel and Symposium. All of the panel presentations, and the Symposium articles that followed, focused on criminal trials and primarily on criminal defendants.

Indeed, social psychologists developed narrative theory out of their research on jury decision making in criminal trials.¹⁹ Academic interest in this theory has grown since Justice Souter's explicit references to it in the *Old Chief* majority opinion, a criminal case.²⁰ That opinion approved use of the concepts of "evidentiary richness" and "narrative integrity" as components of the probative value of evidence offered by the prosecution. Justice Souter's comments have been taken to signal the possible relaxation of a rule of evidence—relevancy²¹—in favor of the prosecution, justified by the prosecution's heavy burden of constructing persuasive narratives that could overcome the "beyond a reasonable doubt" standard and the jury's moral inhibitions.²²

Professor Risinger's own scholarship explores the risks that inhere in such leniency toward the prosecution, and this interest sparked his choice of the topic of *Guilt vs. Guiltiness*. The Symposium authors have asked the next logical question: can and should the same concern for narrative theory that motivated *Old Chief's* leniency toward the prosecution also apply to the criminal defendant's prof-

¹⁸ See Rothstein, *supra* note 1, at 1400 ("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.").

¹⁹ See REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (1983); W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981). It is widely accepted that the narrative elements of stories mesh well with the essential elements of criminal prosecutions. Juries thus easily construct "stories" to make sense of the evidence presented to them in criminal cases. See Swift, *supra* note 2, at 980–82, 988–89.

²⁰ See *Old Chief v. United States*, 519 U.S. 172 (1997).

²¹ *Id.* at 187–88. Professor Rothstein claims that *Old Chief* did not "relax" any evidence rule. Rothstein, *supra* note 1, at 1400 n.16. But see 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) ("[T]he Supreme Court recognized a sense in which evidence can be relevant which does not fit within the Federal Rule's core definition of relevant evidence . . .").

²² *Old Chief*, 519 U.S. at 187–88.

fers of proof? This is the question that interested us and that made for a coherent and successful panel.

C. *Federal Case Law Focuses the Timeliness Test on Criminal Defendants*

The case law itself also determined the focus of my article. It bears repeating that federal courts of appeals originally adopted the timeliness test exclusively in cases that excluded criminal defendants' proffers of their post-crime state of mind hearsay.²³ Current research reveals that this test still seems to pose a problem only for criminal defendants, not for the prosecution. The great majority of published federal appellate cases during the past ten years that contain any significant discussion of FRE 803(3) are criminal.²⁴ Of these, when the timeliness test was applied, it was used only to uphold the exclusion of state of mind hearsay offered by criminal defendants.²⁵ In the single case in which this test was mentioned in objection to a prosecutor's proffer of hearsay, the appellate court ducked the timeliness issue and upheld admission of the hearsay statement as within the trial court's discretion.²⁶

²³ See Swift, *supra* note 2, at 991 n.61.

²⁴ For appellate court statistics see *id.* at 994.

²⁵ This one-sided impact of the timeliness test was not a surprise. My prior research on California law had shown that criminal defendants' post-crime state of mind hearsay was excluded in nineteen published cases out of twenty, pursuant to the California trustworthiness test. See 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, 627 (2008). In the California cases, state of mind hearsay offered by the prosecution was not excluded despite gaps in time between the alleged triggering events and the making of the statements. *Id.* at 626, 637–38 & nn.61–63.

²⁶ *United States v. Newell*, 315 F.3d 510 (5th Cir. 2002). At issue were hearsay notes written by the defendant's accountant, expressing the accountant's then existing concerns about the defendant's accounting practices. The notes were offered to prove that the accountant held those same concerns on July 10, 1995, when she spoke to defendant. The notes were written "sometime following" July 10. Despite an objection from defendant that the notes were not made contemporaneously with the July 10 meeting (thus potentially failing the timeliness test cited by the court in a footnote), the court held as follows:

We find that the district court did not abuse its discretion in admitting the notes. The notes were admitted to prove [the accountant's] state of mind around the time she confronted [the defendant]. Although [the accountant] could not identify the specific date on which she wrote the notes, she testified that she authored them when the events were still "fresh in her mind."

Id. at 523. The court's focus on the "freshness" of the accountant's memory of the July 10 meeting shows that the court treated the notes as asserting a past fact. Such an assertion would be flatly inadmissible under FRE 803(3). See *infra* Part III.B. It is possible that the court interpreted the statement to be a past recollection recorded

In the civil appellate opinions within this data set, the timeliness test is not even mentioned. The data set did include forty-six district court opinions in civil cases containing a significant discussion of FRE 803(3).²⁷ Of these, only three discussed and applied the timeliness requirement, framed as the declarant must have “no time to fabricate” or to reflect.²⁸ All three opinions excluded plaintiffs’ proffers of state of mind hearsay, two of which were statements made by the individual plaintiffs themselves. In these two cases, courts perceived a risk of insincerity due to the self-interested nature of the plaintiffs’ own statements.²⁹

Thus, including civil cases more explicitly in my Symposium Article would not have changed my critique of the timeliness test. As applied, it keeps otherwise admissible hearsay from the jury. And it was first developed, and now is applied most consistently, to exclude a very particular type of hearsay offered by criminal defendants. This fact, in and of itself, is disturbing and worthy of comment.

III. THE TIMELINESS TEST OPINIONS CANNOT BE UNDERSTOOD AS “IMPRECISE” APPLICATIONS OF OTHER EVIDENCE DOCTRINES

Professor Rothstein agrees with me that the timeliness test is bad hearsay policy, but he thinks that the courts applying it are not “as legally off-base or unsupported by law” as I claim.³⁰ He suggests that these courts may actually be using other doctrines “in an imprecise way” to exclude the defendants’ state of mind statements.³¹ He refers

which, under FRE 803(5), does require a “fresh” memory. In any event, the timeliness test was not applied, despite defendant’s objection. Had it been, it would have queried whether, during the time lapse between July 10 and the writing of the notes, the accountant had time to reflect and to fabricate the statement of then existing state of mind in her notes. Clearly she did.

²⁷ See Swift, *supra* note 2, at 996. Forty of these cases were found through Westlaw, six were found through Lexis. This sizeable number of published civil opinions reflects many pre-trial decisions on evidence questions through motions in limine, motions for summary judgment, and even motions for class certification. The most common civil suits in this database involve employment discrimination, civil rights, and trademark protection.

²⁸ See *Metro. Enter. Corp. v. United Techs. Int’l*, No. 3:03cv1685, 2006 U.S. Dist. LEXIS 9866, at *3 (D. Conn. Feb. 28, 2006); *Hussey v. Chase Manhattan Bank*, No. 02-7099, 2005 U.S. Dist. LEXIS 15012, at *24–*25 (E.D. Pa. July 27, 2005); *Thomas v. Fred Meyer Jewelry, Inc.*, No. 02-3090-CO, 2005 U.S. Dist. LEXIS 18204, at *3, *6 (D. Or. June 23, 2005).

²⁹ *Fred Meyer Jewelry*, 2005 U.S. Dist. LEXIS 18204, at *3, *6 (letters and diary of deceased grievant in a sexual harassment and discrimination case excluded); *Hussey*, 2005 U.S. Dist. LEXIS 15012, at *24–*25 (out of court statements by plaintiff in suit against employer under Employee Retirement Income Security Act were excluded).

³⁰ See Rothstein, *supra* note 1, at 1404.

³¹ *Id.* at 1405.

to two doctrines that exclude statements pursuant to the express exclusionary clause in FRE 803(3) excluding “statements of memory or belief offered to prove the fact remembered or believed.” This clause, and these two doctrines, are focused on preventing the use of the state of mind exception to admit hearsay statements that bear significant perception and memory dangers. Perhaps Professor Rothstein’s idea is that judicial use of the timeliness test is “supported by law” if what it accomplishes is the exclusion of hearsay that is inadmissible anyway under the exclusionary clause. My review of the major timeliness test opinions, however, shows that this is not what the timeliness test is doing.

A. *The Doctrine Excluding Implied Assertions of a Past State of Mind*

A hearsay declarant’s statement of then existing state of mind can be excluded if, by making that statement, the declarant intended to make an “*implied statement*”³² that he held the same state of mind in the past, at the time of the alleged crime. This implied assertion would be a statement of memory or belief, used to prove the remembered past state of mind, and would violate the express exclusionary clause in FRE 803(3). As Professor Rothstein states, the key to the exclusion of implied assertions under the FRE is the declarant’s intent to assert.³³ In cases involving statements by criminal defendants, the burden would be on the prosecution to persuade the judge by a preponderance of the evidence, pursuant to FRE 104(a), that by expressing his then existing state of mind, the criminal defendant intended to assert the implied statement that he had previously held the same mental state in the past.

If courts are using the timeliness test as a clever (or bumbling) way to avoid the rigorous intent requirement under the implied assertion doctrine, this “imprecision” should not be condoned. Moreover, in the appellate cases that I reviewed,³⁴ every opinion that actually upheld exclusion of a defendant’s statement by applying the timeliness test explicitly did so on the basis of sincerity dangers resulting from an identified time lapse between the alleged crime (or act related to the crime) and the making of the statement. No findings of intent to make an implied assertion of past state of mind, and no

³² *Id.* at 1405.

³³ *Id.* at 1405 nn.22–23.

³⁴ The opinions I reviewed are those identified in my Symposium Article. See Swift, *supra* note 2, at 995 n.74. For my previous research, see Swift, *supra* note 25, at 645 n.101. For additional cases cited in Evidence treatises, see 2 MCCORMICK ON EVIDENCE § 274, at 267 n.8 (Kenneth S. Broun et al. eds., 6th ed. 2006).

discussion of perception and memory dangers, were present in these opinions. It therefore cannot be said that the statements in these cases would have been inadmissible under the implied assertion doctrine, not even if applied “imprecisely.”³⁵

B. The Doctrine Excluding Statements Relevant Only to Prove a Past Fact

Sometimes a statement offered to prove the declarant’s state of mind does not fit within FRE 803(3) because it is actually relevant only to prove what the declarant remembers and believes about a past fact. Such statements cannot fit within the FRE 803(3) exception because the jury would use them as statements of memory or belief to prove the past fact. They are inadmissible under the Rule’s explicit exclusionary clause.³⁶

In the appellate cases that I reviewed, two opinions relied on this doctrine.³⁷ They upheld exclusion of statements that had been offered as statements of defendants’ then existing state of mind but which the courts interpreted as actually being statements of memory or belief about past events, typically the crime charged.³⁸ While these

³⁵ Two other opinions did apply the implied assertion doctrine. In one, the burden of proving the defendant’s intent to make an implied assertion appears satisfied. *United States v. Cardascia*, 951 F.2d 474, 486, 488 (2d Cir. 1991) (finding that the defendant’s statement “was not the product of a contemporaneous state of mind, but was intended rather for use by the jury to infer a state of mind that had occurred six months earlier [the defendant] was making ‘a statement of memory or belief’”). In the second, there was no discussion of the intent issue at all. *United States v. Hernandez*, 176 F.3d 719, 726 (3d Cir. 1999). Neither court even purported to be applying the timeliness test, although one opinion did mention that test. The holding in each of these two cases was that the defendant’s statement was excluded as an implied assertion of a past fact by the express exclusionary clause in FRE 803(3).

³⁶ PAUL F. ROTHSTEIN, MYRNA S. RAEDER & DAVID CRUMP, *EVIDENCE IN A NUTSHELL* 515 (5th ed. 2007). “If the declarant’s declared state of mind (belief) is relevant only because it reflects an external fact of the present or past, which fact itself is the thing of significance to the lawsuit, . . . then the state of mind exception is inapplicable.” *Accord* MUELLER & KIRKPATRICK, *supra* note 8, § 8:71, at 605.

³⁷ *See* *United States v. Jackson*, 780 F.2d 1305 (7th Cir. 1986); *United States v. Cianci*, 378 F.3d 71 (1st Cir. 2004).

³⁸ *See, e.g., Jackson*, 780 F.2d at 1315 (defendants’ denials of wrongdoing made two years after the alleged crime were offered to prove their own past actions and excluded as a statement of memory or belief to prove the fact remembered); *Cianci*, 378 F.3d at 91 (concluding that the statement, “at least in part, applied to past acts of the Cianci administration and were to a large extent ‘self-serving’ attempts to cover tracks already made . . .”). In *Jackson*, exclusion was also justified under the timeliness test. 780 F.2d at 1315. In this opinion, therefore, the overlap between the two exclusionary doctrines was explicit. The court was not using the timeliness test to

are sometimes difficult interpretations to make,³⁹ the cases show that courts do make them. In contrast, courts use the timeliness test to exclude a very different kind of statement—a statement that does express a then existing state of mind and does not bear perception and memory dangers in violation of FRE’s explicit exclusionary clause.

C. *The “Continuity” Theory of Relevance Permits Statements of Then Existing State of Mind to Prove the Same State of Mind in the Past Without Violating the Exclusionary Clause of FRE 803(3)*

Hearsay statements of a then existing state of mind can be relevant to prove that the declarant held the same state of mind in the past. Relevance is based on an inference that the declarant’s state of mind was continuous, extending backwards in time. This inference relies on generalizations about the temporal stability and continuity of people’s states of mind. Relevance is not based on inferences about the accuracy of the declarant’s memory and belief about past facts—what he once felt, saw, or heard in the past. Thus, statements offered under this backwards “continuity” inference do not bear perception and memory dangers and are not excluded under the express exclusionary term of FRE 803(3) discussed above.

This is a crucial distinction throughout hearsay policy. Commentators and case law approve the “continuity” theory as supporting a proper inference from a present state of mind to the existence of an identical past state of mind.⁴⁰ Reliance on this theory of relevance

cover up an “imprecise” use of the doctrine excluding statements relevant only to prove past facts.

³⁹ Some state of mind statements are ambiguous; that is, the statements can be read either as expressing a then existing state of mind or as an assertion of a past state of mind, or as conduct that would not fit within FRE 803(3). Some courts then apply a “primary purpose” inquiry as noted in MCCORMICK, *supra* note 34, § 274, at 269 n.8. If a court finds that the statement is being offered for the “primary purpose” of proving a past fact, then the exclusion decision should be governed by the doctrine now being discussed in Part III.B, because the then existing state of mind is not itself relevant. If a court finds that it was declarant’s “primary purpose” in making the statement to impliedly assert a past state of mind or past fact, then the exclusion decision should be governed by the intent test discussed *infra* Part III.A.

⁴⁰ MCCORMICK, *supra* note 34, § 274, at 270–71 (“[T]he evidentiary effect of the [then existing state of mind] statement is broadened by the notion of the continuity in time of states of mind Continuity may also look backwards.”); MUELLER & KIRKPATRICK, *supra* note 8, § 8:71, at 605 (“[I]t is plausible to admit [a] statement not only to prove [state of mind] at the moment of speaking, but to permit backward-looking inferences that [the speaker] probably has similar [mental state] a week earlier, or a month earlier, or perhaps even years earlier.”). Professor Rothstein mentions this issue of backwards continuity in his *Evidence Nutshell* in the form of a question that the authors do not answer. ROTHSTEIN, RAEDER & CRUMP, *supra* note 36, at 515.

to admit statements of then existing state of mind under FRE 803(3) is permissible precisely because it does not involve the declarant's perception or memory and does not rely on generalizations about the accuracy of those testimonial qualities.

Professor Rothstein suggests that the timeliness test opinions could be justified as holding that any statement of then existing state of mind offered to prove the past identical mental state can be excluded as a statement of memory or belief to prove a past fact.⁴¹ This is simply wrong.⁴² The inference backwards to the past state of mind does not involve memory or belief. Treating it as if it did would require rejecting the backwards continuity theory of relevance in all state of mind cases, and there is no hint in the timeliness test opinions that they are doing any such thing.

D. Conclusions

There is a cluster of doctrines that courts use to administer the proper scope of FRE 803(3). I have no quarrel with the doctrines, just discussed, that exclude criminal defendants' post-crime statements because of perception and memory dangers that violate the express exclusionary term of FRE 803(3). They are necessary to prevent the seepage of perception and memory risks into the scope of that exception. They should be applied precisely, and it is an important role of the academic commentator to hold courts to precision in their use of exclusionary doctrines. If, as Professor Rothstein suggests, courts are using the timeliness test in order to exclude statements that could be "imprecisely" excluded otherwise, we should point this out.

But I do not think that the courts using the timeliness test are doing this. I think they know what they are doing. They use this test to exclude statements of then existing state of mind that do not fall within the exclusionary doctrines suggested by Professor Rothstein. They use the timeliness test precisely because it can exclude relevant

⁴¹ See Rothstein, *supra* note 1, at 1405.

⁴² Professor Rothstein relies on *United States v. Samaniego*, 345 F.3d 1280 (11th Cir. 2003), to support this suggestion. However, *Samaniego* discusses and applies only the traditional doctrine forbidding use of FRE 803(3) to admit an irrelevant state of mind (in this case that the declarant said "I'm sorry.") in order to prove a past external event (his theft of Roberto Duran's championship belts) that triggered it. The doctrine from Professor Rothstein's *Evidence Nutshell* quoted above in footnote 36 thus required exclusion. *Samaniego* did not involve the use of a present state of mind as relevant to prove the declarant's identical past state of mind, the circumstance to which the timeliness test is applied.

and admissible state of mind hearsay statements which these doctrines simply do not reach.

IV. THE TIMELINESS TEST OPINIONS CANNOT BE JUSTIFIED ON
GROUNDS OF IRRELEVANCE, AS PERMISSIBLE JUDICIAL AMENDMENT OF
FRE 803(3), OR AS AN APPLICATION OF FRE 403

So far I have shown that Professor Rothstein's explanation of the timeliness test as an "imprecise" application of two valid exclusionary doctrines does not hold. Now, Professor Rothstein's further set of suggestions must be addressed. These suggestions also posit reasons why defendants' post-crime state of mind hearsay could legitimately be excluded, again in the hope of justifying its outcomes.

A. *If the Continuity Inference Logically Fails in a Specific Case, the
State of Mind Statement Can Be Excluded as Irrelevant*

Professor Rothstein's first suggestion is based on an idea, raised in the McCormick treatise, that a present state of mind statement could be excluded as irrelevant to prove an identical past state of mind.⁴³ The traditional example of such irrelevance is if a lengthy passage of time between present statement and past state of mind makes the inference of backwards continuity to the past state of mind so highly improbable as to be unreasonable.⁴⁴ Irrelevance is a question for the court to decide as a matter of logical relevancy, on the specific facts.⁴⁵ Courts that find irrelevance on this basis decide the issue explicitly and do not confuse it with application of the timeliness test.⁴⁶

⁴³ Rothstein, *supra* note 1, at 1407 n.30; see MCCORMICK, *supra* note 34, § 274, at 267–68 n.8; see also MUELLER & KIRKPATRICK, *supra* note 8, § 8:71, at 604–05.

⁴⁴ “[T]o say that circumstantial evidence is irrelevant . . . is to say that knowing the evidence does not justify *any* reasonable inference as to the fact in question.” MCCORMICK, *supra* note 34, § 185, at 735.

⁴⁵ See *id.* § 274, at 271.

⁴⁶ See, e.g., *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986) (The court views the two year time lapse between the end of the alleged criminal scheme and the making of the statement under the timeliness test both as “two years to reflect upon their actions and potentially an incentive to misrepresent the truth” and as raising a “questionable lack of relevance . . .”); *United States v. LeMaster*, 54 F.3d 1224, 1231–32 (6th Cir. 1995) (viewing defendant’s statement made twenty-four hours after the triggering event as “not probative” to prove the identical mental state twenty-four hours earlier, as well as violating the timeliness test to prove a “mistaken” state of mind on the prior day due to lapse of time and knowledge that he was under investigation); *United States v. Reyes*, 239 F.3d 772, 743 (5th Cir. 2001) (Two and one-half months between defendant’s last criminal act and making of statement, plus likelihood defendant knew his conversation was recorded, violated the timeliness

The Mueller and Kirkpatrick treatise also suggests that irrelevance could be based on a fact that logically negates the backwards inference of continuity of state of mind. For example, a “triggering event” on June 1 could cause the declarant to have a specific state of mind.⁴⁷ If the declarant makes a statement expressing this then existing state of mind on June 2, it could not be relevant to prove that the declarant held the same specific state of mind on any date before June 1. Logically, the declarant could not have held the relevant mental state prior to the triggering event that caused it. No inference of continuity of state of mind, backwards to a time prior to that event, could be made.

The McCormick treatise, which Professor Rothstein cites, suggests a different theory of an intervening event. It posits that if a criminal defendant’s post-crime statement of an “innocent” state of mind is made after the defendant’s arrest or consultation with counsel, the statement might not be relevant to prove that the same “innocent” state of mind existed earlier, at the time of the alleged crime.⁴⁸ The claim would be that these are intervening events that so increase the likelihood that the defendant would fabricate a self-serving statement that it would no longer be plausible to infer continuity backwards to that earlier time.

But this claim is not equivalent to the “logical irrelevance” that is based on the lengthy passage of time or the occurrence of the triggering event in between the present and past mental state. While events like an ongoing police investigation, arrest, charge, and consultation with counsel may enhance a defendant’s motive to fabricate, the case law holds that a defendant’s motive to fabricate already exists during

test’s contemporaneity requirement; the court also seems to hold independently that the passage of time destroyed the relevance of defendant’s statement.).

⁴⁷ The Muller and Kirkpatrick treatise presents an example of a hearsay statement about a then existing belief about physical state: “I’m allergic to peanuts.” This state of mind is relevant to the question whether or not the declarant would have eaten peanuts at a particular time. See MUELLER & KIRKPATRICK, *supra* note 8, § 8:71, at 605. The treatise asserts that if it could be proved that the declarant was first informed about the allergy a week before making the statement, a backwards inference that the declarant held the same state of mind of belief about her physical state a month before is not plausible. See *id.*

The case of *Colasanto v. Life Ins. Co. of N.A.*, 100 F.3d 203, 212–13 (1st Cir. 1996) presents another example of exclusion based on an intervening event (angry letters written in March excluded to prove same past state of mind in January and early February, due to the intervening event of a bitter quarrel and break-up between the letter writer and the recipient). The governing legal standard cited by the *Colasanto* court is a relevance standard.

⁴⁸ See MCCORMICK, *supra* note 34, § 274, at 268 n.8 (“The normal assumption that states of mind continue . . . does not hold in this circumstance.”).

an ongoing crime or immediately after, and certainly before the defendant has knowledge of any investigation.⁴⁹ More important, judicial concern about a defendant's motive to fabricate does not make his statement of an "innocent" state of mind irrelevant. Motive generates a competing inference of insincerity, but it does not wholly negate either the possibility of sincerity or that the defendant's innocent state of mind continues backwards to a time prior to the investigation, arrest, and so forth.⁵⁰

The inference that a person with strong motive to lie can still be telling the truth is reasonable. A party's admission offered against him under FRE 801(d)(2)(A) is often tainted by a powerful self-serving motive to fabricate. Such admissions are not rejected as irrelevant because it is not impossible or implausible that the party is nevertheless telling the truth when making his hearsay statement.⁵¹ It seems at least equally possible that a criminal defendant is sincere in stating the truth about his then existing state of mind. And if he is sincere, then the continuity inference backwards in time to the alleged crime remains reasonable.

B. Courts Can Respond to the Sincerity Dangers in Statements of Then Existing State of Mind that Are Admissible Under FRE 803(3) in Three Ways, but Only One of These is Legitimate Under the Federal Rules of Evidence

The crux of the timeliness test opinions is that courts are concerned about significant sincerity dangers in defendants' post-crime statements of state of mind. After investigation, arrest, and charge, defendants certainly do have the opportunity to misrepresent their actual state of mind. It is criminal defendants' motive and opportunity to make false statements, not dangers of perception and memory, that haunts the judicial mind and pervades the courts' opinions.

⁴⁹ See, e.g., *United States v. Carmichael*, 232 F.3d 510, 521 (6th Cir. 2000) (statement made by defendant during ongoing crime and without knowledge that he was being investigated); *United States v. Carter*, 910 F.2d 1524, 1530 (7th Cir. 1990) (statement made one hour after triggering event); *United States v. Macey*, 8 F.3d 462, 467–68 (7th Cir. 1993) (statement made to office manager four hours after executing allegedly fraudulent invoice).

⁵⁰ MCCORMICK, *supra* note 34, § 185, at 735 ("That more than one inference could be drawn is not enough to render the evidence irrelevant.").

⁵¹ In making such determinations of irrelevancy, "[t]he judge can only ask, could a reasonable juror believe that . . . [the statement of then existing innocent state of mind] makes it more probable than it would otherwise be that the accused . . . [lacked criminal intent at the time] of the crime being tried?" *Id.*

There are three ways that courts could respond when they perceive a significant sincerity danger in hearsay that has satisfied the express terms of FRE 803(3). First, they could admit the hearsay statement under those express terms, open the credibility question to proof and argument by the adversaries, and permit the jury to resolve it. This is the general approach of the FRE.⁵² Second, courts could impose a specific additional doctrinal test on the exception, such as the timeliness test, that would permit them to exclude the hearsay themselves. This has the effect of adding a foundational requirement that amends the hearsay exception. Third, courts could exercise discretion to exclude the problematic hearsay on a case by case basis under FRE 403. I believe that only the first option is legitimate under the FRE's categorical approach to the admission of hearsay.

1. The First Option: Let the Jury Decide

Professor Rothstein agrees that the first option is the better one, but he describes this position as "personal perceptions."⁵³ I cannot agree that this view is just a matter of perception. I have stated elsewhere the reasons that legitimate the first option both under traditional hearsay policy⁵⁴ and under narrative theory.⁵⁵ I understand that courts do adopt the second option, and perhaps even the third, but I will briefly sketch again why these two options should not be endorsed as legitimate.

2. The Second Option: Adding a Brightline Requirement to FRE 803(3) Cannot Be Justified Without Amending the Rule.

Courts that inject the timeliness test into FRE 803(3) seem to have adopted the second option. They have added a requirement to the categorical exception and have applied it as a brightline test. They ask, "Has time passed between a triggering event (which they assume is the alleged crime) and the declarant's state of mind statement?"⁵⁶ If time has passed, then there is time for the defendant to

⁵² See MCCORMICK, *supra* note 34, § 270, at 250 ("Under the structure of the Federal Rules, judgments about credibility [of out-of-court statements] should generally be left to the jury rather than preempted by a judicial determination of inadmissibility.").

⁵³ See Rothstein, *supra* note 1, at 1406 n.27.

⁵⁴ See Swift, *supra* note 25, at 647–55.

⁵⁵ See Swift, *supra* note 2, at 978, 997–99.

⁵⁶ As I wrote earlier:

The reported federal cases demonstrate that the "time" between event and statement . . . can be whittled down to nothing . . . two years . . .

reflect and the opportunity to fabricate exists. Many timeliness test opinions engage in no case specific analysis of the strength or weakness of that motive, even when the statement is made before the criminal defendant is investigated, arrested, or charged with a crime.⁵⁷ Courts also assume that this motive will have dominated the thinking of the defendant to such an extent that his post-crime statement should not even be considered by the jury.⁵⁸

The crucial question is whether the second option—judicial imposition of the brightline timeliness test—can be justified under the FRE’s categorical approach to the admission of hearsay. Prior to the adoption of the Federal Rules of Evidence, the definitions of the hearsay exceptions evolved through common law decision making, with courts adding and subtracting specific terms as part of this process. Since the adoption of the Rules, it has been held to be unacceptable for courts to import common law foundational requirements into the Rules when those requirements are not supported by the terms of the Rule itself.⁵⁹

one hour . . . four hours . . . the very start of three weeks of illegal enticing . . . and in the middle of a business lunch conversation in which the defendant may or may not have learned he was speaking to an undercover FBI agent.

Swift, *supra* note 25, at 650.

⁵⁷ See, e.g., cases cited *supra* note 49.

⁵⁸ See, e.g., United States v. Macey, 8 F.3d 462, 467–68 (7th Cir. 1993) The court’s analysis consisted only of the following:

Macey claims that his statement shows that he never intended the invoice to be fraudulent But the statement was made four hours after the invoice was executed. The district court could have reasonably concluded that Macey had time to fabricate a story in the four hours between his fraud and his statement to Kaiser. Because good reason existed for its decision, the district court did not abuse its discretion by precluding Kaiser’s hearsay testimony.

Id.; United States v. Rivera-Hernandez, 497 F.3d 71, 82 (1st Cir. 2007) The court reasoned only as follows:

But evidence in the record confirms that [the defendant’s] statement to his father occurred well after his demand . . . for the money. As such, the district court could have reasonably concluded that the statement was untrustworthy, and therefore unreliable, because [the defendant] had enough time to fabricate and misrepresent his statement.

Id.

⁵⁹ See Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 883–88 (1988). Professor Imwinkelried cites three cases from the Supreme Court of the United States in support of his conclusion that “[R]ule 402 deprives the judiciary of the common-law power to prescribe exclusionary rules of evidence, and the legislative history of rule 402 confirms that suggestion.” *Id.* at 882.

Professor Rothstein posits that I may have overlooked that some federal courts continue the common law tradition by insisting upon “a judicially imposed requirement for many hearsay exceptions, that there be no motive to fabricate.”⁶⁰ For this position he cites *United States v. Brown*⁶¹ and Wigmore’s treatise.⁶² But the *Brown* opinion does not impose a “no motive to fabricate” requirement on FRE 803(2), the excited utterance hearsay exception at issue therein, nor on any other exception. *Brown*’s analysis focuses on whether the utterance was in fact “under stress of excitement” and therefore within the express terms of the exception.⁶³

⁶⁰ See Rothstein, *supra* note 1, at 1406 n.26.

⁶¹ *United States v. Brown*, 254 F.3d 454 (3d Cir. 2001).

⁶² See 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1714, at 91 (James H. Chadbourn ed., 1976). Professor Rothstein also states that his own citations of major Evidence treatises support this point, citing his own footnotes 30 and 26. Rothstein, *supra* note 1, at 1408 n.26. Footnotes 30 and 36, however, concern the use of FRE 403 to exclude untrustworthy state of mind hearsay on a case by case basis, not a general “no motive” requirement imposed on the state of mind exception itself. In fact, commentators agree that there was no general “no motive” requirement enacted into FRE 803(3). See *infra* note 66.

⁶³ It is well-established that the “stress of excitement” is viewed as disrupting the opportunity to fabricate, and does not speak to the existence (or non-existence) of a motive to do so. “The rationale for the exception lies in the special reliability that is furnished when excitement suspends the declarant’s powers of reflection and fabrication.” MCCORMICK, *supra* note 34, § 272, at 255. *Brown* does refer to a requirement in the Third Circuit that an excited utterance be made “before there has been time to reflect and fabricate.” *Brown*, 254 F.3d at 458. This timeliness factor is a consideration in deciding whether the statement was made under the “stress of excitement,” as is required by the express terms of FRE 803(2), as the *Brown* and other opinions make clear.

The *Brown* opinion states as follows:

Fed. R. Evid. 803(2) does not require that, in order to be admissible, the statement be contemporaneous with the startling event, but rather only with the excitement caused by the event. The critical question in the instant case, therefore, is whether the men’s report of an armed man likely occurred during the period of excitement engendered by their sighting of the gunman [citing cases in which “stress of excitement” was found even after the passage of up to three hours] Under factual circumstances comparable to those here, where the temporal gap was only a matter of one or a few minutes, courts have often admitted the asserted excited utterance

In the case at bar . . . it was entirely reasonable for the District Court to infer from the testimony that only a short time had passed between the startling event and the statements, that the declarants were still visibly in an excited state, that their statements thus were likely made in a state of excitement originating with the event, and consequently that their statements were admissible as excited utterances pursuant to Rule 803(2).

Brown, 254 F.3d at 460–61.

Nor does Wigmore's treatise support Professor Rothstein's position. The treatise simply states the fact that, at common law, the hearsay exception for statements of physical and mental states included a premise that they were made "without any obvious motive to misrepresent."⁶⁴ While this common law principle is still reflected in the California Evidence Code,⁶⁵ commentators agree that FRE 803(3) did not enact a general "no self-serving motive" requirement.⁶⁶

Appellate courts adopting the timeliness test have based their decisions not on express terms in FRE 803(3) itself but on a comment in the Advisory Committee Note to the Rule, which states that "Exception (3) is essentially a specialized application of Exception (1), presented separately to enhance its usefulness and accessibility." Exception (1), FRE 803(1), is the exception for a declarant's present sense impressions of events happening in the external world. Its express terms require contemporaneity between perception of the external event that is the subject of a declarant's statement and the making of the hearsay statement itself. FRE 803(3)'s express term "then existing state of mind" likewise requires contemporaneity between perception of the internal state of mind that is the subject of a declarant's statement and the making of the hearsay statement it-

⁶⁴ WIGMORE, *supra* note 62, § 1714, at 91. Moreover, the treatise then criticizes application of this principle to criminal defendants' presumed pre-crime or post-crime motive to misrepresent because the assumption that all defendants do have a guilty motive because they really are guilty is unfair. *Id.* § 1732, at 156-62.

⁶⁵ CAL. EVID. CODE § 1252 provides for the exclusion of statements of state of mind on grounds of lack of trustworthiness.

⁶⁶ See MCCORMICK, *supra* note 34, § 270, at 249.

The rules give no authorization to such [consideration of the self-serving nature of the statement] and indeed the omission of a requirement found in the original Uniform Rule that the statement must not be made "in bad faith" indicates a contrary legislative intent. Moreover, in some other exceptions, the self-serving character of a statement, appearing in the form of a motive to falsify, is specified as a ground for exclusion.

Id.

See also STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *in* 4 FEDERAL RULES OF EVIDENCE MANUAL § 803.02[4][d], at 803-30 (9th ed. 2006) (It is "inappropriate to superimpose a trustworthiness requirement on the provisions of Rule 803(3)."); MUELLER & KIRKPATRICK, *supra* note 8, § 8:71, at 614 ("It is surely wrong to apply a per se rule that would exclude self-serving statements that further the interests of the speaker or tend to justify or excuse his conduct."); MICHAEL GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:0, at 61 (6th ed. 2006). These sources have also been thoroughly discussed and quoted in my earlier Article. See Swift, *supra* note 25, at 645-47.

self.⁶⁷ This interpretation makes Rule 803(3) parallel to Rule 803(1), in accord with the Advisory Committee's Note.

In adopting the timeliness test, however, courts have taken the analogy to FRE 803(1) much further. They treat the alleged crime as if it were an event "perceived" that is the subject of the defendant's statement. Their analogy to FRE 803(1) then permits them to demand strict contemporaneity between the past crime and the defendant's statement about his then existing state of mind.⁶⁸ This is wrong as a matter of fact. It may not be the past alleged crime that triggers the defendant's then existing state of mind about which he speaks. Rather, some other current event—a conversation, a question, another person's conduct—could trigger a then existing mental state which the defendant expresses, thus generating no opportunity for reflection and fabrication.

Even more important, there is a crucial distinction between FRE 803(1) and FRE 803(3) which undercuts the courts' analogy. The requirement of contemporaneous perception of an external event and the making of a statement about it is founded on the express terms of FRE 803(1). The same is not true for the timeliness test and FRE 803(3). The timeliness test is not a reasonable judicial interpretation of an express term of the Rule; it adds an express term that expands the Rule's approach to sincerity danger well beyond the requirement of "then existing" state of mind. Without an amendment to the Rule, this is unacceptable in a system of codified evidence law.⁶⁹

Whether to inject the timeliness test into FRE 803(3) as a bright-line requirement is a question that should be subjected to the formal mechanism of amending the Federal Rules.⁷⁰ Were this amendment

⁶⁷ See, e.g., MCCORMICK, *supra* note 34, § 274, at 267 ("As with statements of bodily condition, the special assurance of reliability for statements of present state of mind rests upon their spontaneity and probable sincerity."). See also MUELLER & KIRKPATRICK, *supra* note 8, § 8:71, at 600, 603 ("To fit the exception, a statement must indicate the speaker's *present* and *existing* state of mind Problems of memory are negligible and problems of perception minimal . . .").

⁶⁸ See *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005).

⁶⁹ Cf. Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 HOW. L.J. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144143 (contending that the judicial gloss on FRE 803(1) that the statement of present sense impression be "spontaneous" is "defensible" because it "has some footing in the statutory language").

⁷⁰ Professor Rothstein's position that it would take an amendment to get rid of the timeliness test may be correct as a practical matter because so many courts of appeal have adopted the test. See Rothstein, *supra* note 1, at 1409. But on the merits, it

proposed, I would oppose it, in particular as it is focused on a particular sub-class of hearsay declarants and presumes their guilty motive to fabricate. Had this test been incorporated into FRE 803(3) from the beginning, its operation in practice would still make it subject to the substantive critiques developed in both my Symposium Article and prior writing.⁷¹ Professor Rothstein is incorrect in stating that my substantive opposition to the timeliness test as bad hearsay policy would cease had that test been enacted into FRE 803(3).⁷²

3. The Third Option: FRE 403 Should Not Be Used to Exclude Admissible Hearsay as Lacking Credibility

Professor Rothstein suggests that it might be a legitimate use of FRE 403 to exclude hearsay on grounds of lack of credibility even when it fits within a categorical exception; he also suggests that this may be what the timeliness test opinions are doing “in an inarticulate way.”⁷³

There are two problems with these suggestions. First, the timeliness test opinions are not applying FRE 403, or its evaluative standards, to the pertinent state of mind statement. Rather, as just described above, they assume that any time for reflection between the alleged crime and the defendant’s statement creates a sincerity danger that justifies exclusion. There is no estimation of the effect of this danger on the probative value of a particular defendant’s hearsay statement in the context of the facts of the particular case, no evaluation of what specific Rule 403 danger the statement triggers, and no application of FRE 403’s “substantially outweighs” requirement. Can Professor Rothstein really condone such an “inarticulate” use of this Rule? If unstated and hypothesized reasoning takes the place of substantive legal analysis, we will have no evidence law.

Second, Professor Rothstein suggests that if courts were openly to apply the terms of FRE 403 to admissible hearsay, it could be proper for the judge to consider the trustworthiness and credibility of the declarant as a component of probative value. Thus if, on the particular facts of the case, a “statement is so self-serving as to be almost worthless[,] . . . its reception into evidence would be unduly time

is incorrect and should be the opposite. If a brightline timeliness requirement is to be injected, it should be by rule amendment.

⁷¹ See Swift, *supra* note 2, at 990–99; Swift, *supra* note 25, at 647–55.

⁷² See Rothstein, *supra* note 1, at 1398. Indeed, the purpose of my Symposium Article was to critique this test on its merits under narrative theory.

⁷³ *Id.* at 1407.

consuming and misleading”⁷⁴ At the Association of American Law Schools panel presentation, I took the position that a FRE 403 override of the FRE’s categorical approach to the admission of hearsay would not be appropriate if based on the credibility of the hearsay declarant. Professor Rothstein queried this position at the panel presentation and does so again in his *Comments*, raising several points that he suggests could support a FRE 403 override based on declarants’ lack of credibility.

His first point is that my position assumes that hearsay declarants’ credibility should be treated like witnesses’ credibility under FRE 403.⁷⁵ He is correct. The “prevailing view” is that “a judge may *not* consider the credibility of the source of evidence [the witness] in gauging probative value under rule 403.”⁷⁶ Professor Rothstein asserts that a number of courts do not agree with this view, but the single case he cites does not in fact disagree.⁷⁷ Even if there were isolated instances of judicial disagreement, the clear majority view should define the proper use of FRE 403.⁷⁸

His second point is that a Rule 403 override is justified because jurors have a harder time assessing the credibility of hearsay declarants who do not appear before them, particularly criminal defen-

⁷⁴ *Id.*

⁷⁵ *See id.* at 1408.

⁷⁶ Imwinkelried, *supra* note 59, at 886 (citing leading commentators and the “overwhelming majority” of case law) (emphasis added). *See also* MUELLER & KIRKPATRICK, *supra* note 8, § 4:12, at 639–40.

⁷⁷ *See* Rothstein, *supra* note 1, at 1409 n.35. The opinion of the Supreme Court of Florida in *Drackett Products v. Blue*, 152 So. 2d 463 (Fla. 1963) held that the plaintiff’s testimony about what she would have done had she known then what she knew now about the risk of explosion from mixing water with Drano was correctly excluded. “Conjecture has no place in proceedings of this sort The law seems well established that testimony consisting of guesses, conjecture or speculation—suppositions without a premise in fact—are clearly inadmissible in the trial of causes in the courts of this country.” *Id.* at 465. This is the grounds for the court’s holding, not that the testimony was “too self-serving” as Professor Rothstein claims, although the court also states, “Moreover, the answer to such a question would be obvious from the inception.” *Id.* at 465.

⁷⁸ Professor Imwinkelried acknowledges the existence of isolated, and early, federal opinions that consider impeachment as pertinent to the probative value of testimony. Imwinkelried, *supra* note 59, at 886. But the strongly-held majority view remains that a witness’s credibility is for the jury, and it is therefore to be assumed by the court in applying Rule 403. *United States v. Thompson*, 615 F.2d 329, 332 (5th Cir. 1980) (reversing trial court because FRE 403 neither authorizes a judge to “protect” jury from contradictory testimony nor excludes evidence because a judge “does not find it credible”); *Bowden v. McKenna*, 600 F.2d 282, 284 (1st Cir. 1979) (weighing probative value against unfair prejudice under FRE 403 means probative value “if the evidence is believed, not the degree the court finds it believable”).

dants whose mendacity they have little experience with.⁷⁹ But these fears about jurors challenge the entire structure of categorical exceptions. The FRE adopted categorical exceptions in order to leave the evaluation of the credibility of most admissible individual hearsay declarants to jurors,⁸⁰ knowing full well that jurors do not observe most of these declarants.⁸¹ Moreover, jurors lack experience with many kinds of hearsay sources whose credibility may be more difficult to evaluate than criminal defendants' obvious motive for mendacity.⁸²

Finally, then, the real point of disagreement between Professor Rothstein and me seems to be whether, under a system of codified evidence hearsay exceptions, using Rule 403's provision for judicial discretion to exclude admissible hearsay for lack of credibility should be considered legitimate. Although such discretion is not his preference, he suggests that it may be legitimate.⁸³

4. Would Judicial Discretion to Exclude Admissible Hearsay for Lack of Credibility Under FRE 403 Be Legitimate?

This short Article will address only briefly the legitimacy of judicial exclusion of admissible hearsay because the declarant lacks credibility. There is surprisingly little academic commentary that is directly on point.⁸⁴ However, it is clear that the majority of major

⁷⁹ See Rothstein, *supra* note 1, at 1408.

⁸⁰ A few of the FRE exceptions do explicitly permit judicial evaluation of trustworthiness in the admission and exclusion of individual hearsay statements. See FED. R. EVID. 803(6), 803(8), 804(b)(3), 807. But as is well known, the Advisory Committee rejected the idea of generally allowing judges to admit or exclude hearsay based on their evaluation of its credibility "as involving too great a measure of judicial discretion." FED. R. EVID. art. VII advisory committee's note. A general use of FRE 403 to exclude otherwise admissible hearsay would amount to that "great measure" of judicial discretion.

⁸¹ Only FRE 801(d)(1) and 803(5) require the hearsay declarant to be subject to cross-examination. Rules 804 and 807 either require or presume the absence of the declarant; Rules 803 (apart from 803(5)) and 801(d)(2) are agnostic on the issue.

⁸² See MCCORMICK, *supra* note 34, § 270, at 250 ("[T]he credibility issue can be readily appreciated by the jury . . . when the reason to question credibility rests upon the declarant's self-serving motivation.").

⁸³ We both agree, I think, that the better policy would be "to preclude judges' discretion to exclude in these cases." See Rothstein, *supra* note 1, at 1409.

⁸⁴ A 1984 article by Professor Margaret Berger stated as follows:

It is considerably less clear whether the Rules also afford the trial judge discretion . . . by allowing him to rely on rule 403 to exclude otherwise admissible evidence on the ground that the rationale underlying the hearsay rule has not been satisfied . . . because the proffered proof is so unreliable that its "probative value is substantially outweighed by the danger of unfair prejudice"

treatises do not support either the court-imposed timeliness test or the general principle that judges can exclude admissible hearsay because it is self-serving.⁸⁵ Those that deal most carefully with the topic of legitimacy state that judicial discretion to exclude hearsay admissible under FRE 803(3) for lack of credibility could perhaps reside in FRE 403 on a case by case basis, even though the opinions they cite are not using that Rule. Those treatise authors also take great pains to insist that such discretion should be cabined.⁸⁶

Federal case law actually addressing the use of FRE 403 to exclude admissible hearsay for lack of credibility is sparse. Opinions cited by Professor Rothstein⁸⁷ and the McCormick treatise⁸⁸ as exam-

Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 272 (1984). Professor Berger does not resolve this lack of clarity but poses two questions:

Now that we have had a decade's experience with the hearsay rules, are we satisfied with how they are working? Should we make article VIII specifically subject to rule 403 . . . or should some of the rules be amended to require a trial judge to make a preliminary finding of trustworthiness?

Id. at 272.

⁸⁵ See *supra* note 66. Cf. MUELLER & KIRKPATRICK, *supra* note 8, § 8:5, at 42–43 (“Although the judge has broad authority under . . . [FRE] 403 to exclude hearsay on account of risks of unfair prejudice . . . and so forth, this power does not justify refusing to accept hearsay that fits an exception simply because the judge thinks a live account would be better.”). The exception is 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 803–31 (Joseph M. McLaughlin ed., 2006) (2d ed. 2008). The only authorities cited are four appellate opinions that all apply the “timeliness” test. Elsewhere this treatise also suggests that FRE 403 could be used to exclude hearsay that falls within an exception on grounds of unreliability. *Id.* at § 805.06, at 805–09.

⁸⁶ Swift, *supra* note 25, at 646–47 & nn.108–09.

⁸⁷ Professor Rothstein cites one case, *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983). Defendant offered hearsay statements made by a third party which supposedly exculpated him. Professor Rothstein claims that the appellate court upheld exclusion of these statements “as not credible under Rule 403” and that this case should have been “a prime candidate for [my] cross-hairs . . .” Rothstein, *supra* note 1, at 1409 n.35. But this opinion upheld the exclusion of the declarant’s hearsay as untrustworthy under FRE 804(b)(3), the exception for statements against interest. Under the terms of this Rule, statements offered to exonerate the accused must have “corroborating circumstances [that] clearly indicate the trustworthiness of the statement . . .” The court relied on Rule 403 only to reject the non-hearsay use of the statements as prior inconsistent statements to impeach.

⁸⁸ MCCORMICK, *supra* note 34, § 270, at 249 n.11 (citing *United States v. Soghalian*, 777 F. Supp. 17 (S.D. Fla. 1991)). But *Soghalian* is better read as holding that the declarant’s [defendant’s] statement was a statement of past fact, not admissible as then existing state of mind.

[The defendant’s] statement to O’Neill regarding Marden’s conduct and the transportation of the rocket launchers is clearly a declara-

ples do not in fact exemplify such use of that Rule. A few cases discuss whether FRE 403 can be used to exclude statements that contain multiple levels of hearsay, even where each level is admissible, due to the overall unreliability, complexity, confusion, and prejudice involved in properly evaluating them. Two of the decisions exclude a multiple hearsay statement on that basis.⁸⁹ Other decisions warn against misusing the FRE 403 balancing test to defeat the presumption that public records which include evaluative findings are presumptively admissible under FRE 803(8)(C).⁹⁰

It is hard to know what to make of the fact that there is so little case law on this point. Perhaps parties do not raise the issue of the court's power to exclude admissible hearsay for lack of credibility; perhaps this issue seems so obvious to trial judges that they do not need to write about it, or they mistakenly assume that the issue is too thorny or too sensitive to address in print.

On the merits, judicial discretion to exclude otherwise admissible hearsay on grounds of credibility troubles me. Whether judges should have power to override the terms of categorical hearsay exceptions depends on the strength of one's commitment to the policies and values that underlie the FRE's adoption of the categorical system of admitting hearsay. These include preferring the jury to the judge as the arbiter of credibility. Giving judges discretion to decide whether a hearsay declarant lacks sufficient credibility raises prob-

tion of [defendant's] belief concerning some past act by Marden in transporting the rocket launchers. . . . Had the statement been made at the time the rocket launchers were discovered at the airport, perhaps the defense position of a *then* existing mental conditions [sic] would be stronger.

Soghanalian, 777 F. Supp. at 17. The court's reference to Rule 403 is thus unnecessary. And it is actually applied, at least in part, to the testimony of the witness who reported defendant's hearsay statement.

⁸⁹ See *Plastipak Packaging, Inc. v. DePasquale*, 75 Fed. Appx. 86, 90–93 (3d Cir. 2003) (based on “the uncertainty as to the basis for the statements, the fact that [one declarant] denied ever making these statements, the multiple layers of hearsay involved and the inability of the jury to assess [the key declarant's] credibility, we conclude that this evidence is ‘so unreliable that its probative value is substantially outweighed by the danger of prejudice and confusion’”); *Precision Piping & Instruments, Inc. v. E.I. Du Pont de Nemours & Co.*, 951 F.2d 613, 620 (4th Cir. 1991) (exclusion upheld based on question of reliability, confusion and untoward prejudice); *Boren v. Sable*, 887 F.2d 1032, 1034–37 (10th Cir. 1989) (exclusion upheld based on inadmissibility of one level of hearsay). All of these opinions reference *WEINSTEIN & BERGER*, *supra* note 85, § 805.6, for the proposition that there is increased risk of unreliability in multiple hearsay and that the trial judge has discretion under FRE 403 to exclude such statements.

⁹⁰ See *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 201–02 (5th Cir. 1995).

lems: risk of stereotyping,⁹¹ rushed and pressured judgments made with little time to reflect,⁹² and inadequate appellate review under the abuse of discretion standard. These are just some of the dangers that discretionary exclusion of hearsay on grounds of credibility could raise.

V. CONCLUSION

In any event, resolving the question whether FRE 403 can or should be so used is not dispositive of my critique of the timeliness test. It must be remembered that the courts applying this test make no pretense of applying Rule 403, and they do not engage in the fact-intensive, case-specific, multi-factored analysis that this Rule demands. The timeliness test poses a great challenge to the administration of a codified system of evidence rules because it is premised on judicial ability to re-write those rules, not just to interpret their terms.

Professor Rothstein seems to be more comfortable with such judicial amending of the FRE, even though he disagrees with the policy of the timeliness test. Perhaps he thinks that the common law tradition of judicial control over evidence law is still operative and appropriate. I believe that reasoned critique of the substance of the timeliness test and its outcomes, and its lack of support in the text of FRE 803(3), shows that this test is “as off-base or out of step with the law”⁹³ under the Federal Rules of Evidence as I have claimed.

⁹¹ The timeliness test opinions reflect the judicial presumption that criminal defendants will give in to their motive to fabricate. Other invidious stereotypes or overbroad generalizations could be put into play by judges evaluating the credibility of unseen hearsay declarants.

⁹² Careful and sensitive application of FRE 403 in the midst of trial is a daunting task. It requires estimation of the probative value of a criminal defendant’s admissible hearsay statement not just on credibility grounds, but within the context of the entire case. It may require nuanced evaluation under *Old Chief’s* concepts of evidentiary richness and narrative integrity. And it certainly requires more than a reflex response to risky hearsay statements as too prejudicial or confusing for the jury. It is for all of these reasons that the Advisory Committee rejected a discretionary approach to the admission of hearsay in favor of the categorical exceptions.

⁹³ See Rothstein, *supra* note 1, at 1409.