

ARTICLES

Narrative, Truth, and Trial

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This Article critically evaluates the relationship between constructing narratives and achieving factual accuracy at trials. The story model of adjudication—according to which jurors process testimony by organizing it into competing narratives—has gained wide acceptance in the descriptive work of social scientists and currency in the courtroom, but it has received little close attention from legal theorists. The Article begins with a discussion of the meaning of narrative and its function at trial. It argues that the story model is incomplete, and that “legal truth” emerges from a hybrid of narrative and other means of inquiry. As a result, trials contain opportunities to promote more systematic consideration of evidence. Second, the Article asserts that, to the extent the story model is descriptively correct with respect to the structure of juror decision making, it also gives rise to normative concerns about the tension between characteristic features of narrative and the truth-seeking aspirations of trial. Viewing trials through the lens of narrative theory brings sources of bias and error into focus and suggests reasons to increase the influence of analytic processes. The Article then appraises improvements in trial mechanics—from prosecutorial discovery obligations through appellate review of evidentiary errors—that might account for the influence of stories. For example, a fuller understanding of narrative exposes the false assumption within limiting instructions that any piece of evidence exists in isolation. And to better inform how adjudicators respond to stories in the courtroom, the Article argues for modifying instructions in terms of their candor, explanatory content, and timing.

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* Professor of Law, Duke University School of Law. © 2013, Lisa Kern Griffin. I gratefully acknowledge the contributions of Barbara Babcock, Jamie Boyle, Robert Burns, Guy Charles, George Fisher, Brandon Garrett, David Hoffman, Michael Pardo, Neil Siegel, David Sklansky, and participants in faculty workshops at Duke University School of Law, Temple University Beasley School of Law, and the University of Virginia School of Law. I am also indebted to Jennifer Behrens in the Goodson Law Library for her expertise, to Jake Charles, Paul Cohen, Leslie Mahaffey, and Josh Mitchell for valuable research assistance, and to the many students in my evidence class who located materials and offered useful insights, including Zack Anderson, Kara Duffle, Bea Hahn, Ian Long, Shiveh Roe, and Nels Vulin. This paper was selected as the winner of the 2012 Scholarly Papers Competition, Association of American Law Schools, Criminal Justice Section.

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INTRODUCTION

In 2008, Mark Jensen stood trial for the murder of his wife Julie in a Kenosha County Circuit Court in Wisconsin.¹ At one point in the trial, the presiding judge commented: “People who think you can try a case off a script, they ought to read this transcript.”² What is striking about the transcript, however, is that it does indeed call to mind a script. The case evokes familiar narrative constructs about unfaithful spouses and abusive relationships, and even the marquee piece of evidence was a tried and true literary device: a “letter from the grave” to be opened in the event of the victim’s death.³ Despite strong advocacy on both sides of the case and the court’s steady hand, the record leaves a sense of disquiet about the outcome. That uneasiness arises in part from the overpowering effect of a dominant narrative that may have obscured the inconclusive and inconsistent nature of some evidence.

The known facts include that Julie Jensen died at her home in Pleasant Prairie, Wisconsin on December 3, 1998.⁴ She had been married to Mark Jensen

1. See *State v. Jensen*, 2011 WI App 3, ¶¶ 1, 19, 331 Wis. 2d 440, 447, 455, 794 N.W.2d 482, 486, 490 (Wis. Ct. App. 2010).

2. See *Pornographic Pictures at Center of Jensen Trial Monday*, YouTube (Feb. 4, 2008), <http://www.youtube.com/watch?v=kjL15ioOt94> (at 1:46).

3. See *State v. Jensen*, 2007 WI 26 ¶ 5, 299 Wis. 2d 267, 273, 727 N.W.2d 518, 521. The defense argued that this tactic was “out of the movies,” and the media frequently described the case as one involving a “letter from the grave.” See, e.g., Carrie Antlfinger, *Wis. Jury Hears Dead Wife’s Letter*, WASH. POST, Jan. 8, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/07/AR2008010702958.html>; Mallory Simon, *Jury: Letter from Grave Was ‘Road Map’ to Murderer*, CNN.COM (Feb. 25, 2008), <http://edition.cnn.com/2008/CRIME/02/22/jensen.jurors/index.html>.

4. Eric LaRose, *Kenosha Man Charged in Wife’s 1998 Poisoning Death*, MILWAUKEE J. SENTINEL, Mar. 21, 2002, <http://news.google.com/newspapers?id=1KcaAAAIBAJ&sjid=mj8EAAAIBAJ&pg=3737%2C331796>.

for fourteen years, and they had two sons, ages eight and three at the time of her death.⁵ The case was at first treated as a suicide. Initial autopsy and toxicology reports were inconclusive, but tissue samples examined two years later established that Julie had ingested ethylene glycol, a poisonous substance commonly found in antifreeze.⁶ Later analysis of the Jensen home computer revealed Internet searches seeking information about various methods of poisoning.⁷ Mark Jensen's e-mail correspondence also exposed his long-term affair.⁸ After Julie's death, he began living with his girlfriend, and they later married.⁹ On March 19, 2002, Mark was charged with first-degree intentional homicide.¹⁰

The narrative the prosecution advanced at trial was framed by Julie Jensen's own account. Ten days before her death, Julie visited her neighbor and tearfully handed him a sealed envelope. If anything should happen to her, she said, he was to deliver it to the police.¹¹ That document became the focal point of more than a decade of litigation to determine the legal truth about the events that led to Julie's death.¹² In the letter, Julie expressed fear for her life because Mark had never forgiven her for a brief affair she had seven years before.¹³ She identified Mark as the "first suspect" should anything happen to her and noted that he was an "avid" Internet user. She also detailed the medicines she was taking but denied abusing alcohol. And she disavowed any suicidal tendencies, citing her love for her sons. The letter concluded: "I pray I'm wrong [and] nothing happens . . . but I am suspicious of Mark's behaviors [and] fear for my early demise."¹⁴ Julie made similarly foreboding comments to a police officer with whom she was acquainted, one of her son's teachers, and her sister-in-law in the weeks before she died.¹⁵

Mark and Julie's story is in many respects an ancient one, but it emerges in modern ways, including through dueling websites established by their respective families and the jurors' discussions with the media.¹⁶ The websites vividly

5. Jessica Hansen, *Jury Finds Jensen Guilty in Murder of Wife*, KENOSHA NEWS (Oct. 27, 2008), http://www.kenoshanews.com/news/jury_finds_jensen_guilty_in_murder_of_wife_261151042.html.

6. *The Letter*, CBS NEWS (Aug. 23, 2009), http://www.cbsnews.com/8301-18559_162-4010441.html.

7. *State v. Jensen*, 2011 WI App 3, ¶ 37, 331 Wis. 2d 440, 463, 794 N.W.2d 482, 493 (Wis. Ct. App. 2010).

8. *Id.*

9. *Jensen*, 2011 WI App 3, ¶ 74, 331 Wis. at 474, 794 N.W.2d at 499.

10. *State v. Jensen*, 2007 WI 26, ¶ 3, 299 Wis. 2d 267, 272, 727 N.W.2d 518, 521.

11. Jay Schadler & Shana Druckerman, *'Letters From the Grave' Help Unlock Mystery Behind Two Mothers' Deaths*, ABC NEWS (Aug. 21, 2011), <http://abcnews.go.com/US/letters-grave-unlock-mystery-mothers-deaths/story?id=14340121.ukndve0e8rg>

12. *Jensen*, 2011 WI App 3, ¶¶ 28–35, 331 Wis. 2d at 461–62, 794 N.W.2d at 492–93. Mark Jensen's challenge to the admissibility of the letter was unsuccessful. Although the appeals court later determined that recent Supreme Court decisions interpreting the Confrontation Clause of the Sixth Amendment may have rendered its admission erroneous, it also concluded that any error was harmless. *Id.*

13. *See Jensen*, 2007 WI 26, ¶ 7, 299 Wis. 2d at 274, 727 N.W.2d at 522.

14. *Id.*

15. *Jensen*, 2011 WI App 3, ¶¶ 42–43, 331 Wis. 2d at 462, 466, 794 N.W.2d at 495.

16. *See, e.g., Jury: Julie Jensen's Letter Key Evidence: Sentencing Scheduled for Wednesday*, WISN: MILWAUKEE NEWS (Feb. 22, 2008), <http://www.wisn.com/t/15378697/detail.html>.

represent the competing narratives in the case. “Our Sister Julie,” the site founded by Julie Jensen’s four brothers, features scrapbook-style pages that portray a loving mother who suffered silently from abuse.¹⁷ Links can be found throughout the site to resources for victims of domestic violence.¹⁸ Mark Jensen’s website—“Justice Isn’t Always Served”—includes links to innocence projects and other sources on wrongful convictions.¹⁹

In Mark’s narrative, his affair was the reason for Julie’s suicide rather than a motive for murder. His account begins much earlier in Julie’s life and chronicles sources of emotional disturbance.²⁰ Various members of Julie’s family battled alcoholism and depression, including a brother who attempted suicide. She lost another brother in childhood after a suspicious rough-housing accident at home, and her mother also mysteriously drowned.²¹ Trial testimony further established that Julie had a long-term depressive disorder, for which she was under treatment at the time of her death.²² According to Mark, there was indeed mounting hostility between him and Julie, but in his version, she was despondent about the affair and plotted to kill herself and frame her husband in revenge. Julie’s letter is arguably consistent with this theory, and its timing and curious content raise doubts about the facts surrounding her death. But it accords as well with the prosecution’s claim that Julie was enduring emotional abuse, living in fear, and trapped in a dangerous home environment. Jurors came to see the letter within the prosecution’s framework and reported that it was the most important piece of evidence to them; one juror termed it a “clear road map” to conviction.²³

After six weeks of trial, thirty-two hours of deliberations, and an early vote with some jurors undecided and others divided between conviction and acquittal, the jury reached agreement and returned a guilty verdict.²⁴ Mark Jensen received a sentence of life without parole,²⁵ and his conviction was affirmed in 2010.²⁶ That verdict is the legal truth of what happened to Julie Jensen, but doubt lingers about whether the jury reached its conclusion by improperly

17. See OUR SISTER JULIE, <http://www.oursisterjulie.com/Julie/Home.html> (last visited Oct. 17, 2012).

18. *Id.*

19. MARK JENSEN—JUSTICE ISN’T ALWAYS SERVED, <http://www.markjensenlegaldefense.com> (last visited Oct. 17, 2012).

20. *Let’s Talk About Julie Jensen*, MARK JENSEN—JUSTICE ISN’T ALWAYS SERVED, <http://www.markjensenlegaldefense.com/who.shtml> (last visited Oct. 17, 2012).

21. *Id.*

22. Tom Kertscher, *Testimony Ends in Poisoning Trial*, MILWAUKEE J. SENTINEL, Feb. 16, 2008.

23. Ann O’Neill, *Husband Guilty of Murder in “Letter from Grave” Case*, CNN.COM (Feb. 22, 2008), <http://edition.cnn.com/2008/CRIME/02/21/jensen.verdict/index.html> (internal quotation marks omitted); see also *Julie Jensen’s Letter Points Finger at Mark*, ASSOCIATED PRESS (May 18, 2009), <http://www.620wtmj.com/news/local/45320097.html>.

24. Tom Kertscher, *Jensen Guilty of Homicide*, MILWAUKEE J. SENTINEL, Feb. 22, 2008, <http://www.jsonline.com/news/wisconsin/29524184.html>.

25. Tom Kertscher, *Jensen Gets Life, No Parole*, MILWAUKEE J. SENTINEL, Feb. 28, 2008, <http://www.jsonline.com/news/wisconsin/29552414.html>.

26. *State v. Jensen*, 2011 WI App 3, ¶ 19, 331 Wis. 2d 440, 455, 794 N.W.2d 482, 490 (Wis. Ct. App. 2010).

relying on a letter admitted in violation of Mark's Confrontation Clause rights, and the record raises questions about the factual truth behind Julie's death as well. The jury was confronted with a hazy but intensely thematic tale about events that transpired a decade earlier in the midst of an unraveling marriage and various betrayals and at the height of at least one spouse's deep desperation. Even assuming that every fact the jury heard was true, how did they determine what the facts meant?

Many social scientists who study juries have concluded that they interpret information not by considering and weighing each relevant piece of evidence in turn, but by constructing competing narratives and then deciding which story is more persuasive. The most plausible story in this case may well be that Mark Jensen killed his wife, but the question remains whether the prosecution established that beyond a reasonable doubt. The trial illustrates how juries rely unconsciously on narrative to arrive at a verdict and suggests that they ought to have more explicit guidance about the dangers of doing so.

This Article analyzes the process of making meaning at trial using stories, with three objectives: to assess the extent to which narrative structure accurately describes what transpires at trials, to evaluate the effect of narrative on the reliability of decision making, and to consider aspects of trial design that might mitigate the bias and error that stories can introduce. Part I questions the precision of the "story model," which is a descriptive framework according to which jurors process testimony by organizing it into competing stories. As a matter of both cognitive psychology and advocacy within the adversarial system, stories are unavoidable. To prohibit them altogether would be both unworkable and a form of incremental inquisitorialism. But even though presented with stories, jurors do not reach verdicts exclusively by referring to narratives. The Article concludes that trials can best be understood as a hybrid of subjective and objective approaches to the interpretation of facts, and therefore that opportunities exist to increase analytic processing. In Part II, the Article addresses whether evidence that does take shape through familiar stories detracts from the accuracy of trial outcomes. There are various ways in which the truth-seeking goals of trial and essential characteristics of stories conflict. Narrative's indifference to objective facts, its invitation to readers to construct parts of the tale, and the expectations it raises for the sequence, significance, and coherence of evidence all risk distortions in fact-finding. Misconceptions arise in part from the intuitive and sometimes emotional decision-making jurors use to fill perceived gaps in evidence.

None of this is to say, however, that narrative and truth seeking are irreconcilable, or that narrative is a pernicious force. Rather, it is to recognize that there are points at which particular types of stories can override doubts, even though those doubts, considered dispassionately, have a stronger basis in the evidence, and that decision makers in the criminal justice system may be ill-equipped to follow particular rules and instructions as a result. Part III thus considers whether trial mechanics—from discovery obligations through appellate review

of evidentiary errors—might counterweigh certain kinds of narrative bias. In particular, narrative theory exposes the false assumptions within limiting instructions that testimony can be “unsaid” or that any piece of evidence admitted or excluded in error can be considered in isolation. Acknowledging this fiction, confronting the challenges of deliberately disregarding evidence in deliberations, explaining the rationales for exclusion, and framing the issues before the jury hears prejudicial information could all increase the reliability of verdicts.

I. ARE TRIALS “NARRATIVES”?

A. NARRATIVE THEORY AND THE LAW

Narrative theory highlights two characteristics of stories that are essential to understanding how meaning is produced at trial. First, the elements of the story interact in ways that alter their individual significance: each merges with what came before and flows into what comes after. This idea that no one piece of evidence can be assessed in isolation, and that new pieces color both the information already before the jury and the testimony to come, stems from various definitions of narrative.²⁷ In Jerome Bruner’s scholarship on folk psychology, he explains that the constituent parts of a story have no “life or meaning of their own” but acquire meaning from “their place in the overall configuration of the sequence as a whole—its plot or *fabula*.”²⁸ Kenneth Burke describes narrative as a “pentad” with the following components: “an Actor, an Action, a Goal, a Scene, and an Instrument,” plus some “Trouble” that causes an imbalance among the five elements and must be morally explicated and redressed to restore balance.²⁹ From the structuralist perspective, Roland Barthes offers a different taxonomy but with this same sense of collective effect. Narratives, he theorizes, are composed of “nuclei” or hinge points, “catalysers” that fill narrative space and connect the hinge points, “informants” to identify the time and place of the story, and mood-setting “indices.”³⁰

Second, accounts of the basic structure and features of narrative cite its appeal to preexisting models for human behavior and the inescapable way in

27. The term “stories” fits within the broader category of narrative, which includes various aspects of the production and reception of stories and generally describes a “collective way of knowing things.” Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141, 148 (1997); *see also id.* (“[L]aw contains stories and can be categorized as narrative . . .”).

28. JEROME BRUNER, *ACTS OF MEANING* 43 (1990). Narrative, Bruner further explains, has the “principal property” of “inherent sequentiality” and is “a unique sequence of events, mental states, happenings involving human beings as characters or actors.” *Id.*; *see also* ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 113–14 (2000) (describing the unfolding of narrative plot from steady state, to disruption by trouble, to efforts at redress, to restoration of a steady state, followed by the moral of the story).

29. BRUNER, *supra* note 28, at 50; *see also* KENNETH BURKE, *A GRAMMAR OF MOTIVES* (1954) (detailing the five components, originally referred to as “act,” “agent,” “agency,” “scene,” and “purpose”).

30. ROLAND BARTHES, *Introduction to the Structural Analysis of Narratives*, in *IMAGE—MUSIC—TEXT* 79, 92–96 (Stephen Heath trans., 1977).

which assumed facts and structures supplement given information. Paradigms exercise a “grip on the human imagination”³¹ and therefore guide and influence the reception of evidence as well. They recur so frequently in stories that familiar elements can enact them implicitly. These embedded forms are characterized in Steven Winter’s scholarship on narrative as “observed prototype effects” that take shape as “frames, scripts, schemas, scenarios, stock stories, and idealized cognitive models.”³² Stephen King articulates a similar idea from the craftsman’s viewpoint. Stories, one of his characters states, should all include a “*musta-been*” or an obvious solution to the unknown piece of the story that in turn makes the reader “tell *himself* a story.”³³

Stories, of course, are an ancient—even preliterate—form of communication, and the reference to narrative structure as a guide to interpreting human experience has a long provenance.³⁴ As Joan Didion stated, “[w]e tell ourselves stories in order to live.”³⁵ There is an old question whether narrative is structure or substance—that is, whether it serves as a means of describing experience or constitutes the experience itself. Scholars from many disciplines have concluded that events have a narrative character “all the way down.”³⁶ Philosopher David Carr writes that “no elements enter our experience . . . unstoried or unnarrativized.”³⁷ And literary theorist Barbara Hardy observes that “we dream in narrative, daydream in narrative, remember, anticipate, hope, despair, believe, doubt, plan, revise, criticize, construct, gossip, learn, hate, and love by narrative.”³⁸ Legal academics have also suggested that narrative is preconceptual, and that it influences not just how facts are perceived but what facts *are*,

31. BRUNER, *supra* note 28.

32. STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 87 (2001) (citing Gerald P. López, *Lay Lawyering*, 32 *UCLA L. REV.* 1, 6 (1984) (“Once the principal features of a given phenomenon suggest a particular stock structure, that structure shapes our expectations and responses . . . resolv[ing] ambiguity and complement[ing] ‘given’ information with much ‘assumed’ information.”)).

33. STEPHEN KING, *THE COLORADO KID* 46–47 (2005). King also writes that stories have “a beginning, a middle, and an end,” a “through-line,” and a single unknown fact. *Id.* at 158, 173.

34. *See, e.g.*, PAUL RICOEUR, *HERMENEUTICS AND THE HUMAN SCIENCES* 288, 292 (John B. Thompson ed., trans., 1981).

35. JOAN DIDION, *THE WHITE ALBUM* 11 (1979).

36. *See* ROBERT P. BURNS, *A THEORY OF THE TRIAL* 222 (1999) (citing literary theorists, historians, and philosophers who share the view that “narrative forms the deep structure of human action” and asserting that “the bedrock of human events is not a mere sequence upon which narrative is imposed but a configured sequence that has a narrative character all the way down” (footnote omitted)).

37. DAVID CARR, *TIME, NARRATIVE, AND HISTORY* 68 (1986); *see also id.* at 176–77 (contrasting the work of analytical philosophers who argue that “narrative is merely the literary surface, the manner in which historians write up the results of their research, which is really incidental to the scientific work of discovery or reconstruction”).

38. Barbara Hardy, *Towards a Poetics of Fiction: 3) An Approach Through Narrative*, 2 *NOVEL: A FORUM ON FICTION* 5, 5 (1968); *see also id.* (“In order really to live, we make up stories about ourselves and others, about the personal as well as the social past and future.”); Theodore R. Sarbin, *The Narrative as a Root Metaphor for Psychology*, in *NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT* 3, 11 (Theodore R. Sarbin ed., 1986) (“Our plannings, our remembering, even our loving and hating, are guided by narrative plots.”).

particularly in the criminal justice system.³⁹ In Robert Burns's scholarship on trials, he explains that the events adjudicated have narrative structure before they enter the courtroom: "To act at all is to hold an immediate past in memory, to anticipate a goal, and to organize means to achieve that goal,"⁴⁰ and each of those things corresponds to the "'beginning, middle, and end' of a well-constructed story."⁴¹

This Article does not require one to proceed from the premise that there are objective, self-announcing "facts in the world" and that an essential function of adjudication is identifying and labeling them. Obviously, if one takes that position, then the interplay between narrative and truth becomes a matter of deep concern.⁴² The argument here, however, is hospitable to those who question whether there are objectively verifiable "truths,"⁴³ who recognize the necessarily internal perspectives of both litigants and fact finders, and who

39. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593–96 (1981); see also Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2083–98 (1989) (claiming that rape cases demonstrate that truth is only a property of an account of an event—for example, the interpretation of consent—and not of the event itself). For a discussion on the way in which stories reach the unconscious and influence perception, see also AMSTERDAM & BRUNER, *supra* note 28, at 116.

40. BURNS, *supra* note 36 (footnote omitted).

41. *Id.* (quoting CARR, *supra* note 37, at 48).

42. As Catharine MacKinnon asserts, the operation of legal institutions assumes some facts exist to be found. She writes:

This may be embarrassingly non-postmodern, but reality exists. Of this the law, at least, has no doubt. Something happened or will be found to have happened. You can still be tried for perjury even though there supposedly is no truth. You can still be sued for libel, so somewhere reality exists to be falsified.

Catharine A. MacKinnon, *Law's Stories as Reality and Politics*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 232, 235 (Peter Brooks & Paul Gewirtz eds., 1996). Epistemologist Susan Haack similarly argues that the accuracy of expert testimony has consequences:

[I]t really matters whether this witness's recovered memory of an alleged crime is genuine, whether this is the person who committed the crime, whether this plaintiff's injury was caused by a defect in this manufacturer's tire or seat-belt buckle or lawn-chair, whether this was the chemical exposure that caused or promoted the plaintiff's cancer, and so on.

Susan Haack, *What's Wrong with Litigation-Driven Science? An Essay in Legal Epistemology*, 38 SETON HALL L. REV. 1053, 1053–54 (2008). Of course, as other theorists have observed, the reality that exists is not "already out there now real" and accessible by "taking a look," but co-constituted by the cognitive processes brought to bear, including the production of legal truth. BERNARD J.F. LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 251, 424–25 (1957).

43. "[S]ome truths are made true by things we do," Susan Haack observes, "and others by what we believe; and some truths make sense only relativized to a time, a place, or a culture. . . . Truths come in all shapes and sizes; and much of the time we traffic in the almost, the approximately, or the partially true." Susan Haack, *The Whole Truth and Nothing But the Truth*, 32 MIDWEST STUD. PHIL. 20, 21–22 (2008); see also STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 344 (1989) (asserting that "questions of fact, truth, correctness, validity, and clarity can neither be posed nor answered in reference to some extracontextual, ahistorical, nonsituational reality, or rule, or law, or value"). *But see* THOMAS NAGEL, *THE VIEW FROM NOWHERE* 5 (1986) (suggesting that it is essential to strive for objective truth to "detach gradually from the contingencies of the self" even while recognizing that objectivity is not purely attainable).

struggle with the vexed idea of the subject itself.⁴⁴ More importantly, even taking a world of brute and unmediated facts as a given, the world of trials deals with “*legal truth*,” a very different concept. The goals of trial are more complex than finding facts or discovering “the truth.”⁴⁵ Trials express concerns about procedural fairness, about constitutional protections for privacy, about privileged relationships, about power disparities between the state and citizens, about the differential costs of error in innocent and guilty verdicts, and so on. These concerns may lead to denying the fact finder evidence that is clearly relevant to the question of the factual truth of an allegation. Exclusionary rules, for example, can bar even the most probative physical evidence or most heartfelt confession if it is unconstitutionally obtained. And the broad concerns of trials may dictate that the correct verdict, the legal truth, is that a defendant is “not guilty” even when, as a factual matter, he may have possessed the drugs he is accused of possessing or poisoned his wife. One can care deeply about legal truth, be personally convinced the defendant committed the crime, and think that, if the prosecution has not met its burden of proof, the right result is that the defendant be found not guilty.

To say all this is not to omit the importance of factual accuracy. As the increasing exonerations of wrongfully convicted defendants emphasize, there are correct and incorrect outcomes.⁴⁶ A common refrain in both cases and commentary is that “truth about allegations of fact on the basis of evidence” is a necessary precondition to substantive justice.⁴⁷ The Supreme Court has often

44. For a particularly incisive description of the postmodern take on the fractured subject, see James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 498 (1999) (“The subject dissolves ‘upward’ into the structures that constrain it, and ‘downward’ into the discourses that constitute it . . . [and] little is left other than a gummy biological and geographical residue.” (footnotes omitted)).

45. See LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* 3 (2006) (offering the example of double jeopardy guarantees and pointing out that “[t]he absence of a mechanism for appealing acquittals is patently not driven by a concern to find the truth”); Donald A. Dripps, *The Substance-Procedure Relationship in Criminal Law*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 409, 415 (R.A. Duff & Stuart P. Green eds., 2011) (noting that many familiar legal doctrines—including “permitting the accused to stand silent at trial”—“appear to deviate from rationalist theory” and “testify to the plurality of values at stake in criminal procedure”); Eleanor Swift, *Rival Claims to “Truth,”* 49 HASTINGS L.J. 605, 613 (1998) (reviewing the “non-instrumental values and principles” that justify some evidence rules, including liberty, autonomy, and privacy); see also JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 99 (1994) (discussing the jury’s broader role in reinforcing democratic principles).

46. See generally, e.g., Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012* (Univ. of Mich. Law Sch., Pub. Law & Legal Theory Working Paper Series No. 277, 2012), available at <http://ssrn.com/abstract=2092195>.

47. WILLIAM TWining, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* 14 (1985) (stating that “implementation of substantive laws by the determination of the truth about allegations of fact on the basis of evidence is a necessary condition of achieving . . . justice under the law”); see 1 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 22 (Fred B. Rothman & Co. 1995) (1827) (referring to “Injustice, and her handmaid Falsehood”); JOHN RAWLS, *A THEORY OF JUSTICE* 239 (1971) (asserting that the rule of law requires “a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances”); see also

stressed the primary importance of “arriving at the truth in criminal trials.”⁴⁸ When adjudication produces institutionalized meaning from evidence, factual accuracy matters and so too does an examination of any constructs and procedures that might inhibit it. Yet, trial process expresses concern about more than “getting the facts wrong”; an equally weighty problem is “getting the facts right” through means that are either legally forbidden or procedurally off-limits. This Article addresses the tension between narrative and both factual and legal truths.

The relationship described here is a complex one. That there is a connection between reliable adjudication and the role of stories does not entail a perfect correlation between curtailing those stories and reducing errors. Weighing the validity of stories, in a process bounded by careful trial mechanics, may reveal as much as it distorts. And stories play some practical (and unobjectionable) parts in the adjudicative process. One function of stories is to provide a starting point for organizing events. Whether narrative fully constructs or merely describes reality, literature serves across many settings as what Kenneth Burke calls “equipment for living.”⁴⁹ Forms like tragedies and comedies offer labels for experiences “sufficiently representative of our social structure . . . for people to ‘need a word for it.’”⁵⁰ The historian and the novelist tend to “*share* the narrative form,” which underscores the extent to which narrative offers a pattern for recounting experiences and events.⁵¹ Indeed, as Marianne Wesson writes, “[e]very lawsuit begins and ends as a story.”⁵²

Moreover, narrative does a great deal of work in the legal context apart from ordering events. It provides both a compelling form for legal advocacy and an underlying structure for judicial decisions.⁵³ Legal processes not only reflect,

LAUDAN, *supra* note 45, at 2 (“Truth, while no guarantee of justice, is an essential precondition for it.”); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 846 (1982) (“[E]vidence remains alive in American legal parlance and thought because the rules express some usable ideas about one of the main concerns of the lawyer: the establishment of a fact as true.”).

48. *United States v. Havens*, 446 U.S. 620, 626 (1980); *accord Addington v. Texas*, 441 U.S. 418, 425 (1979) (“[T]he function of legal process is to minimize the risk of erroneous decisions.”); *Tehan v. United States*, 382 U.S. 406, 416 (1966) (“The basic purpose of a trial is the determination of truth.”).

49. KENNETH BURKE, *THE PHILOSOPHY OF LITERARY FORM* 293 (3d ed. 1973); *cf.* ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984) (noting the temporal and moral ordering that characterizes narratives and enables people to account for experiences).

50. BURKE, *supra* note 49, at 300; *see also* JAMES A. HERRICK, *THE HISTORY AND THEORY OF RHETORIC* 222 (3d ed. 2005) (explaining that rhetoric provides a “means of understanding and living successfully in a world of symbols”).

51. BRUNER, *supra* note 28, at 45.

52. Marianne Wesson, “*Particular Intentions*”: *The Hillmon Case and the Supreme Court*, 18 *LAW & LIT.* 343, 343 (2006).

53. *See* Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 *YALE J.L. & HUMAN.* 1, 6–17, 22–25 (2006) (citing *Bumper v. North Carolina*, 391 U.S. 543 (1968)) (giving examples of courts engaging in the construction and communication of narrative); *State v. Rusk*, 424 A.2d 720 (Md. 1981); *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928)); *see also id.* at 27 (discussing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and that Court’s effort to fit its opinion into a “master narrative” about what courts do).

but also create, familiar narratives. Those narratives can, in turn, serve as sources of continuity in the sense that the events that give rise to litigation, the testimony in court, and the pronouncement of a verdict all form one story.⁵⁴ A quarter century ago, legal scholars began focusing attention on the role of narrative in the development of precedent and court opinions, as well as law's origins in values and principles expressed by classic narratives.⁵⁵ Robert Cover, for example, wrote that law itself is derived from the "sacred narratives of our world."⁵⁶ Later scholars introduced new terms to the debate over narrative, evaluating its role not in supporting but in challenging embedded power structures.⁵⁷

These questions about narrative as source material and structural underpinning for law and also as a platform for disenfranchised voices have received ample scholarly attention. Legal theorists, however, have focused less on the effect that narrative has on the fact-finding process itself. Social scientists have engaged in a descriptive project that demonstrates that jurors make decisions by evaluating competing narratives. But this idea, often referred to as the "story model" of adjudication,⁵⁸ warrants closer consideration in terms of both its

54. See, e.g., BURNS, *supra* note 36, at 224 ("[T]here is no discontinuity between the task of the proper characterization of the past act and the implicit story the jury is telling about itself and its society in the present.").

55. See RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 269 (1988) (discussing the language of judicial opinions). See generally, e.g., JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990) (exploring lay litigants' experiences in small claims courts); L.H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* (1995) (focusing on major Supreme Court opinions); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (analyzing the issue in legal scholarship); Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992) (discussing Justice Marshall's use of narrative to make legal arguments to his colleagues).

56. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 180 (1985); cf. MILNER S. BALL, *CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW* 36 (2000) (theorizing that stories "nurture . . . the discernment of guiding presences between the lines of legal texts and between the facts of situations"); Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983) (defining narratives as "the trajectories plotted upon material reality by our imaginations" and identifying their central role in giving meaning to legal texts and prescriptions).

57. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1268 n.126 (1993) (stating that "personal narrative . . . developed in response to the exclusion of the disempowered from mainstream academic discourse"); see also Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 1028 (1991) (describing how feminist narrative theory demonstrates ways of knowing "that may not be generated or validated by scientific objectivity"); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412–15 (1989) (maintaining that narratives and counter narratives provide a means for understanding differing pictures of events, especially those concerning disenfranchised minorities). See generally JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (1976) (advocating a person-centered approach to the law through critical retellings of notable cases in which judges "masked" the human story).

58. Nancy Pennington and Reid Hastie coined the phrase. See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 542 (1991)

explanatory power and its relationship to the epistemic competence of trials.

B. THE STORY MODEL OF ADJUDICATION

A first step in evaluating the relationship between the story form and legal and factual accuracy is to determine the extent to which trials actually constitute narratives that jurors “read” before rendering their verdicts. Trials themselves are a hybrid with elements like the rehearsal of competing narratives that begins with voir dire; the story telling that takes place in opening statements; the more disciplined narrative of eliciting testimony on direct examination; and the more “logical” or argumentative approaches of cross-examinations and closing arguments. A more complex question involves how decisions are then reached at trial. The conventional view of fact finders’ approach to deciding “what happened” is a rationalist one.⁵⁹ According to this tradition in evidence theory, the process of proof is deductive and logical relevance links the evidence introduced to the facts in issue.⁶⁰ One “rational” path to resolution is simply determining which side of the case has weightier evidence overall,⁶¹ and another is the integrated processing of Bayesian analysis, which involves making probability assessments and then updating them in light of newly acquired evidence.⁶² The law of evidence thus rests primarily on theories of knowledge that purport to give an account of accuracy in other-than-narrative

[hereinafter Pennington & Hastie, *Cognitive Theory*] (reporting that sequences of available evidence were less compelling to mock jurors than cases presented in narrative form); see also Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 192, 192–221 (Reid Hastie ed., 1993) [hereinafter Pennington & Hastie, *Story Model*].

59. See 5 BENTHAM, *supra* note 47 (“If there be one business that belongs to a jury more particularly than another, it is, one should think, the judging of the probability of evidence.”); see also WILLIAM TWING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 71 (1990) (asserting that the rationalist approach has dominated evidence scholarship since the eighteenth century); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978) (describing the “burden of rationality” in adjudication); D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1283–84 (2004) (describing the truth-seeking model of trials); Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 996 (1994) (noting that most evidence scholars accept as a premise the rationalist belief that “the overarching function of evidence law” is to maximize the probability that fact finders “will accurately determine objective historical truth”).

60. See George F. James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 690 (1941).

61. See generally, e.g., Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012) (critiquing conventional thinking about the burden of proof according to probabilistic conceptions).

62. See Kenworthy Bilz, *We Don’t Want To Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429, 435 (explaining that, in a Bayesian model, “the order in which one presents evidence should not matter, emotion on the part of decision makers tends to introduce error (because emotion cannot shift the probabilities of objective facts), and decision makers should come to their conclusions by estimating the likelihood of their objective truth”); Stephen E. Feinberg & Mark J. Schervish, *The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and for Legal Decisionmaking*, 66 B.U. L. REV. 771, 773 (1986) (defining the Bayesian approach as “a framework for quantifying uncertainty and methods for revising uncertainty measures in the light of acquired evidence”); Richard D. Friedman, *Commentary, A Presumption of Innocence, Not of Even Odds*, 52 STAN. L. REV. 873, 875 (2000) (describing Bayesian analysis).

terms. Versions of probability analysis pervade the rules of evidence themselves, which provide that evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and that fact “is of consequence in determining the action.”⁶³ Furthermore, judges often profess rationality and objectivity when making findings in opinions.⁶⁴

Developments in cognitive psychology, however, pose a challenge to the objectivist account. Experimental research has yielded the insight that jurors do not, by and large, estimate probabilities when determining the events that transpired in a case; rather, they draw conclusions based on whether information assembles into plausible narratives.⁶⁵ Narrative provides a deep structure inside the courtroom just as it does outside of it, not only so that triers of fact can “organize and reorganize large amounts of constantly changing information,” but also so that they can decide what it means.⁶⁶ In order to reach a verdict, jurors construct a story, learn of their decision alternatives and the “verdict category attributes,” and then classify the story “into the best fitting verdict category.”⁶⁷ At this last step—the selection of the “best” account—jurors rely on coverage (whether the story can accommodate all the evidence), coherence (whether the story makes sense), and uniqueness (whether there are other plausible explanations).⁶⁸

More recent models of jury decision making, such as plausibility theory, clarify that “legal fact finding involves a determination of the comparative plausibility of the parties’ explanations offered at trial rather than a determination of whether discrete elements are found to a specific probability.”⁶⁹ Michael Pardo and Ronald Allen, for example, critique the Bayesian approach and develop an “explanation-based account.”⁷⁰ In their version, jurors interpret and

63. FED. R. EVID. 401.

64. See, e.g., Paul Gewirtz, Essay, *On “I Know It When I See It,”* 105 YALE L.J. 1023, 1042 (1996) (describing judicial opinions as “marked by a rhetoric of certainty, inevitability, and claimed objectivity”); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988) (observing that judicial opinions generally “depict the process of reasoning as a logical deduction”).

65. See, e.g., Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. EXPERIMENTAL PSYCHOL.: GEN. 3, 24 (1999); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 513 (2004); see also Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 HASTINGS L.J. 843, 852 (1998) (“By now, it is commonplace that most successful courtroom advocacy is structured as storytelling rather than logical proof.”).

66. W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 8–10 (1981) (noting that information at trial is presented through “conflicting testimony,” “disorienting time lapses,” multiple perspectives, and a “confusing array of subplots”).

67. Pennington & Hastie, *Cognitive Theory*, *supra* note 58, at 521.

68. Reid Hastie & Nancy Pennington, *The O.J. Simpson Stories: Behavioral Scientists’ Reflections on The People of the State of California v. Orenthal James Simpson*, 67 U. COLO. L. REV. 957, 960–61 (1996).

69. Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1527–28 (2001).

70. Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223, 225 (2008). There is another interesting echo of the “plausibility” version of the story model in

weigh evidence to comport with the most coherent theory of the case, using an “abductive reasoning process of inference to the best explanation.”⁷¹ Rather than determining, based on probability, how likely propositions appear, decision makers reverse the inferential process and consider whether propositions, if true, offer the best explanation for the evidence as a whole. This explanatory model amplifies and amends the descriptive contribution of the story model. It suggests that decision makers identify potential explanations for evidence and then determine whether those explanations are better or worse compared to the available alternatives. Instead of drawing conclusions based on how likely propositions appear as evidence accumulates, as in Bayesian updating, decision makers draw inferences based on how well each possible account, if true, would explain the evidence. In other words, the question in the *Jensen* case was not whether Julie’s letter made her murder more or less probable, but whether murder or suicide better explained the curious combination of evidence, including the letter.

Both the story model and this plausibility theory describe jurors as considering evidence holistically rather than weighing each piece in terms of whether it is logically tied to specific issues. And both theories contemplate that jurors will draw upon their own backgrounds to construct and evaluate explanations for the evidence.⁷² When stories conflict and jurors must privilege one to reach a verdict, they do not rely only on “case-specific information acquired during the trial,” but also on their experience and values and on “generic expectations about what makes a complete story.”⁷³ Triers of fact look for a story that both “has all of its parts” and corresponds to their “knowledge about what typically happens in the world.”⁷⁴

Although these holistic conceptions of the adjudicative process make only a

the recent decisions concerning pleading standards in civil cases. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court held that allegations in a complaint must cross the line “between possibility and plausibility” in order to survive a motion to dismiss. *Bell Atlantic*, 550 U.S. at 557. This suggests that a complaint has to present a version of the relevant events that the jury will accept as the “best available explanation.” See Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1455 (2010).

71. Pardo & Allen, *supra* note 70, at 226. By “abductive,” Pardo and Allen mean inference “from a given effect (the premise) to a causal proposition (the conclusion) that would explain, or best explain, that effect.” *Id.* at 228. In some respects, Pardo and Allen’s analysis closely tracks the story model. They state, for example, that an explanation is “better to the extent that it is consistent, simpler, explains more and different types of facts (consilience), better accords with background beliefs (coherence), is less ad hoc, and so on.” *Id.* at 230 (footnote omitted).

72. See, e.g., Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 681 (2000) (“The activation of trial-relevant schemas appears to have a powerful effect on verdict choice because of jurors’ reliance on ‘commonsense justice.’”).

73. Pennington & Hastie, *Cognitive Theory*, *supra* note 58, at 522.

74. *Id.* at 528.

few appearances in legal theory,⁷⁵ they have surfaced in cases concerning the admissibility of evidence. The 1997 *Old Chief* decision⁷⁶—among the canonical decisions in modern evidence law—discusses the importance of narrative richness and each side’s opportunity to shape the moral force of its case. Johnny Lynn Old Chief was charged with being a felon in possession of a firearm. The government sought to prove the element that Old Chief was a felon by introducing a record of his prior conviction for an assault that caused serious bodily injury. Old Chief offered to stipulate that he had a qualifying prior felony but moved to exclude any evidence of its violent nature. The Court concluded, in a 5–4 decision authored by Justice Souter, that the government could be compelled to stipulate to the underlying felony because the violent nature of the prior offense would unduly prejudice the jury against Old Chief. The Court limited its holding, however, by simultaneously advancing an expansive understanding of probative value. According to the Court’s analysis, evidence has “force beyond any linear scheme of reasoning” and may help to tell “a colorful story with descriptive richness.”⁷⁷ Echoes of the story model sound in the Court’s statement that the government can only meet its burden if it satisfies juror “expectations about what proper proof should be.”⁷⁸ The Court was mindful, as well, of the collective impact of evidence and the overarching narrative that litigants may need to present. In that vein, the Court wrote that the government

may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant’s legal fault.⁷⁹

Both key elements of narrative theory emerge from the *Old Chief* opinion: that jurors have preexisting conceptions about stories that affect how they process evidence, and that individual pieces of evidence interact with each other in ways that influence meaning.

The Court’s evocative language and rejection of an atomistic view of trial enlarged the arguments for admitting evidence. The case represents perhaps the only facet of evidence law expressly concerned with *decreasing* jurors’ detachment. The lower courts have cited *Old Chief* when reasoning that the jury “properly weighs fact questions in the context of a coherent picture of the way the world works” and that “[u]nduly sterilizing a party’s trial presentation can

75. Robert Burns’s many descriptions of the narrative quality of events at trial and the construction and deconstruction of stories through testimony and argument are notable exceptions. See, e.g., BURNS, *supra* note 36; Robert P. Burns, *The Rule of Law in the Trial Court*, 56 DEPAUL L. REV. 307 (2007).

76. *Old Chief v. United States*, 519 U.S. 172, 174–75 (1997).

77. *Id.* at 187.

78. *Id.* at 188.

79. *Id.*

unfairly hamper her ability to shape a compelling . . . exposition of the facts.”⁸⁰ In the *Jensen* case, for example, the Wisconsin Court of Appeals rejected Mark Jensen’s claim that extensive pornography found on his computer was erroneously admitted because the court accepted it as part of the “panorama” of evidence about his abusive relationship with his wife.⁸¹ The court reasoned, in familiar terms, that “[f]or the finder of fact to arrive at the truth, it was proper not to limit the evidence to a frame-by-frame presentation.”⁸² Courts have also concluded that juries will penalize prosecutors if they neglect to follow “the natural sequence of narrative evidence,”⁸³ even where the evidence in question is offered to prove points the defendant has fully admitted.⁸⁴ And on the defense side, in a 2010 habeas case, the Seventh Circuit went so far as to suggest that the failure to present a coherent narrative rises to the level of ineffective assistance of counsel. In the case of a defendant adjudged “guilty but mentally ill” in a murder trial, Judge Posner wrote that a narrative richer than the “bare facts of his bizarre behavior” was necessary to effective representation.⁸⁵

With respect to other uses of evidence—such as the admission of victim impact testimony—courts openly embrace the force of narrative. In *Payne v. Tennessee*, the Supreme Court held that “a State may properly conclude that for a jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.”⁸⁶ The Supreme Court has also noted the interrelationship between seemingly discrete pieces of evidence; the reasoning in several cases acknowledges that unfavorable testimony may taint the other evidence presented. In *Bruton v. United States*, for instance, the Court concluded that juries cannot disregard codefendant confessions that are formally admissible only against the confessing defendant, yet incriminating as to others

80. *In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., 369 F.3d 293, 314 (3d Cir. 2004); *see also, e.g.*, *United States v. McCourt*, 468 F.3d 1088, 1091–92 (8th Cir. 2006) (explaining that *Old Chief*’s reasoning favored admission of pornographic images even though defendant stipulated that the photographs were of minors).

81. *See State v. Jensen*, 2011 WI App 3, ¶ 86, 331 Wis. 2d 440, 480, 794 N.W.2d 482, 502 (Wis. Ct. App. 2010) (“The evidence that Jensen secretly planted pornography around the home gave viability to the State’s theory of the case that Jensen had been engaging in a campaign of emotional torture toward Julie up to the time he poisoned her.”).

82. *Id.*

83. *See Old Chief*, 519 U.S. at 189.

84. *See United States v. Williams*, 238 F.3d 871, 876 (7th Cir. 2001); *see also United States v. Walker*, 428 F.3d 1165, 1168–69 (8th Cir. 2005) (“[A] criminal defendant may not ‘stipulate or admit his way out’ of the full evidentiary force of the case against him.” (quoting *Old Chief*, 519 U.S. at 186)); *United States v. Queen*, 132 F.3d 991, 997 (4th Cir. 1997) (“[T]he government, which has the burden of proving every element of the crime charged [beyond a reasonable doubt], must have the freedom to decide how to discharge that burden.”).

85. *Wilson v. Gaetz*, 608 F.3d 347, 352 (7th Cir. 2010); *cf. United States v. Stever*, 603 F.3d 747, 753–54 (9th Cir. 2010) (holding that it was an abuse of discretion for the district court to decline to order discovery of government evidence that might have supported a compelling story about alternative perpetrators in a drug trafficking case).

86. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

in a joint trial.⁸⁷ Confronted with powerful testimony about a damaging confession that is consistent with the story offered by the prosecution, the Court stated that jurors would find it impossible to “segregate evidence into separate intellectual boxes” and set this piece of it aside.⁸⁸

Of course, long before experimental psychologists documented its effects or courts began to reason both implicitly and explicitly from narrative theory, advocates had recognized how potent stories can be. Narrative has long influenced not only how fact finders respond to arguments but the way in which litigants shape their appeals in the first place. Many experienced trial lawyers begin their opening statements with some version of the phrase: “This is a case about . . .” In a criminal fraud case, that sentence might end with “theft” or “lies” or “greed”; in a toxic tort case, the theme might be something like “poisoning.” Trial strategy typically involves communicating that theme when presenting evidence and following the thread all the way to closing argument. As Robert Weisberg writes, “[i]t would hardly shock lawyers who lived before the era of high critical theory in American academia to discover that the winner in some trials is the more sophisticated or compelling storyteller.”⁸⁹ The trial advocacy literature includes both implicit and explicit references to narrative theory, with terms that closely track its core insights. Practitioners are advised that jurors recreate events “through their own stimulated imagination.”⁹⁰ Some contemporary practice guides also reveal awareness of cognitive models and reference the “rules of narrative” that jurors have “learned through a lifetime of exposure to stories.”⁹¹ “Good lawyers,” one such manual states, tie the circumstances of the case to “plotlines already deeply embedded in listeners’ minds, to

87. 391 U.S. 123, 135–36 (1968).

88. *Id.* at 131 (citation omitted); *cf.* *United States v. Bagley*, 473 U.S. 667, 706 (1985) (Marshall, J., dissenting) (“Evidence is not introduced in a vacuum; rather, it is built upon.” (quoting Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 *FORD. L. REV.* 391, 412 (1984))).

89. Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, in *LAW’S STORIES*, *supra* note 42, at 61–64. Steven Lubet puts it succinctly: “[T]he party who succeeds in telling the most persuasive story should win.” STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* 1 (2d ed. 1997).

90. JAMES W. JEANS, SR., *TRIAL ADVOCACY* § 10.1, at 305 (2d ed. 1993); *cf.* BURNS, *supra* note 36, at 164 (explaining that stories become “suitors for the jury’s imagination”); MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 75 (1995) (noting how literature can stimulate the moral imagination and arouse empathy); Delgado, *supra* note 57, at 2415 (stating that stories “stir imagination in ways . . . conventional discourse cannot”).

91. *See* RICHARD D. RIEKE & RANDALL K. STUTMAN, *COMMUNICATION IN LEGAL ADVOCACY* 47–48 (1990) (asserting that jurors employ stories when “asked to make sense of the complexities with which they are presented” rather than doing so “by inherent human rationality or by being exposed to a reconstruction of reality”); *see also, e.g.*, THOMAS A. MAUET, *TRIAL TECHNIQUES* 26 (8th ed. 2010) (“If lawyers do not organize the evidence into a clear, simple story, jurors will do so on their own.”); SAM SCHRAGER, *THE TRIAL LAWYER’S ART* 210 (1999) (“Lawyers reach for drama, metaphor, voice, gesture, persona, myth, and other expressive resources of the storyteller’s art to give authority to their accounts.”); MICHAEL E. TIGAR, *NINE PRINCIPLES OF LITIGATION AND LIFE* 99 (2009) (“The story is actually built up from the testimony—the personal experiences—of witnesses, who bring us their version of what happened and their sense of the justice or injustice of it.”); RONALD WAICUKAUSKI ET AL., *THE*

mythic narratives whose familiar moves reveal how the world is and how people, faced with fateful choices, act for good or for ill.”⁹²

C. A HYBRID OF SUBJECTIVE AND OBJECTIVE PROCESSES

Although advocates instinctively make use of stories and courts increasingly recognize their interaction with the rules of evidence, the transition to a narrative conception of trials has occurred without a thorough analysis of either its descriptive accuracy or its normative fit with the aims of trial. Empirical social scientists now widely accept the story model of decision making under uncertainty in the adversary system, but evidence scholarship itself continues to devote more attention to probability than to narrative theory and to maintain a distinction between the two even when probability determinations themselves cannot be severed altogether from narrative influences.⁹³ For a critical look at the theory of trial narratives, one has to turn elsewhere. Epistemology, social cognition, and linguistics all help bring into focus a composite view that merges different modes of decision making. Trials both construct and are constructed by stories, but jurors also rely on more empirical sources when processing evidence. Decision making is neither focused exclusively on probability assessments nor grounded entirely in the identification of familiar narratives. As a result, there are opportunities to leverage analytic processes, to counteract narrative distortions where appropriate, and to increase accuracy.

Legal epistemology—a field that speaks to fundamental questions about the “empirical adequacy” of adjudication⁹⁴ and considers the methodology of trial in terms of whether it is “well engineered to lead to true beliefs about the world”⁹⁵—offers a framework that offsets the story model. It suggests that jurors engage in more than one approach to decision making. While narrative provides the basic structure for intelligible hypotheses, probability analysis comes into play when jurors test and weigh those hypotheses. Jurors surely are not breaking down all of the open questions at trial into discrete probability assessments, and the claim that they instead organize the information received into a narrative form is a convincing one. But at the next step, in rendering a verdict, jurors consider the relative weight of competing narratives and are attentive not only to how each fits with familiar stories, but also to the theoretical plausibility of each account and the normative attractiveness of the practical course of action that it suggests. Jurors take what they hear, combine it with what they know, and then reach a decision based in part on how they feel.

WINNING ARGUMENT § 6.02, at 87 (2001) (“Telling a story taps into your listener’s conscious and subconscious processes for receiving and analyzing information and holds the listener’s attention.”).

92. SCHRAGER, *supra* note 91, at 7.

93. See Pardo & Allen, *supra* note 70, at 224 & n.2; see also Simon, *supra* note 65, at 559 (remarking that Bayes Theorem “appears to have attained prominence within mainstream evidence scholarship”).

94. Allen & Leiter, *supra* note 69, at 1493.

95. LAUDAN, *supra* note 45, at 2–3.

They also, however, seek a measure of formal validity when disentangling persuasive and unpersuasive narratives. Although jurors first assemble stories, they then engage in a logical evaluation of “which version was more likely to yield the evidence that has been presented in court, and by how much.”⁹⁶

Jurors not only draw on more than one mode of understanding, but also engage in objective and subjective processes at the same time. Cognitive psychologists hypothesize that systems like the story model can operate together with more mechanical and hierarchical reasoning grounded in logic and probability.⁹⁷ Different computational systems may produce divergent resolutions, but the dual-process framework also contemplates interdependent types of cognition, interacting and occurring simultaneously.⁹⁸ Even when an optical or perceptual illusion has been revealed, for example, a viewer may continue to see it the same way. “[A] person can be torn,” Steven Sloman explains, “between descriptions that he or she resonates to and descriptions that he or she finds to be analytically more accurate.”⁹⁹ Descriptions that resonate, as stories do, can coexist with logic but will frequently override it when there is a conflict: “The associative system . . . always has its opinion heard and, because of its speed and efficiency, often precedes and thus neutralizes the rule-based response.”¹⁰⁰ Dan Simon has further elaborated on the dual-process theory of persuasion. In his terms, the theory mediates between the rationalist claim to objectivity and the realist assertion that legal decisions arise not from logic but from the “felt necessities of the time.”¹⁰¹ The cognitive processing commonly termed “System I” involves “emotion, motivation, affect, effort-minimization, and closure-seeking.”¹⁰² “System II processing,” on the other hand, is “analyti-

96. Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 667 (1991); see also David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029106 (“Nothing about the story model, however—notwithstanding the general emphasis it places on nonlinear, unconscious, coherence-based modes of reasoning—requires that jury reasoning be entirely nonlinear or unconscious.”).

97. See Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 PSYCHOL. BULL. 3, 6 (1996). Of course, those systems cannot themselves be reduced to pure rule application but require “theory choice” and the weighing of sometimes incommensurable values. It oversimplifies, as well, to suggest that formal validity marks the boundary between arguments that produce accurate outcomes and those that do not. See STEPHEN EDELSTON TOULMIN, *THE USES OF ARGUMENT* 145 (1958) (“[A]nalyticity is one thing, formal validity is another; and neither of these is a universal criterion of necessity, still less of the soundness of our arguments.”).

98. See, e.g., Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 186 (2011).

99. Sloman, *supra* note 97, at 19; cf. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 734 (2012) (“Seeing is always selective, always shaped by context. Once we see some image . . . we may be unable not to see it.”).

100. Sloman, *supra* note 97, at 15 (“The force of the evidence is to support not only the conclusion that people have and use two computationally distinct systems of reasoning but also that the associative system intrudes on the rule-based one.”).

101. Simon, *supra* note 65, at 512 (quoting OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881)).

102. Simon, *supra* note 98, at 184 (detailing characteristics of System I processing).

cal, thorough, and rational.”¹⁰³ Simon also concurs in Sloman’s finding that analytic thinking is “susceptible to being skewed by superficial heuristic processing” in situations of uncertainty.¹⁰⁴ System II may dominate cognition when it comes to straightforward inquiries or easy cases, but many trials raise complex questions. Doubt and difficulty prompt jurors to rely on existing images and personal experiences, and an unconscious and associative process can thus take precedence.

The question, then, is whether there are opportunities during a trial when it is possible and desirable to highlight the risk of instinctive decision making and encourage more effortful and systematic consideration of the evidence. Potential counterweights to stories arise, for example, within the jury’s deliberative process. Generating support for a position first arrived at through automatic processing requires the more considered, System II approach. That move, in turn, opens a juror’s conclusions to external evaluation and critique. Linguistic theory further suggests that, in addition to multiple processes coexisting within jurors, the subjective prompts that come from stories vary across jurors. The aspiration for a diverse jury, which finds expression in the cases prohibiting discriminatory jury selection,¹⁰⁵ in part focuses on the introduction of other perspectives and, with them, other ways of “reading” the story.

Although stories enact preexisting models, those models are not necessarily the same for everyone. Consequently, the interaction between jurors using distinct schemas might expose the subjective nature of their assessments. Linguistics further illuminates the reception of stories because language likewise uses image schemas as the basic tools to construct more complex cognitive models.¹⁰⁶ That search for metaphor is how understanding emerges in “domains where there is no clearly discernible preconceptual structure to our experience.”¹⁰⁷ George Lakoff provides the illustration of “two ways of understanding electricity—as a continuous fluid that flows like water and as a bunch of elec-

103. *Id.*; see also DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2011) (explaining that System I processing “operates automatically and quickly” while System II “allocates attention to the effortful mental activities that demand it”); Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCHOL. 752 (1980) (distinguishing between systematic “high-involvement” processing and heuristic “low-involvement” processing).

104. Simon, *supra* note 98, at 185; see also Simon, *supra* note 65, at 583–84 (concluding that “people make decisions through what appears to be a rational-like choice in which a strong alternative is straightforwardly preferred over its rival” but that the choice is less rational than it seems because it is driven by an “unconscious cognitive process that reconstructs and transforms difficult and complex decisions into easy ones by amplifying one alternative and deflating the other”).

105. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986).

106. GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987) (arguing that cognition depends on metaphor or the mapping of conceptual structures from one domain to another).

107. *Id.* at 303. Examples of such metaphors include “Life is a journey” and “Time is a thief.” See *id.* at 210, 439; see also GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 47–48 (1980) (describing various metaphors for the abstract concept of an “idea,” including a being that can reproduce and die, a plant that can bloom or wither, and a commodity that can be packaged and sold).

trons that move like people in a crowd;” these are “conflicting models, in that they give different results in a certain range of problems.”¹⁰⁸ Lakoff’s prototype theory parallels the notion that there are multiple perspectives on the facts that give rise to litigation, and no single, correct method for assessing what is and is not true. Some abstract concepts, such as hunger and pain, are stable, well-defined, and widely shared. But subjects vary in terms of how they model emotions and also important legal concepts like reasonableness, premeditation, and other states of mind.

Cognitive linguistics suggests as well that, while metaphors have subjective elements, they correspond to objective facts in the world. The cognitive models that stories enact are thus not arbitrary ones. Even though they do not exist outside of a human, conceptual scheme, they also must “work” or “fit.” Steven Winter advances a similar concept when he argues that intersubjective meaning is possible because, even though there is no “objective” perspective outside of a “particular, human conceptual scheme,” there are “reality constraints on what those conceptual systems can look like” and human cognition has a “grounded, embodied nature” as a result.¹⁰⁹ Idealized cognitive models are themselves indeterminate constructions but not entirely unbounded ones; they are limited by other stock practices and broader cultural standards.

Consequently, the story model need not crowd analytical approaches out of the courtroom. Although narrative helps to organize the experiences and events conveyed to the jury at trial, the trial itself is not entirely narrative. Subjectivity coexists with objective processes that can help advance the most basic rule-of-law principle that “similar cases be treated similarly.”¹¹⁰ Understanding the possibilities of hybrid decision making provides a starting place for reconsidering trial design. At certain points, nudging fact finders in the objective direction, or at least exposing the role that stories play, might produce greater epistemic competence. Stories can “energize the convictions of right reason,” but the convictions themselves come from other domains.¹¹¹ And trial procedure could encourage jurors to question intuition, examine their own thinking processes, and privilege analysis grounded in logic when narrative endangers both legal and factual accuracy.

II. WHAT’S WRONG WITH STORIES?

Before turning to the aspects of trial procedure that intensify the effect of narrative, the question is why there ought to be any effort to mitigate the power of stories. If stories are a useful form to communicate and organize information,

108. LAKOFF, *supra* note 106, at 122.

109. Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2230 n.15 (1989).

110. See RAWLS, *supra* note 47, at 237.

111. Anthony Kronman, *Leontius’ Tale*, in *LAW’S STORIES*, *supra* note 42, at 54, 56 (“Reason is needed to guide us, but is incapable of inducing us to follow. It depends on the emotions, and hence on stories, to help carry us along, to provide the force that moves us to do as reason commands.”).

how does choosing the “best” one imperil a correct verdict? By and large, jurors are regarded as capable at the basic task of processing the story of “what happened” in a given case.¹¹² They are likewise adept at discrediting witnesses who too obviously rely on a “good story” with a tidy narrative arc and careful editing. But the story model and all that it contains may compromise the integrity of fact-finding in close cases.¹¹³ Criminal adjudication, moreover, is often much more than a question about “what happened” in terms of exterior facts. Difficult and contested cases, especially in the white collar arena, often turn on “why” something happened, and what the defendant was thinking when it did. Mental state determinations are particularly reliant on narrative constructs and, thus, especially susceptible to their shortcomings as well.¹¹⁴

The story model, as set forth by empirical psychologists, is purely descriptive; it reveals only that there may be blueprints from which decision makers work in the adjudicative process. Narrative theory enlarges the model by explaining where those schemas come from and identifying some of their elements. But to the extent that the story model does accurately describe a structure for juror decision making, it also gives rise to normative concerns about content in terms of the deceptive power of narrative. If fact finders process information in terms of stories rather than logic, then they are predisposed to some misleading elements from familiar plots. Trials purposefully leave gaps, and story telling inspires jurors to fill those spaces. Simultaneously, the narrative form raises expectations: for the significance of each piece of evidence, for a certain sequence and completeness to the tale, and for closure at the end. The implicit invitation for jurors to participate in constructing facts, combined with the missing narrative components, can introduce bias and lead to error.

A. INDIFFERENCE TO FACTS AND FALSEHOOD

To begin with, narrative power stems from formal authenticity rather than substantive accuracy. Stories, as with other art forms, have the capacity to reveal truth and to demonstrate what most likely happened, but they also lack the discipline of the argumentative devices that tend to shape the law. They are, to some extent, indifferent to truth (in the sense of historical facts) or falsehood; both “real” and “imaginary” stories compel.¹¹⁵ A story, of course, is not necessarily false or fictional, but it is governed by convention rather than

112. See, e.g., NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 346 (2007) (“After evaluating all of the evidence, our verdict is strongly in favor of the American jury.”).

113. See Simon, *supra* note 98, at 147–48 (observing that the “difficult cases, in which the evidence is more complex, less obvious, and relies heavily on human testimony” are the ones that “put the diagnostic capabilities of the trial to the test”).

114. See Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 *LAW & CONTEMP. PROBS.* 133–153 (2012).

115. See BRUNER, *supra* note 28, at 44 (stating that the story form emphasizes the “sequence of . . . sentences, rather than the truth or falsity of any of those sentences”); see also AMSTERDAM & BRUNER, *supra* note 28, at 113 (“A narrative can purport to be either a fiction or a real account of events; it does

“empirical verification and logical requiredness.”¹¹⁶ The most successful stories—with the greatest utility to litigants—also comport with facts in the world. But the structural adequacy of a story drives its appeal. Journalist Janet Malcolm captures this when she writes that “truth is messy, incoherent, aimless, boring, absurd . . . [it] does not make a good story; that’s why we have art.”¹¹⁷

Both the overt story telling at trial and the way in which even expert testimony and scientific evidence unfolds within the narrative structure of a trial raise again the vexing question whether the process reflects or constructs the facts.¹¹⁸ This notion dates back to Aristotle’s mimetic theory and the idea that stories do not produce copies of facts but instead “an aspect of reality that is not visible outside the artistic representation.”¹¹⁹ The metaphor that emerges is a “new reading”¹²⁰ and a mere “version of reality” that “can only achieve

not have to specify which.”). Bennett and Feldman explain that the primary integrity of stories is structural rather than substantive, as follows:

Although it is doubtful that completely undocumented stories will be believed in many instances, it is quite possible that adequately documented but poorly structured accounts will be rejected because they do not withstand careful scrutiny within a story framework. Similarly, a well-constructed story may sway judgments even when evidence is in short supply.

BENNETT & FELDMAN, *supra* note 66, at 67–68. *But see* Simon, *supra* note 98, at 187 (finding “reason to believe that, in reality, truthful evidence is more likely to produce a good narrative than untruthful evidence”).

116. Jerome Bruner, *The Narrative Construction of Reality*, 18 *CRITICAL INQUIRY* 1, 4–5 (1991); *see also* LaRue, *supra* note 55, at 56, 121 (distinguishing historical fact and fiction from the artistic truth or falsehood of a story). *But see* HANS-GEORG GADAMER, *TRUTH AND METHOD* 483 (Garret Barden & John Cummin eds., 1975) (2d ed. 1965).

117. JANET MALCOLM, *THE CRIME OF SHEILA MCGOUGH* 26 (1999).

118. For an excellent discussion of a legal narrative that constructs reality, see Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 *VA. L. REV.* 1723 (2001). Mnookin challenges the “bedrock assumption of most commentators on expert evidence, that reliability is exogenous to law, . . . [and] that when judges make determinations about the validity and reliability of expert evidence, they are ratifying something that either exists or does not exist out in the world.” *Id.* at 1729. Judicial determinations themselves, she argues, “play an enormous role in constructing broader cultural perceptions of reliability.” *Id.* Judges thus do more than “simply certify a reliable technique;” they help “shape the form taken by the technique, and their decisions and their dicta help[] create its authority.” *Id.* at 1742.

119. BURNS, *supra* note 36, at 234; *see also* ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 38–39 (2009) (“The trial shows us the meaning of the situation in a way that would be invisible without its methods, yet once we have experienced the trial, we cannot see the situation other than in the light the trial has shed.”). For contemporary literary expressions of this concept, see, for example, TIM O’BRIEN, *Good Form*, in *THE THINGS THEY CARRIED* 171, 171 (1990) (“[S]tory-truth is truer sometimes than happening-truth.”) and LORRIE MOORE, *People Like That Are the Only People Here: Canonical Babbling in Peed Onk*, in *BIRDS OF AMERICA* 212, 237 (1998) (“The trip and the story of the trip are always two different things. . . . One cannot go to a place and speak of it; one cannot both see and say, not really.”).

120. RICOEUR, *supra* note 34, at 292–93 (discussing the idea of mimesis and “the narrative function”); *see also* CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 173 (1983) (suggesting that legal facts “are not merely things found lying about in the world and carried bodily into court, show-and-tell style, but close-edited diagrams of reality the matching process itself produces”).

‘verisimilitude.’”¹²¹

Narrative’s characteristic emphasis on form over substance may be incompatible with the essential object of trial. Even in the midst of the invitation to narrative richness in *Old Chief*, Justice Souter also wrote that verdicts must first and foremost be “honest.”¹²² Trials are still fundamentally about discovering historical truth.¹²³ However, the judicial process does systematically tolerate some discord between the actual truth of the events giving rise to litigation and the legal truth of a verdict. The former involves the “true/false verdict dichotomy,” which is settled “by comparing it with the facts,” whereas the latter’s “valid/invalid distinction” is settled “by comparing it with the evidence presented at trial, [and] asking whether that evidence meets the applicable standard of proof.”¹²⁴ According to Larry Laudan’s analysis, “[i]t is crucial to see that the valid/invalid distinction does *not* map neatly onto the true/false verdict dichotomy.”¹²⁵ Courts have acknowledged that no trial can uncover “the total truth in all its mystery,”¹²⁶ and it is clear that “[b]eing found guilty” and “being guilty” are not the same thing.¹²⁷ But the justice system also aspires to align

121. Bruner, *supra* note 116, at 4; *see also* BENNETT & FELDMAN, *supra* note 66, at 33 (“Judgments based on story construction are, in many important respects, unverifiable in terms of the reality of the situation that the story represents.”); *cf. id.* at 6 (“People who cannot manipulate symbols within a narrative format may be at a disadvantage even when, as witnesses or defendants, they are telling the truth.”); SCHRAGER, *supra* note 91, at 5 (“The need to be believable to jurors pushes lawyers well beyond giving a straightforward presentation of evidence. It forces them to try to create the *appearance* of truth.”). *But cf.* STEVEN LUBET, *NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON’T, CAN’T, AND SHOULDN’T HAVE TO TELL THE WHOLE TRUTH 2* (2001) (“A conscientious attorney fashions a story not to hide or distort the truth, but rather to enable a client to come closer to the truth.”).

122. *Old Chief v. United States*, 519 U.S. 172, 187 (1997); *see also, e.g.*, *Bullington v. Missouri*, 451 U.S. 430, 450 (1981) (Powell, J., dissenting) (“From the time an accused is first suspected to the time the decision on guilt or innocence is made, our criminal justice system is designed to enable the trier of fact to discover that truth according to law.”).

123. *See, e.g.*, H. Richard Uviller, Essay, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar’s Tale*, 42 *DUKE L.J.* 776, 777 (1993) (“As a practical matter, we have no better way to discover the historical truth underlying a case than the trial process itself.”).

124. LAUDAN, *supra* note 45, at 13.

125. *Id.* Laudan maintains a clear distinction between the outcome of the trial and the facts of a case or between the “validity of a verdict” and its truth. *See id.* at 11–12 (claiming that, “while what is presented in evidence surely shapes the jury’s verdict, that evidence does not define what is true and false about the crime”). This tension plays out as well in the film *A Civil Action*, when the main character laments the constraints of the trial and objects that the court’s instructions are asking the jury to “create a fiction that will stand for the truth, but won’t be the truth.” *A CIVIL ACTION* (Touchstone Pictures 1998).

126. *United States v. Jackson*, 405 F. Supp. 938, 946 (E.D.N.Y. 1975) (calling trials “a carefully constructed and sanitized version of life” and a “kind of two dimensional cartoon rendition of the three dimensional world” that only allows “decision of narrow issues of fact and law within the limitations of a moderately effective litigation system”); *see also* AMSTERDAM & BRUNER, *supra* note 28, at 118 (“The outcomes of adjudication, given the specialized nature of adversarial storytelling and the limited choices that emerge from it, are a bit too pat.”); GEERTZ, *supra* note 120, at 173 (“[W]hatever it is that the law is after it is not the whole story.”).

127. LAUDAN, *supra* note 45, at 12. Laudan distinguishes the guilt of committing the crime from the guilt of legal condemnation. He calls the first “material guilt” and the second “probatory guilt.” *Id.*; *see also* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal*

truth and legal truth as closely as possible when it publicly announces what occurred. Stories have no such aspiration.

B. MANAGING NARRATIVE EXPECTATIONS

A further inconsistency between narrative and trial arises because stories require a type of engagement with the evidence that jurors are not formally permitted.¹²⁸ Jurors are often instructed to interpret the evidence in light of their common sense and their experience in life,¹²⁹ and they are traditionally praised by commentators for the perspective that they bring to the courtroom.¹³⁰ At the same time, however, they are deemed passive recipients of information. Although some reformers have advocated for increased participation in the form of juror note taking and questioning,¹³¹ the current conception of the jury precludes any outside knowledge of the actual facts in issue. Recent concern about jurors consulting Google, Wikipedia, Facebook, Twitter, litigants' blogs, and other social media underscores that principle.¹³² As opposed to the common law jury, which had at least some opportunity not only to interpret facts but also

Adjudication, 93 CALIF. L. REV. 1585, 1608–09 (2005) (mentioning the “periodic disconnect between resolution and truth” at trial).

128. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (“The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”).

129. See, e.g., PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT 1.04 (1998), available at <http://www.ca7.uscourts.gov/pjury.pdf> (“You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.”).

130. See G. K. CHESTERTON, TREMENDOUS TRIFLES 85–86 (1920) (“[I]t is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things And the horrible thing about all legal officials . . . is simply that they have got used to it.”); PATRICK DEVLIN, TRIAL BY JURY 154 (1956) (commenting that jurors may not be as skilled as judges at “separating the wheat from the chaff” but “there are some cases in which a little admixture of chaff is not a bad thing”).

131. See B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1247–61 (1993) (proposing a variety of reforms to increase juror participation); see also VIDMAR & HANS, *supra* note 112, at 130 (noting increasing support for juror queries and note taking); Larry Heuer & Steven D. Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 NW. U. L. REV. 226, 231 tbl.3 (1990) (surveying state judges’ reactions to juror note taking and submission of questions); cf. LAUDAN, *supra* note 45, at 137 (arguing that the “obstacles that discourage jurors from asking questions of witnesses,” the jury’s “inability to subpoena those who appear to have a knowledge of the crime,” and the jury’s “inability to ask for independent expert witnesses to address issues they find perplexing” are all among the “evidentiary practices [that] hinder the ability of the jury to come to a correct verdict”).

132. See John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up*, N.Y. TIMES, Mar. 18, 2009, http://www.nytimes.com/2009/03/18/us/18juries.html?_moc.semityn.www=&pagewanted=print (“The use of Blackberrys and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country, upending deliberations and infuriating judges.”); see also, e.g., *United States v. Sabir*, 628 F. Supp. 2d 414, 421–25 (S.D.N.Y. 2007) (denying a mistrial after a juror Googled the names of defendant’s coconspirators, finding that the presumption of outside information being prejudicial was sufficiently rebutted in this instance); *State v. Boling*, 127 P.3d 740, 741 (Wash. Ct. App. 2006) (upholding a grant of mistrial after a juror explored possible causes of death in a manslaughter case on his own and then shared the results of his Internet searches with other jurors).

to uncover them,¹³³ the modern American jury is composed of “neutral arbiters” whose “formal role is as an observer of the proceedings.”¹³⁴

In narrative, however, readers necessarily become participants in the story. And the story model likewise posits jurors speculating about facts external to the trial in order to complete the picture.¹³⁵ Readers construct the events themselves “in the light of the overall narrative,”¹³⁶ and by the time an audience confronts a story, “readers necessarily become coauthors of and participants in that world.”¹³⁷ Some literary theorists follow this concept to its endpoint and conclude that stories have a life of their own, that authorial intent is irrelevant, and even that the author is “dead.”¹³⁸ A passive jury—theoretically shielded from outside influences and even regarded as untrustworthy with complex, inflammatory, or prejudicial evidence—is thus at odds with the audience described in narrative theory.

Furthermore, narrative form creates expectations that guide how listeners participate in the construction of meaning. The *Old Chief* decision justified descriptive richness on the ground that colorful stories “satisfy the jurors’

133. Larry Laudan describes the early English jury, which would “conduct its own inquiries, often including interviews outside of the courtroom proper”:

Jurors were simultaneously the chief repository of knowledge about the crime, the interpreters of the relevant law that applied to the case, and the triers of fact, who would settle issues of guilt and innocence. Jurors could interrogate whomever they liked (including the defendant), and put to them whatever questions they thought relevant.

LAUDAN, *supra* note 45, at 215; *see also, e.g.*, JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 115–26 (2006) (discussing the “self-informing jury” and the expectation in twelfth through sixteenth century England that jurors would “know or . . . find out the facts of the event or events in dispute and . . . decide without the help of any documentary or testimonial evidence given in court”); Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 127 (2003) (concluding that the thirteenth century jury was “sufficiently well-informed that regulation of in-court testimony was not seen as important”); Barbara J. Shapiro, “*To a Moral Certainty*”: *Theories of Knowledge and Anglo-American Juries 1600–1850*, 38 HASTINGS L.J. 153, 155 (1986) (“Jurors, men of the neighborhood, were assumed to know the facts and to incorporate their own knowledge into the verdict. Juries thus arrived at findings of fact guided by common sense and common knowledge.”). *But see* George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 591–97 & nn.44–51, 55 (1997) (questioning assumptions about the self-informing jury).

134. VIDMAR & HANS, *supra* note 112, at 129; *see also id.* (“The law’s ideal juror is a blank slate on which only attorneys can write.”); *cf.* MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 29 (1997) (“One would expect a legal process that glorifies novice amateurs as fact finders to presume their intellectual and emotional capacity for the job.”).

135. *See* VIDMAR & HANS, *supra* note 112, at 135 (“While the trial evidence and legal context set the parameters, the differing life experiences and beliefs frequently result in jurors drawing on different scripts and constructing divergent narratives.”); Pennington & Hastie, *Cognitive Theory*, *supra* note 58, at 527 (explaining that the jury constructs the story in part by inferring events and adding causal relationships to fill gaps).

136. Bruner, *supra* note 116, at 8.

137. WINTER, *supra* note 32, at 122; *see also* Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in LAW’S STORIES, *supra* note 42, at 144 (“[A]ll storytelling, after all, is transactional, with listeners affecting tellers as well as tellers affecting listeners.”).

138. *See, e.g.*, ROLAND BARTHES, *The Death of the Author*, in IMAGE—MUSIC—TEXT, *supra* note 30, at 142.

expectations about what proper proof should be.”¹³⁹ Anticipation that originates from familiar narratives may, however, be misleading. Steven Winter offers the example of “the hero’s uncanny ability to arrive in the nick of time” in a suspense drama. That element provokes “relief rather than . . . skepticism” because it meets expectations, and the audience uses “contrivances of plot and character” to make the accustomed story work.¹⁴⁰ Jurors engage in similar contrivances and, thus, may err in their interpretation of evidence. This might occur when fact finders rely on preexisting models for stories in which every detail has significance, events occur in a basic sequence, the point of view is omniscient, and the characters achieve closure.

First, jurors rely on expectations about stories to give meaning to pieces of evidence that may have none. “Events are often simply meaningless, irrelevant to what comes next; events can be out of sequence, random, purely accidental, without purpose.”¹⁴¹ Some scholars who have documented the “storied nature of our thinking” acknowledge as well that life itself rarely follows narrative logic.¹⁴² Legal stories concern facts in the world, and they include some mundane details because their central goal is not to “entertain, or to terrify, or to illuminate life.”¹⁴³ Often, people cannot even describe the reasons for action or speak clearly about the basis of the choices they make,¹⁴⁴ but in stories, everything mentioned has salience. Fact finders therefore anticipate that acts discussed at trial will have meaning, and they strive to fit each piece into the emerging picture of a defendant’s conduct, even when that effort produces misleading results. Alan Dershowitz recounts the example of a trial in which a businessman’s purchase of life insurance for his partner, who was murdered shortly thereafter, seemed powerful circumstantial evidence of his guilt. In the familiar genre of a legal thriller, buying the insurance policy would foreshadow the killing, but in reality, people quite often take out life insurance policies on business partners and family members with no ill intent.¹⁴⁵ Narrative expecta-

139. *Old Chief v. United States*, 519 U.S. 172, 188 (1997).

140. WINTER, *supra* note 32, at 128.

141. Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in LAW’S STORIES, *supra* note 42, at 99, 100; *see also* DIDION, *supra* note 35, at 13 (“I was meant to know the plot, but all I knew was what I saw: flash pictures in variable sequence, images with no ‘meaning’ beyond their temporary arrangement, not a movie but a cutting-room experience . . . [but] I wanted still to believe in the narrative and the narrative’s intelligibility . . .”).

142. Brooks, *supra* note 53, at 25–26; *see also* KING, *supra* note 33, at 174 (“[D]o things have a beginning, a middle, and an end in real life? . . . [L]ife usually doesn’t work that way.”); *cf.* ROLAND BARTHES, *Introduction to the Structural Analysis of Narratives*, in IMAGE–MUSIC–TEXT, *supra* note 30, at 119 (“On meeting in ‘life’, it is most unlikely that the invitation to take a seat would not immediately be followed by the act of sitting down; in narrative these two units, contiguous from a mimetic point of view, may be separated by a long series of insertions . . .”).

143. Paul Gewirtz, *Narrative and Rhetoric in the Law*, in LAW’S STORIES, *supra* note 42, at 2, 5.

144. *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980).

145. Dershowitz, *supra* note 141, at 99–100. Dershowitz also notes Anton Chekhov’s famous observation: “If in the first chapter you say that a gun hung on the wall, in the second or third chapter it

tions not only hazard wrongful convictions but can also prejudice the prosecution when they lead, for example, to an unfavorable image of a victim or an unlikely alternative perpetrator. Some prosecutors also fear that jurors will fail to separate the actual capacity of law enforcement from the scientific evidence featured in procedural crime dramas.¹⁴⁶

Second, jurors may import expectations about sequence from narrative conventions. Trials themselves are not linear. Facts are presented in whatever order the lawyers deem advantageous, and that often means that witnesses appear according to strategic considerations rather than to track the chronological unfolding of events. Timing depends, as well, on witness availability and trial schedules, and the defense witnesses may also reset the timeline after the prosecution or plaintiff has concluded the case. Layers of procedural rules further interrupt the story's chronology. Although trials at common law included extended monologues within which each side could present a coherent narrative,¹⁴⁷ contemporary trials may begin with opening statements that evoke story telling, but they proceed to a piecemeal presentation elicited through questions and interrupted during the adversarial process of cross-examination and objections. In trials with multiple defendants, serial cross-examinations of witnesses by their individual lawyers make the narrative still more disjointed. Fact finders react to this seemingly incoherent effort to chronicle what happened by imposing order on the telling by using familiar plots.

Third, exposure to narrative constructs may give jurors misplaced confidence in their capacity to comprehend what has occurred. Fictional stories can expand and contract as needed to convey images and ideas. Novelists recognize that the "truth [is] not a line from here to there,"¹⁴⁸ but trials focus on particular moments and often leave out the contour and color crucial to understanding. Trials do not "begin at the beginning"; they start where the events that give rise

must without fail be discharged." *Id.* at 100 (quoting ANTON CHEKHOV: LITERARY AND THEATRICAL REMINISCENCES 23 (S.S. Kotliansky ed. & trans., 1927)).

146. See, e.g., Simon A. Cole & Rachel Dioso-Villa, *Investigating the "CSI Effect" Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1339–40 (2009) (documenting an extensive "CSI effect discourse" in the media); Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the 'CSI Effect' Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 364 (2006) (concluding that the origins of juror expectations about prosecutors' use of modern science and technology stem from "the confluence of rapid advances in science and information technology and the increased use of crime stories as a vehicle to dramatize those advances").

147. See, e.g., James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 295, 316–17 (1892). Early courtrooms in the United States also allowed witnesses "a good deal of leeway to tell their stories uninterrupted" with "less fussing over minor points of evidence . . . [and] less shadowboxing over rules of procedure" and a "looser, freer, more colloquial" charge to the jury. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 237 (1993).

148. Haack, *supra* note 43, at 30–31 ("The truth [is] not a line from here to there, and not ever-widening circles like the rings on a sawn log, but rather trails of oscillating overlapping liquids that poured forth [and] assumed a shape and life of their own, that circled back around in spirals and fluctuations to touch and color all truths that came out after that one." (first alteration in original) (quoting JEFFREY LENT, *AFTER THE FALL* 253–54 (2000))).

to litigation do.¹⁴⁹ Again consider the *Jensen* case. Where does that story begin?: With Julie Jensen's 1998 death, with the enmity between her and Mark, with her struggle with depression, or as far back as her mysteriously troubled childhood? Or take the 1998 murder prosecution of Leslie McGee, a teenager who confessed to shooting a cab driver in Chicago.¹⁵⁰ McGee was convicted at a trial during which both the prosecution and the defense declined to mention that she had a previous sexual relationship with the victim. The defense feared the preexisting relationship would detract from arguments against premeditation, and the prosecution feared "muddl[ing] things for the jury" by contradicting the confession.¹⁵¹ "People exist over time," as Mark Kelman explains, but prosecutions focus on "untoward incidents—that these people commit," often omitting what happened before and after.¹⁵² Thus, the competing paradigms advanced in an adversarial trial may actually, and unexpectedly, exclude salient facts of what happened.

Although a complete story would require information flow akin to an inclusive "free proof" approach to admissibility,¹⁵³ the premise of the rules of evidence is that "less is more."¹⁵⁴ Witnesses testify in the "language of perception," stripped of interpretation and opinion, and they are permitted to report only what they observed firsthand and only in the form of a present accounting.¹⁵⁵ Approximately seventy different federal evidentiary rules, many of them divided into multiple subparts, articulate exceptions to the rule that all relevant evidence is admissible.¹⁵⁶ Many of those rules reflect skepticism about jurors or the concern that complete, rich narratives will lead to collateral moral judgments. In this editorial tradition, Kenworthy Bilz has written approvingly of the "exclusionary" function of the rules and advocated for excising "structurally relevant—but morally irrelevant—points of view."¹⁵⁷ In earlier work, Samuel

149. See, e.g., BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 46–71 (1984) (discussing the "reactive lawyer[ing]" paradigm).

150. See STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* 236 (2005).

151. *Id.* at 242.

152. Kelman, *supra* note 39, at 593–94.

153. See Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way*, 49 *AM. J. JURIS.* 43, 56 (2004) (explaining that the "main theme" of Bentham's "free proof" approach was that exclusionary rules confound the epistemological desire for complete information).

154. See MCCORMICK'S *HANDBOOK OF THE LAW OF EVIDENCE* § 53, at 121 (Edward W. Cleary et al. eds., 2d ed. 1972) ("The great body of the law of evidence consists of rules that operate to exclude relevant evidence."); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 *U. PA. L. REV.* 1251, 1252 (2005) ("Trials search for truth by excluding certain truths.").

155. See BURNS, *supra* note 36, at 20.

156. The majority of state evidence codes draw heavily on the Federal Rules of Evidence. 6T WEINSTEIN'S *FEDERAL EVIDENCE* (Joseph M. McLaughlin ed., 2012).

157. Bilz, *supra* note 62, at 434 (emphasis omitted); see also *id.* at 433 ("[J]ustice is not passively blind; we often must proactively blind her."). Bilz's intriguing argument is not that the narrative model is an inaccurate or distorting account of what occurs at trial, but rather that the prevailing conception of narrative itself is incorrect. She uses literary theory to argue that the unfiltered "richness" associated

Gross summarized the merits of paring down the presentation of evidence:

Any exclusion of relevant evidence involves some distortion of reality in the sense that the picture presented to the trier of fact includes less information than the available total. . . . Distortion in this general sense is not necessarily bad. It can serve general social goals, make trials more efficient, and improve the accuracy of fact-finding by focusing attention on relevant issues and probative evidence.¹⁵⁸

That aspiration to make jurors more discerning, however, often conflicts with their expectations that the trial narrative will paint a complete picture. The narrative construct prompts jurors to resist evidentiary limitations, and thus they supplement the evidence with what they imagine to be the untold parts of the story. “[T]rue-but-incomplete account[s]” may mislead,¹⁵⁹ and missing details can “substantially change the significance of the stories told at trial.”¹⁶⁰ When jurors supply those details according to generic narratives or their personal experiences, they may reach false conclusions. Trials can thus become “bad narrative[s]” that “deceive[] with the illusion of concreteness.”¹⁶¹

Finally, stories raise expectations for closure, and jurors may rely on narrative to reach decisions even when the weight of the evidence is not sufficient to support a verdict. Narrative is a tool of reconciliation; it favors resolution and often achieves it by transforming deviations into accepted cultural patterns.¹⁶²

with a narrative model of judging is actually incompatible with the discernment that characterizes literature. And she describes narrative as “a close and careful interpretative description” that offers an experience “deeper, sharper, and more precise than much of what takes place in life.” *Id.* at 443–46 (quoting MARTHA C. NUSSBAUM, *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 47–48 (1990)).

158. Gross, *supra* note 65, at 843 (footnotes omitted).

159. Haack, *supra* note 43, at 30. This point relates to the admission of prejudicial evidence that is “inextricably intertwined” with the government’s case against a defendant. *See, e.g.*, *United States v. DeGeorge*, 380 F.3d 1203, 1219–20 (9th Cir. 2004) (citing *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1013 (9th Cir. 1995) (“The jury cannot be expected to make its decision in a void—without knowledge of the time, place, and circumstances of the acts which form the basis of the charge.”)) (concluding that the jury in an insurance fraud case could not understand the relevant transaction without information about the defendant’s three prior losses of insured vessels at sea).

160. Robert P. Burns, *A Short Meditation on Some Remaining Issues in Evidence Law*, 38 *SETON HALL L. REV.* 1435, 1437 (2008); *accord* Haack, *supra* note 43, at 31 (concluding that “the effect of telling only part of the truth” can be “to *slant* or to *skew* the audience’s perception of the larger truth that is not told”).

161. Weisberg, *supra* note 89, at 67 (“Bad narrative deceives with the illusion of concreteness, selecting and deleting facts and naming people and things to distort them to fit a conventionally acceptable legal conclusion.”).

162. *See* BRUNER, *supra* note 28, at 49–50 (stating that one function of story “is to find an intentional state that mitigates or at least makes comprehensible a deviation from a canonical cultural pattern” (emphasis omitted)); *id.* at 47 (explaining that narrative provides an essential “set of interpretive procedures for rendering departures from . . . norms meaningful in terms of established patterns of belief”); BURNS, *supra* note 119, at 32 (observing that stories “are told when there has been a deviation from a traditional pattern and the community needs to understand the event in light of an inventory of commonsense beliefs about the sources of deviance”).

Trials similarly involve disruptions of arrangements and relationships, and the process of adjudication enables the restoration of some desired order. When a child dies or is seriously injured, for example, the need to place blame can feel acute. That desire for closure may have overridden questionable evidence in a series of cases involving “shaken-baby syndrome.”¹⁶³ Several caregivers convicted of murder or abuse are seeking new trials because the medical evidence introduced at trial now appears inconclusive.¹⁶⁴ Although there was some conflicting testimony even a decade ago, many experts at the time stated that subdural bleeding indicated recent shaking. Medical experts now believe that the symptoms classically associated with “shaken baby syndrome” could also be attributable to old skull fractures, chronic hematomas from traumatic births, bleeding disorders, and infections. And when those symptoms do stem from abuse, the causal injury may have taken place days, rather than hours, before the injury manifested and, thus, cannot necessarily be attributed to the most recent caregiver.¹⁶⁵

Narrative can jeopardize accuracy because it offers the illusion of understanding the often terrible and unpredictable events that give rise to litigation.¹⁶⁶ It can prompt fact finders to overvalue, and deem conclusive, evidence that converts readily to a recognizable plot. Julie Jensen’s letter, for example, did more to lead the jury to conviction than any other evidence and rereading it was what finally convinced one holdout juror.¹⁶⁷ Much of the testimony in the *Jensen* case was conflicting, and all of it was circumstantial. Indeed, one juror reported thinking that Julie’s letter itself “wasn’t making any sense.”¹⁶⁸ Over the course of the trial, however, the jurors developed “deep sympathy for Julie Jensen and disdain for Mark.”¹⁶⁹ Jurors commented that they found his failure to seek medical attention for Julie, his consumption of pornography, his de-

163. Emily Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, N.Y. TIMES, Feb. 2, 2011, <http://www.nytimes.com/2011/02/06/magazine/06baby-t.html?pagewanted=print>.

164. *See id.*; *see also* *Cavazos v. Smith*, 132 S. Ct. 2, 9 (2011) (Ginsburg, J., dissenting) (noting that recent scientific research “casts grave doubt” on the prosecution’s expert testimony on shaken-baby syndrome).

165. *Cavazos*, 132 S. Ct. at 9–11. The *Cavazos* case also underscores the epistemic challenges that dueling experts pose. *See, e.g.*, Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1680 (1998) (arguing that nonexpert judges and jurors are incapable of evaluating competing scientific experts “in an epistemically nonarbitrary manner”); Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331, 333 (1985) (discussing expert claims to privileged knowledge of historical truth).

166. *Cf.* LUBET, *supra* note 121, at 7 (“Even the people who observe an event seldom know what really happened A courtroom reconstruction, alas, is at best an approximation, . . . [an] effort to extract a reliable conclusion from the ineffable secrets of past events.”); SCHRAGER, *supra* note 91, at 7 (“Stories give meaning to things that happen to people, things that in the absence of stories about them may be too complicated or confusing, too painful or mysterious, to figure out at all.”).

167. *See* Katie DeLong, *Jensen Juror: “Sorry It Took Ten Years,”* TMJ 4 MILWAUKEE (Feb. 22, 2008), <http://www.todaystmj4.com/news/local/45620947.html>; Kertscher, *supra* note 24.

168. *Mark Jensen Guilty of First Degree Murder*, ASSOCIATED PRESS (Feb. 22, 2008), <http://www.todaystmj4.com/news/local/45620582.html>.

169. Kertscher, *supra* note 24.

meanoir in court, and his “unemotional and cold” personality concerning.¹⁷⁰ One member of the jury further explained that the jurors felt unequal to the task of being “psychologists” and evaluating whether Julie was suicidal,¹⁷¹ but they did find the letter accessible, and it eventually convinced them of Mark’s guilt.¹⁷² The issue, then, is not that narratives are inherently irrational but rather that they can make events appear *more* linear than they are. The raw truth of what transpires between people may be incoherent, and it may be mercurial. Julie Jensen shifted in complex ways throughout her life and has continued to do so during the decade of investigation and litigation that followed her death. That the jurors processed the evidence as a story helped them reach a decision, but narrative structures also smoothed over a multifaceted situation in the process.

Trials make jurors choose, and narratives give them a false sense of completeness and closure when they do. The selected story of “what happened” binds to receptors formed through a lifetime of stories. Once that bond is formed, other ideas are suppressed, in much the same way that one particularly salient conversation can make surrounding ones just background noise. These familiar stories, however, report only how people usually act; they codify common sense. Yet “knowledge about what typically happens in the world”¹⁷³—which the story model deems a central part of jury decision making—does not necessarily improve accuracy when jurors confront the anomalous situations that give rise to criminal cases. The story model describes decision makers turning to stories to find meaning when confronted with deviations.¹⁷⁴ Narrative theory, however, reveals that the stories themselves arise from conventional patterns, and that those familiar templates may serve as poor tools for comprehending extreme behavior.

C. HEURISTIC AND EMOTIONAL DECISION MAKING

Trials thus leave gaps in significance, sequence, and completeness that defy narrative expectations and at the same time invite fact finders to sketch in details. In those moments of uncertainty, confronted with contradictory informa-

170. *Id.*

171. *Mark Jensen Guilty of First Degree Murder*, *supra* note 168.

172. See DeLong, *supra* note 167. The significance of the Jensen letter calls to mind Marianne Wesson’s critique of the epistolary evidence in *Mutual Life Insurance Co. of New York v. Hillmon*, 145 U.S. 285 (1892), which gave rise to the “state of mind” exception to the hearsay prohibition in evidence law. See FED. R. EVID. 803(3). According to Wesson, the authenticity of Frederick Adolph Waters’s letter to his fiancée Alvina Kasten (which famously declared his intention to travel to Crooked Creek with John Hillmon) was taken for granted because the courts grew attached to the false narrative that Hillmon had murdered Waters. Wesson, *supra* note 52, at 346–50.

173. Pennington & Hastie, *Cognitive Theory*, *supra* note 58, at 527–28.

174. Cf. Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1604 (2009) (“[N]arrative is a conventional, familiar, and appropriate methodology for producing the truth about or, more precisely, the meaning of human action, including those acts that we deem to be crimes.” (footnotes omitted)); *id.* at 1620 (“Our narrative impulse arises most strongly *when*—and *because*—we encounter and need to understand conduct that is extraordinary or nonsensical when measured by the conventional patterns for the context in which it occurs.”).

tion, both jurors and judges may resort to heuristic decision making. Heuristics produce the intuitive judgments that form automatically and typically escape scrutiny. To take some common examples, the “availability heuristic” arises when jurors assess the probability of an event according to the ease with which they can bring occurrences of that event to mind.¹⁷⁵ “Confirmation bias” causes jurors to interpret evidence in a fashion that supports existing preferences, beliefs, expectations, and theories.¹⁷⁶ The “focusing illusion” magnifies the importance of any detail under consideration.¹⁷⁷ And “belief perseverance” can make jurors more likely to doubt evidence that conflicts with a preexisting paradigm and to interpret what is ambiguous as consistent with that belief.¹⁷⁸

Consider the durability of the “never forget a face” concept. Despite mounting evidence linking eyewitness identification errors to wrongful convictions, a recent study revealed that jurors continue to disregard variables that detract from eyewitness accuracy.¹⁷⁹ These kinds of shortcuts may helpfully moderate the flow of information, but they can also increase the probability of cognitive bias and processing error. Some perceived shortcuts simply lead the wrong way. To take another example, the widespread belief that sexual offenders recidivate at a high rate, and therefore that a defendant’s past sexual assaults are unusually salient evidence, finds no support in the statistical evidence on repeat offenses.¹⁸⁰

The metaphors, anecdotes, and superficial associations of heuristic persuasion underscore potential problems with decision making that draws upon stories.

175. See, e.g., Jennifer Groscup & Jennifer Tallon, *Theoretical Models of Jury Decision-Making*, in *JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES* 41, 55 (Joel D. Lieberman & Daniel A. Krauss eds., 2009).

176. See, e.g., D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 7, 15 (2002).

177. KAHNEMAN, *supra* note 103, at 402–06.

178. See, e.g., Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979) (“[J]udgments about the validity, reliability, relevance, and sometimes even the meaning of proffered evidence are biased by the apparent consistency of that evidence with the perceiver’s theories and expectations.”). For more general information on heuristic decision making, see, for example, REID HASTIE & ROBYN M. DAWES, *RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (2001). And for further discussion of the difference between central and peripheral routes to persuasion, see, for example, RICHARD E. PETTY & JOHN T. CACIOPPO, *ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES* (1981).

179. See Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 119–20 (2006).

180. See, e.g., Aviva Orenstein & Tamara Rice Lave, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, U. CIN. L. REV. (forthcoming 2013), available at <http://papers.ssrn.com/abstract=2143174>. The perceived link between sexual offenders and recidivism, however, pervades both the narratives accessible to jurors and the political process in which some rules of evidence are promulgated. *Id.*; see FED. R. EVID. 413–15 (permitting evidence of the accused’s prior acts of sexual assault in sexual assault and child molestation cases).

Evidence with strong emotional content particularly endangers accuracy.¹⁸¹ Emotion can focus attention and inspire critical thinking, but it can also cloud judgment about human behavior. Archetypes and metaphors hold sway because they stir feelings or trigger memories. For example, jurors recognize stock characters and then overvalue character traits as a determinant of behavior in life.¹⁸² In stories, the characters' actions are plausible and their tales compelling because their "nature" has been shown to the reader.¹⁸³ Stories offer close relationships to characters quite different from the merely approximate way in which one knows other people in everyday life, where neither "complete clairvoyance" nor "complete confessional" exists.¹⁸⁴ As in life, trials reveal intent only through layers of inference, and jurors have no direct access to the motivations of witnesses or parties. Cognitive types like protagonist and antagonist may be too binary for the intricate conflicts that trials seek to adjudicate. When stories turn complex litigants into the jurors' preexisting images of what characters should be, their implicit emotional response is a source of prejudice.¹⁸⁵

Narrative is thus not only the inevitable tool of advocates but also a sticky concept that has unseen influence in the process of adjudication. Narrative theory explains that the primary link between fact and judgment is the subjectivity of the adjudicator, including her commitments, attitudes, and experiences.

181. Overwhelmingly emotional evidence faces exclusion under the rules. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). But *Old Chief* and its progeny have made the argument against sensational (and narratively rich) evidence more difficult.

182. *See, e.g.,* LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 90–91 (1991) ("[P]eople are inveterate dispositionalists. They account for past actions and outcomes, and make predictions about future actions and outcomes, in terms of the person—or more specifically, in terms of presumed personality traits or other distinctive and enduring personal dispositions."); *see also* Gross, *supra* note 65, at 853 (commenting that in stories "character is a strong and reliable predictor of conduct, by authorial fiat" and that the "ambition of trial lawyers is to achieve that sort of control in court" by enacting "familiar, proven forms").

183. *See* Gross, *supra* note 65, at 853 ("We know why fictional people act as they do because we are told.").

184. E.M. FORSTER, *ASPECTS OF THE NOVEL* 74 (1927); *see also id.* at 47 ("We know each other approximately, by external signs, and these serve well enough as a basis for society and even for intimacy. But people in a novel can be understood completely by the reader, if the novelist wishes; their inner as well as their outer life can be exposed.").

185. *See* Dershowitz, *supra* note 141, at 104 ("[B]ad man' evidence—a history of prior criminality—is always relevant in literature and rarely in criminal trials. And it is precisely because of its prevalence in literature that it is so prejudicial in court."). Justice Jackson discussed the danger that juries will overweigh character in *Michelson v. United States*:

The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. . . . [Character] is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

335 U.S. 469, 475–76 (1948) (footnotes omitted).

But the purposes of trial require some distinction between producing legal truth and the constitutive experience of reading and responding to a story. Accordingly, trial procedures should focus on guiding the decision maker to maintain that boundary when it is feasible to do so. What the jury considers will never be the “whole truth” that witnesses ostensibly promise when they take the stand, but it should at least be “nothing but the truth,” and as free from cognitive bias as possible. The tension between the evidentiary rules and narrative expectations creates an opportunity to exact more analytic assessments. And pressing jurors to think outside of the constraints of archetypes might produce better outcomes at trial.

III. CAN TRIALS BALANCE STORIES AND ACCURACY?

A. END-TO-END MODIFICATIONS

The law of evidence has long engaged to some extent in the regulation of story telling. To date, however, references to the role of stories in both evidentiary rulings and academic commentary have primarily addressed the admission or exclusion of evidence.¹⁸⁶ The reflexive and uncritical acceptance of the story model by some courts, for example, has led to expansions of *Old Chief's* theory of admissibility. But a close look at narrative theory exposes procedural issues from end to end in the process of adjudication. And a different way to be attentive to the distortions revealed by narrative theory—and the focus of this Article—is to consider improvements in the *reception* of stories. Silencing advocates, who necessarily communicate in narrative, would prove impossible and, in important respects, undesirable.

The point here is not to suggest that narrative is inherently a flawed form or entirely incompatible with verdict accuracy. The intertwined relationship between different cognitive processes and the hybrid nature of decision making suggest instead that narrative reasoning can coexist with more analytic approaches. But a fuller understanding of narrative's problematic features points to possibilities for either insulating or empowering decision makers. Various aspects of trial mechanics might benefit from more nuanced rules designed to correct for some of the complexities of human communication and cognition. And the closer look at the story model offered here—which identifies both the limits of its explanatory power and the ways it can operate to deceive—begins to suggest reforms from the discovery stage through appellate review of evidentiary errors.

For example, due process demands that prosecutors disclose to the defense all “evidence favorable to an accused” that is “material either to guilt or to

186. See, e.g., Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975 (2008). Narrative theory has also informed questions concerning the admission of impeachment evidence that inhibits a defendant's opportunity to take the stand and thus precludes the defendant from telling his or her story. See, e.g., Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1 (1993).

punishment.”¹⁸⁷ This includes evidence that “might have affected the outcome of the trial.”¹⁸⁸ In practice, this standard has proven difficult to apply.¹⁸⁹ Narrative theory suggests some reasons why. A before-the-fact determination as to how each piece of evidence will interact with and affect other parts of the tale told at trial is virtually impossible as is any accurate prediction about whether particular parts of the story will awaken preconceptions that the fact finders bring to court. The prosecutor, moreover, approaches the assessment whether evidence is meaningfully exculpatory with his own convincing story of the defendant’s guilt already running on a reel in his mind. Even prosecutors with the best intentions may fail to appreciate the significance of a potential disclosure. At one end of the spectrum—where evidence like an alternative perpetrator holding the proverbial smoking gun lies—any prosecutor would be on notice of the fair-trial implications of discovery. But the case file will mostly contain evidence subject to judgment calls, such as small inconsistencies in eyewitness descriptions and other details that might detract from the credibility of a prosecution witness. Given that meaning is produced not only from the evidence itself but also from its interaction with other facts and arguments and its intersection with preexisting narrative schemes to which jurors have been exposed, there can be no confident forecasts about the impact an inconsistency will have. Accordingly, either consistently broad “open file” rules, or a standard that mandates disclosure of any evidence that “tends to negate . . . guilt,” would better respond to the due process concern.¹⁹⁰

Another aspect of the process of criminal adjudication that might be construed as a missed opportunity to counterweigh subjectivity is the debate over the reasonable doubt standard. Triers of fact not only determine “guilt” but also assess the “story of guiltiness,” in the words of the *Old Chief* decision.¹⁹¹ The reasonable doubt standard similarly contemplates “moral certainty” that a criminal defendant is guilty.¹⁹² The emphasis on a fact finder’s state of mind with regard to the evidence elevates subjective considerations and invites associative

187. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

188. *United States v. Agurs*, 427 U.S. 97, 104 (1976).

189. See, e.g., Alafair S. Burke, *Talking About Prosecutors*, 31 *CARDOZO L. REV.* 2119, 2132 (2010).

190. See MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2012) (imposing ethical standards for the disclosure of all evidence that “tends to negate the guilt of the accused or mitigates the offense,” without regard to materiality or its likely impact on trial outcome, a broader approach than *Brady*’s requirements); see also *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 *CARDOZO L. REV.* 1961, 1968 (2010) (discussing possible reforms such as open-file discovery).

191. *Old Chief v. United States*, 519 U.S. 172, 188 (1997).

192. See LAUDAN, *supra* note 45, at 32–50, 51 (discussing the origins of the reasonable doubt standard and various efforts to define it); see also, e.g., *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (stating that the reasonable doubt standard is met by a decision maker’s “near certitude”); Elisabeth Stoffelmayr & Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining “Beyond a Reasonable Doubt,”* 6 *PSYCHOL. PUB. POL’Y & L.* 769 (2000) (analyzing the standard of “moral certainty”).

processing. As Justice Harlan explained, concurring in *In re Winship*, the standard speaks to the “degree of confidence [a fact finder] is expected to have in the correctness of his factual conclusions.”¹⁹³ The requisite level of confidence, however, is poorly and inconsistently defined, and many jurisdictions decline to characterize it at all.¹⁹⁴ The extant instructions attempting a definition focus only on the strength of belief and provide no information as to the quality or quantity of evidence sufficient to support it.¹⁹⁵ Clearer and more comprehensive instructions could introduce a greater element of objectivity by, for example, directing fact finders to infer innocence when there are plausible explanations of the evidence consistent with that conclusion.¹⁹⁶ The defense in the *Jensen* case, for example, requested an instruction that contains echoes of Pardo and Allen’s explanation-based account,¹⁹⁷ which is one approach with some potential for balancing probability and narrative processes. The requested instruction read: “[I]f the evidence which you have heard is susceptible of two interpretations, each of which appears to be reasonable, and only one of which points to the guilt of the defendant, it is your duty to adopt the interpretation which will admit the defendant’s innocence and reject that which points to his guilt.”¹⁹⁸

Critically evaluating the story model also brings to light an incorrect assump-

193. 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

194. *See* *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (“[T]he Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof.”); *see also* *Dunbar v. United States*, 156 U.S. 185, 199 (1895) (“Repeated attempts have been made by judges to make clear to the minds of the jury what is meant by the words ‘reasonable doubt’; but, as said by Mr. Justice Woods, speaking for this court, in *Miles v. U.S.*, 103 U.S. 304, 312 [1880]: ‘Attempts to explain the term “reasonable doubt” do not usually result in making it any clearer to the minds of the jury.’”); Jessica N. Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept*, 22 AM. J. CRIM. L. 677, 687–88 (1995) (noting that several states forbid any definition of the standard); Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. REV. 979, 982–90 (1993) (discussing the lack of any fixed meaning for the standard).

195. *See* Larry Laudan, *Is It Finally Time to Put “Proof Beyond a Reasonable Doubt” Out to Pasture?*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW*, 317, 319 (Andrei Marmor ed., 2012) (“The brute psychological fact that a juror has no lingering, rational doubts about a defendant’s guilt may or may not indicate that the hypothesis of the latter’s guilt has passed epistemic tests that would warrant a well-founded belief that the defendant committed the crime in question.”).

196. *See, e.g.*, Michael S. Pardo, *Second-Order Proof Rules*, 61 FLA. L. REV. 1083, 1105–06 (2009) (proffering a reasonable doubt instruction that would improve the quality of decision making by explaining that facts are proven beyond a reasonable doubt “when there is a plausible explanation of the evidence and events in dispute that includes this fact and no plausible explanation that does not include this fact”); *see also, e.g.*, Elizabeth R. Tenney et al., *Unpacking the Doubt in “Beyond a Reasonable Doubt”: Plausible Alternative Stories Increase Not Guilty Verdicts*, 31 BASIC & APPLIED SOC. PSYCHOL. 1 (2009).

197. *See* Pardo & Allen, *supra* note 70, at 225.

198. Defendant’s Requested Non-Pattern Jury Instruction No. 14, *State v. Jensen*, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482 (Wis. Ct. App. 2010) (No. 02-CF-314). The related instruction the jury actually received read: “If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant’s innocence, you should do so and return a verdict of not guilty.” Jury Instructions, *State v. Jensen*, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482 (Wis. Ct. App. 2010) (No. 02-CF-314).

tion about atomistic evidence at the heart of appellate consideration of trial errors concerning the admission or exclusion of evidence. Evidentiary errors are subject to harmless error review,¹⁹⁹ and even constitutional errors at criminal trials do not require reversal if they are “harmless beyond a reasonable doubt.”²⁰⁰ In practice, two basic approaches to applying the harmless error standards have emerged: a “guilt-based” approach²⁰¹ and an “effect-on-the-verdict” approach.²⁰² Increasingly, rather than engage in the difficult exercise of assessing whether the error contributed to the verdict in some fashion, courts comb the record to ask “whether independent evidence of guilt taken alone *could* support the conviction.”²⁰³ In the *Jensen* case, for example, the Wisconsin Court of Appeals concluded that even if admission of Julie Jensen’s letter was a Confrontation Clause violation, the error was harmless because other trial testimony established the same basic facts.²⁰⁴ Narrative theory suggests, however, that there is no such thing as “independent evidence of guilt.” And the court’s conclusion underscores how stories might compromise legal as well as factual truth. It is not possible for judges to accurately picture the trial that “would have” included the improperly rejected evidence or excluded the evidence that was erroneously admitted.²⁰⁵ And in hindsight, almost every conviction will appear inevitable and sound.²⁰⁶

Instead of asking whether “in a trial that occurred without . . . error, a guilty verdict would surely have been rendered,” courts might inquire “whether the guilty verdict actually rendered in this trial was surely unattributable to the error.”²⁰⁷ In other words, reviewing courts should not attempt to imagine a trial

199. See FED. R. EVID. 103 (stating that evidentiary errors require reversal only where “the error affects a substantial right of the party”); FED. R. CRIM. P. 52(a) (defining “harmless error” as “[a]ny error, defect, irregularity, or variance that does not affect substantial rights” and providing that such errors “must be disregarded”).

200. *Chapman v. California*, 386 U.S. 18, 24 (1967).

201. See Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 59.

202. See Harry T. Edwards, Lecture, *To Err is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1171 (1995).

203. Garrett, *supra* note 201; see also Edwards, *supra* note 202 (explaining that, under a guilt-based approach, “more often than not, [judges] review the record to determine how [they] might have decided the case; the judgment as to whether an error is harmless is therefore dependent on [their] judgment about the factual guilt of the defendant”).

204. See *State v. Jensen*, 2011 WI App 3, ¶¶ 38–73, 331 Wis. 2d 440, 465–74, 794 N.W.2d 482, 495–99 (Wis. Ct. App. 2010).

205. See Edwards, *supra* note 202, at 1173 (“[I]t is impossible for an appellate judge to consider whether an error has influenced a jury without thinking about the weight of the evidence against the defendant; and once an appellate judge lapses into this mindset, it is difficult to avoid guilt-based decisionmaking.”).

206. Cf. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 200–04 (2011) (discussing the conclusions on direct appeal that errors were inconsequential or that defendants were obviously guilty in hundreds of cases with subsequent postconviction exonerations through DNA evidence).

207. *Virgin Islands v. Davis*, 561 F.3d 159, 165 (3d Cir. 2009) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

free of error but instead consider the trial that did take place. They could then holistically evaluate the seriousness of the error and its likely position in the constellation of facts that emerged at trial.²⁰⁸ That examination might include an assessment of the narrative advanced by the government, and the extent to which a particular evidentiary error affects the entire narrative arc or merely a discrete or insignificant piece of it. And even in the case of testimony that broadly interacts with the trial narrative, courts might conclude that either admitting or excluding wholly duplicative or cumulative evidence did not affect a verdict. On the other hand, the inclusion of a unique and inculpatory piece could alter the reception of other evidence, as could the exclusion of a distinctive and exculpatory one.

B. AN APPLIED THEORY OF LEGAL FICTIONS

Narrative theory suggests that it is impossible for prosecutors to assess materiality *ex ante*, or for judges to imagine a separate error-free trial. It thus exposes the legal fiction of discrete evidentiary components. A similar approach to the underlying assumption in jury instructions holds promise for improving jury deliberation and decision making. Before considering modifications, however, a fuller understanding of the “untruthful” quality of instructions is required. That is, what premise stands in the way of reform?

The idea that fictions necessarily exist in the law—both producing it and produced by it—is an old one.²⁰⁹ The purpose of legal fictions, according to the classic definition, is to “reconcile a specific legal result with some premise.”²¹⁰ A legal fiction is often a “factual statement a judge, a legal scholar or a lawyer tells, while simultaneously understanding full well—and also understanding that the audience understands—that the statement is *not fact*.”²¹¹ Some of these false statements are simply procedural devices “recognized as having utility.”²¹² “Constructive” service of process and “constructive” notice, for example, have an inherent “as if” quality.²¹³ Peter Smith has put a modern gloss

208. And in this more holistic analysis, an “uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict.” *O’Neal v. McAninch*, 513 U.S. 432, 435 (1995); *see also* Edwards, *supra* note 202, at 1194 (concluding that, if there is “any serious doubt” as to “what a jury might have done if the case had been tried without error,” it “ought to be returned to the jury”).

209. *See* LON L. FULLER, *LEGAL FICTIONS* 1 (1967) (stating that there is “scarcely a field of the law in which one does not encounter” legal fictions).

210. *Id.* at 51; *id.* at 4–5 (arguing that keeping the “skeleton” of legal fictions “in the closet is both dangerous and unbecoming”); *accord* Louise Harmon, *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 *YALE L.J.* 1, 15 (1990) (explaining that Fuller connects the danger of legal fictions to lack of awareness about their falsehood).

211. Annelise Riles, *Is the Law Hopeful?* 3–4 (Cornell Law Faculty, Working Paper No. 68, 2009), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1408522. Other examples of factual fictions include *in rem* forfeiture and the equation of a corporation with a person. *See id.*

212. L.L. Fuller, *Legal Fictions*, 25 *ILL. L. REV.* 363, 369 (1930).

213. *See, e.g.*, *Warren v. Stancliff*, 251 A.2d 74, 76 (Conn. 1968) (“Constructive notice is premised on the policy determination that under certain circumstances a person should be treated *as if* he had actual knowledge so that one should not be permitted to deny knowledge when he is acting so as to

on this concept and defined fictions as legal rules offered as factual suppositions even though social science demonstrates their falsehood.²¹⁴

Legal fictions are generally regarded as both necessary and practical. As Nancy Knauer explains, a legal fiction presents a conundrum because it “retains its utility *despite* its falsity.”²¹⁵ They are also, however, viewed with suspicion. A survey of the Supreme Court’s use of the term “legal fiction” reveals an underlying sense that there is something dangerously deceptive about them. The phrase generally appears in opinions with negative connotations and is most often used in dissent.²¹⁶ On the other hand, even legal fictions’ detractors find them harmless so long as there is full knowledge of the pretense. According to Jerome Frank’s realist critique, if they are used without awareness of their “purely ‘operational’ character,” then they become “harmful dogmas.”²¹⁷ But

keep himself ignorant.” (emphasis added)); *Latimer v. Union Pac. Ry.*, 43 Mo. 105, 110 (Mo. 1968) (explaining that, when the statutory requirements are met, “judgment should go against the others in like manner *as if* they were served with process, the service of process upon one being regarded as constructive service upon the rest” (emphasis added)); *see also* Riles, *supra* note 211, at 6–7. Riles builds on the work of epistemologist Hans Vaihinger, who concluded that legal fictions are “As ifs”—neither true nor not true but rather themselves the tension between what is true and not true. *Id.* (citing H. VAHINGER, *THE PHILOSOPHY OF “AS IF”* xlvii (C.K. Ogden trans., 2001) (1924)).

214. Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1441 (2007).

215. Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1, 6 (2010).

216. The Court has used the term approximately one hundred times but has not engaged in any extended analysis of the concept. The term has been deployed primarily as a descriptive phrase, such as in Justice Scalia’s claim that it is a “legal fiction” that committee reports express the will of Congress. *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 647 (2005) (Scalia, J., concurring in part). Justice Souter’s dissent in *Caballes* also termed it a “legal fiction” that drug-sniffing dogs are infallible. *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (Souter, J., dissenting); *see also* Frederick Schauer, *Legal Fictions Revisited I* (Aug. 3, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904555 (“It is no compliment nowadays to accuse a judge, a court, or a theorist of employing a ‘legal fiction.’”).

A more classic understanding of legal fictions appears in cases citing, for example, the fiction that heirs who disclaim property have predeceased decedents, *United States v. Craft*, 535 U.S. 274, 279 (2002), the fiction that states “own” wild animals within their borders, *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979), the fiction that unwanted counsel “represents” the defendant, *Faretta v. California*, 422 U.S. 806, 821 (1975) (characterizing the concept as a “tenuous and unacceptable legal fiction”), and the fiction that an annulment makes the marriage ceremony as though it had never occurred, *Sutton v. Leib*, 342 U.S. 402, 410 (1952).

The Court has also acknowledged that legal fictions are a practical device with limits on appropriate usage. On the issue whether the term “person” in the Sherman Act includes sovereigns, the Court acknowledged that “legal fictions have an appropriate place in the administration of the law when they are required by the demands of convenience and justice.” *United States v. Cooper Corp.*, 312 U.S. 600, 619–20 (1941) (Black, J., dissenting) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 92 (1934), *superseded by statute*, Sherman Act, 15 U.S.C. § 15(a), *as recognized in* *U.S. Postal Serv. v. Flamingo Indus. (USA)*, 540 U.S. 736 (2004)). And the Court has further stated that legal fictions are not “unbending and uncontrollable principle[s] of law” but yield to actual facts. *Columbus S. Ry. Co. v. Wright*, 151 U.S. 470, 479 (1894) (quoting *Missouri v. Severance*, 55 Mo. 378, 388 (1874); *see also, e.g., Pullman’s Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 29 (1891) (declining to find unconstitutional as incompatible with the Commerce Clause a state tax based on the “legal fiction” that “personal property has its *situs* at the owner’s domicile”).

217. JEROME FRANK, *LAW AND THE MODERN MIND* 167 (1930); *see also* JEREMY BENTHAM, *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 509 (J.H. Burns & H.L.A. Hart eds., 1977)

they are expedient assumptions so long as they are “consciously false.”²¹⁸

The theory of legal fictions provides a useful starting point for any discussion of potential changes to jury instructions. Limiting instructions are recognized fictions, but they persist unchanged and cause some harm because the particular falsehood within them has not been fully exposed. They potentially have great utility but only with elevated awareness about how they interact with narrative and what qualities make them fictional. The foregoing discussion of narrative in the courtroom helps define the flawed assumption underlying limiting instructions: that any piece of evidence can be cleanly excised from the narrative that unfolds at trial.

This fiction dates back to the first uses of limiting instructions in the early Republic when courts began instructing jurors on the use of “multiple evidence” that is admissible for one purpose and inadmissible for others.²¹⁹ Contemporary jurors, who purportedly need to be “shielded, guided, and controlled” by the court,²²⁰ also receive limiting instructions to mitigate their exposure to inadmissible evidence like pretrial publicity,²²¹ testimony ruled irrelevant or prejudicial,²²² or evidence within a rule of exclusion, such as the ones prohibiting the introduction of insurance information²²³ or subsequent remedial measures.²²⁴

Most of the nonconstitutional exclusionary rules preclude the use of evidence only for particular inferences.²²⁵ It is impermissible, for example, to introduce prior crimes by a defendant to show her propensity to act in conformance

(2d enlarged ed. 1823) (deriding legal fiction as “delusion”); Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1256 (1990) (distinguishing legal fictions from interpretive fictions).

218. Riles, *supra* note 211, at 6–8.

219. See 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 13, at 40–43 (1904) (noting that it “is uniformly conceded that the instruction of the Court suffices” to prevent the jury from “misusing the evidence”). Several nineteenth century cases refer to limiting instructions. In *State v. Farmer*, for example, the court wrote that “evidence properly admissible for one purpose may be so perverted in its use as to effect a different and illegitimate purpose . . . [but] [t]he correction of its abuse lies in such explanation as the presiding judge may feel required to give to the jury concerning it.” 24 A. 985, 986 (Me. 1892); see also *Pegg v. Warford*, 7 Md. 582, 607 (1855) (explaining that, when appropriate, a judge should “point out [to the jury] the branch of the case to which the [challenged] evidence is not to be applied”); *Willis v. Bernard*, (1832) 131 Eng. Rep. 439, 441; 8 Bing. 376, 382–83 (finding that admitted evidence did not create reversible error when “the jury were cautioned that it was not to be taken as evidence” for a different purpose).

220. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 277 (1978).

221. See, e.g., KEVIN F. O’MALLEY ET AL., 1A FEDERAL JURY PRACTICE & INSTRUCTIONS § 11:08 (6th ed. 2012).

222. See, e.g., *id.* § 11:06 (providing sample instructions to the jury on improperly considering objections and rulings on the admission of evidence).

223. See FED. R. EVID. 411; see, e.g., WASHINGTON PATTERN INSTRUCTIONS—CIVIL JURY 2.13 (6th ed. 2009).

224. See FED. R. EVID. 407; see, e.g., 1 PENNSYLVANIA BAR INSTITUTE, PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 3.50 (4th ed. 2010).

225. See, e.g., Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 568 (1991) (“Too many gaps would be created if evidence legitimately relevant and admissible for one point was barred because it was irrelevant and inadmissible on some other.”).

with those other acts.²²⁶ That same evidence is admissible, however, when it fits within a theory other than propensity—such as “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident”²²⁷—or when offered to impeach a witness,²²⁸ including a criminal defendant who takes the stand.²²⁹ The underlying theory is one of nonpropensity-based relevance in the former case and the sense that convictions indicate greater willingness to breach the social contract, including by committing perjury, in the latter. Jurors in the *Jensen* case, for example, heard evidence that Mark Jensen frequently consumed pornography and had a substantial number of files containing pornography saved on his computer because the court deemed it relevant to Mark’s vindictive relationship with Julie as well as the frequency of his Internet use.²³⁰ Jurors commented after the trial, however, that his possession of pornography broadly discredited the defendant and influenced their conclusion that he tortured and killed his wife.²³¹ Similarly, when a defendant takes the stand and is exposed to questioning about prior crimes on the theory that they impeach her credibility, no one “believes that the jury will consider this evidence only as affecting credence, particularly if the crime on trial is similar to the prior offenses.”²³² Notwithstanding that the jury typically receives instructions to consider character evidence only with respect to truthfulness,²³³ the evidence reflects more generally on the likelihood that the defendant committed the crime. And as a result, the impeachment exception has a profound effect on whether defendants choose to take the stand.²³⁴

The difficulty that jurors have “unbiting the apple of knowledge” in response

226. FED. R. EVID. 404(b)(1).

227. FED. R. EVID. 404(b)(2).

228. FED. R. EVID. 608.

229. FED. R. EVID. 609(a)(1)(B).

230. *State v. Jensen*, 2011 WI App 3, ¶¶ 85–88, 331 Wis. 2d 440, 479–81, 794 N.W.2d 482, 502 (Wis. Ct. App. 2010).

231. See Kertscher, *supra* note 24 (reporting that the jurors were bothered by the images and that they affected evaluations of the defendant’s demeanor as well).

232. Uviller, *supra* note 47, at 869; see also Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357 (2009) (reporting a statistically significant association between the jury’s exposure to a defendant’s criminal record and convictions in cases coded as having weaker evidence); Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 67 (1995) (“Mock jurors were more likely to convict the defendant when they had evidence of a prior conviction than when they had evidence of a prior acquittal or no record evidence. . . . Judge’s limiting instructions were ineffective in guiding jurors’ use of prior record evidence.”).

233. FED. R. EVID. 404(b).

234. See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 486, 490–91 (2008) (finding that, of factually innocent defendants who did testify, only forty-three percent had a criminal record that could have been introduced against them, but of the factually innocent defendants who did not testify, ninety-one percent had a criminal record that could have been exposed to the jury); Eisenberg & Hans, *supra* note 232, at 1357 (documenting that sixty percent of defendants without criminal records chose to testify, compared to forty-five percent of defendants with criminal records).

to pro forma cautionary instructions has been widely observed.²³⁵ Several opinions recognize that limiting instructions may fall short of their intended effect. “Discrimination so subtle,” Judge Cardozo famously remarked, “is a feat beyond the compass of ordinary minds.”²³⁶ Justice Robert Jackson termed them an “unmitigated fiction,”²³⁷ and Judge Learned Hand described the “mental gymnastic[s]” jurors must perform for such instructions to be effective.²³⁸ But because limiting instructions are essential to the administration of the jury system, as well as to the application of an evidence code with many rules of limited admissibility, most courts do not scrutinize them and only partially acknowledge their inaccuracy.²³⁹

Judicially recognized limitations on the curative effect of limiting instructions come exclusively from the Supreme Court’s decisions on the admissibility of confessions. The Court has determined that, notwithstanding instructions, juries are incapable of discounting the prejudicial effect of a coerced confession²⁴⁰ or a codefendant’s confession.²⁴¹ Although that is certainly true, it may be equally difficult for jurors to ignore prior convictions,²⁴² the defendant’s failure to testify,²⁴³ and pretrial publicity.²⁴⁴ Or, at least, there is no data-based reason to

235. DAMASKA, *supra* note 134, at 50; *see also* FRANK, *supra* note 217, at 184 (comparing limiting instructions to “exorcising phrases intended to drive out evil spirits”); Uviller, *supra* note 47, at 869 (“Although jurors seem to digest knotty principles, no one can believe in actual compliance with instructions of this sort.”).

236. *Shepard v. United States*, 290 U.S. 96, 104 (1933).

237. *Krulwitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); *see also* *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (portraying limiting instructions as “pragmatic” and “rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation”).

238. *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (describing a limiting instruction as “the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else”).

239. Peter Smith, for example, has argued that judges are reluctant to abandon the fiction that juries follow instructions because forswearing limiting instructions would “work significant, and perhaps severely constraining, changes in accepted rules of evidence” and potentially require “mistrials in every case in which inadmissible evidence is heard by the jury.” Smith, *supra* note 214, at 1492. Smith argues further that, if jurors cannot be presumed to follow instructions, then the legitimacy of the jury system as a whole is in peril. *Id.*

240. *See Jackson v. Denno*, 378 U.S. 368, 386 (1964) (explaining that such evidence “inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness”).

241. *Bruton v. United States*, 391 U.S. 123, 135 (1968) (“[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.”); *cf.* *Parker v. Randolph*, 442 U.S. 62, 72 (1979) (stating that confessions present “probably the most probative and damaging evidence” (quoting *Bruton*, 391 U.S. at 139 (White, J., dissenting)), *abrogated* by *Cruz v. New York*, 481 U.S. 186 (1987)).

242. *See* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 *LAW & HUM. BEHAV.* 37, 47 (1985) (concluding from an empirical study that presentation of the defendant’s criminal record increases the likelihood of conviction and that “limiting instructions do not appear to correct that error”).

243. *See Griffin v. California*, 380 U.S. 609, 614 (1965) (considering if “the inference of guilt for failure to testify as to facts peculiarly within the accused’s knowledge is in any event natural and

conclude that jurors have more difficulty following instructions with respect to confessions. The available social science indicates that limiting instructions fall short when it comes to any highly salient or emotionally charged content, and that improving them will require broader correction of their flawed premise.

The standard formulation of the fiction contained in limiting instructions is that courts are relying on a factually incorrect assumption that juries will follow them.²⁴⁵ But “jurors following instructions” is a presumption rather than a fiction. And jurors generally do follow instructions, or at least they try. Focusing on “following instructions” as the core fiction has inhibited reform; no court wants to accept the consequences of jurors ignoring other kinds of instructions.²⁴⁶ Moreover, while it is obvious that jurors cannot follow them to the letter, it is also apparent that limiting instructions serve some purpose beyond efficiency and external legitimacy. Advocates routinely request them, and both the rules of evidence and case law recognize some degree of operational effect.²⁴⁷ If the discussion of limiting instructions were to refocus on insights from narrative theory rather than these general concerns with juror compliance, then reforming instructions would not risk abandoning them altogether.

Narrative theory sheds light on the meaning and force of evidence outside of any linear presentation or frame-by-frame processing. Testimony has a refractive quality and both illuminates and bounces off other parts of the trial narrative. Because each new piece of evidence fits into a “shifting mosaic,”²⁴⁸ its effect is hard to classify or quantify. The narrative lens exposes the difficulty of

irresistible”); *see also* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 *STAN. L. REV.* 1477, 1534–35 (1999) (explaining that “[j]udges who want jurors to take seriously the principle that guilt should not be inferred from a refusal to waive the privilege against self-incrimination will have to come up with a credible explanation for why an innocent person might fear the consequences of testifying,” but that he is “not sure there *is* a credible explanation”).

244. *See, e.g.*, Simon, *supra* note 98, at 190 (analyzing empirical tests that found pretrial publicity linked to a sixteen percent increase in overall conviction rates).

245. *See, e.g.*, Smith, *supra* note 214, at 1450–51.

246. *Id.* at 1478–80 (claiming that “new legal fictions” such as instructions appeal to judges because they “serve a legitimating function and because their abandonment might have de-legitimizing consequences”).

247. *See* FED. R. EVID. 105 advisory committee’s note (suggesting that jurors can disregard inadmissible evidence but disavowing “any implication that limiting or curative instructions are sufficient in all situations”); FED. R. EVID. 403 advisory committee’s note (citing the potential effectiveness of a curative instruction as a factor in balancing the probative value of evidence against its prejudicial effect); *Carter v. Kentucky*, 450 U.S. 288, 301, 303 (1981) (stating that an admonishment to the jury is a sufficiently “powerful tool” to “remove from the jury’s deliberations any influence of unspoken adverse inferences” (quoting *Lakeside v. Oregon*, 435 U.S. 333, 339 (1978))); *see also* Sklansky, *supra* note 96 (rebutting the conventional wisdom that limiting instructions are totally ineffective and concluding that they “probably do work, although imperfectly and better under some circumstances than others”).

248. *United States v. Schipani*, 289 F. Supp. 43, 56 (E.D.N.Y. 1968); *see also* *Ryan v. United States*, 759 F. Supp. 2d 975, 980 (N.D. Ill. 2010) (commenting on defendant’s argument that the evidence on various counts of conviction was intertwined and “went into one churning cauldron”), *vacated*, 132 S. Ct. 2099 (2012); BURNS, *supra* note 36, at 150 (“Stories solve the problem of information overload by

disentangling implicit and explicit influences, and the theory of legal fictions suggests some solutions. The way to render fictions “wholly safe,” according to Lon Fuller, is to use them only with “complete consciousness of [their] falsity.”²⁴⁹ Their distorting effect “varies inversely with the acuteness” of the awareness of their untruth.²⁵⁰ Making them “safe” requires redefinition, or “a compensatory change [that] takes place in the meaning of the words or phrases involved, which operates to bridge the gap that previously existed between the fiction and reality.”²⁵¹ Simply put, courts should stop pretending that juries did not hear evidence at all, expressly acknowledge the significance of what they did hear, and offer instructions that might counteract the preexisting schemas that can affect fact finders’ interpretations of evidence. Understanding the limits and implications of the story model does not require broad constraints on the form in which evidence is presented so much as information that can heighten jurors’ attention.

C. USING LIMITING INSTRUCTIONS TO COUNTERACT NARRATIVE BIAS

Judges cannot ultimately control what evidence jurors will consider for which propositions or how much weight they will give it. At some level, juries consider all evidence for all purposes.²⁵² But instructions could be more than incantations if courts substituted useful concepts for the pretense of not hearing. Merely instructing jurors to purge certain considerations only removes explicit ones, even when jurors act in entirely good faith. Implicit influences may have the most powerful effect on how jurors listen and what they privilege, but most instructions ignore them and thus give them free reign.

The hybrid model of jury decision making outlined above highlights some of the shortcomings of limiting instructions. Giving instructions after receipt of all the evidence conflicts with the cognitive psychological research finding that jurors associate new material with previously received information.²⁵³ Telling jurors not to take evidence into account also precludes deliberations on the forbidden evidence or inferences. Yet insights from narrative theory—combined with empirical findings that jurors can use multiple cognitive processes, that those ways of thinking interact, and that conflicting models can challenge and change each other—indicate that candid deliberation will help jurors disregard

allowing a continuing reintegration of new information and reorganization of that information according to the changes in meaning that the new information allows or requires.”).

249. FULLER, *supra* note 209, at 9–10; *see also id.* at 22 (“Redefinition is proper where it results in the creation of a useful concept—where the dead (redefined) fiction fills a real linguistic need.”).

250. *Id.* at 10.

251. *Id.* at 14.

252. BURNS, *supra* note 36, at 147.

253. *See* Simon, *supra* note 65, at 530–31 (discussing the coherence effect); *see also* Burns, *supra* note 160, at 1437 (“[A] single additional detail, and certainly a constellation of additional details, can substantially change the significance of the stories told at trial.”).

the most distorting evidence.²⁵⁴ Other theories of social psychology suggest that, even were fact finders able to disregard forbidden information, they may not be willing to do so under the conditions imposed by standard limiting instructions. According to ironic processes and reactance theory, for example, limiting instructions delivered without any supporting rationale may have a backfire effect that underscores inadmissible evidence.²⁵⁵ Most individuals strongly prefer to maintain their autonomy and, when they feel it to be threatened, may perform the restricted behaviors to reestablish freedom.²⁵⁶

If courts were more attentive to the candor, content, and timing of instructions, they could capitalize on potential de-biasing effects.²⁵⁷ Though it may be impossible to excise particular pieces of evidence or to wholly prohibit the consideration of evidence for particular purposes, an informed jury's reliance on that evidence can be reduced. Instructions could enable jurors to deliberate effectively about what they hear, could explain why admissibility is limited, and could prepare jurors before they receive evocative evidence. Those changes might foreground objective processes and help jurors counter narrative expectations rather than unconsciously fulfill them.

First, permitting mention of inadmissible evidence—and its role in the narrative the jury constructs—holds promise for later neutralizing its impact on deliberations. The jury system itself depends in part on the idea that comparing different interpretations and debating the significance of the facts makes the whole greater than the sum of its parts, and that juror deliberations produce a “counterbalancing of various biases.”²⁵⁸ There is a useful and growing body of research on the nature of the information that juries receive and the way in which they receive it, but the effect of the deliberative process itself

254. See Sloman, *supra* note 97, at 11 (“Situations abound in which people first solve a problem in a manner consistent with one form of reasoning and then, either with or without external prompting, realize and admit that a different form of reasoning provides an alternative and more justifiable answer.”).

255. See Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 *PSYCHOL. REV.* 34, 34 (1994) (explaining that the effort to suppress thoughts actually underscores them because “processes that undermine the intentional control of mental states are inherent in the very exercise of such control”); see also Kerri L. Pickel et al., *Jurors' Responses to Unusual Inadmissible Evidence*, 36 *CRIM. JUST. & BEHAV.* 466, 476 (2009) (“[T]he jurors' primary objective is to decide on a verdict, so the operating process must seek information relevant to this task . . . [which] is not semantically unrelated to the inadmissible evidence [presented at trial], so the former may serve as a retrieval cue for the latter, making suppression of it difficult.”).

256. One of the earliest and best-known demonstrations of this effect is the finding in a 1959 experiment that mock jurors who were informed that a defendant was covered by insurance (which is not admissible on the issue of damages) awarded slightly higher damages (\$37,000) than mock jurors who were informed that the defendant had no insurance coverage (\$33,000). When expressly instructed to set aside the insurance information in their deliberations, jurors awarded even higher damages: \$46,000. Dale W. Broeder, *The University of Chicago Jury Project*, 38 *NEB. L. REV.* 744, 754 (1959).

257. For an analogue, see the discussion of an instruction intended to alert jurors to implicit biases in Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1181–84 (2012).

258. *Ballew v. Georgia*, 435 U.S. 223, 234 (1978); see also *Allen v. United States*, 164 U.S. 492, 501 (1896) (“The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.”).

is under theorized.²⁵⁹ Deliberations are complex and difficult to recreate clinically. Little is known about them relative to other aspects of the trial. Indeed, it is a touchstone of the jury system that deliberations are rarely if ever examined.²⁶⁰ Two notable exceptions include videotaped deliberations of fifty civil juries in Arizona state cases and the earlier (and controversial) Chicago Jury Project, in which members of actual jury pools listened to hypothetical cases and reached verdicts.²⁶¹ Those studies shed some light on how deliberations interact with the story model. As scholars have noted, “[i]t appears that juries try to reconcile their individual narratives and arrive at a consistent story they can all agree on.”²⁶² The process is a “combination of rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to group discussion.”²⁶³

There are some studies that contradict this model of dynamic deliberation and conclude that it emphasizes, rather than attenuates, the potency of inadmissible evidence. In the political context, exploration of the effect of deliberation has revealed that it can “make group members more extreme in their views than they were before they started to talk.”²⁶⁴ Researchers have also found that deliberation may magnify inaccuracies because “[a]s the size of the majority grows, the statements about evidence and arguments that support the majority position become more numerous than the comments that support the minority view, and there is increasing pressure on the shrinking minority to conform.”²⁶⁵ The weight of the data suggests, however, that when a unanimous jury verdict is

259. See Groscup & Tallon, *supra* note 175, at 47 (“[T]he Story Model is well-articulated in terms of the individual juror’s information processing, but there is a lack of research investigating the impact story construction has on jury decision-making. It is largely unknown how the Story Model will interact with the deliberation process to influence and inform decision-making.”); see also Joel D. Lieberman et al., *Inadmissible Evidence and Pretrial Publicity: The Effects (and Ineffectiveness) of Admonitions to Disregard*, in *JURY PSYCHOLOGY*, *supra* note 175, at 67, 78 (noting the discrepancy between criminal trials and laboratory-based juror simulations because of the absence of deliberation and citing studies on group verdicts that indicate diminished inadmissible-evidence effects); Pickel et al., *supra* note 255, at 479 (“As with most studies of inadmissible evidence, a limitation of the current experiments is that the jurors made decisions as individuals but did not deliberate.” (citation omitted)).

260. See *Tanner v. United States*, 483 U.S. 107, 127 (1987) (explaining that “long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry”).

261. See VIDMAR & HANS, *supra* note 112, at 137–40 (discussing some of the deliberations recorded during the Arizona Jury Project); see also HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 486 (1966) (describing the dynamic in deliberations, including talk that “moves in small bursts of coherence, shifting from topic to topic with remarkable flexibility”); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 *PSYCHOL. PUB. POL’Y & L.* 622, 627 (2001) (reviewing 206 studies, 70 of which used actual juries); Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 *LAW & SOC. INQUIRY* 323 (1991) (discussing the impact and legacy of the Chicago Jury Project).

262. VIDMAR & HANS, *supra* note 112, at 137.

263. KALVEN & ZEISEL, *supra* note 261, at 489.

264. See David Schkade et al., *What Happened on Deliberation Day?*, 95 *CALIF. L. REV.* 915, 915 (2007) (focusing on political discussion); see also Simon, *supra* note 65, at 518 (mentioning polarization research, which demonstrates “that deliberation in groups causes systematic shifts that amplify the group members’ predeliberation positions”).

265. VIDMAR & HANS, *supra* note 112, at 144.

required, jurors are willing to change voting preferences, and that deliberation can mitigate polarization by providing jurors with identity affirmation through the group dynamic rather than the assertion of previously held beliefs.²⁶⁶

Thus, one possibility is allowing jurors to deliberate on—and therefore reaffirm—the permissible and impermissible purposes of evidence. Jury scholars Shari Seidman Diamond and Neil Vidmar have advocated for more detailed instructions along these lines. In the context of the rule prohibiting jury consideration of insurance coverage, they argue that “simply ignoring [a] topic generally will not prevent it from being raised.”²⁶⁷ A frank and accurate instruction, they maintain, “promises to be the most effective way to combat misinformation about, and inappropriate influence from, jury discussions about insurance.”²⁶⁸ Candid instructions that acknowledge the impact of character evidence, explain its limited admissibility, and allow jurors to discuss the impression it left—instead of simply charging jurors to ignore it altogether with respect to the underlying offense—might be productive as well. Allowing consideration of the evidence to this extent also has the potential to counteract ironic process effects, which make the influence of impermissible information stronger precisely because the effort to dispel the thought heightens its accessibility.²⁶⁹ Allowing deliberation on forbidden topics makes space to collectively reinforce the instruction to disregard them. It also transcends simple directives to be

266. See, e.g., Jeffrey Kerwin & David R. Shaffer, *Mock Jurors Versus Mock Juries: The Role of Deliberations in Reactions to Inadmissible Testimony*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 153, 158 (1994) (concluding that instructions are more likely to be followed when jurors meet as a collective body rather than when they vote for a verdict individually). For a discussion of the reduction of defensive biases through affirmations of valued self-identity, see David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 119, 120–22 (2002).

267. Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1911 (2001). The authors document jury speculation about forbidden topics such as insurance coverage and attorneys’ fees awards and suggest disclosure of the parties’ insurance status accompanied by an instruction on its irrelevance. *Id.*; see also VIDMAR & HANS, *supra* note 112, at 163 (recounting jury deliberations during which jurors read aloud the instruction on considering prior felonies only for credibility and reminded each other of its intended use); Thomas R. Carretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291, 307–08 (1983) (concluding, from mock jury deliberations, that jurors undertake “self-monitoring” and remind each other to disregard inadmissible evidence). A related argument that prior-crimes evidence should be broadly admitted was recently advanced by Ronald Allen and Larry Laudan. In their view

[o]nly in that way can jurors arrive at an informed assessment of the bearing, frequency, and magnitude of the prior crimes they have reasonably inferred the defendant to have committed . . . exclusion can do nothing whatever to block jurors from prejudicially overinterpreting the relevance of the priors that they suppose the defendant to have.

Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 522 (2011).

268. Diamond & Vidmar, *supra* note 267, at 1911.

269. Lieberman et al., *supra* note 259, at 86 (suggesting that a technique that shows promise for reducing ironic process effects—from the clinical arena of paradoxical interventions—would be “to actually have the individual focus on the to-be-suppressed thought”).

“objective,” which can merely amplify identity-protective cognition.²⁷⁰ A broader mandate for deliberation could thus mitigate some of the drawbacks of narrative constructs by exposing implicit processes to external critique and encouraging the formation of new commitments.²⁷¹

A second, related approach with the potential to improve decision making involves reframing the content of instructions to include procedural justifications for exclusion. Again, there are some contrary findings,²⁷² but the research suggests that explaining the rationale for admonitions to disregard information enhances the effectiveness of the instruction.²⁷³ The possibility of a reinforcement effect for a strong procedural instruction, for example, finds some empirical support in analyses of recorded juror deliberations.²⁷⁴ When the policy underlying exclusion is explained, jurors better understand the core purposes of trial and their role.²⁷⁵ And offering logical reasons for exclusion can shape an

270. See Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 22–23 (2011).

271. See Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 206 (1989) (asserting that group deliberation “forces people to realize that there are different ways of interpreting the same facts” and that even though “this rarely provokes a prompt revision of their own views, it necessarily reminds the jury members that their perceptions are partly conjectural” and that “alternative construals are possible”); see also VIDMAR & HANS, *supra* note 112, at 162 (“[D]eliberating groups of adults who learned of a defendant’s prior criminal record were obedient to the judge’s instructions, even admonishing each other that they were supposed to disregard the criminal record if one of them mentioned it.”). *But see* Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 435 (1990) (reporting that deliberations may increase the effect of publicity on jurors).

272. See, e.g., Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 407 (1995) (documenting a backfire effect with regard to prior-conviction evidence accompanied by a judicial explanation, although not with regard to hearsay evidence accompanied by instructions as to unreliability). Another discouraging finding in the research is that judges perform no better than jurors in experiments gauging their ability to disregard improper considerations. See VIDMAR & HANS, *supra* note 112, at 164 (noting that “legal training does not necessarily make judges less prone to make certain errors in following the law” (citing Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001))).

273. See Lieberman et al., *supra* note 259, at 78 (citing various studies suggesting that, “if jurors are given a logical reason for why evidence is inadmissible and they believe it to be legitimate, then instructions to disregard the evidence can be successful”); see also, e.g., Diamond & Vidmar, *supra* note 267, at 1911 (arguing that “routinely incorporating the instruction in the jurors’ normal instruction package promises to be the most effective way to combat misinformation about, and inappropriate influence from, jury discussions about insurance”); Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC’Y REV. 513, 558 (1992) (“When jurors are taken seriously and efforts are made to deal with their concerns and expectations, that is, when they are treated as active co-participants rather than passive sponges, they appear to be willing and able to respond more appropriately to the dictates of legal rules.”).

274. Ellsworth, *supra* note 271, at 222 (reporting that 114 of 172 remarks in recorded deliberations about jurors’ duties were about the judge’s instructions to disregard outside influences, avoid speculation about sustained objections, or leave aside considerations as to the penalty or consequences of the verdict).

275. See Eugene Borgida & Roger Park, *The Entrapment Defense: Juror Comprehension and Decision Making*, 12 LAW & HUM. BEHAV. 19, 32 (1988) (stating that jurors more readily disregard prior-conviction evidence upon instruction if they share an “intuitive view” that it should not be used);

intuitive acceptance that some evidence ought to be set aside.

Both the analysis of the story model's effect on trial and the social science on the impossibility of directed forgetting counsel in favor of this mindful discounting approach. Take belief perseverance, for example. It causes information to bind quickly to existing receptors and makes it difficult to disaggregate and undo perceptions. Consequently, effective instructions have to address both information itself and its organizing principles. As one study puts it, "ignoring the information itself is not enough" because the "inferences that explain and accommodate the information into an integrated picture of the world must also be ignored, or the information will affect decision making indirectly."²⁷⁶ Procedural instructions that help shape jurors' intuitions about evidence have the potential to challenge those inferences. Similarly, consider "reactance theory," which is the tendency documented by social scientists for jurors to find forbidden information more attractive when they are deprived of the freedom to choose it.²⁷⁷ Strong admonitions will be most effective when they respect decisional freedom by allowing jurors to conclude that information *should* be disregarded.

Furthermore, procedural justice instructions draw upon the generally high level of juror compliance. Researchers have documented, for example, that juries "diligently review[] the evidence, attempt[] to understand it, pa[y] attention to the judicial instructions, and appl[y] the law as they underst[and] it."²⁷⁸ Enlisting jurors in the larger purposes of trial leverages that good faith. Accordingly, instructions should convey enough information to ensure that jurors buy into the rationale for exclusion. A recent study on the difficulty that judges themselves have adhering to limiting instructions underscores that offering a reason for admonitions to disregard information can increase the effectiveness of an instruction.²⁷⁹ In a bench trial, the same judge who determines the

Shari Seidman Diamond & Jason Schklar, *The Jury: How Does Law Matter?*, in *HOW DOES LAW MATTER?* 191, 205–06 (Bryant G. Garth & Austin Sarat eds., 1998) (conveying the results of a 1992 experiment testing juror responses to antitrust cases, in which jurors who were told that damages would be trebled by statute or given that information combined with an admonition not to lower the award as a result, gave reduced damages, but jurors who were treated as "collaborators" and given a detailed instruction explaining the congressional purpose behind the trebling provision did not give reduced awards); see also Sklansky, *supra* note 96 ("[J]uries should be told why they are being asked to disregard evidence or to use it only a particular way . . ."). *But cf.* Wistrich et al., *supra* note 154, at 1258–59 (reporting experimental findings indicating that judges often fail to ignore the very evidence they have deemed inadmissible).

276. See Wistrich et al., *supra* note 154, at 1269; see also John A. Bargh & Ezequiel Morsella, *The Unconscious Mind*, 3 *PERSP. ON PSYCHOL. SCI.* 73 (2008) (explaining that, although the content of thoughts may be accessible, the decision-making process is beyond awareness).

277. See Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment To Disregard on the Judgments of Mock Jurors*, 7 *J. APPLIED SOC. PSYCHOL.* 205, 213 (1977).

278. Diamond & Vidmar, *supra* note 267, at 1874.

279. The study appears in Wistrich et al., *supra* note 154. See also Diamond & Casper, *supra* note 273, at 558 (finding that, "when judicial instructions acknowledged jurors' inclinations to reduce their awards and jurors were given a clear justification for *not* reducing their awards, the windfall avoidance

admissibility of evidence then serves as the trier of fact. And the system simply “trusts judges to be able to see inflammatory and unfairly prejudicial evidence and then to be able to put it into perspective, not allowing it to warp their judgment.”²⁸⁰ Yet, if narrative is the deep structure broadly affecting all information processing, there is no reason to think judges are any more immune to the effect of prejudicial information than jurors. And it turns out they are not.²⁸¹ But, in one set of experiments, researchers also identified evidence obtained in violation of constitutional rights as the one category in which judges actually could reliably and deliberately disregard inadmissible information.²⁸²

For their part, jurors tend to favor reliability rationales. Most of the extant studies indicate that, when instructed to ignore evidence on procedural grounds like law enforcement violations of criminal procedure rules, jurors could not disregard it, whereas they could set aside evidence when told that it was otherwise invalid, inaccurate, or lacking in credibility.²⁸³ It is the discredited nature of the information, and thus its relative lack of utility in terms of constructing the events, that enables compliance with the instruction. The story model suggests that jurors ought to be informed that there are accuracy concerns with certain evidence. For example, character evidence is not strongly predictive of criminal activity,²⁸⁴ eyewitness identifications are often mistaken,²⁸⁵ and technological methods of lie detection are not widely regarded as reliable.²⁸⁶

This theory finds support in studies of a subject’s attachment to stored information as well. General instructions to be objective do little to counteract

effect was substantially meliorated”); Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 629 (2008) (“Instructions not only communicate the rules of law, but also the rules of jury behavior. . . . Instructions that address the relevance and irrelevance of [demeanor] can help direct the discussion of jurors as they reach their verdicts.”) (citing Anne Bowen Poulin, *The Jury: The Criminal Justice System’s Different Voice*, 62 U. CIN. L. REV. 1377, 1411 (1994)).

280. LAUDAN, *supra* note 45, at 25.

281. See Wistrich et al., *supra* note 154, at 1251.

282. *Id.*

283. See Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1050 (1997).

284. See, e.g., Edward J. Imwinkelried, *Reshaping the “Grotesque” Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 754–55 (2008) (highlighting behavioral studies that show the combined influence of situations and traits).

285. See, e.g., Benton et al., *supra* note 179.

286. Polygraph evidence is generally inadmissible because it lacks reliability, but courts also suspect it of overwhelming jurors’ own judgments on credibility. See, e.g., *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (“By its very nature, polygraph evidence may diminish the jury’s role in making credibility determinations.”). In one experiment, however, researchers found that mock jurors receiving both polygraph evidence *and* a warning about the fallibility of the technology issued guilty judgments twelve percent less often than those who did not receive the warning but twelve percent more often than those shielded from the polygraph evidence entirely. See Ann Cavoukian & Ronald J. Heslegrave, *The Admissibility of Polygraph Evidence in Court: Some Empirical Findings*, 4 LAW & HUM. BEHAV. 117, 122–24 (1980).

the appeal of evidence that accords with what jurors already believe. But if pressed to imagine their reaction to evidence pointing to the opposite conclusion, jurors may grow more receptive to contrary information.²⁸⁷ Courts might accomplish something similar by instructing jurors that prior convictions indeed appear relevant but may not be as telling as they imagine. An explanation could include the rationale for allowing the consideration of character on the issue of credibility. Jurors might then be more likely to accept that the evidence has some import with respect to truth telling but offers little useful information about criminal culpability. That insight could also enrich jurors' discussions of the prohibited inferences during deliberations and, thus, further reduce its power.

Finally, courts might prime jurors with instructions earlier in the trial to prevent the construction of a narrative that includes improper considerations.²⁸⁸ Instructions designed to forewarn jurors of high-impact evidence and its potentially biasing effects—including, perhaps, an explanation of the unconscious range of influences it might have—could better prepare them to resist its persuasive force. In one study based on a simulated murder trial, preinstructed jurors exposed to gruesome photographs returned significantly fewer convictions than the participants who were admonished only after seeing the photographs.²⁸⁹ Most juries receive their instructions just before they begin deliberations, once all of the evidence has been presented but, particularly with regard to due process issues, preinstructions might increase both comprehension and compliance.²⁹⁰ As David Sklansky explains, “complying with an evidentiary instruction will often, or even usually, require the jury to undo a complicated set of interactions between the evidence in question and other evidence in the case.”²⁹¹ Early warnings, however, might prevent integration of the evidence into a familiar narrative paradigm.²⁹² They might also mitigate

287. See Lieberman et al., *supra* note 259, at 81 (“[A]lthough belief perseverance can be a powerful force, it can be overcome by prompting participants to explain why beliefs opposite to their own may be true.”).

288. See Lieberman & Arndt, *supra* note 72, at 705 (“Persuasion studies have demonstrated that forewarning participants that they will be exposed to prejudicial information is effective at creating resistance and reducing the effectiveness of subsequent persuasive messages.”).

289. Rachel K. Cush & Jane Goodman Delahunty, *The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence*, 13 *PSYCHIATRY PSYCHOL. & L.* 110, 110 (2006); see also Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 *J. APPLIED PSYCHOL.* 220, 220–28 (1991).

290. See Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 1877, 1877 (1979); cf. Lieberman & Arndt, *supra* note 72, at 684 (“Because deliberations occur after the presentation of trial evidence, they may be too late to effectively reduce the impact of inadmissible evidence.”).

291. Sklansky, *supra* note 96.

292. As Pennington and Hastie stated in the foundational piece describing the story model, “maximal sharing of information and minimal early commitment to decisions will ensure the broadest coverage of evidence and relevant background knowledge.” Pennington & Hastie, *Cognitive Theory*, *supra* note 58, at 556. Dan Simon's research on jury decision making has demonstrated in other contexts that priming, framing, and the role in which the jury imagines itself when it receives

spillover effects on admissible evidence, including the coherence effect that prompts a decision maker to experience “supporting evidence as stronger and more probative, while the contrary evidence wanes.”²⁹³

The federal rules, adopted in most state jurisdictions as well, would permit preliminary, intermediate, and concluding instructions.²⁹⁴ It is also within the court’s province “to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence.”²⁹⁵ There are some administrability concerns and one recurring objection to preliminary instructions is that the applicable law depends in part on the evidence introduced, which is not entirely predictable before the trial unfolds.²⁹⁶ The judge, however, can seek preliminary agreement from the parties and advise the jury that the instructions are subject to revision and addition as the trial proceeds.

The reforms outlined here are neither costly nor burdensome, but they illustrate one way in which a clear understanding of the story model, its limitations, and its effects can improve the accuracy of adjudication. Jurors will be best equipped to counteract the deceptive power of narrative if they are aware of its impact, motivated to adhere to the admissible evidence, and able to adjust their judgments accordingly.²⁹⁷ Surfacing potential sources of error in deliberations, offering juries a rationale for the evidentiary rules they are asked to follow, and alerting them in advance to the powerful influence but limited utility of certain kinds of evidence can help create those conditions.²⁹⁸

information might affect how evidence is processed. *See* Dan Simon et al., On the Objectivity of Investigations: An Experiment 2 (Aug. 18, 2008) (conference paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130103 (reporting that participants given adversarial assignments, ambiguous fact patterns, and instructions to evaluate them objectively were polarized in the direction of their assignment); *see also* Blair H. Sheppard & Neil Vidmar, *Adversary Pretrial Procedures and Testimonial Evidence: Effects of Lawyer’s Role and Machiavellianism*, 39 J. PERSONALITY & SOC. PSYCHOL. 320, 320 (1980) (finding that witnesses who observed a fight and were interviewed by adversary lawyers before testifying biased their testimony in favor of the adversary lawyer’s client, compared to those interviewed by nonadversary lawyers, which in turn had an influence on the guilt judgments of adjudicators).

293. Simon, *supra* note 98, at 196; *see also id.* at 199 (stating that, with later instructions, “the biasing effect of the exposure on the other, legitimate evidence items is bound to be harder to reverse”).

294. *See* FED. R. CIV. P. 51(b)(3) (providing that the court “may instruct the jury at any time before the jury is discharged”); FED. R. CRIM. P. 30(c) (“The court may instruct the jury before or after the arguments are completed, or at both times.”).

295. *Quercia v. United States*, 289 U.S. 466, 469 (1933).

296. *See* William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 130 (“[J]urors arrive at tentative opinions in the case early in the trial, regardless of whether they are preinstructed. The benefits of improved comprehension outweigh any concern over such tentative opinions.” (footnote omitted)).

297. *See* Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994). Of course, the conclusions and proposals here inevitably “lump” jurors together, even though there will be individual variation in the commission of errors and the effect of bias. *See generally* Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. CHI. L. REV. 207 (2006).

298. Implementing these ideas would require attention to juror comprehension of instructions as well. On reforms aimed at drafting, including vocabulary and syntax, *see generally* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB.

CONCLUSION

A final question concerns the relationship between stories and the legitimacy and moral credibility of trials.²⁹⁹ On the one hand, coherent narratives that allow both jurors and observers to construct accounts consistent with their experience and common sense may be perceived as more legitimate.³⁰⁰ On the other, outcomes that ultimately appear at odds with the facts or seem to rest on improper considerations, undermine confidence in the justice system. A balance between convincing narratives and fair and reliable fact-finding is essential not only to individual defendants, but also because of the broader messages that trials send.³⁰¹ Despite declining numbers of trials,³⁰² they remain the aspect of the law most “vivid” to the public.³⁰³ Trials also function as contemporary morality plays, continually “develop the norms that ought to apply to the basic

POL’Y & L. 589 (1997); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081 (2001); and Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37 (1993).

299. See Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 212 (2012) (explaining that “legitimacy” stems from “fair adjudication and professional enforcement” and “moral credibility” stems from “just results”).

300. Charles Nesson has argued, for example, that narrative coherence is essential in order for a verdict to be perceived as legitimate. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1390–91 (1985). This is relevant to both the external reception of a verdict and the internal experience of participants in the process, from the litigants themselves to the fact finders. One of the *Jensen* jurors, the last holdout who was ultimately convinced by rereading Julie’s letter, remarked: “I feel that we served justice today, and I am so comfortable with my decision, I can’t begin to tell you.” DeLong, *supra* note 167. At least four of the jurors later appeared at Mark Jensen’s sentencing. Jean Casarez, *Jensen Sentencing Packs the Courtroom*, CNN IN SESSION BLOG (Feb. 27, 2008, 10:20 AM), <http://insession.blogs.cnn.com/2008/02/27/jensen-sentencing-packs-the-courtroom/>.

301. See Tom R. Tyler, *Procedural Justice*, in JURY PSYCHOLOGY, *supra* note 175, at 25, 36 (surveying the social science research that demonstrates that “procedural justice judgments were the most important factors shaping trust and confidence in the courts”).

302. Many commentators have written recently about courtrooms across the country falling dark, noting the relocation of many legal disputes to the regulatory context and a rise in plea bargains, civil settlements, and summary dismissals by the courts. See, e.g., Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 172 (2006) (commenting that “the number of criminal and civil jury trials has declined substantially” and that “the civil jury has for all practical purposes disappeared”); see also BURNS *supra* note 119, at 82, 83–85 (citing Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004)) (reporting that the percentage of federal cases going to trial declined from 11.5 percent of civil cases and 15 percent of criminal cases in 1962 to 1.8 percent of civil cases and 5 percent of criminal cases by 2002, and that a parallel reduction occurred in the state courts).

303. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 570 (2001); accord *Herrera v. Collins*, 506 U.S. 390, 416 (1993) (trials are the “paramount event” in the justice system); DAMASKA, *supra* note 134, at 1 (the adversarial trial has become part of the “global popular culture”); WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY’S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY 155 (2002) (“Trials are only a part of our system, but they are the apex, the model, the part that is open to the public, reported in the media, dramatized in TV shows and movies, recounted in popular books, and even broadcast live.”); JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW & LEGAL EDUCATION 108 (2002) (calling trial the “central institution of the law as we know it”).

structure of society,”³⁰⁴ and serve as catalysts for political debate.³⁰⁵ Because trials often occur in the hard cases that lie on the margins of civil and criminal liability, they are vehicles for developing legal concepts and improving doctrine as well.³⁰⁶ Correctly describing what happens at trial, therefore, matters a great deal, and improvements to trial design pay dividends with respect to the credibility and legitimacy of the justice system as a whole.

The characteristics of narrative are in many ways incompatible with the work that trials do, but this Article does not reach the conclusion that the courtroom should exclude stories. Nor, even if that were desirable, could any procedure or reform put a stop to narrative. Jurors of course use stories to organize the information they receive. Trials address difficult and complex questions about human behavior, and they need not be mechanistic undertakings. But the story model is incomplete and recognizing its limitations reveals opportunities to improve truth seeking and counteract bias. Understanding that the analytical and emotional coexist and then identifying ways in which subjective processes introduce error, could lead to corrections for some false premises in trial procedure and better protections for both the accuracy and the legitimacy of verdicts.

304. BURNS *supra* note 119, at 5; *see also id.* at x (stating that trials stand “astride some of the most important tensions that have defined our national character”).

305. *See id.* at 134 (listing historic American trials, such as the Triangle Shirtwaist Fire trial, that were “public proceedings with public records that provided a basis for long-term and serious political debates”).

306. *See* Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1726 (1988) (noting that litigation often involves disputes that raise novel issues); *see also* BURNS *supra* note 119, at 113 (describing trials as “the forum that has traditionally been the place where the rigidity and sometimes harshness of written law was softened” (emphasis omitted)).