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## Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research

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This paper has its roots in *Old Chief v. United States*, [2] a case the Supreme Court of the United States decided in 1997. I will begin by describing this case; then comment on its implications for the Supreme Court's conception of the jury, and conclude by examining the agenda one may draw from it for empirical jury research. *Old Chief* arose when Johnny Lynn Old Chief was charged not only with assault with a dangerous weapon and using a firearm in the commission of a crime of violence, but also with violating a law that precludes convicted felons from possessing firearms. [3] To prove the "felon in possession" charge, the government sought to introduce a record of Old Chief's prior felony conviction which disclosed that he had been sentenced to five years imprisonment for an unlawful assault that had resulted in serious bodily injury. [4] Old Chief's defense was that he never possessed a gun, and he offered to stipulate to the fact that he was a convicted felon and so would have violated the felon in possession law if the jury found he had possessed a gun.

It is clear that under the American law of evidence, evidence of Old Chief's prior conviction would have been inadmissible had he been charged only on the first two counts and not as a "felon in possession." The prosecutor rejected the stipulation, arguing that he had a right to prove this case with whatever relevant evidence he wished. [5] The trial judge agreed with the prosecutor, and the appellate court affirmed. [6] The Supreme Court, in a 5-4 decision written by Justice Souter, reversed. [7] The Court held that, despite the broad discretion that Federal Rule 403 gives trial judges in deciding whether to exclude evidence because its probative value is substantially outweighed by its prejudicial effect, the trial judge could not reasonably have admitted this evidence given the availability of the stipulation. [8] The Court was correct. The proffered stipulation would have given the jury all the information it would have been authorized to draw from evidence of the conviction—specifically that Old Chief had been convicted of a felony and would be guilty under the statute if he possessed the gun. The other information that the prosecutor got before the jury by presenting the conviction, the nature of the prior offense, could only have prejudiced the jury by leading it to believe that Old Chief was a violent person.

While *Old Chief* marked the first time the Court limited a trial court's discretion under Federal Rule 403, [9] the Court attempted to limit the reach of the case, so that parties could not use stipulations to exclude all evidence that carried with it substantial prejudicial potential. [10] In so doing, the Supreme Court recognized a sense in which evidence can be relevant which does not fit within the Federal Rule's core definition of relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence." [11] Specifically, the Court recognizes as relevant evidence which relates to a case and which helps a party tell an involving and coherent story, Justice Souter wrote:

The "fair and legitimate weight" of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness . . . . Evidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to

sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them . . . . [T]he evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statement ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution 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.

But there is something even more to the prosecution's interest in resisting efforts to replace the evidence of its choice with admissions and stipulations, for . . . there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about . . . . Expectations may also arise in jurors' minds simply from the experience of a trial itself. The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.

In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it . . . . A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best. [12]

I refer to the aspect of relevance Justice Souter described as *narrative relevance*. The justification for admitting such evidence, despite the possibility that it might inappropriately sway jurors as it engages their emotions, is that the evidence is needed to place more factually probative (or less prejudicial) evidence in the context of a convincing narrative about what happened.

The first thing to note about the portion of *Old Chief* I have quoted is the image of the jury implicit in Justice Souter's recognition of narrative relevance. The jury is not, as the Court assumed in the jury size cases, a mechanical processor of information whose

output, and all that matters, is the verdict. Nor is the jury easily biased or confused, contrary to what one might assume from the great discretion recent Supreme Court cases have given trial judges to exclude scientific evidence. [13] Instead the jury is an active, curious, and intelligent processor of information. The jury is motivated not just by its duty to decide a case correctly but also by its interest in learning what happened. The jury recognizes, deal in, and may be persuaded by, nuance. Jurors actively create their own stories from the facts provided, and if some important item of evidence seems missing or is under-emphasized, they may hold this failure against the party responsible for it. The jury is, not unreasonably, suspicious when evidence is provided in strange or unfamiliar ways, as by stipulations. Further, jurors not only wonder about information they feel is being withheld, but they may also actively construct explanations for gaps in the evidence. The jury does not merely process facts but also considers what is morally reasonable. Above all, the jury evaluates stories not as specific strings of evidence but as gestalts that hang together coherently or fail to do so. Consequently, parties have the right in most cases--albeit not in *Old Chief* itself- to present facts in the context of stories with considerable texture. They may introduce material which supplies that texture even when it does not fit the Federal Rule's definition of relevant evidence, and has substantial potential for prejudice.

To illustrate what I think *Old Chief* allows, I believe it is not unfair to read the case to say not only that prosecutors ordinarily have a right to show jurors bloody pictures of crime scenes, but also that jurors may expect such pictures and are likely to see the prosecution's case as weaker if the prosecution only provides them with verbal descriptions of the crime scene. The prosecution suffers not because it is unable to arouse the jury emotionally by showing gore but because cognitively the jury suspects that the prosecution did not want them to know the full story. Moreover, the case suggests that there is nothing intrinsically wrong with the jurors appreciating the full brutality of the crime that society may benefit if the bloody pictures better enable the jury to assess the morality of the crime they are judging. Yet, the holding in *Old Chief* indicates that jurors ordinarily should not rely on their assessment of a defendant's character to support a conviction without regard to what they know of the crime.

So *Old Chief* takes us from the image of the jury, in some past cases, as a group of relatively fragile lay decision-makers who, for example, may not properly discount hearsay evidence [14] and are likely to be bamboozled by glib witnesses peddling junk science. [15] It offers instead the image of a particularly robust decision maker who is actively participating in the construction of an account of what occurred. *Old Chief* does not deplore the effect of jurors' emotional and moral perspectives on their efforts to get at the truth--a dramatic change from how the influence of emotion on legal fact-finding is commonly regarded. Instead, it sees emotional involvement and morality judgments as integral to the decisions we expect jurors to make. Jurors in *Old Chief* become fully human.

From the perspective of social psychologists studying the jury, there's also much to take from *Old Chief*. First, the court not only recognizes the story model of case presentation associated with Lance Bennett and Martha Feldman, [16] and the story model of jury decision making, which Nancy Pennington and Reid Hastie [17] introduced about a decade ago, but treats them as if they were established truths about what lawyers should

do and how juries decide cases. These supposed truths are, of course, empirical propositions. While it seems clear that lawyers strive to include evidence in their cases that is only narratively relevant (if it is relevant at all), it is less clear how narratively relevant evidence affects the jury's construction of stories. Hastie and Pennington showed that the order in which evidence was presented affects the degree to which juries are persuaded by it. [18] Evidence presented in story order is more persuasive than the same evidence presented in witness order. [19] But we know little about whether a more richly textured and presumably more interesting story is more persuasive with juries than a story which has all the essential facts needed for a judgment, but is not richly supplied with connecting narrative facts. (Studies of testimony, however, indicate that irrelevant detail makes a witness's relevant testimony appear more credible than it would appear without the detail.) [20]

Second, the idea of narrative relevance complicates some of the normative assumptions students of the jury often make when investigating the quality of jury performance. For example, suppose one wished to study whether juries were biased by attention-getting or emotionally-arousing evidence. A simple paradigm for such a study might be to show one group of mock jurors bloody pictures of a decapitated corpse while the second group was only told that the victim's head had been cut off. If the first group was more prone to convict than the second, the natural conclusion would be that the pictures aroused the first group's emotions and improperly influenced their judgment of the weight of the evidence. After *Old Chief*, it is not as easy to make this normative assumption. In light of Justice Souter's analysis, it seems possible that the jury that saw the pictures was more interested in the case as a whole, or better appreciated the coherence of the prosecution's story, and therefore reached the better decision. Again we have an empirical question: one that requires us to look at process rather than at outcome in assessing how all juries have performed. Moreover, even when one has access to process, it may not be easy to determine the effects of narratively relevant evidence on the quality of jury decisions. If, for example, jurors in the bloody picture condition argue more passionately for conviction, or conversely easily reach a decision to convict without substantial argument, have they done a better job than jurors in the witness condition who fail to convict because the only passionate juror argues for acquittal or because they differ so much among themselves that they cannot reach a decision. It could be that the latter jurors have performed worse because they don't care as much about "getting it right."

A third area to which Justice Souter calls our attention concerns the implications of gaps in stories. [21] Again, Judge Souter's analysis raises a wealth of empirical questions, and we know little about most of them. What, for example, constitutes a significant story gap? Is Justice Souter right in his suggestion that a jury will see a gap or feel cheated when an essential fact that could be proved in a dramatic and potentially prejudicial fashion is instead proved by stipulation? Will the quality of jury deliberations differ depending on whether facts are proved by evidence or established by stipulation, and if so, how? It is not at all clear that the quality of jury deliberations will be affected by the jurors' sense that there is a gap in what has been provided them, because jurors may appreciate that proof in courts of law has special characteristics which caution against making inferences from how evidence is presented, and they may be willing to rely on the evidence that they have heard, rather than drawing inferences from what they haven't heard, so long as this is adequate to justify a verdict.

Justice Souter suggests that jurors have rather strong expectations regarding what evidence to be presented on what issues, generated either by their personal experiences or by what the case they are hearing tells them about trial procedure. He illustrates what he means with examples of jurors expecting that a gun will be introduced when a person is charged with firearm violence, and expecting that witnesses will be used to prove all the facts in a case because the first facts presented were proven in that manner. It would be interesting to identify the expectations of proof jurors bring with them to the courtroom or acquire in the course of a trial, and their reactions when their expectations are disappointed. There are, for example, anecdotes of jurors being influenced by what they have seen in actual or fictional televised trials. [22] Some lawyers implicitly support Souter's theory as they seem to assume that jurors' expectations will raise doubts if an opponent has not presented evidence stereotypically associated with her case. Thus defense counsel in criminal cases often defend, in part, by emphasizing gaps in the state's story, such as the absence of fingerprint evidence in a burglary prosecution or the state's failure to produce the gun used in an assault. [23] It is not clear, however, whether defenses that essentially call the jury's attention to possible gaps in the other side's presentation often succeed. Generalizing from the transcripts I have read, it often appears that when a defense in a real trial consists largely of pointing to gaps in an opponent's story, it is because other evidence tending to make a case for the defendant is weak. In a close case, however, gaps in expected stories may make a difference. Again we have a topic for empirical investigation. Although the literature includes reports of mock jury deliberations in which jurors have raised questions about gaps in evidence, the matter has not been systematically studied.

There is, however, another side to the gap issue which calls into question the admission of narratively relevant evidence that *Old Chief* celebrates. Cognitive psychologists have shown that subjects who have been given a large portion of a schema or story and asked to recall what they were told tended to fill in gaps in information in a manner that fit whatever the story led them to expect. When quizzed, they will remember hearing story-consistent facts they were never told. [24] It is possible that an engrossing, narratively rich trial story may foster similar tendencies. Jurors who hear a large portion of a familiar story, but not its entirety, may recall story-consistent information that was not presented to them or they may assume that such information exists. [25] In addition, narratively rich information may produce an unduly strong tendency in jurors to credit story-consistent testimony or information even though it clashes with what, without the context of the story, would be more persuasive evidence. In *Old Chief*, for example, if the jurors heard that Old Chief's felony was a crime of violence, they might, on that account, have credited the testimony of an eye witness who claimed to have seen Old Chief with a gun in his hand rather than what they otherwise might have found to be the more credible testimony; that of two eyewitnesses who swore Old Chief had no gun. [26]

So the best reason to exclude the evidence of the specific prior felony committed by Old Chief may not have been the possibility of prejudice in the sense of creating a pro-conviction bias, but, instead, because of the cognitive implications of this narratively rich evidence when the jury, in good faith, evaluated the probative value of other evidence in the case. Here too, is an area that cries out for empirical investigation.

In his discussion of narratively relevant evidence, Justice Souter assumes that such

evidence would benefit the offeror's case more than a stipulation would, and parties rejecting stipulations certainly make that assumption. But is the assumption categorically correct? Might not an uncontested stipulation provided with the judge's imprimatur carry greater weight than seemingly more vivid testimony which is questioned vigorously on cross-examination? We don't know. Nor do we know whether narratively relevant evidence's persuasive power stems from the virtues that Justice Souter recites, such as its attention-stimulating features, or its amelioration of gaps that either confuse juries or else leave them speculating about the likely implications of missing evidence or the motive of the party who did not present it. Evidence that would be inadmissible but for its narrative relevance may persuade juries for less palatable reasons: it conduces to unwarranted gap filling or to prejudicial aspects of the evidence. Before *Old Chief*, it was generally assumed that parties who tried to avoid accepting stipulations to important facts did so because they sought to present less binding but more vivid proof.

Another virtue of narrative relevance for Justice Souter is that colorful stories with descriptive richness can sustain the willingness of jurors to draw whatever inferences are necessary to reach an honest verdict. [27] It is not clear why jurors would be unwilling to draw the inferences essential to reach honest verdicts or how narratively relevant evidence has the effect that Justice Souter posits. Two possibilities come to mind. The first is cognitive; mental work is required to draw inferences from facts. Jurors exposed to richly descriptive evidence may be more motivated to do this work than jurors who have heard a more bare bones story, or they may have less work to do because the additional facts trigger scripts stored in their memories. But the converse is also possible. It may take more cognitive work to focus on the facts needed to make necessary inferences when they are embedded in a captivating story or if they trigger a legally inappropriate script than when they are presented in starker fashion. The second explanation is motivational. Evidence that involves a juror as a whole person may be needed to counteract jurors' emotions in situations where they would otherwise be reluctant to draw valid inferences, such as the inference that a person who assists at a mercy killing has an intent to kill. For example, Dr. Kevorkian's recent conviction after four jury acquittals may have happened because the prosecution had a movie of the doctor actually killing a "patient" rather than just a description of what occurred. Alternatively, the trial court prevented Dr. Kevorkian from presenting evidence that was narratively relevant from his perspective; namely, evidence from the deceased's close family members about his condition and desires and their sense that what Dr. Kevorkian did was a blessing that brought peace to a loved one. Finally, Dr. Kevorkian's more active role in bringing about death in the killing for which he was convicted might have been critical—earlier, he had "merely" constructed lethal machines that a person wanting to die could trigger. Perhaps even a colorless description of how Dr. Kevorkian had acted to bring about the death he was most recently tried for would also have resulted in a conviction. Again in Justice Souter's speculations there are rich possibilities for empirical investigation.

The law of evidence and the behavior of juries have been persistent themes in the teaching and research that I have done throughout my career. *Old Chief* brings them together in a way I find fascinating. As an evidence case, it recognizes limits to the judge's discretion under FRE 403 when evidence despite its prejudicial potential is unlikely to raise strong emotions. It also departs from the literal reading of the Federal



rules that dominates most of the Supreme Court's recent rulings interpreting these rules. Instead the Court recognizes a new aspect of relevance that relates more to the actual persuasiveness of evidence than to its abstract tendency to make a fact in issue more or less likely than it would be without the evidence. As a case on the role of the jury, *Old Chief* presents a different image of the jury from the view that commonly seems to motivate Supreme Court decisions. It calls into question what seemed to be well-established norms regarding the appropriate influence of different kinds of evidence on jurors. The *Old Chief* Court also places its imprimatur on the story model of jury decision making, and in doing so suggest new questions for empirical research on juries and gives a new urgency to further research about old question. Few cases in recent memory have raised more intriguing questions about how juries respond to evidence.

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[1] Francis A. Allen Collegiate Professor of Law, and Professor of Sociology, The University of Michigan. I would like to thank Craig Callen for the very careful reading he gave this paper and for his many useful suggestions for improvement as well as for the help several of his students gave me in tracking down citations.

[2] 519 U.S. 172 (1997).

[3] *Id.* at 174

[4] *Id.* at 177.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 178.

[8] *Id.* at 191-92.

[9] Fed R. Evid. 403.

[10] *Old Chief*, 519 U.S. at 192.

[11] Fed. R. Evid. 401.

[12] *Old Chief*, 519 U. S. at 187-89.

[13] *General Electric v. Joiner*, 118 S. Ct. 512, 517 (1997).

[14] *Bruton v. United States*, 391 U.S. 123, 132-33 (1968).

[15] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S., 579, 595 (1993)(trial court should be more willing to use Rule 403 to exclude expert testimony, in light of degree to which it may be misleading, than to exclude lay witness testimony)(quoting

Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1992)).

[16] See W. Lance Bennett & Martha Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (1981).

[17] Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519 (1991).

[18] *Id.* at 541-44.

[19] *Id.* at 542.

[20] Brad Bell & Elizabeth Loftus, *Trivial Persuasion in the Courtroom: The Power of (a Few) Minor Details*, 56 J. Personality & Social Psych. 669 (1989).

[21] *Old Chief*, 519 U.S. at 189.

[22] Reid Hastie, for example, tells the story of a mock juror in one of his simulation studies who, “had been in a community theatre production of “Twelve Angry Men” and who spouted speeches from the Henry Fonda role in our mock-jury deliberation and said, when we asked, that he had done it in real juries, too.” Personal communication, September 3, 1999. David Simon, *Homicide: A Year in the Killing Streets* 456 (1991), says

More than anything else, it’s the cathode-ray tube—not the prosecutor, not the defense attorney, certainly not the evidence—that gives a Baltimore juror his mindset...Never mind that the trace lab rarely makes a case, a juror nonetheless wants to see hairs and fibers and shoe prints and every other shard of science gleaned from *Hawaii Five-O* reruns.

[23] *Old Chief*, 519 U.S. at 188.

[24] See F.C. Bartlett, *Remembering: A Study in Experimental and Social Psychology*. (1932); G.H. Bower, J.B. Black, & J.T. Turner, *Scripts in Memory for Text* 11 *Cognitive Psychol.* 177 (1979). J.D. Bransford, J.R. Barclay, & J.J. Franks, *Sentence Memory: A Constructive Versus Interpretive Approach*, 3 *Cognitive Psychol.* 193 (1972); Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making Effects of Memory Structure on Judgment*, 14 *J. Experimental Psychol.: Learning, Memory, and Cognition* 521 (1988); A. C. Graesser, M. Singer & T. Trabasso *Constructing Inferences during Narrative Text Comprehension*, 101 *Psychol. Rev.* 371 (1994). Some psychologists, however, suggest that little gap filling occurs. For a general review see, E. Tory Higgins and John A. Bargh, *Social Cognition and Social Perception*, 38 *Ann. Rev. Psychol.* 369 (1987).

[25] Pennington & Hastie, *supra* note 17, at 519.

[26] See D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and*

*“Legitimate Moral Force”: Keeping the Courtroom Safe for Heartstrings and Gore*, 49 Hastings L.J. 403, 447 (1998).

[27] *Old Chief*, 519 U.S. at 187.