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Evaluating Brady Error Using Narrative Theory: A Proposal For Reform

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I. INTRODUCTION

Life is filled with the unexpected. Researchers disappointed with a promising pharmaceutical for hypertension and angina began to notice that users were consistently reporting a surprising side effect. Further investigation lead to Viagra.[1] Children enjoying the wonders of Play-Doh can thank what was initially an attempt to create wallpaper cleaner.[2] Those of us who could not function in the world without our assortment of Post-It notes owe it all to a group of scientists who were trying to make an effective adhesive.[3] The point is that some of the most important results of our labors can be unintended. Like science, law, too, seems to possess the capacity for serendipity.

When the United States Supreme Court granted certiorari in *Old Chief v. United States*,[4] the Court examined Federal Rule of Evidence 403[5] in light of a defense offer to stipulate to aspects of the proffered prosecution evidence, purportedly to lessen their prejudicial impact.[6] While this was clearly an issue of interest to litigators and trial judges, the decision hardly portended anything earth-shattering. Where the rhetoric of that decision may lead, however, could well eclipse Post-It notes in significance (at least within the criminal court system). For at the core of the opinion rests the validation of a theory born from such disparate fields as Law and Literature,[7] Sociology,[8] and Narrative Theory.[9]

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1. Giles Whittell, *Wackiest Paths to Prosperity*, THE AUSTRALIAN, Feb. 27, 2002, at 32. *See generally* SHARON BERTSCH MCGRAYNE, BLUE GENES AND POLYESTER PLANTS 17-79, 131-46 (1997) (recounting serendipitous discoveries in chemistry, zoology, medicine, and such).

2. Whittell, *supra* note 1.

3. *Id.*

4. Old Chief v. United States, 519 U.S. 172 (1997). For a detailed analysis of the case, see Jeff Nicodemus et al., *Recent Developments*, 24 AM. J. CRIM. L. 441, 444-46 (1997). For a practical perspective, review the "seven lessons" discussion in Stephen A. Saltzburg, *Trial Tactics*, CRIM. JUST., Spring 1997, at 45, 48.

5. The rule states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

6. Old Chief v. United States, 519 U.S. at 185-86.

7. *See, e.g.*, JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 169 (1995) ("The story is the most basic way we have of organizing our experience and claiming meaning for it.").

8. *See, e.g.*, LANCE BENNETT & MARTHA FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 32-37 (1981) (discussing the social functions of American trial justice).

While this recognition of narrative theory could have sweeping implications for how appellate courts assess trial errors, my objectives in this Article are far more modest than to explore the full spectrum of such possibilities. Rather, I will focus on only one such possible application of narrative theory. Specifically, it will be my contention that, though it was not on the proverbial radar screen of the Court when it decided *Old Chief*, narrative theory provides the most effective tool available for assessing prejudice from *Brady* error (i.e., where the prosecutor fails to provide the defense with "exculpatory" evidence).[10] It is that proposition that this Article addresses.

In Part II, I will briefly discuss the *Old Chief* case and the various perspectives of commentators following the decision. Part III will then set up the context for the Court's incorporation of narrative theory in *Old Chief*. In Part IV, I will discuss the specific way in which the United States Supreme Court, for the first time, validated and applied narrative theory in a decision.

In Parts V and VI, I will then move to the heart of my proposal for reform, first exploring the limitations of the current doctrine for evaluating the prejudicial impact of a so-called *Brady* error, and then proposing incorporation of narrative theory into the current analysis as a way of meeting these limitations. Finally, I apply my proposal in Part VII to a case example: a street criminal facing life without the possibility of parole after conviction for his "third strike."

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9. *See generally* John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 85-97 (1999) (arguing that all legal theories are derived from cultural and historical narratives).

10. *See* Brady v. Maryland, 373 U.S. 83, 84-85, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). While this Article focuses on the use of narrative theory as a tool for assessing a *Brady* error, narrative theory would be similarly useful for assessing the impact of any error resulting from the denial of defense evidence to the fact finder. Thus, narrative theory could be useful in determining whether the erroneous denial of proffered defense evidence under the Federal Rules of Evidence affected a substantial right. *See* FED. R. EVID. 103(a) ("Error may not be predicted upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."); *see also* Jordan v. Medley, 711 F.2d 211, 218-19 (D.C. Cir. 1983) (discussing "substantial rights" standard for finding reversible error and concluding that such a right has been affected when "the error affect[s] the outcome of the case").

II. *OLD CHIEF* LEVEL ONE: A CASE ABOUT EVIDENCE THEORY

As the result of an altercation at a liquor store, Johnny Lynn Old Chief faced two federal charges: assault with a dangerous weapon with intent to do bodily harm and felon in possession of a firearm.[11] The problem for the defense was that the prior felony supporting the felon in possession of a firearm charge was an "assault causing serious bodily injury."[12] If the jury heard about this prior violent assault, the defense understandably feared the jury would think Old Chief was a violent sort who likely acted accordingly during the incident at the liquor store.[13]

As all law students learn in Evidence class, the American legal system refuses to let a jury hear evidence revealing a defendant's prior bad acts if the sole purpose of the evidence is to ask the jury to infer that the defendant is the kind of person (i.e., had a "propensity") to do such bad things and, therefore, probably acted "in conformity" with that deficient character in the current case.[14] On the other hand, evidence law will allow prior bad acts to be brought before the jury if the evidence is relevant for something (i.e., has an "other purpose") other than to ask the jury to engage in forbidden propensity logic.[15] Because a prior felony conviction was a necessary element of one of the crimes with which Old Chief was charged, it was obviously admissible for this "other purpose" and thus the introduction of the prior conviction did not run afoul of the bar on

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11. Old Chief v. United States, 519 U.S. at 174-75; *see also* Brief for the United States at 2-3, Old Chief v. United States, 519 U.S. 172 (1997) (No. 95-6556) (summarizing charges and noting that the fracas took place at a liquor store).

12. Old Chief v. United States, 519 U.S. at 175. "[E]vidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it." FED. R. EVID. 404(b) advisory committee's note; *see also* Old Chief v. United States, 519 U.S. at 181-82 (discussing Rule 404(b)); Michelson v. United States, 335 U.S. 469, 475-76 (1948) (discussing the common law tradition of prohibiting the use of character evidence by the prosecution as part of the case-in-chief).

13. *See* Old Chief v. United States, 519 U.S. at 175.

14. FED. R. EVID. 404(b). The rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident* . . . .

Id. (emphasis added).

15. *Id.* (emphasis added).

propensity evidence.[16]

Defense counsel understood this rule and accepted that the jury would be told that his client had a prior felony which was among the list of those that made subsequent possession of a gun illegal.[17] However, defense counsel did not want the jury to hear this prior felony was for assault resulting in serious bodily injury.[18] This information carried the risk that, despite a limiting instruction,[19] the jury would tend to find the defendant guilty of the liquor store shooting because he was "the kind of person" who assaulted people.

With this in mind, defense counsel offered to stipulate that the jury be told Old Chief had a prior felony conviction in order to satisfy the element of the felon in possession of a firearm charge, but that the jury not be told the felony conviction was for a serious assault.[20] Thus, the prosecutor would satisfy the prior felony element of the offense, and the defendant would be spared the risk that the jury would engage in propensity logic. Everybody's happy, right? Not quite. The prosecutor refused to agree to the stipulation, claiming that the Government had the right to try its case as

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16. Old Chief v. United States, 519 U.S. at 196 (O'Connor, J., dissenting).

17. *Id.* at 175-76.

18. *Id.* at 175. However, some point out that it is not always in a defendant's interest to allow a jury to speculate as to the particular crime for which the defendant was previously convicted. *See, e.g.*, Michael J. Pavloski, Old Chief v. United States: *Interpretation and Misapplication of Federal Rule of Evidence 403*, 33 NEW ENG. L. REV. 797, 832-35 (1999) ("The rule does not prevent juries from considering the nature of the prior felony, rather, it only deprives them of accurate information concerning it," leaving jurors to speculate as to the nature of the stipulated prior felony, including speculation based on negative stereotyping); Daniel C. Richman, Old Chief v. United States*:* *Stipulating Away Prosecutorial Responsibility?*, 83 VA. L. REV. 939, 950-52 (1997) (suggesting that jurors may be left to rely falsely on the circumstances of the crime or on stereotypes).

19. Under the Federal Rules of Evidence, a party may ask for a limiting instruction, and "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105. Thus, defense counsel in *Old Chief* could have asked for an instruction informing the jury that it could *only* consider the prior assault conviction as a predicate for the felon with a firearm charge. In fact, one criticism of *Old Chief* is that it appears to preclude a trial court from considering an option such as Rule 105. *See* Lynn Amanda Wyers, Note, *Judicial Discretion and a Prosecutor's Right to Prove the Case: An Analysis of* Old Chief v. United States, 42 ST. LOUIS U. L.J. 917, 943 (1998) ("For example, the district court may determine that the record of prior conviction is unfairly prejudicial, but that this prejudice may be adequately alleviated through a proper curative instruction . . . .").

20. Old Chief v. United States, 519 U.S. at 175.

it saw fit.[21]

The issue before the Supreme Court was an interesting one: Can a defense offer to stipulate—in lieu of arguably prejudicial prosecution evidence, where the stipulation thereby provides a less prejudicial way to prove an element of a crime—affect the outcome of a Rule 403 balancing by diminishing the probative value of the otherwise proffered prejudicial evidence?[22] The majority said yes,[23] and Old Chief's conviction was reversed.[24]

Predictably, disparate commentary in legal journals followed. Some criticized the Supreme Court for throwing away an opportunity to clarify the Rule 403 balancing[25] and, in actuality, making matters more muddled.[26] Others have voiced concern that the Court had breached the basic tenet that, within the rules of ethics, evidence, and procedure, the prosecution is left to try its case as it sees fit,[27] and does not have to accept a defense stipulation in lieu of how it would choose to prove its case.[28]

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21. *Id.* at 177.

22. *Id.* at 174.

23. *Id.*

24. *Id.* at 192.

25. *E.g.*, Louis A. Jacobs, *Evidence Rule 403 After* United States v. Old Chief, 20 AM. J. TRIAL ADVOC. 563, 590 (1997) ("Rule 403 after *Old Chief* may well closely resemble Rule 403 before *Old Chief*. If so, a tremendous opportunity to develop a practical standard for guiding discretion will have been wasted.").

26. *See* Pavloski, *supra* note 18, at 819-23. In fact, some contend that the Court added new issues by failing to give guidance to the symmetry versus asymmetry issue (i.e., if a prior felony would appear *minor* to jurors, can a prosecutor force a stipulation preventing the jurors from hearing the exact nature of the prior felony, even though the defense wants them to know?). *Id.* at 821; *see also* Donnie L. Kidd, Jr., Case Note, *Pretending to Upset the Balance*: Old Chief v. United States *and Exclusion of Prior Felony Conviction Evidence Under Federal Rule of Evidence 403*, 32 U. RICH. L. REV. 231, 272 (1998) ("If the rule applies symmetrically, then neither the defense nor the prosecution may introduce the nature of a prior conviction. . . . If the rule is asymmetrical, then the defendant could introduce prior conviction evidence to assist the defense, but the prosecution would remain barred from introducing the nature of the past felony."); Richman, *supra* note 18, at 954 (arguing that the analysis employed by the *Old Chief* Court could disadvantage defendants if they are prevented from offering evidence about the nature of prior felonies if they wish); Stephen A. Saltzburg, *Trial Tactics*, CRIM. JUST., Spring 1997, at 45, 48 (identifying situations in which "the approach taken by the majority in *Old Chief* will not always favor the defendant").

27. Wyers, *supra* note 19, at 940-41.

28. Old Chief v. United States, 519 U.S. at 186-87 (recognizing the "standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case the Government chooses to present").

From a defense perspective, some saw in *Old Chief* the possibility of significant tactical advantage,[29] suggesting the use of "judicial admissions"[30] or "judicial notice"[31] as preferable to offers of stipulation to accomplish that task. Most, however, saw *Old Chief* as a very limited ruling,[32] procedurally difficult to raise,[33] unlikely to lead to reversal,[34] and applying

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29. *E.g.*, Scott Patterson, Case Note, Old Chief v. United States: *Radical Change or Minor Departure? How Much Further Will Courts Go in Limiting the Prosecution's Ability to Try Its Case?*, 49 MERCER L. REV. 855, 864 (1998) ("[D]efense attorneys have a tremendous window of opportunity to push for an expansive reading of *Old Chief* and to offer to stipulate to any prejudicial or detrimental elements of the crime in order to preclude the jury from being influenced by the introduction of evidence of those crimes."); David Rudolph & Gordon Widenhouse, *Reeling in Otherwise Relevant Evidence Due to Unfair Prejudice*, THE CHAMPION, Mar. 1997, at 46, 56 (identifying the *Old Chief* decision as giving rise to two new weapons for criminal defense attorneys: to challenge "a trial court's discretionary rule on a Rule 403 objection," and "to challenge prejudicial evidence for which a less damaging alternative exists").

30. *See* D. Michael Risinger, *Johnny Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force"—Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 451 (1998) (explaining that "if one is ever going to recognize that it is sometimes serious error to reject a proffered judicial admission," *Old Chief* was such a case, because the defendant stipulated to the "status element" of the offense, rendering "unnecessary" the specifics of the predicate felony).

31. *See* James Joseph Duane, *Stipulations, Judicial Notice, and a Prosecutor's Supposed "Right" to Prove Undisputed Facts: Oral Argument from an Amicus Curiae in* Old Chief v. United States, 168 F.R.D. 405, 419 (1996) (explaining that judicial notice allows one party to go over the other party's head by obtaining an admission from a judge under Federal Rule of Evidence 201 that a fact is true).

32. *See, e.g.*, Jacobs, *supra* note 25, at 590 (stating that "Rule 403 after *Old Chief* may well closely resemble Rule 403 before *Old Chief*"); Kidd, *supra* note 26, at 268-69 (stating that the holding of *Old Chief* is limited); David Robinson, Jr., Old Chief, Crowder, *and Trials by Stipulation*, 6 WM. & MARY BILL RTS. J. 311, 342 (1998) (stating that *Old Chief*'s holding was narrow).

33. *See* James Joseph Duane, *Litigating Felon-with-a-Firearm Cases After* Old Chief, CRIM. JUST., Fall 1997, at 18, 21 (arguing that "[e]ven if you find that some district judge has arguably violated [a defendant's] rights under *Old Chief* at some future trial, any appeal seeking to obtain reversal solely on that ground will almost always be dead on arrival" because error must be "properly preserved by just the right maneuvering in the district court"—"[t]he defense must have remembered to offer an appropriate stipulation," and the stipulation offered cannot be "conditional, equivocal, or unclear").

34. *Id.* at 21-22; *see also* Terry W. McCarthy, Comment, *The Use of Unilateral Stipulation as a Trial Tactic in Alabama After* Old Chief*: The Effect of the Federal Rules of Evidence on an Infancy State*, 50 ALA. L. REV. 237, 251 (1998) (noting "the early returns indicate [*Old Chief*'s] rather limited holding," recognizing that "[d]ecisions subsequent to *Old Chief* have held that even if the trial judge erred in not

to a narrow set of facts and charges where, as in *Old Chief*, an element of the charge is a status (i.e., prior felon).[35]

But there, lying within the rhetoric of the opinion, all but unnoticed by most of the commentary,[36] were the seeds of a dramatic reframing of how appellate courts understand jury trials. For in *Old Chief*, the Supreme Court of the United States for the very first time validated and applied narrative theory[37] (a.k.a. "Narratology")[38] and, in doing so, set in motion

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accepting [a] stipulation, the conviction will not be overturned if it is harmless error"); Jana L. Torok, Comment, *The Undoing of* Old Chief*: Harmless Error and Felon-in-Possession-of-Firearms Cases*, 48 U. KAN. L. REV. 431, 431 (1999) (noting that several courts of appeals have found that district courts' admitting evidence of the name and nature of prior felonies, thus violating *Old Chief*, was harmless error).

35. *See* McCarthy, *supra* note 34, at 251 (stating that if properly used, felony convictions can only be used to prove felony status, not action in conformity therewith); *see also* Kathryn Cameron Walton, Note, *An Exercise in Sound Discretion:* Old Chief v. United States, 76 N.C. L. REV. 1053, 1092 (1998) (noting the Court in *Old Chief* "has formulated a new rule that applies in a narrow context of cases requiring proof of a defendant's status as a felon" and "has used the discretion that Rule 403 affords the judiciary generally to provide a specific rule that negates a trial court's discretion in determining the admissibility of prior convictions under the felon-in-possession statute").

36. There were a few exceptions. *See, e.g.*, Peter Brooks, *Policing Stories*, *in* LAW'S MADNESS 29 (Austin Sarat et al. eds., 2003). Brooks writes:

> It is almost as if [Justice] Souter had been reading literary "narratology" (which he may have been, since he appears to be the most erudite and curious of the current justices) and been persuaded by the argument that narrative is a different kind of organization and presentation of experience, a different kind of "language" for speaking the world . . . .
>
> . . . .
>
> . . . Souter in *Old Chief* does articulate the nature and force of narrative in the law, in a startling move that [the author] ha[d] not found in other legal opinions.

Id. at 31, 33; *see also* Kidd, *supra* note 26, at 231-32 (recognizing the role of stories in trials); Risinger, *supra* note 30, at 455 (noting the Supreme Court's recognition of narrative theory).

37. Brooks, *supra* note 36, at 33; *see also* Risinger, *supra* note 30, at 455 (describing the use of narrative theory).

38. Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 737 (1997) (reviewing LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996)) ("The law and literature movement has evolved to a point at which it comprises a number of subdisciplines. One of the newer ones—call it 'legal narratology'—is concerned with the story elements in law and legal scholarship.").

what is likely to be the true legacy of the case.

III. *OLD CHIEF* LEVEL TWO: THE CONTEXT FOR INCORPORATION OF NARRATIVE THEORY

In *Old Chief*, the majority was willing to push against a semisacrosanct line in criminal trials.[39] The general rule has been that the defense cannot force the prosecution to accept a stipulation in place of the prosecution's desired means of proving some point in its case.[40] The prosecution bears the burden of proof, and a very heavy one at that. It should be free to try its case as it wants, and should not have its presentation to the jury constricted by forced acceptance of defense offers to stipulate.[41] As a general rule, this sentiment is persuasive.

For example, imagine that a defendant is charged with armed robbery of a store under an aiding and abetting theory for being the getaway driver. The defense strategy is to raise a reasonable doubt as to whether the defendant knew what was happening inside the store, thereby showing that the defendant lacked the element of intent to aid and abet in the robbery. Imagine further, that if left to her own devices, the prosecutor would elicit the following dialogue from an eyewitness to the incident, Mr. Jones:

> Prosecutor [P]: Mr. Jones, do you recall where you were around 3:45 p.m., October 17th of this year?
>
> Witness [W]: I was just walking out of Joline's Cards. I had to get a birthday card for my nephew.
>
> [P]: Did you notice anything unusual at that time?
>
> [W]: Well, something did catch my eye.
>
> [P]: And what was that?

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39. *See* Old Chief v. United States, 519 U.S. 172, 186-87 (1997) (recognizing the "standard rule" that the prosecution may "prove its case by evidence of its own choice").

40. Parr v. United States, 255 F.2d 86, 88 (5th Cir. 1958); *see id.* ("The reason for the rule is to permit a party 'to present to the jury a picture of the events relied upon [and that] [t]o substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.'") (quoting Dunning v. Me. Cent. R.R. Co., 39 A. 352, 356 (Me. 1897)).

41. *See* Wyers, *supra* note 19, at 940-41 (arguing that "[t]he role of the prosecution is, in essence, to develop and present a "'continuous story' to the jury" which "is undermined when a prosecutor is forced to stipulate to elements of the crime for which the defendant has been charged").

[W]: There was this car parked in front of the Dollar Store.

[P]: Was that unusual?

[W]: Not that he was parked, but that he'd parked in the commercial loading-unloading zone when there were half a dozen empty legal spaces right next to where he was parked.

[P]: Is there any difference between the commercial space and the other spaces?

[W]: Well, the commercial space is parallel to the curb and right on the corner. The legal spaces are those back-in, parallel parking kind.

[P]: Anything else?

[W]: Yes. The car was running and the driver kept looking around. I mean, he and I made eye contact, and it was weird.

[P]: How?

[W]: He looked a bit, like, like startled I was looking at him. And then he quickly looked away.

Imagine now that before Mr. Jones can take the stand, defense counsel asks to approach the bench and says:

Your Honor, hearing this witness is a waste of time under Federal Rule of Evidence 403. We will stipulate that my client was in the driver's seat and the car was running. While we do not contend that the testimony of the witness is unfairly prejudicial under Rule 403 as was the case in Old Chief, this testimony nevertheless is properly precluded under Rule 403's grounds of wasting time and confusing the jury, given its peripheral nature in light of my client's willingness to stipulate to the gist of that testimony.

I do not think any of us would believe the prosecutor should have to accept that stipulation. On the other hand, many reasonable minds (including a majority of the Supreme Court) would conclude that mandating the prosecution to accept the stipulation in *Old Chief* was totally proper. How can we account for this? Enter narrative theory as an analytic tool.

IV. *OLD CHIEF* LEVEL THREE: THE EMERGENCE OF NARRATIVE THEORY

Crucial to the *Old Chief* Court's eventual decision that Rule 403 barred admitting evidence about the defendant's prior conviction for a

serious assault in light of the defense stipulation offer was the following passage:

> 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. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus 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. . . . 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.
>
> . . . .
>
> 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. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. 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.[42]

The concept that lawyers are persuasively communicating with jurors when they are telling "a colorful story with descriptive richness"[43] (i.e., a

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42. Old Chief v. United States, 519 U.S. at 187-89.
43. *Id.* at 187.

narrative), provides a perspective against which the question of the propriety of the respective proffered stipulations in *Old Chief* and our hypothetical getaway driver case are easily resolved. In *Old Chief*, the exact nature of the particular prior felony (as opposed to the very fact that the defendant had a felony conviction constituting an element of felon in possession of a gun) is not any part of the "story" of what happened that day at the liquor store.[44] With or without this information about a prior serious assault, the prosecution witnesses will testify to exactly the same information about the alleged assault with a deadly weapon at the liquor store. In fact, the only "story" to be drawn from information that the prior felony was for a serious assault is one based on forbidden propensity logic.[45]

In contrast, the stipulation in our hypothetical would clearly be improper within a narrative theory frame. After all, the stipulation would take away the detail and nuance which, in combination, provides the jury with a classic story of a getaway driver.

The *Old Chief* Court's use of narrative theory as a framework to understand an aspect of the legal system (here, a jury trial) is unique only in the fact that this is the first time the Supreme Court has ever formally acknowledged and utilized the theory in one of its cases. It is hardly novel,

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44. *See id.* at 190-91 (noting that the prosecution's need to tell a continuous story has no application when the point at issue is the defendant's status, which is dependent on another judgment rendered on events independent of the later criminal charges against him).

45. *See* FED. R. EVID. 404(b). Peter Brooks adds that:

> Souter here breaches the bar over what you might call an element of the repressed unconscious of the law, bringing to light a narrative content and form that traditionally go unrecognized. Yet curiously, or perhaps predictably, he does it by way of arguing that in the present case the lower courts failed to guard against the irrelevant and illegitimate power of narrative, admitting into evidence story elements—the story of Old Chief's prior crime—that should not be considered part of the "natural sequence" of the present crime. The past story would give too much credence to the present story that the prosecution must prove. It is in defending against the power of storytelling that Souter admits its force.
>
> This defensiveness is typical of the law: its recognition of the claim of narrative in the law most often comes—though rarely in such open and perspicuous form as Souter gives it here—by way of its desire to limit the play of narrative, its desire to set narrow formal limits to storytelling.

Brooks, *supra* note 36, at 32.

however, in legal[46] and scientific literature.[47] In fact, the notion that theories about storytelling and the human experience could be productively applied to law in general, and jury decision making in particular, pre-dated *Old Chief* by well over a decade.

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46. *See generally* PETER BROOKS, TROUBLING CONFESSIONS 8-34 (2000) (discussing the importance of storytelling through confessions); LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996) (collecting essays discussing legal discourse as a mixture of narrative and rhetoric); DAVID RAY PAPKE, NARRATIVE AND THE LEGAL DISCOURSE (1991) (collecting essays discussing the importance of narrative in legal education, courtroom strategies, and legal commentary, and proposing alternative legal narratives); ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 345-418 (1993) (comparing and contrasting Northrup Frye's analysis of the role of myth in narrative literature with analogous judicial traditions, concluding that parallels can be drawn between the two concepts because they both rely on common narrative methods).

47. *See generally, e.g.*, BENNETT & FELDMAN, *supra* note 8 (employing narrative theory to better explain jurors' decisionmaking process). Bennett and Feldman's sociological research on stories as affecting the core of jury decisionmaking parallels the findings of cognitive psychologists who believe we give meaning to our experience by placing it into cognitive frames or "schema." Schema can be thought of as follows:

> All of us carry socially-constructed conceptions of the world composed of an array of cognitive structures that guide the constant process of interpretation that we call giving meaning to our experience. The influences that create these structures are both a function of our concrete experiences and our cultural knowledge base. Both of those components of course will likely differ with class, ethnicity, gender, and sexual orientation.

John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1310-11 (1994) (footnote omitted). *See* Richard C. Anderson, *The Notion of Schemata and the Educational Enterprise: General Discussion of the Conference*, *in* SCHOOLING AND THE ACQUISITION OF KNOWLEDGE 415, 415-30 (Richard C. Anderson et al. eds., 1977) (discussing the importance of "response components, perceptual factors, semantic features, functional attributes," and other similar elements used in educational settings by students to perceive and comprehend); Robert Glaser, *Education and Thinking: The Role of Knowledge*, 39 AM. PSYCHOL. 93, 100 (1984) (defining schema as "a modifiable information structure that represents generic concepts stored in memory;" asserting that "[p]eople typically try to integrate new information with prior knowledge," thus allowing individuals to "fill in" gaps in a narrative with information from their own schema); John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275, 277-87 (1989) (applying schema theory in an educational setting); David E. Rumelhart, *Schemata: The Building of Blocks of Cognition*, *in* THEORETICAL ISSUES IN READING COMPREHENSION 33-58 (Rand J. Spiro et al. eds., 1980) (same). *See generally* JEAN PIAGET, THE LANGUAGE AND THOUGHT OF THE CHILD (2d ed. 1932) (presenting cognitive, as opposed to behavioral, theory regarding child development).

In one of the most extensive studies of jury decision making in a criminal case, sociologists Lance Bennett and Martha Feldman found that narrative provided the key to understanding juror behavior in two fundamental respects. First, narrative allows jurors to make sense of the trial.[48] Opening statements aside, trials are often fragmented affairs in which evidence comes in a piece at a time, often without any deference to logical order, and at times consists of extensive evidentiary foundations which are unrelated to the substance of the case. Jurors make sense of this by constantly trying to fit the information they are hearing into a story.[49] Narrative also guides jurors to their ultimate decision, as they look at the stories being presented and assess whether they "made sense" in terms of logic, common sense, their own experiences, their cultural biases and beliefs, and their own stories about how people do or do not behave in the situations raised in the trial.[50] A study by Nancy Penning and Reid Hastie confirms Bennett and Feldman's thesis.[51] Penning and Hastie argue that jurors do not make their decisions using mathematical models, Bayesian or otherwise.[52] They decide using what Penning and Hastie call the "Story Model."[53] Like Bennett and Feldman, these researchers conclude that jurors order the information at trial into story representations and then compare their own stories to those offered by the parties in deciding the case's outcome.[54] Their central finding is that "the story the juror constructs determines the juror's decision."[55] These stories are constructed from case-specific information mixed with the juror's unique knowledge

48. *See* BENNETT & FELDMAN, *supra* note 8, at 164-68 (describing how jurors rely on the story presented to them in order to organize and make sense of all aspects of the case).

49. *Id.* at 9-10.

50. *See id.* at 88-90 (discussing how the structural properties of a narrative become important to jurors in making their decision, and concluding "that the way in which a story is told will have considerable bearing on its perceived credibility regardless of the actual truth status of the story").

51. *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 521-22 (1991) (arguing that "jurors impose a narrative story organization on trial information" derived from "case-specific information acquired during the trial," "knowledge about events similar in content to those that are the topic of the dispute," and "generic expectations about what makes a complete story").

52. *Id.* at 519-20.

53. *Id.* at 520.

54. *Id.* at 521-22.

55. *Id.* at 521; *see also id.* at 525 (arguing that jurors construct different stories that will determine the decision that a particular juror reaches).

and beliefs about the world and those in it.[56] In other words, the story will reflect the juror's socially constructed reality.[57]

Thus, in providing doctrinal legitimation for narrative theory, the Supreme Court has aligned its understanding of how jury trials really work with that of social scientists, cognitive psychologists, and law and literature academics.[58] Down which paths, however, does this legitimation of narrative theory lead?

The remainder of this Article will discuss one such path: The proposition that narrative theory should be utilized by appellate courts as an analytic tool to assess prejudice resulting from the failure of the prosecution to provide exculpatory information to the defense (the so-called *Brady* error) by evaluating the withheld evidence in terms of its likely real world impact on the narratives and stories available to the defense at trial. First, however, it is necessary to analyze the limitations of the current doctrinal standard for finding reversible error under *Brady* that motivate this proposal for reform.

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56. *Id.* at 525.

57. *See id.* ("Because all jurors hear the same evidence and have the same general knowledge about the expected structures of stories, *differences in story construction must arise from differences in world knowledge; that is, differences in experiences and beliefs about the social world.*") (emphasis added).

58. Another commentator explains narrative theory as follows:

> To the extent that it knows its own narrativity, I have suggested, the law represses and censors that knowledge. While it is true that courtroom advocates know they must tell an effective story—and textbooks on trial practice for law students make the point—one searches legal doctrine in vain for recognition of narrative as a category of thought and practice. In discussions of legal decision making, in arguments on rules of evidence, on causes and effects, there is no overt recognition—Souter's statement on the subject is a rare exception—that how stories are told may be a major shaping force in selecting facts and reaching those shining truths. Absent this recognition, legal actors who are in fact often adjudicating on the basis of narrative constructions have no conceptual and analytic tools for understanding and unpacking these constructions.

Brooks, *supra* note 36, at 40 (footnote omitted).

V. LEAVING *OLD CHIEF* BEHIND: APPLYING NARRATIVE THEORY TO ANALYZE *BRADY* ERROR

A. *Evolution of the Standard for Finding Reversible* Brady *Error*

The ancestry of *Brady v. Maryland*[59] includes a line of Supreme Court cases beginning with the finding of a due process violation when the government knowingly presented perjured testimony[60] and, later, a finding of a similar constitutional violation when, though not intentionally presenting false testimony, the state sat back and allowed false testimony to go uncorrected when offered by a witness.[61]

Brady represented a significant jump in this lineage of "fair trial" cases. The *Brady* Court found that due process has been violated "irrespective of the good faith or bad faith of the prosecution"[62] whenever the state fails to provide the defendant with favorable evidence prior to trial "where the evidence is material either to guilt or to punishment."[63]

While this concept appears rather simple and straightforward, the Supreme Court's analysis of the standard for finding prejudicial error in the *Brady* arena has been anything but. In *Brady*, the Court held that suppression by the prosecution of material exculpatory evidence regarding sentencing violated due process.[64] The Court, however, offered no explanation about what it meant by "material" or how this concept of materiality related to the determination of whether the error was prejudicial, thus warranting reversal. Of course, the normal standard for reversal for constitutional error is the *Chapman v. California*[65] test: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[66] However, while the *Chapman* test has been applied to cases where the prosecution knowingly offered or tolerated false testimony,[67] it has never been applied in a *Brady* case.

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59. Brady v. Maryland, 373 U.S. 83 (1963).

60. *Id.* at 86 (citing Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

61. *Id.* at 87 (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)).

62. *Id.*

63. *Id.*; *accord* United States v. Bagley, 473 U.S. 667, 676 (1985) (impeachment evidence must be disclosed if the evidence is material); Giglio v. United States, 405 U.S. 150, 153-54 (1972) (same).

64. Brady v. Maryland, 373 U.S. at 87.

65. Chapman v. California, 386 U.S. 18 (1967).

66. *Id.* at 24.

67. United States v. Bagley, 473 at 679 n.9.

United States v. Agurs[68] purported to address questions concerning materiality left undeveloped in *Brady*.[69] Initially, the *Agurs* Court compressed the standard defining the prosecutor's duty under *Brady* and the standard for reversal based on a breach of that duty into a single concept: materiality.[70] In other words, if a court finds that a piece of exculpatory evidence is not material, then the prosecutor has no duty to disclose that information under *Brady*.[71] If, on the other hand, a court finds that the evidence is material, the prosecutor not only has a duty under *Brady* to provide that evidence, but failure to do so will automatically result in reversal.[72]

So, what is material? To that central issue, the *Agurs* Court provided

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68. United States v. Agurs, 427 U.S. 97 (1976).

69. *See id.* at 107 ("We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty.").

70. *Id.* at 108.

71. *See id.* This analysis, however, has not gone without criticism from commentators. Professor Tom Stacy assessed the *Bagley* standard of materiality as follows:

> The *Bagley* standard, which focuses on the likely impact of evidence on the ultimate result in the case, suffers from two interrelated deficiencies. The first problem is that the standard will frequently be misapplied. A prosecutor's lack of information about the planned defense and partisan inclinations impede her from making an accurate and objective assessment of the evidence's effect on the outcome. The second problem is that many misapplications of the *Bagley* standard will never be detected and remedied. Because the prosecution has exclusive possession of the evidence subject to the duty to disclose and a clear incentive to withhold it, the defense or a court sometimes will never learn of evidence wrongly withheld.
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> ....
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> In short, the Court has interpreted the prosecution's duty to disclose exculpatory evidence more narrowly than a true concern for accurate fact-finding implies. For a Court genuinely interested in the search for the truth, neither the adversarial system, prosecutorial burdens, nor the constitutional text can justify the *Bagley* standard, which will result in important exculpatory evidence not being disclosed in a significant number of cases.

Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1393, 1396 (1991) (footnote omitted).

72. United States v. Agurs, 427 U.S. at 108, 112; *see also* Kyles v. Whitley, 514 U.S. 419, 436 (1995) (finding that once withheld exculpatory evidence is found to be material, the case is automatically reversed without any additional harmless error analysis).

more of a litany of policy concerns than an articulated standard.[73] Because the prosecution is equally obligated to provide *Brady* material whether or not the defense makes a specific request for the information,[74] the *Agurs* Court felt it must define *Brady* (i.e. materially exculpatory) evidence as that which is "so clearly supportive of a claim of innocence that it gives the prosecution notice" of its duty to provide the information.[75] In other words, the *Agurs* Court did not want to put the prosecution at risk each time it failed to provide the defense with some seemingly innocuous scrap of paper from its file which, in hindsight, could be characterized as exculpatory.[76] That concern, again, shaped the Court's approach in developing a standard for materiality.

With that policy framework as a guide, the *Agurs* Court not only rejected the application of the classic *Chapman* test, but even rejected the less lenient *Kotteakos* "harmless error" test[77] for nonconstitutional error claims.[78] Apparently, the Court felt that an even higher burden was required for *Brady* error than under the standard traditionally applied to nonconstitutional error.[79] Otherwise, the Court apparently believed, every nondisclosure of evidence that could later be characterized as exculpatory would automatically become constitutional error.[80]

In trying to ascertain the exact standard the *Agurs* Court arrived at

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73. *See* United States v. Agurs, 427 U.S. at 108 (struggling with an "inevitably imprecise standard").

74. *Id.* at 107-08.

75. *Id.* at 107; *see also id.* at 110 ("If evidence highly probative of innocence is in [the prosecutor's] file, he should be presumed to recognize its significance even if he has actually overlooked it. . . . [T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed . . . .").

76. *See id.* at 109 ("If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.").

77. Kotteakos v. United States, 328 U.S. 750, 764-65 (1946) ("If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specified command of Congress.") (footnote omitted). In federal habeas actions, on the other hand, *Kotteakos* replaces *Chapman* ("harmless beyond a reasonable doubt") as providing the standard for reversal. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

78. United States v. Agurs, 427 U.S. at 112 (rejecting the *Kotteakos* test).

79. *See id.* (holding that "[u]nless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden [than the harmless error test] on the defendant").

80. *See id.*

for defining materiality, the best one can do is draw out the "standard-sounding" sentences from the opinion: The withheld evidence must be "of sufficient significance to result in the denial of the defendant's right to a fair trial;"[81] it must rise to the level where it "might have affected the outcome of the trial;"[82] and it must be such that it "created a reasonable doubt that did not otherwise exist."[83]

The Court in *United States v. Bagley*[84] took another crack at defining the standard of materiality to be applied in *Brady* cases. Following the lead of *Agurs*, the *Bagley* Court proclaimed the need for a standard more lenient than that for reversal based on newly discovered evidence, in which one must show that the evidence "probably would have resulted in acquittal,"[85] but stricter than the *Kotteakos* harmless error standard.[86] The *Bagley* Court then paraded out the two policy concerns from *Agurs*: A more lenient standard for reversal would lead to finding error in every instance in which the prosecution has failed to provide exculpatory evidence, and a less lenient definition of materiality would put a prosecutor in the position of having "to deliver his entire file to defense counsel" rather than risk committing reversible error.[87] Against that policy backdrop, the *Bagley* Court provided this standard for materiality: "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[88] At first reading, one could respond that the *Bagley* Court could not have meant what it said. Requiring a "reasonable probability" that the result would have been different seems the same as the newly discovered evidence standard (*probably* would have resulted in acquittal), which is the very standard the *Bagley* Court deemed too strict.[89] However, for the *Bagley* Court, the phrase "reasonable probability" was a term of art: "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[90]

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81. *Id.* at 108.
82. *Id.* at 104.
83. *Id.* at 112.
84. United States v. Bagley, 473 U.S. 667 (1985).
85. *Id.* at 680-81.
86. *Id.* at 681.
87. *Id.* at 680.
88. *Id.* at 682. The *Bagley* Court specifically adopted the formulation of the *Agurs* test in *Strickland v. Washington*, 466 U.S. 668 (1984), the case setting the standard for Sixth Amendment ineffective assistance of counsel claims.
89. United States v. Bagley, 473 U.S. at 680-81.
90. *Id.* at 682.

Taking the lead from the *Bagley* Court's definition of reasonable probability, *Kyles v. Whitley*,[91] the final significant Supreme Court pronouncement on this issue, makes clear that the standard of material exculpatory evidence is intended to reflect moral confidence in the verdict as opposed to mathematical probabilities.[92] "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[93] Again, as in *Bagley*, the Court refers to the materiality decision as one intersecting with a moral-like sense of "confidence" in the verdict.[94] But how is one to conceptually link withheld evidence with moral comfort or discomfort? For the *Kyles* Court, a defendant establishes materiality "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[95]

B. *Why the Supreme Court Standards for Materiality, When Applied Outside the Competing Narrative Context of "The Story That Was" and "The Story That Should Have Been," Fail to Provide Meaningful Guidance in* Brady *Cases*

Offering only two-dimensional concepts within the texts of *Agurs*, *Bagley*, and *Kyles*, the current standards for designating exculpatory evidence as material are static phrases, incapable of guiding appellate courts in the required moral and analytic exploration of whether one can have "confidence in the verdict."[96] Collectively and individually, the

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91. Kyles v. Whitley, 514 U.S. 419 (1995).

92. *Id.* at 434-35. The Court held that "it is not a sufficiency of evidence test. . . . The possibility of an acquittal . . . does not imply an insufficient evidentiary basis to convict." *Id.*

93. *Id.* at 434.

94. *See id.* ("A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'") (quoting United States v. Bagley, 473 U.S. at 678).

95. *Id.* at 435.

96. *See id.* (noting that it is essential to look at whether excluded evidence "could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict" when determining if it is material); United States v. Bagley, 473 U.S. at 678 ("Consistent with 'our overriding concern with the justice of the finding of guilt,' a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.") (citation omitted) (quoting United States v. Agurs, 427 U.S. 97, 112 (1976)); United States v. Agurs, 427 U.S. at 112 ("The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing

existing standards for *Brady* error appear to ask the judge to: (1) look at the withheld exculpatory evidence; (2) look at the trial transcript; (3) ask himself questions like: "Was this a fair trial?" "Am I morally comfortable with the verdict?" "Was this withheld evidence a big deal (i.e., significant in this case)?"; (4) and, finally, after looking at the transcript and the *Brady* evidence, look into his soul and answer "Yes" or "No."

The problem is that the questions posed by the standards are totally unmoored to any meaningful context. In most appellate situations, the bench is evaluating the impact of some alleged error on "the case that was." In the world of *Brady*, however, one is assessing "the case that never was" (but could have been if the defense had been provided with the exculpatory evidence).[97]

Interestingly, one can readily discern a narrative theme if one looks at the standards from *Agurs*, *Bagley*, and *Kyles* as providing practical metaphors for expressing when withholding exculpatory evidence denies the defendant a fair trial, rather than as offering clear analytical guidance. Take *Agurs*'s concept of raising "a reasonable doubt that did not otherwise exist"[98] and *Bagley*'s "'a probability sufficient to undermine confidence in the outcome.'"[99] Where else but in the story, which could have been told by the exculpatory evidence, would one find a "reasonable doubt that did not otherwise exist,"[100] or locate the basis for "undermin[ing] confidence in the outcome[?]"[101] *Kyles* brings the image of narrative almost to the surface when the Court speaks of "put[ting] the whole case in such a different light."[102] For what do we mean when we say that we now see a person or experience in a different light other than that, with subsequent additional information, we would have changed our story about the person or experience? Narrative theory, pitting the case that was against the case that never was, was always implicit in *Brady*.

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guilt beyond a reasonable doubt.") (footnote omitted).

97. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that error occurs "where the [suppressed] evidence is material either to guilt or to punishment").

98. United States v. Agurs, 427 U.S. at 112.

99. United States v. Bagley, 473 U.S. at 682 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

100. United States v. Agurs, 427 U.S. at 112.

101. United States v. Bagley, 473 U.S. at 682 (quoting Strickland v. Washington, 466 U.S. at 694).

102. Kyles v. Whitley, 514 U.S. 419, 435 (1995).

VI. INCORPORATING NARRATIVE THEORY INTO EVALUATION OF *BRADY* ERROR

When I propose incorporating narrative theory into the *Brady* analysis, I am not suggesting discarding the *Agurs*, *Bagley*, or *Kyles* standards. Rather, I am proposing using a relevant and powerful analytic tool to apply those standards in the context of prosecutorial action or inaction resulting in a diminished defense narrative at trial.

Here is how I propose that the Court proceed using the tool of narrative theory. An appellate court would envision the best closing argument the defense could have given (regardless of the actual closing)[103] with the information available at the trial. I choose the closing argument because it is the point where advocates attempt to weave the evidence presented at trial into a persuasive narrative they wish the jury to adopt.[104] As such, the defense's closing is a good proxy for the narrative framework the defense hopes jurors will utilize in assessing the evidence at trial.[105] Trial attorneys intuitively appreciate narrative theory, for in their world, all that exists is information, a lack of information, inferences, and the narratives and stories drawn from those inferences.[106] Within this world, it simply makes sense to evaluate the impact of withheld information by assessing the additional and/or alternative stories which could have been told in closing argument with the withheld information.

The appellate court would then look at the closing argument the defense could have delivered had it received the exculpatory evidence from

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103. If the analysis I propose is followed, the government on appeal is certain to provide the court with both the strongest defense closing which could have been made at the trial that was, and its counterarguments to the defense closing from the trial that never was.

104. See BETTYRUTH WALTER, THE JURY SUMMATION AS SPEECH GENRE: AN ETHNOGRAPHIC STUDY OF WHAT IT MEANS TO THOSE WHO USE IT 40-41, 86-91, 101-05 (1988), for an extensive sociological analysis of the role of the closing argument in persuasively establishing the stories of the parties.

105. *See generally* MARILYN BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY 469 (1989) (describing closing arguments as "your opportunity, once all the evidence has been presented, to argue how the jurors can reach the verdict you desire").

106. *See* John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 107 (1999) ("All that exists in a courtroom is information, lack of information, and the inferences from that information and its lack; these inferences in turn create the narratives and subnarratives which eventually compose the case theory.") (footnote omitted).

the prosecution. The court would then compare the two closings—that of the trial that was, and that of the trial that never was. In doing so, I would suggest that courts ask two questions, the answers to which would give strong guidance for the application of the *Agurs*, *Bagley*, and *Kyles* standards:

> (1) Could the defendant have told a plausible, different story with the withheld evidence than the story he told at trial? Being denied the ability to raise what is in effect a different defense would seem to put one well on the way to triggering the standards of *Agurs*, *Bagley*, and *Kyles*. Of course, some consideration of possible prosecution counterarguments based on the evidence is proper in the court's decision, but again, the point is "plausibility," not whether the court would personally find the prosecution's hypothetical counterarguments convincing.
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> (2) With the exculpatory evidence, could the defendant have made the same story "significantly more persuasive?" An affirmative answer to the second inquiry should likewise put the defendant on the path to reversal.

I recognize that with terms like "plausible" and "significantly more persuasive," appellate courts have a broad, subjectively circumscribed field within which to maneuver. But my object is not so much to constrain appellate judges as to provide them with appropriate tools to look at the right information and ask the right questions. When employing narrative theory to a *Brady* decision, courts will have two vivid, concrete narrative visions to compare (closing arguments from the trial that was, and the trial that never was) and will therefore be able to meaningfully apply the standards of *Agurs*, *Bagley*, and *Kyles* within a context that reflects how cases are really tried and how jurors really decide.

VII. A CASE EXAMPLE: A TALE OF TWO TALES[107]

B was charged with the armed robbery of a Payless ShoeSource store

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107. For over two years, I have been working on this case under the aegis of the Seattle University School of Law Access to Justice Institute with co-counsel, Professor Jacquiline McMurtrie of The University of Washington Innocence Clinic. Because this case is currently moving through the court system, I thought it best to try to limit identifying information. I have also simplified the case a bit, choosing not to discuss all *Brady* material withheld in the case, but I do not feel that in doing so I have distorted the case (at least not in favor of the defendant).

on April 1, 1999. In his first trial, defendant B acted *pro se.* The government did not present any forensic or physical evidence. Instead, the prosecution's entire case centered on the testimony of the robbery victim, the sole employee present at the store, Ms. SB.[108]

Ms. SB described the robber to the police that evening as being Hispanic, in his early twenties, about 150 pounds, five feet eight inches tall, and wearing baggy light green jeans and a baggy gray sweatshirt. Ms. SB described the remainder of the robber's face as covered in foundation makeup, with a large blue circle outlined in white on one side of his face and a red mark on the opposite temple. Ms. SB also reported seeing makeup or paint on the man's hands in the form of roughly five small red dashes. The responding officers relayed to local media that face paint was "effective in concealing [the robber's] identity." The so-called "Clown Robbery" became the subject of media headlines.

In subsequent interviews and at trial, Ms. SB recalled seeing the robber enter the store wearing a handkerchief over the lower half of his face and a baseball cap with the brim forward. The robber remained at her back and spoke over her shoulder while demanding money from the till. Ms. SB relayed that she saw the robber's profile best.

At the time of the incident, defendant B was thirty-nine years old, five feet nine and one-half inches tall, weighed in the range of 200 pounds, and his arms, hands, and neck were covered with tattoos.

Six days after the robbery, Detective H, the investigator assigned to the case, spoke with Ms. SB for the first time. Detective H showed Ms. SB a color photomontage, comprised of six Hispanic males facing forward. Detective H included only one photograph in which a man was wearing a gray sweatshirt—the type of clothing Ms. SB previously described in police reports as being worn by the robber. After comparing the six pictures, Ms. SB picked the photograph of the man in a gray sweatshirt in position number four—defendant B. Detective H next showed her a booking photograph to confirm her selection. Ms. SB was shown only *one* profile shot: that of Mr. B. When asked at trial whether seeing the additional photograph changed her mind about her selection, Ms. SB said "No, it made me more certain that was him because the profile is what I looked at for most of the time when he was taking money."

After showing Ms. SB the booking photograph of Mr. B, Detective H

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108. Every factual statement about the case is supported in either testimony recorded in trial transcripts or in government documents.

spoke to Ms. SB in a taped interview. Having just seen his picture, Ms. SB described—as if from memory—Mr. B's facial structure *for the very first time*. After Ms. SB's account of the incident, in which she carefully described studying the young robber's face and features, Detective H asked, "What about tattoos?," to which Ms. SB questioned, "Tattoos?" Detective H asked again whether Ms. SB had noticed any tattoos on the night of the robbery, and Ms. SB answered in the negative.

Based on this testimony alone (defendant B did not testify), the jury hung 9-3 for acquittal. The court declared a mistrial, and the prosecution subsequently chose to retry B.

Defendant B was represented by counsel at his second trial for the Payless robbery. Again, the prosecution presented neither forensic nor physical evidence. Again, the jury heard the eyewitness testimony of Ms. SB. There was, in fact, only one substantive addition to the prosecution's case—The testimony of jailhouse informant A. Informant A testified that in early April, defendant B confessed to committing the Payless robbery to him. The jury knew A had a juvenile conviction for drugs six years earlier and that he was receiving a deal for his testimony. A's deal included the dismissal of a drug possession charge and the reduction of a felony burglary charge to a misdemeanor. The jury also knew informant A was a current drug user, had a personal grudge against defendant B, and, in the past, had given a close relative's name to police instead of his own, knowing that this attempt to protect himself was likely to lead to the arrest of an innocent family member when A failed to appear in court. In other words, the jury knew that informant A was scum.

The prosecution's story of how it came to use informant A in the second trial was one of chance, fate, and happenstance in which the testimony fell into the prosecution's proverbial lap. According to this story, on June 17, 1999, while in jail, A told Deputy DC that he had information about the Clown Robbery (which was then nearing the conclusion of the first trial) and that he would trade his information for some consideration by the government. By the time Detective H, the primary investigating officer in both trials, went to the jail, however, A had been released and could not be located. Then, on July 15, 1999, A was arrested for drug possession during the execution of a search warrant by the City-County Narcotics Unit (CCNU). Detective H, who had accompanied the CCNU, then talked to A and began the process that would culminate in informant A testifying against defendant B in return for a deal.

Even at the time of the second trial, there were some very strange

aspects of this story. Detective H had provided some of the information cited in the affidavit that justified the July 15, 1999 residential search during which A was arrested. Yet neither his information, nor any information in the affidavit, mentioned or referred to A in any way. In other words, ostensibly this search had nothing to do with A. Detective H then accompanied the CCNU on the search where he just happened to find informant A on the premises. But H was not a member of the CCNU; he was a robbery detective. Why was he on the search? Again, strange—but there was not a great deal to be made of it.

Given all the above information, one can imagine the defense's closing argument: After discussing the significance of the fact that there is absolutely no forensic or physical evidentiary corroboration for the live witness's testimony, and then systematically attacking the eyewitness who had literally described a different man than defendant B by failing to mention any tattoos and who ultimately had selected the defendant from a suggestive photo display, defense counsel would focus upon informant A—

So what do we have so far? Not a shred of forensic evidence—no fingerprints, fibers, or traces of face paint on clothing. No physical evidence—no gun, no money, and no face paint; nothing but an eyewitness who is as untrustworthy as imaginable. Based on that evidence, it is more likely than not that defendant B is innocent. Of course, that is not defendant B's burden. The State must prove him guilty, and must do so beyond a reasonable doubt. So let us look at informant A. Let us look closely because, unless a jury believes him beyond a reasonable doubt, there is really nothing else left in the case to carry that very heavy burden—no matter how it is added up and mixed together.

Before we look at informant A and his actions in this case, let us first look at the character of his breed. I want us to think about the moral code of the jailhouse informant. First, I want to be careful about being too self-righteous. After all, if I were facing prison, facing years in a cage and in fear of being beaten or raped by a larger fellow inmate or being the target of an ethnic prison gang who wants to kill me solely because someone of their race was killed by someone of my race, am I so sure that I wouldn't lie to save myself? I would not lie and get my mother or wife in trouble to save myself (at least I don't think so), but would I really worry about some guy I didn't even like? Would you—really? And that is you and me. We are not people who spend our lives in and out of jail, routinely trading others to get out of responsibility for what we do. So, if we cannot even be certain how we would behave if faced with the choice of lying or going to prison, can we really believe that a jailhouse informant like A would be in any way bound by some set of Jimmy Stewart values like "never tell a lie"? How could you

trust any jailhouse informant—and trust him beyond a reasonable doubt—when he has nothing to lose and everything to gain by lying? And what did confessed drug addict A have to lose? What is there to make A tell the truth? What risk does he take by lying? Perjury? The prosecutor wants to believe him. In any event, there is no third person who can contradict his claim. We have only his word that the conversation even took place.

Who is this informant? He is a person who could have learned his entire story about the robbery through the newspapers or television while sitting in jail. He is a junkie who just wanted to get out of jail, who just wanted to get on the streets and feel drugs in his veins again—is there anything a drug user would not say to get his fix? You know that drug users would cheat and steal from their friends, their wife, and their parents to get a fix. They are sick; the drugs are all that matter. In fact, A demonstrated he would lie to protect himself—even if that lie would likely get innocent family members into trouble. He is a person who initiated all this by telling Deputy DC he had information but would only provide it if he got a deal in return. And what a deal he got: Despite the fact he was caught with a spoon of narcotics in his hand—possession of narcotics dismissed. Dead-to-rights on a felony burglary—a felony reduced to a misdemeanor, no jail time, no probation. The 90-day sentence he was to serve on yet another charge is commuted, and when the dust settles, A is released as soon as he completes his trial testimony. To round this off, A personally dislikes defendant B. Is the prosecutor kidding?

Have you seen any evidence that would not lead you to conclude this man would do anything—lie, cheat, steal—to keep himself out of jail and get back to his drugs? Would anyone trust informant A if he asked, "lend me $5.00, and I'll pay you back tonight?" Of course not. You would not even consider trusting him. Yet the prosecution would ask this jury to trust him as the central piece of an extremely serious criminal accusation, not with $5.00, but with the fate of defendant B—and to trust him beyond a reasonable doubt.

Ridiculous. Can you truly say you have encountered anyone you would trust less?

Yet the jury convicted defendant B of robbery in the second degree. Incredible. Somehow a completely unreliable eyewitness and an equally unreliable jailhouse informant equaled guilt beyond a reasonable doubt. Since this was defendant B's "third strike," he was sentenced to lifetime imprisonment without the possibility of parole.

In postconviction investigation, counsel on habeas corpus discovered a series of government documents making it apparent that the investigating

police, and possibly even the prosecutor, had a relationship with informant A near mid-June 1999, over a month prior to the supposedly happenstance scenario testified to by Detective H and Deputy DC. One might have thought that, in light of this new information, defendant B would get a new trial. Yet, applying *Agurs*, *Brady*, *Bagley*, and *Kyles*, a series of appellate decisions found that though the withheld evidence may have been exculpatory, failure to provide it was not prejudicial (i.e., material). To the appellate courts, the jury had already heard that informant A had a relationship with the prosecution, that he was a junkie and a liar, and that he was only testifying because he had been given a favorable deal. Nonetheless, with all of this in front of them, the jury convicted. So, reasonably, what difference would this additional information have made?[109]

The additional information, however, could have made a significant difference if the defense could have used the withheld information about the state's mid-June relationship with the informant in their closing. In that event, the defense could have offered the jury a *completely* different and completely plausible story than that presented at trial, which not only attacked informant A as above, but would have also questioned the legitimacy of the prosecution's entire case.[110]

This would have been plain to an appellate court reviewing defendant B's case if they had used narrative theory as their analytic tool rather than

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109. Plainly, these appellate courts did not heed the Supreme Court's admonition that "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." United States v. Agurs, 427 U.S. 97, 113 (1976).

110. In *Kyles v. Whitley*, the Court noted that materiality must be assessed for its potential power to dismantle other parts of the prosecution's case, not just an individual witness. *See* Kyles v. Whitley, 514 U.S. 419, 445-46 (1995) (noting that withheld evidence of a prosecution witness's statements would have raised opportunities to attack the probative value of crucial physical evidence, the circumstances in which it was found, as well as the thoroughness, and even the good faith of the investigation); *see also* Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986) (noting that "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"); Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985) (awarding a new trial because withheld evidence "carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case."). The Supreme Court in *Kyles* reasoned that impeachment evidence could have been used to "sully the credibility" of investigating officers and raise suspicions about the prosecution's "remarkably uncritical," attitude toward the investigation. Kyles v. Whitley, 514 U.S at 445, 447.

merely asking whether their "confidence in the verdict"[111] was undermined, and then intuiting the answer.[112] Specifically, the appellate courts should have compared the previous closing argument, the core of which would still have remained, to a closing argument including the following, based on the withheld evidence:

In some ways all of these reasonable—in fact, I would contend inevitable—conclusions concerning the absolute unreliability of A are only the tip of the proverbial iceberg. The mass of that island of ice in this case is composed of evidence that the state had a relationship with A by mid-June 1999. So let's think about what it means: First, it means you can reasonably infer that the "tale" about informant A going to the jailor, Detective H just missing informant A, and then Detective H serendipitously finding informant A at last during a search totally unconnected to A was just that—a tale carefully constructed to make the state look less involved, less interested in trying to get defendant B after his first trial, a trial in which defendant B represented himself, a trial which resulted in a hung jury.

But you might ask yourself why, if the first trial was not over when they made this deal, did the state not use A in the first trial? I do not know. Maybe they thought they did not need him—after all, the prosecutor was a top prosecutor, whereas defendant B did not even graduate from high school—or that informant A was too risky a witness, especially to suddenly bring in at the eleventh hour. Also, I am not saying that the deal was specifically to testify in defendant B's case; it is possible that it was a general deal to cooperate as an informant and to be called upon when needed, with the threat of second degree burglary held over his head. After all, why should we trust Deputy DC when he tells us informant A approached him on June 16th offering to testify against defendant B? All that we have to corroborate the word of each of the state witnesses in this case are the words of other state witnesses. Given that the most reasonable inference from the evidence is that the state presented a totally fabricated story about their relationship with informant A, what is the basis upon which the prosecutor can ask you to trust what you are being told, and trust it beyond a reasonable doubt?

What I am saying is that this is not just about whether you believe a drug addict who would sell out his own family. No, it is much, much more than that. If, as the evidence indicates, the state made a deal with informant A in mid-June, but then presented you with this other story, you cannot trust

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111. *See* discussion *supra* Part V.B.

112. *See* discussion *supra* Part V.B.

anything about their case. If they would deceive you about this, and would even call witnesses to testify under oath to support this charade, why would they be above telling a pathetic, strung-out addict like informant A what to say? In fact, why should you trust that the photo identification procedure with Ms. SB was not far more suggestive and unfair than even the testimony shows?

Because you know that these are genuine questions, you also know that we are way, way past reasonable doubt because you cannot find beyond a reasonable doubt absent the highest level of trust in the state's case. Given the strong inference of a mid-June 1999 deal, such trust is impossible.

With this comparative narrative framework now providing the context for the *Brady* inquiry as to materiality in defendant B's case,[113] it should be clear that the withheld information would have both made the attack on informant A's credibility significantly more persuasive, and afforded credibility to a plausible new story that was otherwise unavailable (i.e., that the jury cannot trust the entire prosecution case). As such, it would be difficult to fathom how, given the comparison of the case that was with the case that never was, defendant B's case would not be put "in a different light," thus "undermin[ing] confidence in the verdict"[114] from his second trial.

VIII. CONCLUSION

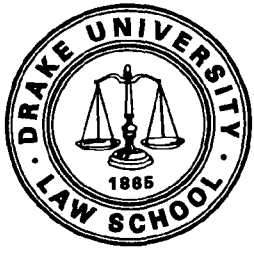
When Justice Souter penned the majority opinion in *Old Chief*, he obviously realized he was creating precedent. I doubt, however, that it ever crossed his mind that perhaps the most important precedential aspect of the opinion was its adoption of a theory of human cognition and juror decision making. Yet I believe, ultimately, that will be the legacy of the opinion.

While I do not purport to know the eventual impact of narrative theory on the analyses of the appellate courts, the theory plainly has direct import in the *Brady* arena. In the world of the trial advocate, where all that exists is information, lack of information, inferences, and the narratives which result, the prejudice from failing to provide exculpatory information to the defense can only be fully appreciated by looking at the

113. *See* discussion *supra* Part V.A.

114. *See* Kyles v. Whitley, 514 U.S. at 435 (A defendant establishes materiality of undisclosed evidence "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.").

narrative(s) the defense could not tell at trial because it lacked the withheld information. Comparing the defense closing argument from the trial that was (i.e., without the *Brady* materiality) with that of the trial that never was (i.e., with the *Brady* material) is the most meaningful methodology for appellate courts to fairly assess the prejudice (i.e., materiality) resulting from the denial of *Brady* information.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