

## Storytelling and Relevancy

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## INTRODUCTION

In a recent federal jury trial, an Occupy Wall Street protestor who suffers from epilepsy sued the City of New York and New York Police Department (NYPD) officers for excessive force used during several protests and willful indifference to her medical condition.<sup>1</sup> At one protest, when the plaintiff was standing over her belongings and chanting, an NYPD sergeant ran toward the plaintiff, picked her up, twirled her around, and threw her to the ground. She was hospitalized for a concussion. When she returned to protesting, on crutches, another sergeant shoved her off her crutches. At another protest, the plaintiff was arrested for making unreasonable noise in front of the New York Stock Exchange. In the patrol wagon, she suffered a seizure, but the officers failed to render any assistance. She was driven to the precinct rolling around in her own vomit.<sup>2</sup>

In her opening statement, the City's attorney portrayed the plaintiff as a money-grubbing exaggerator and inventor. For example, the City's attorney argued,

What we're here to discuss is what's not good, and that's inventing and exaggerating. That is what plaintiff does. This is what you are going to learn about in this trial. This is a deliberate attempt to deceive you and manipulate you into believing that a story exists where it does not.

To conclude her presentation, the attorney reiterated:

So, despite these multiple incidents . . . this is not a complicated case, and the reason for that is because there is one common denominator: There is one plaintiff who invents and exaggerates, and now she wants you to give her money for those inventions and exaggerations. You shouldn't let her deceive you into thinking that there is a story where there is none, and you should not give her money.<sup>3</sup>

To rebut this portrayal and to show the plaintiff's serious commitment to social justice, the plaintiff's counsel planned to ask her

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<sup>1</sup> Third Amended Complaint, *Tardif v. City of New York*, 344 F. Supp. 3d 579 (S.D.N.Y. 2018) (No. 13-CV-4056), ECF No. 135.

<sup>2</sup> *Id.* at 10–14.

<sup>3</sup> Transcript of Record at 51, *Tardif v. City of New York*, No. 13-CV-4056 (S.D.N.Y. Nov. 14, 2018), ECF No. 341.

background questions about (1) her living situation as a foster mother to two three-year-old, immigrant children whose mothers were being detained by ICE at the southern border; (2) her occupation as a sign-language interpreter for deaf children attending *The Lion King*; and (3) her training and volunteer experience as a nationally certified EMT who volunteered for local ambulance companies.<sup>4</sup> But when the plaintiff's attorney tried to broach these topics, the judge sustained all the City's objections. At a sidebar the judge told the plaintiff's attorney:

From my rulings you may have noticed that I don't want you to elicit anything that plays upon the sympathy of jurors. I also want to get right to the heart of matters . . . . Where she lives, who she lives with, that she has foster children, none of that should come in. You need to get to the events of those days [of the protests].<sup>5</sup>

The plaintiff's attorney made an offer of proof of the background evidence she wished to present, but the judge did not reconsider her decision.<sup>6</sup>

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To the court in the Occupy Wall Street case, the "heart of the matter" was limited solely to the events of the alleged abuse at the protests and medical indifference. The context of these events—the broader story of the plaintiff as a person and what brought her to these protests—was to the court merely a ploy to "play upon the sympathy of the jurors." To the plaintiff's attorney, on the other hand, that deeper story was essential to understanding the events at issue in the case. In the defendants' narrative, the plaintiff was a shallow manipulator who raised a ruckus at the New York Stock Exchange for the fun of it and brought the case to cash in. Under the plaintiff's narrative, she protested real injustice and brought the case to vindicate her social justice values. Evidence of where she lived, whom she lived with, and where she worked were all relevant because they supported her explanations of the events and undermined the defendants' explanations. Yet the court prevented the jurors from hearing all of this contextual evidence.

By contrast, in the early common law, courts were not so wary of witness storytelling. In fact, those courts were very open to narrative

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<sup>4</sup> Transcript of Record at 730–31, *Tardif v. City of New York*, No. 13-CV-4056 (S.D.N.Y. Nov. 19, 2018), ECF No. 347.

<sup>5</sup> *Id.* at 605.

<sup>6</sup> *Id.* at 730–31.

in witness testimony.<sup>7</sup> As the great evidence scholar John Henry Wigmore put it, storytelling was the “natural way of giving testimony.”<sup>8</sup> Nevertheless, courts in the early twentieth century began to limit testimony to evidence that was “logically probative” to the elements at issue in a case.<sup>9</sup> By the mid-twentieth century, this practice was codified in rules, limiting testimony to evidence that was “logically relevant” to a case.<sup>10</sup> Reflecting this trend, the dominant model for examining issues of relevancy—the probabilistic paradigm—focuses almost exclusively on “likelihood ratios” of whether an item of evidence will support or undermine a proposition in dispute in the case.<sup>11</sup> We are now a far cry from the witness storytelling of the early common law.

Even as evidentiary rules have impeded storytelling in testimony, empirical research in the late twentieth century has demonstrated the significant role of stories in the legal decision-making process.<sup>12</sup> Those studies have shown that jurors instinctively construct stories from the trial evidence in making their decisions, weighing the comparative credibility of the competing narratives.<sup>13</sup> These findings are supported by other cognitive science studies recognizing stories as essential ingredients in human interaction and a primary form of human communication.<sup>14</sup> Relying on this research and insights from narrative theorists, filmmakers, and neuroscientists,<sup>15</sup> scholars in the new field

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<sup>7</sup> See *infra* text accompanying notes 19–31.

<sup>8</sup> 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 767, at 49 (2d ed. 1923); see *infra* text accompanying note 31.

<sup>9</sup> See *infra* text accompanying notes 33–35.

<sup>10</sup> See *infra* text accompanying notes 37–52.

<sup>11</sup> See *infra* text accompanying note 55.

<sup>12</sup> See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (Quid Pro Books 2d ed. 2016); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

<sup>13</sup> See, e.g., BENNETT & FELDMAN, *supra* note 12, at 88–90; Pennington & Hastie, *supra* note 12, at 522–23.

<sup>14</sup> Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 3, 6 (2008); see *infra* text accompanying note 81.

<sup>15</sup> RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE (2000); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 15 (1984); Philip N. Meyer, “*Desperate For Love*”: *Cinematic Influences upon a Defendant’s Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994). While the field of law and literature researches some of the same issues as Applied Legal Storytelling, its focus is on understanding legal texts using the methods of literary interpretation, critique, or analysis or understanding enduring legal issues in literary texts. Applied Legal Storytelling, on the other

of Applied Legal Storytelling (ALS) have considered the role of narrative in brief-writing, trial presentation, and judicial opinions.<sup>16</sup> They have proposed methods for effective storytelling not only in litigation but also in transactional work, regulatory policy-making, and legislative advocacy.<sup>17</sup> And they have addressed the importance of narrative in law school teaching—not only in experiential courses but also in traditional doctrinal subjects.<sup>18</sup>

But these scholars have paid little attention to the interplay between narrative method and the evidentiary rules that regulate the presentation of a case at trial. While many scholars tout the significance of storytelling in presenting a persuasive case, they have not considered the roles that the relevancy rules play in inhibiting and facilitating the storytelling process. Nor have they addressed how procedural and evidentiary rules have affected the presentation of narratives in the modern trial system. Simply put, these scholars have failed to confront the theories underlying the probabilistic paradigm.

In this context, we will address the relationship between the rules of relevancy and narrative theory. We will first describe the role of storytelling in the common law of relevancy and the rise and widespread adoption of the probabilistic model of proof—a turn to logic that is seen as culminating in Federal Rule of Evidence 401. We will then address criticism of the probabilistic paradigm and its main alternative, the explanatory paradigm. The explanatory paradigm builds on insights from cognitive science and the theory of Inference to

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hand, examines the actual use of storytelling and narrative methods in practice. Robbins, *supra* note 14, at 8–12.

<sup>16</sup> See, e.g., Todd A. Berger, *A Trial Attorney's Dilemma: How Storytelling as a Trial Strategy Can Impact the Criminal Defendant's Successful Appellate Review*, 4 DREXEL L. REV. 297 (2012); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 127 (2008); Michael J. Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICH. L. REV. 1213 (2010).

<sup>17</sup> See, e.g., Stacy Caplow, *Putting the "I" in Writing: Drafting an Effective Personal Statement to Tell a Winning Refugee Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 249 (2008); Clare Keefe Coleman, *Dangerous Tongues: Storytelling in Congressional Testimony and an Evidence-Based Solution*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 291, 293 (2016); Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355 (2013).

<sup>18</sup> Michael Blissenden, *Using Storytelling as a Teaching Model in a Law School: The Experience in an Australian Context*, 41 LAW TCHR. 260 (2007); Scott DeVito, *The Power of Stories and Images in Law School Teaching*, 53 WASHBURN L.J. 51 (2013); Laurie Shanks, *Whose Story Is It, Anyway? Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLINICAL L. REV. 509 (2008); Jo A. Tyler & Faith Mullen, *Telling Tales in School: Storytelling for Self-Reflection and Pedagogical Improvement in Clinical Legal Education*, 18 CLINICAL L. REV. 283 (2011).

the Best Explanation, and it offers an effective critique of deciding admissibility based on probabilistic formulas. But the proponents of the explanatory paradigm do not address how their formula should be applied in courtrooms. That is where ALS comes in. After outlining the key insights in this area, we address the overlaps between ALS and the explanatory paradigm. We then use ALS's insights to provide guidance for applying the explanatory paradigm in determining issues of relevancy. Finally, we circle back to Rule 401 and show how the seemingly ultrarational approach masks a narrative-friendly model for determining relevancy—one that can be understood through the lens of ALS.

## I

### THE RISE OF THE PROBABILISTIC PARADIGM

#### *A. The Common Law's Embrace of Storytelling*

The reported cases and commentaries indicate that early common law judges and lawyers welcomed narratives in witness testimony. They considered witness narratives the preferred method for presenting a witness's version of the events. A good example is a reported case from 1704 of an alleged assault by Nathaniel Denew against William Colepeper.<sup>19</sup> The prosecution called the victim's sister as a witness concerning the alleged assault by Denew against her brother. The prosecutor asked her, "Pray, madam, will you be pleased to acquaint my lord and the jury what you know concerning this matter, and what passed between your brother, Mr. Colepeper, and Mr. Denew, at his first coming to him?"<sup>20</sup> No objection is noted by the reporter, and the sister answered.<sup>21</sup>

It appears this mode of examination was the common practice for at least the next two centuries in both England and America.<sup>22</sup> In 1795, Zephaniah Swift, a noted Connecticut lawyer who later became a congressman, observed in one of his many digests of the law: "In the examination of witnesses admitted to testify, the proper mode is to permit them in the first place to tell their stories in their own

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<sup>19</sup> *The Trial of Nathaniel Denew, et al.*, in A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON & OTHER CRIMES & MISDEMEANORS 895 (T.B. Howell ed. 1812).

<sup>20</sup> *Id.* at 916.

<sup>21</sup> *Id.*

<sup>22</sup> See generally Arthur E. Howard Jr., *Why Can't I Tell My Story*, 26 CONN. BAR J. 183 (1952).

language.”<sup>23</sup> And in 1835, prominent lawyer Joseph Chitty observed in one of the earliest legal practitioners’ texts in England:

It is certainly the practice, when the time and place of the scene of action have once been fixed, to desire the witness *to give his own account of the matter*, directing him, when not a professional person, to omit as he proceeds any account of what he has only heard from others, and not seen or heard himself . . . . It is difficult, therefore, to extract the important parts of his evidence piecemeal, but if his attention be first drawn to the transaction, by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the due order of time.<sup>24</sup>

At least until the late nineteenth century, most courts seemed very open to direct examination questions asking witnesses to tell their stories. One of the most noted American cases on the issue is *Northern Pacific Railroad Co. v. Charless*, an 1892 decision from the Ninth Circuit.<sup>25</sup> In that case, a railroad employee brought a personal injury action against his employer.<sup>26</sup> The plaintiff’s lawyer called the employee as a witness, asked him a few preliminary questions, and then asked, “Turn to the jury, and tell them the facts of the case, commencing at the time of your employment with the Northern Pacific Railroad Company, and *tell them the complete story*.”<sup>27</sup> The defendant did not initially object, but later objected on relevancy and hearsay grounds when, after the plaintiff began describing his employment and duties, he began to describe the incident.<sup>28</sup> The trial court overruled the objection.<sup>29</sup> On appeal, the defendant argued that because plaintiff’s testimony was given in narrative form, it had no opportunity to object.<sup>30</sup> Citing Joseph Chitty, the court affirmed and held

that the taking of the witness’ testimony in the narrative form would be the best way of getting at what he knew or could state concerning the matter at issue; [and] that it would save time to proceed in that

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<sup>23</sup> 1 ZEPHANIAH SWIFT, DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 748 (New Haven, S. Converse 1822).

<sup>24</sup> 3 JOSEPH CHITTY, THE PRACTICE OF LAW IN ALL ITS DEPARTMENTS 894 (London, S. Sweet, Stevens & Sons, A. Maxwell 1835).

<sup>25</sup> N. Pac. R.R. Co. v. Charless, 51 F. 562 (9th Cir. 1892).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 570 (emphasis added).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

way, and would perhaps furnish to the jury *a more connected statement of the matter to be told as it occurred and took place*.<sup>31</sup>

The court recognized, however, that when a witness gives testimony that is irrelevant, immaterial, or hearsay, the opposing party can object, and the inadmissible testimony can be stricken.<sup>32</sup>

Accordingly, while the common law practice through the late nineteenth century recognized evidentiary rules of relevancy, it also realized the significance of context in a witness's recounting of events—echoing the court's holding in *Northern Pacific Railroad* connecting the witness's individual observations into a narrative.

### *B. The Rationalist Takeover*

Story soon fell out of the picture when it came to relevancy. At the end of the nineteenth century, Harvard Law professor James Bradley Thayer published his classic treatise calling for “a rational system of evidence . . . which forbids receiving anything irrelevant [in evidence], not logically probative.”<sup>33</sup> As Thayer put it,

In the pressure of actual trials, where, often, the interests and passions of men are deeply stirred and all the resources of chicane are called into play and directed by great abilities to obstruct the movements of justice, [t]he rules of evidence and procedure ought to be in a shape to . . . prompt[] the authority of the courts in checking these familiar efforts. . . . [T]wo leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.<sup>34</sup>

This focus on logical probativeness affected the practice of witness examination.<sup>35</sup> Lawyers and judges became irrationally fearful of

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<sup>31</sup> *Id.* at 570–71 (emphasis added).

<sup>32</sup> *Id.*

<sup>33</sup> JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (Boston, Little, Brown & Co. 1898).

<sup>34</sup> *Id.* at 530.

<sup>35</sup> It is unclear from contemporaneous commentaries whether Thayer's treatise effected the change from a storytelling to a question-and-answer format, whether the treatise only reflected the changes in the actual practice at the time, or whether this transformation was a combination of both. Interestingly, in Wigmore's 1904 evidence treatise, published a few years after Thayer's, he does not even address the format of witness examination. See 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE AT COMMON LAW (1st ed. 1904). Two decades later, however, in the second edition of his treatise, Wigmore notes this development in the format of witness examination and criticizes it. 2 WIGMORE, *supra* note 8, at 49.

any evidence that might taint the record in the least bit. As a result, the practice of lawyer control of examination through discrete questions and answers—rather than the former practice of open-ended storytelling—became the prevailing method of direct examination. As another giant in evidence scholarship, John Henry Wigmore, wrote, “This [changed] practice is due largely to the increase of technicality in rulings of inadmissibility on the pettiest of details of testimony. There is in the mind of courts and practitioners an obsession that the natural way of giving testimony [storytelling] is the dangerous way.”<sup>36</sup>

Starting in the 1930s, evidence scholars, lawyers, and jurists began to codify the common law rules of evidence, making changes as they went. In the process, they further increased the technicality in rulings on evidence admissibility and further distanced themselves from the common law method of giving testimony.

In 1939, in an attempt to not only organize but also revise the common law rules of evidence, the American Law Institute set out to prepare the Model Code of Evidence (the “Model Code”).<sup>37</sup> Following in Thayer’s footsteps, the adopted code defined “relevant evidence” as “evidence having any *tendency in reason* to prove [any material matter].”<sup>38</sup> The commentary to the provision states that “[r]elevant evidence is evidence having any value in reason as tending to prove any matter provable in an action.”<sup>39</sup>

While the drafters of the Model Code never fleshed out the meaning of “any value in reason,” it is perhaps no coincidence that at the same time as the adoption of the Code, George F. James published his classic article articulating modern relevancy theory, “Relevancy, Probability

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<sup>36</sup> 2 WIGMORE, *supra* note 8, at 49. Wigmore recognized that continuous narration by the witness has “the disadvantage of risking the witness’ interjection of irrelevant and inadmissible matter (chiefly hearsay) without any opportunity for the opponent to know beforehand in time to object and prevent it,” but suggested that the trial court, in its discretion, could control the format of witness examination to address that problem. *Id.* Clearly, though, he preferred witness storytelling, noting, “It is obvious that this method . . . has . . . the advantage of preserving continuity . . . of thought for the witness himself and of saving time for all parties concerned.” *Id.* at 48.

<sup>37</sup> MODEL CODE OF EVIDENCE intro. at ix (AM. L. INST. 1942).

<sup>38</sup> *Id.* r. 1(12) (emphasis added). While the preliminary drafts of the Code defined “Relevant Evidence” as “evidence having probative value upon any material fact,” later drafts replaced the language “probative value” with “tendency in reason.” Compare MODEL CODE OF EVIDENCE r. 1(10) (AM. L. INST., Tentative Draft No. 1, 1940) with MODEL CODE OF EVIDENCE r. 1(10) (AM. L. INST., Preliminary Draft No. 15, 1941). No explanation is provided in the Preliminary Draft No. 15 for the handwritten change of terminology.

<sup>39</sup> MODEL CODE OF EVIDENCE r. 1 cmt. 12 (AM. L. INST. 1942).

and the Law.”<sup>40</sup> In this article, James grounded the Model Code’s treatment of relevancy in Thayer’s interpretation of the common law of evidence as a rational system.<sup>41</sup> Then, he articulated his conception of the nature of relevancy in such a rational system:

[E]vidence is relevant if it can be demonstrated, in terms of some generalization acceptable to the court, *to alter the apparent probability of any material proposition in the case*. The generalization may rest either upon the general experience of the court or upon expert testimony, but it should be susceptible of expression.<sup>42</sup>

This formulation—what James called “logical relevancy”—is the quasi-syllogistic testing of the value of any proffered evidence by the probability of the major premise.<sup>43</sup> James provided this concrete example of his conception:

Persons who are unwilling to agree that men’s fixed designs (at least in case of murder) are “probably” carried out—or, even conceding the fact of murder, that proof of *A*’s fixed design to kill *B* establishes *A*, more likely than not, as *B*’s killer—still agree that somehow this bit of evidence does have some tendency to indicate *A*’s guilt.<sup>44</sup>

Consistent with James’s formulation of probative value, under the probabilistic paradigm, relevance of a particular item of evidence depends on whether it changes the probability of a proposition in dispute. Relevance is expressed in terms of a *likelihood ratio*:

$$\frac{P(E|H)}{P(E|\text{not } H)}$$

where *P* is the probative value, *E* is the item of evidence, the vertical bar means given, and *H* is the hypothesis.<sup>45</sup> A likelihood ratio of one-to-one means that the evidence is irrelevant. “[E]vidence is logically relevant only when the probability of finding that evidence given the truth of some hypothesis at issue in the case differs from the probability of finding the same evidence given the falsity of the hypothesis at issue.”<sup>46</sup> Any likelihood ratio other than one-to-one means that the evidence is relevant. If the ratio is greater than one-to-one, then the

<sup>40</sup> George F. James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 704 (emphasis added).

<sup>43</sup> *See id.* at 698–99.

<sup>44</sup> *Id.*

<sup>45</sup> *See* Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1025 (1977); 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 185, at 1109–10 (8th ed. 2020).

<sup>46</sup> Lempert, *supra* note 45, at 1026.

evidence is relevant to prove a proposition. If the ratio is lower than one-to-one, then the evidence is relevant for disproving the proposition. The larger the disparity of the antecedent and consequent in the ratio, the more strongly the evidence either supports or undermines the proposition.

Consider the following concrete example: in an assault case, if the judge hypothesizes that a person with a nonviolent reputation is not likely to commit assaults, evidence of such a reputation is relevant. The likelihood ratio is more than one: given the hypothesis, it is less likely than not that the defendant committed the assault in this case. If, on the other hand, the judge hypothesizes that persons with nonviolent reputations are just as likely to commit assaults as those with violent reputations, the likelihood ratio is one-to-one, and the evidence of the defendant's nonviolent reputation is not probative and is accordingly irrelevant.<sup>47</sup>

Under the probabilistic conception, then, evidence must be quantified in some manner to determine its probative value.<sup>48</sup> Quantification of individual items of evidence may be based on objective or subjective considerations. In some cases, courts might consult objective factors, like relative frequencies or known statistical distributions. In other cases, the court might consider subjective factors based on degrees of belief or how strongly the judge believes the evidence “fits” with the underlying hypothesis.

The “tendency in reason” approach of the Model Code and George F. James made its way into the next major codification of evidence law, the Uniform Rules of Evidence (the “Uniform Rules”), which the National Conference of Commissioners on Uniform State Laws and the American Bar Association adopted in 1953.<sup>49</sup> Like the Model Code, the Uniform Rules defined “relevant evidence” as “evidence having any tendency in reason to prove any material fact.”<sup>50</sup> And then, echoing James, the Uniform Rules defined “proof” as “all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or non-existence of such fact.”<sup>51</sup> The comments to the Uniform Rules made explicit James's formulation of logical relevancy. They provide that

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<sup>47</sup> BROUN ET AL., *supra* note 45 § 185, at 1108–09.

<sup>48</sup> Michael S. Pardo, *The Paradoxes of Legal Proof: A Critical Guide*, 99 B.U. L. REV. 233, 247–48 (2019).

<sup>49</sup> UNIF. R. EVID. 1(2) (UNIF. L. COMM'N 1953).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* R. 1(3).

[t]he only test of relevancy is logic. With this simple statement we must be content. Nothing could be gained in a code of rules by making it a thesis on the subject of logic. The courts will have to continue to decide what inferences might reasonably be drawn from knowledge or from perception in or outside of the court room on the basis of common sense.<sup>52</sup>

### C. Rule 401 and the Probabilistic Paradigm

The definition of relevancy in the next major codification, the Federal Rules of Evidence (“the Federal Rules”), adopted in 1975, appears to follow in its predecessors’ footsteps.<sup>53</sup> Rule 401 of the Federal Rules provides that evidence is relevant if: “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”<sup>54</sup>

The language of probability in Rule 401 appears to adopt James’s logical relevancy theory. And in fact, the Advisory Committee Notes cite James for the proposition that the test is whether “the item of evidence tend[s] to prove the matter sought to be proved.”<sup>55</sup>

Rule 401, however, reflects some nuance in its embrace of the probabilistic paradigm. The rule as adopted uses “tendency,” instead of “tendency in reason.”<sup>56</sup> And the Advisory Committee Notes soften the rule’s formulation somewhat:

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. *Evidence which is essentially background in nature can*

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<sup>52</sup> *Id.* R. 1 cmt. subdiv. 2.

<sup>53</sup> As we will later demonstrate, the history of the rules supports a broader reading of the relevancy definition than strict “logical relevancy.” See *infra* text accompanying notes 173–74.

<sup>54</sup> FED. R. EVID. 401; see also FED. R. EVID. 403 (providing “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”).

<sup>55</sup> FED. R. EVID. 401 advisory committee’s note. Indeed, in the first draft of the rules, the Reporter noted, “The approach to relevancy here adopted is based on [James’s article]. It has been followed by most of the subsequent writers on the subject.” *Reporter’s Memorandum on Relevancy and Its Limits*, at 1–2 [hereinafter First Draft], <https://www.law.umich.edu/facultyhome/richardfriedman/Documents/5.%20Art%204%201st%20draft.pdf> [<https://perma.cc/DUA2-QUU2>] (last visited May 7, 2020).

<sup>56</sup> See *infra* text accompanying notes 173–74.

*scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding.* Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.<sup>57</sup>

This language reflects the position of Charles McCormick in his 1954 *Handbook of the Law of Evidence*:

In addition [to evidence that bears directly on the issues] . . . lee-way is allowed even on direct examination for proof of facts which are not really offered as bearing on the dispute . . . but merely as details which fill in the background of the narrative and give it interest, color and life-likeness.<sup>58</sup>

But even this passing acceptance of the relevancy of background evidence was subject to harsh criticism by scholars with a more technical bent. After the Federal Rules were adopted, Professor Olin Guy Wellborn severely criticized the Advisory Committee and McCormick. Noting that neither had cited any case or authority for their propositions about background evidence, he argued, “This is questionable doctrine. . . . [I]t undercuts Thayer’s first principle—‘a presupposition involved in the very conception of a rational system of evidence’—that matters irrelevant in the usual sense, ‘not bearing on the dispute, however defined,’ may not be received.”<sup>59</sup>

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<sup>57</sup> FED. R. EVID. 401 advisory committee’s note (emphasis added).

<sup>58</sup> CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 152, at 315 (1st ed. 1954) (emphasis added). In the second edition of the handbook, edited by Edward Cleary, the Reporter for the Advisory Committee, this passage cites approvingly to the Advisory Committee Notes on Rule 401. MCCORMICK’S *HANDBOOK OF THE LAW OF EVIDENCE* § 185, at 434 n.7 (Edward W. Cleary ed., 2d ed. 1972).

<sup>59</sup> Olin Guy Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 *TEX. L. REV.* 371, 382 (1977) (citation omitted). Wellborn continues,

[McCormick’s position] is a superfluity that inherently tends, if recognized, to restrict the legitimate reach of relevancy as ordinarily conceived; a properly expansive concept of logical relevancy encompasses evidence of the kind McCormick described, and a conception that excludes it is too narrow. Evidence need not itself be in dispute in order to bear on a disputed matter in important ways. Much evidence bearing on the credibility of witnesses is of this nature. Even matters such as a witness’ name, address, and occupation—“identifying the witness with his environment”—are clearly encompassed within the basic definition of relevancy; they are simply one step further away in a chain of inferences from the disputed facts that the proponent seeks to prove or to disprove.

*Id.* at 382–83 (citations omitted).

And Thomas F. Green Jr., a member of the Advisory Committee, offered words of caution about the broad approval of background evidence in the McCormick hornbook in an article published before the adoption of the Federal Rules.<sup>60</sup> Like Wellborn, Green noted that McCormick lacked cited authority for his assertion that “considerable leeway is allowed for proof of facts that are not really offered as bearing on the dispute.”<sup>61</sup> Then, while acknowledging that courts have admitted evidence merely to add interest and color to the narrative even on direct examination, he wondered aloud if such admission was permitted simply because no objection has been made or because it “enable[s] the trier of fact to interpret the testimony in the light of the environment of the witnesses.”<sup>62</sup>

Currently, the major evidence treatises, while recognizing in passing some nuance in the interpretation of the relevancy rules, address the issue of probative value through the probabilistic paradigm. For example, the McCormick treatise frames its discussion of the issue around deductive and inductive formulae for assessing likelihood ratios.<sup>63</sup> Similarly, the Mueller and Kirkpatrick treatise, while eschewing “any suggestion that probative worth is a matter to be gauged with computer-like precision,” turns around and approvingly cites James’s analysis because “it exposes the whole reasoning process to closer scrutiny and better understanding of [the hypotheses’] strength or weakness.”<sup>64</sup> And the Weinstein treatise posits that “[t]he question to be asked in determining the relevance of evidence is whether a reasonable person might believe the probability of the truth of the consequential fact to be different if that person knew of the proffered evidence.”<sup>65</sup> The authoritative treatises thus urge the use of the probabilistic paradigm to determine relevancy.

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<sup>60</sup> Thomas F. Green Jr., *Relevancy and Its Limits*, 1969 LAW & SOC. ORDER 533, 536 n.21 (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 152, at 315 (1st ed. 1954)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (citing *Alford v. United States*, 282 U.S. 687 (1931) (holding that the defense could cross-examine a government witness about the fact that he lived in a jail)). The question, the Court held, was “an essential step in identifying the witness with his environment, to which cross-examination may always be directed.” *Alford v. United States*, 282 U.S. 687, 693 (1931).

<sup>63</sup> BROUN ET AL., *supra* note 45, at 396.

<sup>64</sup> CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:2 (4th ed. 2013).

<sup>65</sup> 2 JACK B. WEINSTEIN, WEINSTEIN’S FEDERAL EVIDENCE § 401.04(2)(b) (2020).

## II THE EXPLANATORY PARADIGM: AN ALTERNATIVE TO THE PROBABILISTIC PARADIGM

While scholarly literature has long considered the probabilistic paradigm to be the dominant theoretical account for assessing probative value,<sup>66</sup> narrative has always lurked on the edges of evidence law. This role of narrative can be seen in the acknowledgment of background evidence in the notes on Rule 401.<sup>67</sup> And though treatises recite the likelihood ratio, they must acknowledge the origins of evidence law, which favored narrative. Professor Wigmore sounded almost nostalgic writing that “[a] healthy view of the subject would banish the obsession [with logic], and would restore the natural method as the usual one, thus obtaining more reliable testimony and a notable economy of time in trials.”<sup>68</sup>

And there are obvious workability problems with the likelihood ratio. The claim that courts *practice* the probabilistic paradigm seems to ignore the fact that few judges actually methodically calculate likelihood ratios in considering a relevancy objection.<sup>69</sup> Such mathematical precision is simply impossible in the rough and tumble of trials. But the probabilistic paradigm does affect the minds of many judges in their rulings on relevancy objections. In the hurry of litigation, many judges adopt a conservative approach, counter to the general rule in favor of admissibility under Rule 401. They require a precise connection between evidence and a particular element in the case or a defense.<sup>70</sup> While these judges do not use slide rules or

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<sup>66</sup> Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547 (2013).

<sup>67</sup> See *supra* text accompanying notes 57–58.

<sup>68</sup> 2 WIGMORE, *supra* note 8, at 49.

<sup>69</sup> A review of the state and federal databases in Westlaw discloses that such an analysis has only been used in reported cases in the context of examining the probative value of expert testimony, primarily DNA testing. See, e.g., *United States v. Lewis*, 442 F. Supp. 3d 1122, 1126 (D. Minn. 2020) (expert testimony as to likelihood ratios provided “extremely strong support” for admission of DNA evidence); *United States v. Allison*, 63 M.J. 365, 369 (C.A.A.F. 2006) (citation omitted) (holding that “evidence of statistical probabilities is not only ‘basic to DNA analysis,’ but also essential to the admissibility of that analysis”); *Ivey v. Commonwealth*, 486 S.W.3d 846, 859 (Ky. 2016) (Venters, J., concurring) (in a case concerning DNA testing, concurring justice notes, “[t]he likelihood ratio, by itself, is a probability-based method for evaluating the probative value of forensic evidence . . .”).

<sup>70</sup> See generally *State v. Fasano*, 868 A.2d 79, 94 (Conn. App. Ct. 2005) (citation omitted) (holding that “the relevance of an offer of evidence must be assessed against the elements of the cause of action, crime, or defenses at issue in the trial. The connection to an element need not be direct, so long as it exists. Once a witness has testified to certain facts, for example, his credibility is ‘a fact that is of consequence to [or material to] the

calculators to determine likelihood ratios, they semiautomatically estimate those ratios using the probabilistic schema. In the police abuse case discussed in the Introduction, for example, the court almost instinctively determined that the probative value of plaintiff's family and occupation background was nil because her background was not in dispute.<sup>71</sup> The likelihood of the elements of any proposition underlying her claim, the court decided, was not affected one way or the other by that evidence.<sup>72</sup>

But what should the probabilistic paradigm be replaced with? In the last two decades, legal scholarship has taken cues from cognitive science and philosophy and has come upon an alternative to the probabilistic paradigm. This approach, most exemplified by Ronald Allen and Michael Pardo, is the explanatory paradigm.

#### *A. Stories in Cognitive Science and Jury Decision-Making Literature*

Recent cognitive science research calls into question a purely probabilistic model in determining probative value. Cognitive scientists have found that when faced with incomplete evidence about the causation of particular situations or conditions, individuals do not simply engage in abstract statistical reasoning to draw inferences but seek explanations based on prior beliefs about similar phenomena.<sup>73</sup>

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determination of the action,' and evidence relating to his credibility is therefore relevant—but only if the facts to which the witness has already testified are themselves relevant to an element of a crime, cause of action, or defense in the case.”); *Esparza v. State*, 513 S.W.3d 643, 647 (Tex. App. 2016) (affirming exclusion of evidence of the complainant's bias in an indecency with child case because the defendant “failed to establish relevancy or the logical nexus required to demonstrate bias”); *State v. Suarez-Bravo*, 864 P.2d 426, 430 (Wash. Ct. App. 1994) (in prosecution for unlawful possession with intent to deliver cocaine, court holds that evidence that defendant's apartment building was in a high crime area was irrelevant because it “[had] no logical relevancy to any element of the charge against” defendant and rejecting prosecution's explanation that the evidence showed how unusual it was for defendant to allow strangers to come to his door).

<sup>71</sup> See Transcript of Record at 605, *Tardif v. City of New York*, No. 13-CV-4056 (S.D.N.Y. Nov. 19, 2018), ECF No. 347 (court indicating that the only issues in dispute were the events surrounding the protests).

<sup>72</sup> See *supra* text accompanying notes 1–6.

<sup>73</sup> See Tania Lombrozo, *Explanation and Abductive Inference*, in *THE OXFORD HANDBOOK OF THINKING AND REASONING* 1, 15 (Keith J. Holyoak & Robert G. Morrison eds., 2012), <https://pdfs.semanticscholar.org/49ca/ff587dc7e08913eed9acf407bd3d4db7e363.pdf> [<https://perma.cc/CQM9-DYLV>]; Tania Lombrozo, *The Structure and Function of Explanations*, 10 *TRENDS COGNITIVE SCIS.* 464, 465 (2006).

The factors that affect an explanation's perceived quality include simplicity, breadth, coherence, and beliefs about causal mechanisms.<sup>74</sup>

Nancy Pennington and Reid Hastie have made similar findings in the context of jury decision-making.<sup>75</sup> In their research, they found that

jurors begin their decision-making process by constructing a narrative to explain the available facts they have heard at trial. The distinctive assumption in our explanation-based approach to decision making is the hypothesis that decision makers construct an intermediate summary of the evidence and that *this explanation, rather than the original "raw" evidence, is the basis of the final decision.*<sup>76</sup>

This explanation-based decision-making framework, or Story Model, posits that jurors develop stories to explain the evidence rather than assess individual items of evidence in the abstract. As Lance Bennett and Martha Feldman concluded in their studies of jury decision-making,

[w]hat makes a particular fact or bit of evidence take on meaning in a case is not its physical form, the credibility of the witness who introduced it, or the corroborating testimony of several witnesses. These things all play important roles when [jurors] weigh evidence and assess its reliability, but they do not determine its significance. What makes a fact or piece of evidence meaningful in a particular case is its contextual role in the stories that make up the case.<sup>77</sup>

Pennington and Hastie's Story Model comports with the research of pioneering cognitive scientist Jerome Bruner on the cognitive process. Bruner asserts, "There are two modes of cognitive functioning, two modes of thought, each providing distinctive ways of ordering experience, of constructing reality."<sup>78</sup> The first mode—the "paradigmatic or logico-scientific" mode—"attempts to fulfill the ideal of a formal, mathematical system of description and explanation. . . . [G]eneral propositions are extracted from statements in their particular

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<sup>74</sup> See Lombrozo, *Explanation and Abductive Inference*, *supra* note 73; Lombrozo, *The Structure and Function of Explanations*, *supra* note 73.

<sup>75</sup> See Nancy Pennington & Reid Hastie, *The O.J. Simpson Stories: Behavioral Scientists' Reflections on The People of the State of California v. Orenthal James Simpson*, 67 U. COLO. L. REV. 957 (1996) [hereinafter Pennington & Hastie, *The O.J. Simpson Stories*]; Pennington & Hastie, *supra* note 12; Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCH. 242 (1986).

<sup>76</sup> Pennington & Hastie, *The O.J. Simpson Stories*, *supra* note 75, at 959 (emphasis added). As Allen and Pardo note, Pennington and Hastie's findings support the explanatory paradigm for assessing evidence. See Pardo, *supra* note 66, at 552.

<sup>77</sup> BENNETT & FELDMAN, *supra* note 12, at 117.

<sup>78</sup> JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 11 (1986).

contexts[,] . . . [and] [i]ts domain . . . is driven by principled hypotheses.”<sup>79</sup> This mode “seeks to transcend the particular by higher and higher reaching for abstraction, and in the end disclaims in principle any explanatory value at all where the particular is concerned.”<sup>80</sup>

In contrast to the paradigmatic mode of thinking, the second mode of thought—narrative thinking—recognizes the explanatory value of the particular:

Narrative . . . differs from purely logical [thinking] in that it takes for granted that the puzzling problems with which it deals do not have a single “right” solution—one and only one answer that is logically permissible. It takes for granted, too, that a set of contested events can be organized into alternative narratives and that a choice between them may depend upon perspective, circumstances, interpretative frameworks.<sup>81</sup>

While this cognitive science research does not totally discount the paradigmatic mode’s importance and the evaluation of the probative value of evidence through the probabilistic model of proof, it demonstrates the significant role that stories play in the cognitive process. Given the indeterminacy of most evidentiary issues in cases, this research indicates that the ultimate decision in a case depends in large part on the quality of the explanations proffered for the evidence—the stories presented to the fact finder—rather than purely logical analysis. For that reason, when a court rules on an item of evidence’s probative value, it would be remiss to focus solely on the probability that the item proves a particular legal proposition and to ignore the role that the evidence plays in explaining one party’s overall story.

### *B. The Explanatory Paradigm of Proof and Inference to the Best Explanation*

Relying in part on the Pennington and Hastie research, Ronald Allen and Michael Pardo have developed the explanatory paradigm as an alternative to the probabilistic conception of proof.<sup>82</sup> Rather than

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<sup>79</sup> *Id.* at 12–13.

<sup>80</sup> *Id.* at 13.

<sup>81</sup> ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 141 (2000).

<sup>82</sup> Allen and Pardo also refer to the conception of relevancy as “relative plausibility.” See, e.g., Ronald J. Allen & Michael S. Pardo, *Relative Plausibility and Its Critics*, 23 *INT’L J. EVIDENCE & PROOF* 5 (2019) [hereinafter Allen & Pardo, *Relative Plausibility and Its Critics*]; Ronald J. Allen & Michael S. Pardo, *Explanations and the Preponderance Standard: Still Kicking Rocks with Dr. Johnson*, 48 *SETON HALL L. REV.* 1579 (2018)

focusing on probability, “the explanatory conception examines whether particular explanations, if true, would be better or worse at explaining the evidence and the underlying events than alternative explanations.”<sup>83</sup> The proponents of this model posit that “[j]udgments on probative value are highly contextual and depend not only on the logical [and] empirical relationships between evidence and disputed propositions, but also on the importance of the evidence” in assessing the explanations of the evidence asserted by the different parties.<sup>84</sup>

According to the proponents of the explanatory paradigm, the probabilistic paradigm’s limited focus on quantifying the probative value of evidence demonstrates the significance of context in determining probative value.

One example in the context of expert evidence shows the differences in approach between the probabilistic and explanatory paradigms. Consider a case in which Child Protective Services (CPS) alleges that the parents have abused their two-year-old daughter, and CPS presents evidence that the daughter still wets her bed. If research shows that bed-wetting is equally common among both abused and nonabused children, then the likelihood ratio is one-to-one, and evidence that the alleged victim wets the bed would not have probative value. If, however, studies show that bed-wetting is twice as common in abused children, then the evidence of bed-wetting in this case would have some probative value.<sup>85</sup>

Under the probabilistic conception, if research showed that bed-wetting is equally common among both abused and nonabused children, then evidence that the alleged victim wets the bed would not have probative value since the likelihood ratio would be one-to-one. But such an analysis can be blinkered by inevitable variation in human behavior:

Even if the behavior is equally common among both groups of children, it might nevertheless be highly probative in a given case if, for example, abused children exhibiting this behavior also possess, and nonabused children lack, an additional characteristic and the particular child at issue possesses (or lacks) this characteristic. Similarly, even if the behavior is one thousand times more likely in abused children, the probative value may nevertheless be minimal if

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[hereinafter Allen & Pardo, *Explanations and the Preponderance Standard*]; Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107, 136 (2007) [hereinafter Allen & Pardo, *The Problematic Value*].

<sup>83</sup> Pardo, *supra* note 66, at 596–97.

<sup>84</sup> *Id.* at 564.

<sup>85</sup> *Id.*

the child possesses (or lacks) an additional characteristic that places the child in the group of nonabused children who exhibit the behavior. In these examples, the evidence and the likelihood ratios remain constant, but the probative value may vary dramatically. *A fortiori*, the probative value is not the likelihood ratio.<sup>86</sup>

Mere quantification, therefore, has its limits.

Unlike under the probabilistic model, the explanatory conception recognizes the significance of context in regard to undisputed facts. To illustrate this point, Pardo cites *People v. Johnson*, a case in which the defendant, an inmate at a maximum-security prison, was charged with two counts of battery on prison guards.<sup>87</sup> The charges arose from an altercation between the defendant and guards after the defendant had refused to return a food tray in his cell.<sup>88</sup> The prosecution's theory was that the defendant battered the guards when they opened the cell door to retrieve the tray.<sup>89</sup> By contrast, the defendant's theory was that one of the guards rushed in and began hitting him first, and that even if he made contact first with the guard, he was acting in self-defense.<sup>90</sup> Multiple witnesses for each side testified to details about a package sent from defendant's family that he had not received and about the mail procedures at the prison.<sup>91</sup> Each side used the undisputed evidence of the nonreceipt of the package to support its own theory of the case. The defendant argued that he withheld the tray only after repeated, unsuccessful attempts to speak with a sergeant about the package, and that the guards attacked him to retaliate or punish him for seeking answers.<sup>92</sup> The prosecutor asserted that the defendant withheld his tray and charged the guard simply because he was frustrated and angry about not receiving the package.<sup>93</sup>

As Pardo argues, under the probabilistic paradigm, the contextual evidence concerning the prison's failure to deliver the package has little or no probative value because both parties can cite it to support their claims and defenses. Because there is no reason to believe that the

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<sup>86</sup> *Id.* at 588.

<sup>87</sup> *People v. Johnson* is an actual case, a revised transcript of which is included in RONALD J. ALLEN ET AL., *AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS, AND CASES* 1–84 (6th ed. 2016). The names of all the participants in the case were changed to provide some anonymity to the parties involved. *Id.* at 1 n.1.

<sup>88</sup> *Id.* at 37.

<sup>89</sup> *Id.* at 73–75.

<sup>90</sup> *Id.* at 80.

<sup>91</sup> *See id.* at 24, 30, 47, 57.

<sup>92</sup> *See id.* at 58–59.

<sup>93</sup> *Id.* at 73–75.

evidence supports one party's theory or the other, the likelihood ratio is one-to-one, and the evidence is likely inadmissible.<sup>94</sup>

But without this evidence, the jury would have been forced to decide who started the altercation without being informed of the events that precipitated it. Under the explanatory paradigm, the evidence has probative value because it either furthers each side's *overall* explanation of the events or distinguishes between the accounts. This evidence would allow the jury to determine the best explanation of what happened—either the prosecution's or the defendant's.

While the probabilistic paradigm focuses on drawing inferences based on quantification of items of evidence, the explanatory paradigm focuses on drawing inferences about particular items of evidence based on their role in explaining a party's version of the events. Accordingly, analysis of the probative value of evidence under the probabilistic paradigm requires some measurement, however imprecise, of the likelihood that the evidence supports or undermines a hypothesis. By contrast, analysis of the probative value of evidence under the explanatory paradigm requires an assessment of the relationship of that evidence to the overall story of the party or its opponent. For the advocates of the explanatory paradigm, evidence is irrelevant if “the reasons given about the relationship between the evidence and the explanation are either false or too speculative. . . . To overcome relevance objections, parties must provide plausible reasons as to why the evidence supports or challenges one of the explanations.”<sup>95</sup>

Allen and Pardo argue that in assessing the “plausibility” of a particular item of evidence to determine its probative value, courts and attorneys should look to a philosophical theory: Inference to the Best Explanation.<sup>96</sup> This theory was fully developed by the late Peter Lipton, a professor at Cambridge University.<sup>97</sup> Lipton contends that when observing an event or condition, “[g]iven our data and our background beliefs, we infer what would, if true, provide the best of the competing explanations we can generate [to make sense of] those

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<sup>94</sup> Pardo, *supra* note 66, at 581.

<sup>95</sup> *Id.* at 603. Indeed, some contend that even speculative evidence should be admitted. See, e.g., David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 26–39 (1997).

<sup>96</sup> See, e.g., Pardo, *supra* note 66, at 597; Allen & Pardo, *The Problematic Value*, *supra* note 82, at 136; Ronald J. Allen, *Burdens of Proof*, 13 LAW, PROBABILITY & RISK 195, 216 (2014); Ronald J. Allen, *Clarifying the Burden of Persuasion and Bayesian Decision Rules: A Response to Professor Kaye*, 4 INT'L J. EVIDENCE & PROOF 246, 256 (2000).

<sup>97</sup> PETER LIPTON, *INFERENCE TO THE BEST EXPLANATION* (2d ed. 2004).

data.”<sup>98</sup> He posits: “[W]e may characterize the best explanation as the one which would, if correct, be the most explanatory or provide the most understanding: the ‘loveliest’ explanation.”<sup>99</sup>

In his writings, Lipton sets forth the factors that impact the loveliness of an explanation:

1. *Mechanism*. As Lipton observes, “We understand a phenomenon better when we know not just what caused it, but how the cause operated.”<sup>100</sup>

2. *Precision*. Lipton also notes that the plausibility of an explanation of a phenomenon depends not only on an understanding of its qualitative features but also its quantitative elements.<sup>101</sup>

3. *Scope*. For Lipton, an explanation that explains more phenomena than the key event is the loveliest.<sup>102</sup>

4. *Simplicity*. Simple explanations, Lipton argues, “enable us to achieve one of the cardinal goals of understanding, namely to reveal the unity that underlies the apparent diversity of the phenomena.”<sup>103</sup>

5. *Fertility or Fruitfulness*. Akin to scope and simplicity, Lipton contends that fertility leads to a clearer understanding of a situation or condition because it “disclose[s] . . . previously unnoted relationships among those already known.”<sup>104</sup>

6. *Fit with Background Belief*. Finally, Lipton notes that an individual’s background belief has a significant impact on her understanding of a situation or phenomenon.<sup>105</sup>

While Allen and Pardo cite these factors as criteria to consider in evaluating the probative value of items of evidence in support of an explanation,<sup>106</sup> they provide little guidance on how lawyers and judges should apply these criteria in practice. They merely observe that “there is no agreed-upon algorithm or method for combining or ranking the

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<sup>98</sup> *Id.* at 56.

<sup>99</sup> *Id.* at 59. Lipton distinguishes between “likeliest” or most probable explanation. “The criteria of likeliness and loveliness may well pick out the same explanation in a particular competition, but they are clearly different sorts of standard[s]. *Likeliness speaks of truth; loveliness of potential understanding.*” *Id.* (emphasis added). This observation succinctly encapsulates the difference between the probabilistic and explanatory conceptions of relevance.

<sup>100</sup> *Id.* at 122.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (citation omitted).

<sup>105</sup> *Id.*

<sup>106</sup> Pardo, *supra* note 48, at 251; Pardo, *supra* note 66, at 597.

criteria as a general matter. Rather, the salience and importance of each will depend on details of the particular context and the inferential task at hand.”<sup>107</sup> They provide a theoretical alternative to the probabilistic paradigm but little direction on how it should be applied in practice.

### III

#### APPLIED LEGAL STORYTELLING AND RELEVANCY

Another powerful, though largely unacknowledged, contender to oust the probabilistic paradigm has developed on parallel tracks to the explanatory paradigm. Applied Legal Storytelling confirms many of the insights of Peter Lipton, but offers—in contrast to the explanatory paradigm—a way to *apply* those insights.

Though ALS scholars have long recognized the importance of explanations in the presentation of a case, they have, up to now, made no attempt to apply these insights to evidentiary rules. And, for that matter, neither have evidence scholars, including Allen and Pardo, looked to the insights of ALS scholarship in their debates with proponents of the probabilistic conception over the model to use in determining probative value.

#### *A. Applied Legal Storytelling*

Scholars in the field of ALS build on cognitive science research to show how stories impact the decision-making process.<sup>108</sup> At the first symposium on the subject, Ruth Anne Robbins, a pioneer in the field, noted,

Stories are essential ingredients in human interaction. According to Jerome Bruner, . . . stories are instinctual, and we understand, intuitively, how they work. Even though law is allegedly about something other than stories, i.e. “logic” and “reasoning,” stories nevertheless are there to guide the logic and reasoning. Ergo, it is misguided for lawyers to be suspicious of stories as applied in law or to try and mitigate their persuasive influence. Rather, stories or narratives . . . are cognitive instruments and also means of argumentation in and of themselves. Lawyers need to realize the importance of story towards accomplishing the goals of legal communication and legal persuasion.

. . . .

. . . The goal of applied legal storytelling is to help lawyers serve their clients through the use of story . . . . The best that we can do for our

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<sup>107</sup> Pardo, *supra* note 66, at 597–98.

<sup>108</sup> See *supra* text accompanying notes 15–18.

lawyers (I am including judges and professors in that category) is to create a rich, and yet accessible, dialogue about how, why, and when legal stories can be used in our profession.<sup>109</sup>

ALS scholars and those in the related field of law and literature are the first to acknowledge that narrative does not meet the “threefold demands of generality, unreflexivity, and reliability that are necessary if a prevailing [legal] order is credibly to justify itself.”<sup>110</sup> But they also recognize that, unlike the abstracted rhetoric of the law, narrative provides legal decision-makers a portal for fully understanding particular situations or conditions through the lenses of their own human experiences.<sup>111</sup> Narrative also has the potential to counterbalance logic-driven injustices:

[W]hatever may be the merits of a rights-based regime, one of the dangers of a society that relies too heavily on [legal] rights and insufficiently on narrative, is that it may be dangerously inattentive to the very real need to assign and then acknowledge both individual and societal responsibility for the consequences of actions.<sup>112</sup>

ALS scholarship is also keenly aware of the dismissive attitude of many scholars and courts to the narrative project. In the minds of the detractors, legal rules are “hard,” but storytelling is “soft.” As one writer puts it,

[T]he law rarely speaks in a doctrinal or analytic way about its narrative dimension. On the contrary, it seems to want to deny the importance of story, to tame it by legal rule, to interrupt it by cross-questioning, to suppress it through the equation of story with the emotional, the irrational, the dangerous wild card in a discourse committed to reason and syllogism. The analytic tools of narratology, including questions of point of view, voice, [and] implied audience, . . . are almost never found in the law, even in those cases that seem urgently to call for such attention.<sup>113</sup>

ALS scholars have also demonstrated how storytelling methods can be applied in practice: in the negotiation of a dispute, in the examination of a witness, in the crafting of a persuasive opening statement and closing argument, and in the drafting of a brief, among

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<sup>109</sup> Robbins, *supra* note 14, at 4–5 (citations omitted).

<sup>110</sup> Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989).

<sup>111</sup> *Id.*

<sup>112</sup> ROBIN WEST, NARRATIVE, AUTHORITY AND LAW 427 (1993). (“[T]he causation element of a tort claim is the element that ultimately assigns responsibility, and it typically invites a story of doing so.”).

<sup>113</sup> Peter Brooks, *Literature as Law’s Other*, 22 YALE J.L. & HUMAN. 349, 360 (2010).

other contexts.<sup>114</sup> This scholarship has demonstrated how the tools of narratology can be used to effectively present a case.

Many of ALS's insights support the explanatory paradigm's critique of the probabilistic paradigm. Specifically, ALS literature contains rich analyses of the role of explanatory facts in presenting a case and the factors that affect the quality of different explanations. As one text in the area suggests, lawyers need to consider that

[t]he context of each [incident in the case] does not include just the physical setting of the event or the physical movements of the participants. To assess fully what is happening in an episode, it is often essential to consider the participants' states of mind: the reasons why each of them acted in the ways they did. Certain actions or omissions, which may seem inconsistent with a party's position in a case, may appear to be reasonable once the explanations for these actions are identified. On the other hand, the parties' explanations may seem quite feeble. *Accordingly, as you review your [evidence], it is helpful to evaluate the strengths and weaknesses of these explanations.*<sup>115</sup>

#### *B. Overlaps and Differences Between ALS and the Explanatory Paradigm*

While Allen and Pardo recognize the relationship between their paradigm and Pennington and Hastie's Story Model of jury decision-making, they argue that there are important differences between the two and, in so doing, overlook the insights of the ALS literature.<sup>116</sup> They acknowledge that many of the criteria identified by Pennington and Hastie that make a story persuasive (e.g., coverage, coherence, and uniqueness) also make an explanation better, and vice versa.<sup>117</sup> And they point to the empirical findings underpinning the Story Model as empirical evidence that the actual reasoning process used at trial comports with the explanatory conception of proof rather than the probability conception.<sup>118</sup>

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<sup>114</sup> See *supra* text accompanying note 16.

<sup>115</sup> STEFAN H. KRIEGER ET AL., *ESSENTIAL LAWYERING SKILLS* 248 (6th ed. 2020) (quoting DAVID A. BINDER & PAUL BERGMAN, *FACT INVESTIGATION* 140 (1984) (emphasis added)).

<sup>116</sup> Allen & Pardo, *Relative Plausibility and Its Critics*, *supra* note 82, at 7 n.7; Allen & Pardo, *Explanations and the Preponderance Standard*, *supra* note 82, at 1583 n.23 (arguing that the Story Model is "a psychological account of juror behavior and, unlike our account, it does not provide an account of standards of proof and other aspects of the proof process"); Pardo, *supra* note 66, at 598.

<sup>117</sup> Pardo, *supra* note 66, at 598.

<sup>118</sup> *Id.*

But Allen and Pardo downplay the significance of storytelling, contrasting their robust explanation of proof with the purely descriptive Story Model.<sup>119</sup> While they correctly note that Pennington and Hastie's studies were empirical, they overlook the fact that the field of ALS—developed from those studies and other cognitive science research—has been engaged in theoretical projects that in fact provide guidance to lawyers and courts. And, as will be demonstrated, storytelling research can be tremendously useful in assessing the relevancy of evidence in light of the explanations proffered by parties.<sup>120</sup>

Pardo contends, for example, that the two models are different because explanations, unlike stories, may be quite general. He argues that while the Story Model focuses on specific stories, “the generality of alternative explanations will depend on the substantive law and the way in which parties attempt to prove their case.”<sup>121</sup> This argument both misconstrues the import of the Story Model research and ignores the insights from his own analysis of the explanatory conception. While Pennington and Hastie did limit the scope of their research to the effect of a single “best” story on jury decision-making,<sup>122</sup> they did not limit their findings to the context of a party's single overall narrative. Indeed, scholars in ALS have recognized that the insights from cognitive science studies show an interplay between alternative narratives, the substantive law, and the parties' competing theories of the case.<sup>123</sup> Moreover, Pardo fails to acknowledge that some of the very factors he identifies as forming the basis for the best explanations—mechanism, precision, scope, fertility—militate in favor of specific explanations. In other words, the factors represent mini-narratives. Lipton, upon whose philosophical theory of Inference to the Best Explanation Allen and Pardo rely, theorizes that people seek explanations that are precise, broad in scope, and coherently make connections between individual

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<sup>119</sup> *Id.*; Allen & Pardo, *Relative Plausibility and Its Critics*, *supra* note 82, at 17 n.86.

<sup>120</sup> See *infra* text accompanying notes 135–70.

<sup>121</sup> Pardo, *supra* note 66, at 599.

<sup>122</sup> Pennington & Hastie, *supra* note 12, at 552.

<sup>123</sup> See, e.g., AMSTERDAM & BRUNER, *supra* note 81, at 287–88 (2000) (“To be sure, results in the law are achieved by the application of specialized legal reasoning—reasoning within and about doctrinal rules, procedural requirements, constitutional and other jurisprudential theories—and are articulated almost wholly in those terms. But final results are *underdetermined* by such rules, requirements, and theories. They are influenced as well by how people think, categorize, tell stories, deploy rhetorics, and make cultural sense as they go about interpreting and applying rules, requirements, and theories.”); ROBERT P. BURNS, *A THEORY OF THE TRIAL* 36 (1999) (observing that in preparing a case for trial, a lawyer creates a “double helix”: a strand of logical argument intertwined with a strand of narrative).

pieces of evidence.<sup>124</sup> Those are the very aspects of good persuasive storytelling, not general argumentation.

Pardo also argues for the primacy of explanations on the basis that they can be disjunctive, in contrast to the integrated stories examined by Pennington and Hastie. While he acknowledges that a party may offer two inconsistent stories at trial, he asserts that they typically work together as one explanation. In contrast, he contends that under the explanatory paradigm, explanations may be disjunctive—they may be inconsistent with each other.<sup>125</sup>

Despite Pardo's contention, nothing in the Story Model—at least as presented by ALS scholars—prohibits the presentation of inconsistent stories. The Story Model recognizes that a party may present alternative narratives in the presentation of its case. In a products liability case, for example, the plaintiff may tell two stories: (1) that the defendant did not exercise care in the production of a product, and (2) that the product's design was defective. A robust defense to a murder charge might tell both the story that the police coerced a false confession from the accused and the story that the alleged victim was behaving so violently and erratically that whoever committed the homicide acted in self-defense. While counsel might try to integrate these stories into an overall narrative, nothing in the storytelling scholarship requires such integration. It only suggests some degree of fit is required between the two stories.<sup>126</sup>

Allen and Pardo's downplaying of narrative ignores the similarities between their own explanatory paradigm and the Story Model. They argue, "[A] story such as a chronological narrative can provide an explanation, but the story does not persuade independent of the evidence at trial. It should be obvious that 'telling a good story' at trial but failing to provide evidence of its truth is a recipe for disaster."<sup>127</sup> This argument, however, creates a straw person. Neither Pennington and Hastie nor any credible scholar in the ALS field argues that telling

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<sup>124</sup> See *supra* text accompanying notes 100–05.

<sup>125</sup> Pardo, *supra* note 66, at 599.

<sup>126</sup> Obviously, alternative stories—like alternative explanations—can become so inconsistent as to lack persuasive effect. See JANET MALCOLM, *THE CRIME OF SHEILA MCGOUGH* 67 (1999) ("Trials are won by attorneys whose stories fit, and lost by those whose stories are like the shapeless housecoat that truth, in her disdain for appearances, has chosen as her uniform."). On the other hand, if a story seems to fit too perfectly, the audience, especially in the litigation context, might become a bit wary. AMSTERDAM & BRUNER, *supra* note 81, at 174 ("The more a story told by a visibly good advocate hangs together . . . the more susceptible it is to being taken as a clever concoction.").

<sup>127</sup> Allen & Pardo, *Relative Plausibility and Its Critics*, *supra* note 82, at 7 n.7.

a story without presenting admissible evidence is either advisable or effective. But Allen and Pardo's language—"the story does not persuade independent of the evidence"—ignores the fact that the reverse proposition often is the case. As the ALS literature demonstrates, evidence in a case may not persuade a fact finder unless it tells a persuasive story.<sup>128</sup>

Obviously, as Allen and Pardo note, all explanations in the legal context are not full-blown stories.<sup>129</sup> But, as will be shown,<sup>130</sup> the factors they identify for assessing the plausibility of explanation—consistency, coverage, completeness, simplicity, coherence, and fit with background knowledge—are the very components that the Story Model shows pervade effective storytelling. So while all plausible explanations are not complete narratives, good explanations possess many of the same qualities as good stories. And those are the narrative qualities recognized by ALS scholarship. Allen and Pardo acknowledge that stories may be one "cognitive tool" in determining the existence and persuasiveness of plausible explanations,<sup>131</sup> but they never explore the import of that insight. Their explanatory paradigm recognizes factors important for assessing probative value: consideration of the Lipton factors on the quality of proffered explanations given the evidence.<sup>132</sup> But it provides no specific direction to attorneys or courts on how to apply those factors in practice. Allen and Pardo do not examine, for example, how an attorney should effectively argue that a particular item of evidence has the precision necessary to support her explanation of an issue in the case. Nor do they consider how a trial judge, in ruling on the probative value

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<sup>128</sup> See, e.g., KRIEGER ET AL., *supra* note 115, at 207 ("A story does more than set out a chronological series of events. It tries to make *sense* of those events."); MALCOLM, *supra* note 126, at 11 (describing how a defendant, herself a criminal defense lawyer, lost her case because she "was not interested in telling a plausible and persuasive story [but] was out for the bigger game of imparting a great number of accurate and numbingly boring facts" in evidence).

<sup>129</sup> Allen & Pardo, *Relative Plausibility and Its Critics*, *supra* note 82, at 27 (noting that in the areas of antitrust litigation, no-fault divorces, and contract disputes, "[c]ompeting explanations may be advanced . . . but not necessarily in the form of the normal meaning of 'stories'"). As the scholarship in ALS demonstrates, however, even in some of these areas, lawyers can use narrative techniques to present their cases. See, e.g., Susan M. Chesler & Karen J. Sneddon, *Once upon a Transaction: Narrative Techniques and Drafting*, 68 OKLA. L. REV. 263 (2016); Sneddon, *supra* note 17.

<sup>130</sup> See *infra* text accompanying notes 135–70.

<sup>131</sup> Allen & Pardo, *Relative Plausibility and Its Critics*, *supra* note 82, at 7 n.7.

<sup>132</sup> See *supra* text accompanying notes 100–05.

of that evidence, determines whether that item of evidence actually adds precision to the party's explanation.

### C. Applying Storytelling Insights to Relevancy Decisions

While the explanatory paradigm provides a superior account to the long-dominant probabilistic paradigm, it has limits. Though the rise of the explanatory paradigm has provided grist for vibrant and sometimes contentious academic debate,<sup>133</sup> it has done little to directly affect actual trial practice. And that is where the scholarship in ALS comes in. The findings in that field can provide guidance to lawyers and judges to apply the Lipton factors and flesh out their contours in arguments and decisions.<sup>134</sup>

#### 1. Storytelling and the Mechanism of an Explanation

The first quality of a best explanation identified by Lipton is the mechanism of a situation or condition. While many legal theories, especially in the area of torts,<sup>135</sup> focus on causation, the best explanations demonstrate in detail how causes operate.<sup>136</sup> In other words, an effective explanation addresses not only the events leading up to the key action (e.g., the causes of the malpractice or breach of the contract or the run-up to the execution of a will) but also how those events actually played out. The ALS scholarship demonstrates that the “mechanics” of a situation or condition are effectively shown by evidence that assists the fact finder in visualizing the events leading up to the particular situation or condition—in other words, evidence that sets the scene. “Scene-setting takes its power from its ability to put [the listeners] into the story, to let [the listeners] ride the narrative arc [themselves].”<sup>137</sup>

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<sup>133</sup> See Allen & Pardo, *Relative Plausibility and Its Critics*, *supra* note 82.

<sup>134</sup> See *supra* text accompanying notes 100–05.

<sup>135</sup> See, e.g., 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM chs. 5–6 (Am. L. Inst. 2010).

<sup>136</sup> LIPTON, *supra* note 97, at 122.

<sup>137</sup> Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 LEGAL WRITING: J. LEGAL WRITING INST. 57, 81 (2015); see also Nick Brown, *Expert Storytelling & Storytelling Experts: Why You Should Use Scientific Stories in the Courtroom*, 5 HLRE: OFF REC. 157, 165 (2015) (in discussing the examination of scientific experts at trial, author observes, “[scene-setting] entails having the expert describe where the events and facts unfold as they progress. An image yanks an idea from its platonic form into the real world. Imagery thus mentally transports jurors into the story, making its ideas more accessible.”); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING:

Such scene-setting can be created by evidence about the location of the key event, the environment of the event, objects involved in the situation or condition, and the presence of other people.<sup>138</sup> In a hostile work environment case, for example, evidence of the office layout, the location of the employee's and her supervisor's offices, and the presence of other employees during the discriminatory incidents all might aid in understanding the mindsets of the parties and the overall mechanics of the situation. Or in an automobile accident case, evidence of the weather conditions, road terrain, direction of the road, the angle of the sunlight, and distractions of the drivers may be important to an understanding of each party's explanation of the incident.<sup>139</sup>

Storytelling literature also shows the possible importance of choreography in the scene in adding to the understanding of the mechanics underlying the key action. "In any particular [situation], the parties may move around, physically interact with other persons, handle objects, have facial expressions, and speak with distinctive intonations."<sup>140</sup> These physical movements and manifestations can significantly impact a fact finder's understanding of the explanations proffered by the parties. In a murder case, for example, a defendant's self-defense claim may turn on the movements of the defendant and the alleged victim, the tones of their voices, and the accessibility of any weapons.

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J. LEGAL WRITING INST. 3, 39 (2009) (noting that "'A scene makes the past present.' It lets the [listener] see the event unfold . . ."); Robert W. Gordon, *Simpson's Leading Cases*, 95 MICH. L. REV. 2044, 2045 (1997) (reviewing A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* (1995)) ("There doesn't have to be a 'point' to a good narrative save that of setting the scene, reconstructing the smell and feel of the situation as contemporaries lived it."); Albert J. Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions*, 34 UCLA L. REV. 611, 624–25 (1987) (arguing that scene-setting evidence is necessary to make the oral story being told more clear, more vivid, and more easily understood and remembered).

<sup>138</sup> See, e.g., KRIEGER ET AL., *supra* note 115, at 246–48; Fajans & Falk, *supra* note 137, at 39–40.

<sup>139</sup> KRIEGER ET AL., *supra* note 115, at 247; see also Fajans & Falk, *supra* note 137, at 39–40 (in the pleadings context, discussing the facts necessary to allege to set the scene for involuntary servitude and slip-and-fall cases); James Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 87, 102–14 (2008) (telling the story about an immigration case concerning the validity of a marriage between an immigrant and an American citizen in which the immigration judge was only convinced the couple was in fact married after the wife's sudden burst of anger at her husband's failure to put down the toilet seat after use).

<sup>140</sup> KRIEGER ET AL., *supra* note 115, at 248.

## 2. *Storytelling and the Precision of an Explanation*

Lipton also contends that the precision of an explanation adds to its plausibility.<sup>141</sup> The quantitative elements of an explanation, he asserts, may be as important as its qualitative aspects.<sup>142</sup> This factor is consistent with evidentiary rules, which prefer the more concrete depiction of a situation or condition over an abstract description.<sup>143</sup>

ALS research suggests that the precision of an explanation can be enhanced by the use of evidence that is particularly detailed as to measurement, quantity, and proportion. For example, a witness who observed a nighttime robbery might truthfully testify that the scene of the crime was brightly lit. Without preparation, however, he would be unlikely to focus on the details of the street lighting: How far was the nearest lamppost? In what direction? How tall was it? Was it blocked by trees or billboards? Did it have one of the newer, high-intensity lamps? And there can be more to lighting than streetlamps: Were there stores nearby? Did they have exterior signs? Did any of the adjacent houses have outside lights? Where? How many? How far?<sup>144</sup> Such evidence can add to the credibility of a witness's testimony and her explanations of her actions.<sup>145</sup> Moreover, such detailed evidence can also help to convince a fact finder that a witness has a particularly good memory of the events and emphasize the emotional impact of the events.<sup>146</sup>

The storytelling literature also demonstrates that precise detail can be used to facilitate the fact finder's visualization of the case. The amount of detail provided to connect the structural elements of a story—scene, act, agent, agency, and purpose—has been found to have a significant bearing on the fact finder's judgments of the persuasiveness of a party's story.<sup>147</sup>

Similarly, this literature reveals how precision can enhance explanations by bringing the fact finder closer to a party. By zooming

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<sup>141</sup> LIPTON, *supra* note 97, at 122.

<sup>142</sup> *Id.*

<sup>143</sup> BROUN ET AL., *supra* note 45, at 30.

<sup>144</sup> Steven Lubet, *Persuasion at Trial*, 21 AM. J. TRIAL ADVOC. 325, 341–42 (1997).

<sup>145</sup> See KRIEGER ET AL., *supra* note 115, at 245.

<sup>146</sup> DAVID A. BINDER & PAUL BERGMAN, *FACT INVESTIGATION* 142 (1984); see Stephen A. Newman, *Discussing Advocacy Skills in Traditional Doctrinal Courses*, 65 J. LEGAL EDUC. 207, 213 (2015) (asserting that the recitation of details in an opinion in an automobile accident case “puts the plaintiff, Ms. Dunphy, in a very sympathetic light, and gives the reader a grasp on the profound emotional impact of the event on her”).

<sup>147</sup> BENNETT & FELDMAN, *supra* note 12, at 89.

in on the actions and feelings of an individual at the key event in a case, a lawyer can focus the fact finder on the viewpoint of that person and create empathy for him.<sup>148</sup> On the other hand, recitation of precise details that fail to connect the pieces or make a point might actually harm the case. As Janet Malcolm observes in regard to legal storytelling, “The person who insists on speaking the whole truth, who painfully spells out every last detail of an action and interrupts his wife to say it was Tuesday, not Wednesday . . . is not honored for his honesty but is shunned for his tiresomeness.”<sup>149</sup>

### 3. *Storytelling and Scope of an Explanation*

An explanation is the loveliest, Lipton posits, when it explains more phenomena than the key event. While the “mechanics” of a situation or condition assist the fact finder in understanding the environment of and actions leading up to the key event, and while precision provides details for that context, scope looks beyond the key event. In the context of the evidence rules, the scope factor is concerned with whether an explanation of a party’s conduct in the key event is consistent with the overall character of that party and other events in the case. In regard to the character of the parties, ALS scholars recognize the importance of “personal facts,” which help to explain the actions of the different parties. These facts are “observable characteristics—such as physical attributes and dress; personality; attitude . . . ; and personal background including economic status, educational status, job status, family status, residence, and previous similar involvements.”<sup>150</sup> These personal facts provide the fact finder with a richer understanding of the parties in a case by showing how they generally behave and react in similar

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<sup>148</sup> Cathren Koehlert-Page, *Come a Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399, 415 (2011) (describing how an amicus brief in *Michigan v. Bryant*, 562 U.S. 344 (2011), by giving a detailed description of the victim’s death, created empathy for him).

<sup>149</sup> MALCOLM, *supra* note 126, at 4.

<sup>150</sup> BINDER & BERGMAN, *supra* note 146, at 107; FED. R. EVID. 404 provides categorical restraints on the admission of such general character evidence to establish propensity because “in many situations the probative value is slight and the potential for prejudice large.” BROUNET AL., *supra* note 45, at 401. While it is beyond the scope of this Article to delve into the validity of such a hard-and-fast rule in terms of the explanatory paradigm or storytelling theory, it should be noted that the cases often do not distinguish between character evidence to show propensity and character evidence to assist the fact finder in understanding the context of a party’s actions. See *infra* text accompanying notes 178–80.

situations.<sup>151</sup> While some judges might hold that such evidence “plays on the sympathy of the jurors,” it actually has probative value because it assists the jury in deciding the issues in the case by providing a broader context for assessing the differing explanations of the parties.

In a similar vein, storytelling research shows that evidence of the participant’s state of mind is often important to an understanding of the key actions in a case.<sup>152</sup> Take the case of an assault: The defendant brutally beats a restaurant worker—a total stranger—seemingly unprovoked. The defendant is arrested on site, so there is no doubt as to identity. The prosecution might present evidence that the defendant had stormed off after a dispute over the bill earlier the same day or, perhaps, that the worker resembled an ex-spouse of the defendant. Defense counsel, arguing that her client was insane at the time of the attack, might elicit evidence that her client was diagnosed with schizophrenia and had run out of medications that morning. Some facts—for example, that the defendant had allegedly been called a slur during the earlier incident—might be used by both parties. While some of this evidence may in fact play to the sympathy of the jury, it also provides necessary context for what could be considered a random act of violence.

And in regard to consistency of events, David Binder and Paul Bergman have noted that, “[b]ased on common experience, most of us believe that events proceed in recognizable patterns and that people’s emotional states and actions remain relatively consistent from one moment to the next. Therefore, when the different parts of the story are in harmony, we tend to trust the story.”<sup>153</sup> Accordingly, even if evidence has only a tangential connection with an element of the case

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<sup>151</sup> KRIEGER ET AL., *supra* note 115, at 249; David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 69 (1999).

<sup>152</sup> KRIEGER ET AL., *supra* note 115, at 428; Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 265 (2012) (“In describing the characters in the story, the focus . . . [should be on] the description of [a party’s] thoughts. . . . The thoughts and emotions of the [party] have an immediacy that invites the audience to share in those thoughts and feelings.”).

<sup>153</sup> BINDER & BERGMAN, *supra* note 146, at 138; see Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 618 (1994) (“[E]vidence is obviously contingent in the sense that the implications of any particular [item of evidence] is a function of other [items of evidence] relevant to the case.”); E-mail from Ronald J. Allen to Jonathan Krieger (June 18, 2020) (on file with author) (“A person is charged with murder, and a witness testified he was seen driving in the area around the time of the murder—inculpatory. Then another witness testifies that he always visits his aged mother at exactly that time in that neighborhood—exculpatory.”).

or the credibility of a witness, it may have probative value under the explanatory conception if it shows a pattern of conduct for a particular party consistent with an explanation. If, for example, the defendant in the *Johnson* case explains his anger at the nonreceipt of the package as motivated by his deep feelings for his family, evidence of other instances demonstrating his close relationship with his family would be probative.<sup>154</sup>

#### 4. *Storytelling and Simplicity of an Explanation*

The fourth Lipton attribute to consider in assessing an explanation is simplicity. A simple explanation “reveal[s] the unity that underlies the apparent diversity of the phenomena.”<sup>155</sup> In the context of the evidence rules, “the apparent diversity” of the contested situation or condition in a case is usually a given. The parties present conflicting evidence as to what really happened, and the fact finder is left to make a decision based on the competing explanations of this evidence. Under Lipton’s formulation and the explanatory model of proof, then, an item of evidence has probative value the more it supports a unifying explanation of all the evidence.

The ALS research on unifying themes in storytelling provides helpful guidance in making this assessment of probative value of particular evidence. A unifying theme is the controlling idea or core insight of a story. It provokes a fact finder to have a particular view of the case.<sup>156</sup> It establishes a “thread of common meaning that runs through[out the entire case].”<sup>157</sup>

While this literature provides practitioners with advice as to how to develop a unifying theme,<sup>158</sup> those insights can also assist judges in deciding whether evidence that might otherwise be considered irrelevant under the probabilistic model helps explain the party’s version of its story. A persuasive theme for a plaintiff, the research reveals, is the particular injustice suffered by the party.<sup>159</sup> Consider, for

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<sup>154</sup> See *supra* text accompanying notes 87–95.

<sup>155</sup> LIPTON, *supra* note 97, at 122.

<sup>156</sup> PHILIP N. MEYER, *STORYTELLING FOR LAWYERS* 16 (2014).

<sup>157</sup> JANICE SCHUETZ & KATHRYN HOLMES SNEDAKER, *COMMUNICATION AND LITIGATION: CASE STUDIES OF FAMOUS TRIALS* 80 (1988). As one skills text suggests, a lawyer “[i]n a single tweet, [should] state the central meaning of [her] client’s case.” KRIEGER ET AL., *supra* note 115, at 214.

<sup>158</sup> KRIEGER ET AL., *supra* note 115, at 213–18.

<sup>159</sup> See EDMOND N. CAHN, *THE SENSE OF INJUSTICE: AN ANTHROPOCENTRIC VIEW OF LAW* 13–14 (1949) (arguing that “the response to a real or imagined instance of injustice . . .

example, in the police abuse case discussed in the Introduction that the plaintiff offers the theme that the officers disregarded their training in using excessive force.<sup>160</sup> Evidence of the police department's use-of-force rules, the officers' willful indifference as the plaintiff cried in pain, the plaintiff's lack of resistance, and the officers' failure to attend to the plaintiff's injury together create a simple picture of that theme.

The storytelling studies also recognize how persuasive themes can be crafted from refrains that recur throughout the events in a case. Even patterns of ostensibly minor errors or problems can, when viewed in the aggregate, appear quite significant.<sup>161</sup> When minor mistakes or lapses repeat themselves, "a feeling of suspicion [may] begin[] to arise and, finally, one of antipathy toward the person who appears to be . . . trying to get away with something."<sup>162</sup> In a breach of warranty of habitability case, for example, in which the plaintiff alleges serious structural problems with the dwelling, evidence of the landlord's failure to make fairly minor repairs may have probative value to support a theme of wanton neglect.

"Trouble" is another possible unifying theme identified by the storytelling scholarship. Many cases concern a party who strives to attain a goal but runs into trouble. An explanation of that trouble is only persuasive to a fact finder if it believes that the trouble is a deviation from the usual state of affairs. The unifying theme in such a case will probably center on this deviation. Otherwise, the troublesome situation seems incomprehensible.<sup>163</sup> That is precisely Lipton's point in identifying simplicity as a factor underlying best explanations. In a criminal case against an inmate for injuring another prisoner, for example, a defendant's self-defense explanation for his conduct will be most persuasive if he can present evidence showing he has an exemplary disciplinary record as compared with the victim's.

##### 5. *Storytelling and the Fertility of an Explanation*

According to Lipton, an explanation is lovely if it leads to a clearer understanding of a situation or condition because it "disclose[s] . . . previously unnoted relationships among those already known."<sup>164</sup>

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is alive with movement and warmth"); James W. McElhaney, *Opening Statements: To Be Effective with the Jury, Tell a Good Story*, 81 A.B.A. J. 73, 74 (1995).

<sup>160</sup> See *supra* text accompanying notes 1–6.

<sup>161</sup> KRIEGER ET AL., *supra* note 115, at 216 n.20.

<sup>162</sup> MALCOLM, *supra* note 126, at 121.

<sup>163</sup> See AMSTERDAM & BRUNER, *supra* note 81, at 46.

<sup>164</sup> LIPTON, *supra* note 97, at 122.

Applying this rule in the trial context, evidence is more probative to the extent that it fits together with evidence that has already been established. As Lipton acknowledges, this fifth factor—fertility or fruitfulness—raises issues similar to those raised by the other factors of scope (the character of the parties and consistency of events) and simplicity (unifying theme). But it adds another element: the cohesion of all the evidence underlying the explanation.

Substantial ALS scholarship addresses the issue of cohesion in storytelling. Studies have shown that the higher the frequency of ambiguities in a story, the more difficult it will be for the fact finder to interpret it.<sup>165</sup> Chris Rideout, a scholar who has focused extensively on this issue, has observed,

When we think of a set of events as a story, as something more than just a collection of discrete actions, then internal narrative coherence is a part of our thinking. The actions must fit together in a sequential arrangement that accords with our sense of causation and that is internally consistent.<sup>166</sup>

Faced with competing stories, “[fact finders] are influenced by the story that seems most probable, and the story that is presented most coherently will also be the story that seems most probable.”<sup>167</sup>

By the same token, then, under the explanatory model of proof, evidence that supports a coherent explanation of a party’s version of the events is quite probative. The impact of a precise portrayal of the setting, the characters, their motivations, and their step-by-step actions—that all fit together—can be more persuasive in explaining a party’s story than limited evidence as to the key event in the case. The whole becomes more than the sum of its parts. So again, evidence that might seem only marginally relevant to an element of the case might in fact be considered probative if it plays a role in connecting the different pieces of evidence supporting a party’s explanation or clears up any ambiguities in the case.

### 6. *Storytelling and Background Belief*

Lipton’s final factor for assessing the quality of an explanation—fit with background belief—is consistent with the findings of cognitive scientists and ALS scholars.

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<sup>165</sup> BENNETT & FELDMAN, *supra* note 12, at 68–90.

<sup>166</sup> J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 LEGAL COMM’N & RHETORIC: JAWLD 67, 75 (2013).

<sup>167</sup> J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 64 (2008).

Different fact-finders are capable of giving different meanings to the telling of the very same story. In one study of a simulated jury trial, for example, jurors in one case constructed radically different stories from the same presentation of evidence in one case. The case concerned the theft of property that the defendant asserted he thought was abandoned. Some jurors concluded that the defendant unlawfully stole the property, while others thought it was the mistake of a well-intentioned, ignorant man who had no sense of what he was stealing. Some saw the situation as the act of a “Good Samaritan” cleaning up the neighborhood, while others viewed it as the commission of the perfect, plotted crime, carried out “in broad daylight” to make the act appear innocent. From 48 groups of jurors viewing the very same video-taped trial, 15 different versions of the story were constructed.<sup>168</sup>

Accordingly, an explanation that might be the best for one set of fact finders might not be that lovely for another.

But, in terms of the issues of proof addressed in this Article, the ALS scholarship does more than simply confirm Lipton’s insights. If, as posited by Lipton, explanations are viewed differently depending on the audience, then in some cases the probative value of evidence supporting an explanation may vary depending on the nature of the fact finder. Accordingly, under the explanatory conception, a judge, in assessing the probative value of evidence may need to consider, depending upon the context of the case, the composition of the jury.

Recent studies in the area of linguistics and communications theory have shown that the most important part of fitting a story to the audience members is not “battering them up” but entering into a dialogue with them attempting to address the particular concerns in their minds.<sup>169</sup> Lawyer-storytellers, then, are most effective if they understand the reasoning process that the fact finder will use in making sense of the evidence at trial.<sup>170</sup>

Applying these insights to the issue of proof under the explanatory model, the judge may need to assess the probative value of a particular item of evidence under the lens of the possible social and cultural biases the jury might be bringing to the case. Boilerplate jury instructions to not allow those biases to interfere with decision-making might have only limited effect. But evidence directly addressing the biases of a particular jury might be quite effective. For instance, in the above hypothetical concerning the theft of property that the defendant

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<sup>168</sup> KRIEGER ET AL., *supra* note 115, at 210 (citing James A. Holstein, *Jurors’ Interpretations and Jury Decision Making*, 9 L. & HUM. BEHAV. 83, 86–90 (1985)).

<sup>169</sup> AMSTERDAM & BRUNER, *supra* note 81, at 136.

<sup>170</sup> KRIEGER ET AL., *supra* note 115, at 211 n.10.

explains he thought was abandoned, if the defendant is a person of color and the all-white jury is from a suburb plagued with thefts, evidence of the defendant's steady work history may have substantial probative value and prevent misconceived biases from interfering with the jury's decision.

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As fleshed out by the insights of the ALS scholarship, it is clear that the explanatory paradigm supports the notion that parties should be allowed to have their witnesses tell their stories at trial. Those stories consist not just of the bare facts concerning the key events in the case but the context for those events. The contextual facts—the surrounding environment, the choreography of the parties' actions, the precise details of those actions, the character of the parties, the existence of a unifying theme, and the consistency and cohesion of the evidence—are essential under the explanatory conception to a full understanding of the explanations proffered by the parties. As Lipton's philosophical theory and cognitive science research demonstrate, without those contextual facts, fact finders are unable to adequately assess the competing explanations presented by the parties.

#### IV

##### RECONCILING RULE 401 AND NARRATIVE-BASED ADMISSIBILITY

Thus, in a surprising way, the explanatory paradigm, as viewed through the lens of ALS, actually has similarities to the common law method of witness examination. As shown above,<sup>171</sup> prior to the late nineteenth century, the preferred method of testimony was to allow witnesses to give detailed versions of their own stories without the interference of multiple attorney questions. Witnesses, unconstrained by the requirement of piecemeal presentation of facts, most likely provided many of the contextual facts necessary to their narrative. Unfortunately, with the widespread adoption of technical rules for witness examination, this prior mode for presenting testimony was severely limited, and, in the words of Wigmore, this “natural method” of witness storytelling was abandoned.<sup>172</sup>

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<sup>171</sup> See *supra* text accompanying notes 20–32.

<sup>172</sup> 2 WIGMORE, *supra* note 8, at 49. Obviously, witness storytelling did not guarantee the presentation of all the contextual facts necessary to support a party's explanations. Some individuals are natural storytellers whose narratives are rich in detail; others are more reticent about providing details. The point is not that the common law favored witness storytelling as a value unto itself but that its approach toward witness storytelling reflected its interest in the presentation of a full picture of the story of the case, not simply a limited

But what of the language of the Federal Rules that defines probative value as whether evidence “has any tendency to make a fact more or less probable than it would be without the evidence”? At first glance, this language—which focuses on the probability of evidence to support the likelihood of a fact—appears to support the probabilistic model for assessing probative value. But a closer reading of the rule discloses that the drafters rejected a strict logical approach to evaluating probative value. As shown above, the Model Code and Uniform Rules defined probative value as evidence having a “tendency in reason” to prove a fact.<sup>173</sup> In contrast, the Federal Rules’ definition only requires a showing of a “tendency” to prove a fact. As the Advisory Committee notes show, this change was deliberate. The committee noted that the language of the Uniform Rules perhaps unduly “emphasiz[es] . . . the logical process and ignor[es] the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.”<sup>174</sup>

The comments of Edward Cleary, the Advisory Committee’s reporter, on his first draft of the rules presented to the committee in April 1966 expansively set forth the rationale for the rejection of the “tendency in reason” language from the Uniform Rules. Unlike formal syllogistic reasoning, Cleary observed, in evidence law, the validity of the major premise is not based on logic.

[T]he validity of the major premise depends upon the existence of a pattern of human behavior, a matter perhaps determinable by observation or experiment, but certainly not by any exercise of logic. . . . *To speak of relevancy as a matter of logic is . . . a misleading partial statement: relevancy is the product of logic applied to a generalization the validity of which must be established from non-logical sources.*

In examining the validity of the [major] premise, experience or perhaps some inner quality which we can only label “common sense,” [comes into play].<sup>175</sup>

Similarly, as demonstrated above,<sup>176</sup> the drafters of the Federal Rules recognized that “[e]vidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally

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presentation of discrete facts in support of particular legal propositions. In this way, the common law mode of proof is similar to the explanatory conception.

<sup>173</sup> See *supra* text accompanying note 38.

<sup>174</sup> FED. R. EVID. 401 advisory committee’s note.

<sup>175</sup> First Draft, *supra* note 55, at 3 (emphasis added).

<sup>176</sup> See *supra* text accompanying notes 56–58.

offered and admitted as an aid to understanding.”<sup>177</sup> Such “background” evidence, admitted as an aid to the jury’s understanding of the case, is essentially the kind of evidence envisioned by the explanatory paradigm.

The Advisory Committee’s rejection of the “tendency in reason” language and its recognition of the relevancy of background evidence reflect a strong preference for commonsense explanations over a purely logical approach to relevancy decisions. Indeed, like the earlier common law cases, the Advisory Committee seemed keenly aware of the significance of narrative in the presentation of evidence.

And despite the development of technical rules of witness examination and some scholars’ distrust of such background evidence, many courts—especially at the state level—have been quite receptive to the admission of such evidence. Courts, for example, have freely admitted evidence of a party’s education and military background.<sup>178</sup> Other courts have approved the admission of specific details about a party’s personal life.<sup>179</sup> And still others have observed that as a general proposition “[i]t is not improper . . . to elicit background information from a witness.”<sup>180</sup>

Unfortunately, however, like the conclusory language of the Advisory Committee, the caselaw provides little guidance for assessing the probative value of background evidence. Following in the footsteps of its predecessor, the New Wigmore treatise approvingly refers to this

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<sup>177</sup> FED. R. EVID. 401 advisory committee’s note.

<sup>178</sup> See, e.g., *United States v. Blackwell*, 853 F.2d 86, 88 (2d Cir. 1988) (“[T]estimony concerning [a witness’s] service in the Marine Corps and his completion of two years of college [may] properly [be] received as background” because “[i]t [tells] the jury something about the [witness] as a person, and his experience in life.”); *Wilcox v. Coons*, 241 S.W.2d 907, 915 (Mo. 1951) (“It is entirely proper . . . to inquire into [a witness’s] residence, antecedents, social connections and occupation, particularly as they reflect his credibility either for good or bad.”).

<sup>179</sup> See, e.g., *State v. Sports*, 255 S.E.2d 631, 633 (N.C. Ct. App. 1979) (holding that testimony regarding a witness’s “orphan status, epileptic history, scholarship assistance and summer employment” “was relevant . . . as an explanation as to why the witness was working at McDonald’s, living with her aunt in Greensboro, and walking home alone on the night in question”); *Ga. S. & F. Ry. Co. v. Ransom*, 63 S.E. 525, 527 (Ga. Ct. App. 1909) (“Who a witness is, his age, his business, whether a married man or otherwise are relevant facts on the question of his credibility . . .”).

<sup>180</sup> *United States v. Croft*, 124 F.3d 1109, 1120 (9th Cir. 1997) (citing *State v. Hussey*, 521 A.2d 278, 281 (Me. 1987)); see also *McDaniel v. Commonwealth*, 415 S.W.3d 643, 654 (Ky. 2013) (“[B]ackground information is relevant to jurors in that it aids in assessing the credibility of fact witnesses and in determining the weight to give their testimony . . .”); *Williams v. State*, 604 S.W.2d 146, 149 (Tex. Crim. App. 1980) (“It is well settled that a party may place a witness in the context of his background . . .”).

Advisory Committee note about background evidence but observes that “[t]he jurisprudence of ‘background evidence’” is “essentially undeveloped.”<sup>181</sup> The scholarship on the explanatory paradigm regrettably offers little direction on this issue. The ALS research described in this Article, however, provides important guidance for the development of such a jurisprudence. But a caveat is in order: the best or loveliest explanation might sometimes be one that reflects the biases of the court (as the gatekeeper which assesses probative value) or the jury. Of course, a judge might say, a defendant’s prior burglary would be relevant to the current charge of breaking into a car. A victim’s residence in a poor neighborhood could be used to blame the victim for a crime or, more likely, to make the prosecution a referendum on crime.<sup>182</sup> From the experience of the authors, it is not rare to see prosecutors, all rich or at least middle-class lawyers, act as if a city’s horrific murder rate can be solved (and poor neighborhoods saved) by a guilty conviction and an inevitable long prison term. These prosecutors would gladly welcome a jurisprudence that admitted extensive contextual evidence about the deficiencies of the defendant and the merits of the alleged victim. Lipton’s factors for assessing the best, or loveliest, explanation do not straightforwardly account for these kinds of biases. The scope factor, for example, might arguably *encourage* resort to these kinds of biases.

But there are two constraints on the wholesale admission of such evidence. First, under the explanatory paradigm, the fact that one of the Lipton factors adds to the quality of an explanation does not automatically guarantee its admission. The court still needs to assess the probative value of evidence in terms of these factors. And that is where the ALS scholarship can provide much guidance. If, for example, a party proffers evidence of marginal probative value to an element of the case to show evidence of the fertility of the story, the court can consider whether the evidence actually contributes to the coherence of the narrative or is in fact just surplusage. Second, standards such as Federal Rule of Evidence 403 provide a limitation to the unfettered admission of explanatory evidence. Rule 403 bars admission of testimony when the probative value is substantially outweighed by factors such as unfair prejudice, confusion, undue delay,

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<sup>181</sup> ROGER PARK ET AL., *THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION* § 9.1 (2012).

<sup>182</sup> Early cases reflect certain class biases by allowing witnesses to be attacked for “drift[ing] about in idleness from place to place, associating with the low and vicious . . . .” See, e.g., *Hollingsworth v. State*, 14 S.W. 41, 42 (Ark. 1890).

or waste of time.<sup>183</sup> The issue then becomes whether the probative value of the evidence in enhancing the explanation of a party's story is substantially outweighed by these factors. In fact, the Supreme Court has provided guidance for assessing prejudice from admission of contextual evidence. In *Old Chief v. United States*,<sup>184</sup> the Court addressed how evidence of a prior conviction should be admitted at trial for a recidivist gun charge. The prosecution, of course, wanted to get into the gory details of the defendant's prior offense. The defense wanted to minimize these details and offered to stipulate to the fact the defendant had been convicted of a felony.

In striking pro-storytelling language, the Court recognized the lost *oomph* in the prosecution's case caused by a stipulation. It observed that such "[e]vidence . . . 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 . . . necessary to reach an honest verdict."<sup>185</sup> It also found the prosecution "need[ed] evidentiary depth to tell a continuous story . . . ."<sup>186</sup> The Court found, however, that the prior convictions at issue added little to the story. Without referring to the Lipton "fertility" factor, but while using it, the Court held that the proffered evidence should not be admitted. It focused on the coherency issue and held that an earlier chronology was unnecessary because it would "leave[] no gap in the story of a defendant's subsequent criminality" and would not "displace[] a chapter from a continuous sequence of conventional evidence . . . ."<sup>187</sup> Finding little probative value in the evidence, the Court concluded that the prejudice substantially outweighed the probative value.

#### CONCLUSION

From the early days of common law trials to Wigmore to the drafting of the Federal Rules of Evidence to *Old Chief v. United States*, courts and scholars have recognized that narrative context is an essential part of the fact-finding process. Allen and Pardo's explanatory paradigm fits into this conception of legal decision-making. But throughout this history, there have also been prominent voices—like the critics of the

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<sup>183</sup> FED. R. EVID. 403.

<sup>184</sup> *Old Chief v. United States*, 519 U.S. 172 (1997).

<sup>185</sup> *Id.* at 187.

<sup>186</sup> *Id.* at 190.

<sup>187</sup> *Id.* at 191.

Advisory Committee's approach to background evidence and the proponents of the probabilistic paradigm—who view fact-finding primarily as an algorithmic process.

Cognitive science studies of legal decision-making and philosophical theories such as Lipton's have demonstrated that the narrative mode is a natural part of human reasoning and cannot be ignored. They do not belittle the logical-scientific mode of thought in legal decision-making, but they caution against a rigid adherence to a formulaic approach to issues such as relevancy. In most cases that proceed to trial, the evidence will be incomplete, and, as Allen and Pardo show, the jury will be left to sort out competing explanations of the evidence presented. A proof system that views the evidence through the lenses of legal elements and ignores contextual evidence simply disregards the important role that such evidence plays in the ultimate verdict.

But while the explanatory paradigm gives some guidance as to the approach courts should take in deciding proof issues, it only goes so far, providing little direction as to the operation of that conception in practice. As this Article has shown, ALS scholarship provides normative guidance for the development of a rich jurisprudence for assessing the probative value of evidence in relation to the explanations proffered by the parties.

