The Problem of Trustworthiness in the Admission of State of Mind Hearsay under California and Federal Evidence Law

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I. INTRODUCTION

This paper examines in detail how a “trustworthiness” criterion operates in the admission of state of mind hearsay in California. Appellate case law indicates that prosecutors mostly succeed in obtaining admission of state of mind hearsay statements in criminal trials, while criminal defendants mostly fail at doing so.1 This difference in appellate outcomes is largely explained by a judicially created per se rule pursuant to which judges exclude as “untrustworthy” virtually all defense offers of criminal defendants’ statements of their own state of mind. The paper then examines case law under Federal Rule of Evidence 803(3), the federal hearsay exception for statements of state of mind. Despite the strictly categorical terms of this exception, a significant line of federal case law imports a trustworthiness test into it. The results in these federal cases are the same as in California – a virtually per se rule excluding defense offers of criminal defendants’ own state of mind statements.2

Against this background, I argue for federal courts to retain the strictly categorical approach to Rule 803(3). The analysis and arguments in this paper may also persuade California judges to use more actual “discretion” in their evaluation of the trustworthiness of defendants’ state of mind hearsay, with the attendant possibility of admitting some of it.

* Professor of Law, School of Law (Boalt Hall), University of California at Berkeley. I am very grateful to my two research assistants, Marwa Hassoun and Anne Shaver, for their first-rate research and generous support.
1. See infra 626-27 tbs. 4 & 5.
2. See infra Part IV.
II. THE "TRUSTWORTHINESS" CRITERION IN THE CEC AND FRE HEARSAY EXCEPTIONS

Analysis of the state of mind exceptions in the California Evidence Code (CEC) and the Federal Rules of Evidence (FRE) starts with placing them into the context of each body of evidence law. Table 1 shows the seventeen hearsay exceptions in the CEC which either require a finding of trustworthiness as a prerequisite for admission or permit exclusion based on lack of trustworthiness. The Table groups these exceptions by the content of the hearsay they admit. The titles of each Code section have been edited to state more clearly that content.

**TABLE 1**

<table>
<thead>
<tr>
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<tbody>
<tr>
<td><strong>Statements Relating to State of Mind</strong></td>
<td>§1250. Statement of declarant’s then existing mental or physical state.</td>
</tr>
<tr>
<td></td>
<td>§1251. Statement of declarant’s previously existing mental or physical state.</td>
</tr>
<tr>
<td></td>
<td>§1252. Inadmissibility of §§1250 and 1251 statements for lack of trustworthiness.</td>
</tr>
<tr>
<td><strong>Statements Relating to Property</strong></td>
<td>§1260. Statements concerning declarant’s will.</td>
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<td>§1261. Statement of decedent offered in action against his estate.</td>
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<td></td>
<td>§1323. Statement concerning boundary.</td>
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<td></td>
<td>§1272. Absence of entry in business records</td>
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<td></td>
<td>§1280. Record by public employee.</td>
</tr>
<tr>
<td><strong>Statements Relating to Family History</strong></td>
<td>§1310. Statements concerning declarant’s own family history.</td>
</tr>
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<td></td>
<td>§1311. Statements concerning family history of another.</td>
</tr>
</tbody>
</table>
Table 2 shows the four exceptions in the FRE that either require a finding of trustworthiness for admission or permit exclusion based on lack of trustworthiness. Again, the titles of some Rules have been edited to state more clearly that Rule’s content.

### TABLE 2

<table>
<thead>
<tr>
<th><strong>Federal Hearsay Exceptions with Trustworthiness Clauses</strong></th>
<th>Fed. R. Evid. 803(6)(7)(8) &amp; 807</th>
</tr>
</thead>
</table>
Rule 803(7). Absence of entry in records kept in accordance with Rule 803(6).  
Rule 803(8). Public records and reports. |
| **Residual Exception**                                     | Rule 807. Statements not specifically covered by Rules 803 and 804 but having equivalent circumstantial guarantee of trustworthiness. |

A. The “Trustworthiness” Approach to Hearsay in These Exceptions

The exceptions in Tables 1 and 2 are subject to clauses that permit a “trustworthiness” approach to hearsay; that is, the trial judge makes what may be called an “open-ended” evaluation of the “trustworthiness” of the
proffered hearsay statement. By “open-ended” I mean two things: The court’s inquiry could take into account the circumstances that affect all of the testimonial qualities of the hearsay declarant – perception, memory, narration and sincerity; and, the court’s evaluation is not constrained by narrowly drawn factual criteria set by the terms of the rule. Thus, the exceptions for past recollection recorded in both the federal and California rules, and the exception for statements against interest in the FRE, are not included the Tables. They are not open-ended because they focus the court’s inquiry on specific factual criteria.

The open-ended evaluation of trustworthiness calls for the exercise of judicial “discretion.” Hearsay that otherwise fits within an exception can be excluded on the basis of a court’s discretionary finding of lack of trustworthiness; or, the exception itself requires that trustworthiness must be found affirmatively in the first place. In either case, the court’s discretionary evaluation of the trustworthiness of the individual declarant’s statement is outcome-determinative of admissibility.

B. The “Categorical” Approach to the Admission of Hearsay

The “categorical” approach to the admission of hearsay requires that hearsay statements be admitted if they fall within categories that are specifically and factually defined as hearsay exceptions. Statements that do not fall within these categories must be excluded. Thus the categorical approach is not based on evaluation of the general trustworthiness of hearsay statements.

The FRE explicitly adopted this categorical approach. In the words of the Advisory Committee’s Introductory Note: The Hearsay Problem, the categorical approach was chosen in preference to the “individual treatment” of hearsay statements “in the setting of the particular case.” Only the four

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3. Although CEC § 1360 contains the word “reliability” instead of “trustworthiness,” I find no discernable difference in the court’s inquiry.

4. CEC § 1237 and FRE 803(5), the exceptions for past recollection recorded, both require findings that the statement was made when “fresh” in the witness’ memory and that the written statement was “true,” CAL. EVID. CODE § 1237 (West 2007) or “correct” FED. R. EVID. 803(5). Case law concerning these exceptions focuses on the fulfillment of these precise terms rather than on general trustworthiness or reliability. FED. R. EVID. 803(b)(3) requires that “corroborating circumstances” clearly indicate the trustworthiness of statements exposing declarants “to criminal liability and offered to exculpate the accused.” This is not an open-ended inquiry into trustworthiness.


6. FED. R. EVID. Article VIII advisory committee’s note. The policy underlying the categorical approach, and it’s operation in practice, is discussed infra at Parts V.A. and Part VLB.
exceptions in Table 2 above depart from the federal policy of categorical, non-discretionary admission.

C. Two Significant Differences Between the CEC and FRE with Regard to the Trustworthiness Criterion

Despite the greater number of exceptions in the CEC that contain a trustworthiness criterion, as shown in Table 1 supra, there are only two significant differences between the CEC and the FRE in actual practice. Why is this so? First, the business and public records exceptions under both the CEC and the FRE permit exclusion for lack of trustworthiness. Professor Myrna Raeder discusses these important exceptions in her contribution to this symposium.7

Second, published case law and treatises show that most of the CEC’s “trustworthiness” exceptions are seldom used.8

It is only the exceptions regarding state of mind hearsay, CEC sections 1250 and 1251, and the exceptions for statements by children concerning abuse and neglect (CEC section 1360) and statements by unavailable declarants concerning threat or infliction of physical injury (CEC section 1370) that have engendered a substantial body of case law in California,


8. Very few cases were found regarding the traditional hearsay exceptions for statements regarding property and family history, CEC §§ 1260, 1261, 1323, and 1311. There is only one opinion applying section 1310, the exception for the declarant’s own family history, that makes a trustworthiness analysis. People v. Riley, 52 Cal. Rptr. 2d 670, 675-76 (Ct. App. 1996). A few cases applying trustworthiness to this type of hearsay were found that pre-date the CEC. Review of the major California treatises confirms these results. See Joseph W. Cotchett, 1 California Courtroom Evidence, ch.21 (5th ed. 2005); William E. Wegner et al., California Practice Guide: Civil Trials and Evidence, ch. 8D (2006); Hon. Earl Johnson Jr., California Trial Guide § 40.01 (2d ed. 2006); 31 California Jurisprudence, ch. VII (2006); 1 Witkin (4th ed. 2000). See generally, Miguel A. Méndez, Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules, 37 U.S.F. L. Rev. 351 (2003). However, it is certainly possible that these exceptions are more frequently used in Probate Court, and that the Probate Code sets limits on the use of § 1260. William E. Wegner et al., California Practice Guide: Civil Trials and Evidence, ch. 8D § 1585 (2006).

Seven other exceptions in the CEC which require “trustworthiness” were drafted by the legislature since 1995 to admit particular kinds of victim statements in particular kinds of criminal cases – those concerning domestic violence, child abuse and child sexual abuse, elder abuse and gang-related crimes. Five of these seven exceptions - §§ 1228, 1231, 1253, 1350 and 1380 - are virtually nonexistent in published California case law. Section 1380 (statements by victims of elder abuse) has been found to violate the confrontation clause, as recently interpreted by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004). See People v. Pirwani, 14 Cal. Rptr. 3d 673, 675 (Ct. App. 2004).
Thus, there are really only two areas of practical difference between the CEC and the FRE with regard to delegating trustworthiness to judges in the admission of hearsay: California explicitly permits exclusion of statements of state of mind for lack of trustworthiness, whereas Federal Rule 803(3) does not; and, California explicitly permits the admission of “trustworthy” statements by victims of child abuse and domestic violence (or other physical injuries), whereas in federal court such statements would have to fall within the general federal residual exception, Rule 807, which also contains a trustworthiness criterion.

This paper explores both the practical and normative significance of the first of these differences – the trustworthiness vs. the categorical approach to the admission of statements of state of mind.

III. JUDICIAL APPLICATION OF THE “LACK OF TRUSTWORTHINESS” TEST UNDER CEC SECTIONS 1250 AND 1252

A. Introduction

Table 3 contains the text of the state of mind exceptions in California. These exceptions extend beyond statements of purely “mental” states to include statements of physical sensation, pain or bodily health, but the term “state of mind” will be used throughout this paper to refer to all hearsay admissible under sections 1250 and 1251.
TABLE 3

CALIFORNIA'S STATE OF MIND EXCEPTIONS
CAL. EVID. CODE (West 2007)

§1250 STATEMENT OF DECLARANT'S THEN EXISTING MENTAL OR PHYSICAL STATE.
(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
   (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
   (2) The evidence is offered to prove or explain acts or conduct of the declarant.
(b) This section does not make admissible evidence of a statement of memory or belied to prove the fact remembered or believed.

§1251 STATEMENT OF DECLARANT'S PREVIOUSLY EXISTING MENTAL OR PHYSICAL STATE.
Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:
(a) The declarant is unavailable as a witness; and
(b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

§1252 LIMITATION ON ADMISSIBILITY OF STATEMENT OF MENTAL OR PHYSICAL STATE
Evidence of a statement is inadmissible under this article [§§1250-1253] if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Research conducted on LEXIS and Westlaw produced forty-six California Supreme Court and District Court of Appeals opinions that have applied section 1250 and ruled on lack of trustworthiness under section 1252, all of them in criminal cases. Thus, the state of mind statements evaluated for lack of trustworthiness under section 1252 can be easily divided into two groups—those statements offered by the prosecution and those statements offered by the criminal accused. Tables 4 and 5 tell the

10. See infra notes 11 and 12.
story. Admission of the state of mind statements offered by the prosecution was upheld on appeal in twenty-one out of twenty-two total cases, as summarized in Table 4.

### TABLE 4

**STATEMENTS OF STATE OF MIND OFFERED BY PROSECUTION: ADMISSION UPHeld AS TRUSTWORTHY UNDER CEC 1250 AND 1252**

**TOTAL:** 21 out of 22

**PRE CRIME STATEMENTS BY DEFENDANTS**
- To show defendant’s intent (1)
- Also to show conduct of others (1)

**PRE CRIME STATEMENTS BY VICTIMS**
- To show fear of defendant (6 out of 7)
- To show discord in relationship with defendant (2)
- To show distrust of defendant (2)
- To show intent in order to show victim’s conduct (2)
- Also to show conduct of others (1)

**POST CRIME STATEMENTS BY VICTIMS (1)**

**PRE-CRIME STATEMENTS BY DEFENDANT’S ACCOMPlices**
- To show conduct of accomplices (1)
- To show conduct of others (1)

**STATEMENT BY OTHERS (1)**

Exclusion of state of mind statements offered by criminal defendants

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for “lack of trustworthiness” was upheld in twenty-two out of twenty-four total cases, as summarized in Table 5.

**TABLE 5**

<table>
<thead>
<tr>
<th>STATEMENTS OF STATE OF MIND OFFERED BY DEFENDANT:</th>
<th>EXCLUSION Upheld AS UNTRUSTWORTHY UNDER CEC 1250, 1251, AND 1252</th>
</tr>
</thead>
<tbody>
<tr>
<td>POST-CRIME STATEMENTS BY DEFENDANTS</td>
<td>TOTAL: 22 out of 24</td>
</tr>
<tr>
<td>To police (8)</td>
<td></td>
</tr>
<tr>
<td>To others (10)</td>
<td></td>
</tr>
<tr>
<td>Writings to self (1 out of 2)</td>
<td></td>
</tr>
<tr>
<td>POST-CRIME STATEMENTS BY ACCOMPILCES (1)</td>
<td></td>
</tr>
<tr>
<td>PRE-CRIME STATEMENTS BY VICTIMS (2)</td>
<td></td>
</tr>
<tr>
<td>PRE-CRIME STATEMENTS BY VICTIMS (0 out of 1)</td>
<td></td>
</tr>
</tbody>
</table>

The difference in outcome in these cases is dramatic – the prosecution gets its statements admitted and admission is usually upheld on appeal while defendants’ statements are excluded and exclusion is usually upheld on appeal. Close reading of these opinions reveals several possible explanations for this difference in the judicial administration of “trustworthiness.”

**B. Caveat**

But first there is a caveat. All of the published cases reported in Tables

4 and 5 are appellate opinions. In criminal cases, appeals are instituted only by defendants from judgments of conviction. Convicted criminal defendants challenge those rulings of trial courts that admit the prosecution's hearsay against them and that exclude their own hearsay statements. No wonder then that the published case law falls neatly into these two categories and contain very few examples of prosecutors' state of mind hearsay that is excluded and of defendants' own state of mind hearsay that is admitted. The reported decisions by appellate courts are the proverbial tip of the iceberg of admission/exclusion decisions made at the Superior Court level. It would be foolish to think that we could extrapolate directly from appellate cases to understand what trial judges are actually doing. While this point is obvious, it bears repeating every time we report on numbers such as those presented in Tables 4 and 5.

And yet, we also have to acknowledge the inevitable impact that appellate case law has on the conduct of trials below. Where do Superior Court judges, prosecutors, defense attorneys, commentators, and treatise writers turn to find out what "the law" of state of mind hearsay is? Where do they find analysis and precedent? From what do they distill principles for future application? They all read these same appellate cases, whether published or unpublished. And these cases present a remarkable consistency and an unmistakable message that in effect "codifies" what "the law" is. When it comes to state of mind hearsay, "the law" is that the prosecution's hearsay is admissible because it is trustworthy, and that defense hearsay is untrustworthy and therefore is excluded. As we look even closer at the reasoning in these cases, we learn why these outcomes are so one-sided; and we have grounds to become even more concerned about the message that is sent to the legal audience, including trial courts below.

C. The Typical Defense State of Mind Hearsay Excluded Under Section 1252

The state of mind hearsay statements most frequently proffered by criminal defendants are statements made by defendants themselves, typically after the criminal act allegedly committed by the defendant has occurred. These statements are made in response to police questioning (before, during or after arrest), or to accomplices, family and friends. The

13. Certainly some state of mind hearsay of criminal defendants is admitted as mitigation evidence in the penalty phase of death cases. See, e.g., Smith, 68 P.2d at 334.
state of mind statements do not outright deny committing the criminal act – if they did, they would not fit within the exception for “state of mind” and would be excluded under section 1250 as statements of “memory or belief to prove the fact remembered or believed.” Rather, they state beliefs and feelings about various aspects of their conduct or their physical sensations.

Some such statements can be relevant to the state of mind element in the crime with which they are charged. For example, in People v. Edwards, a defendant’s notebook written after the crime contained statements about feeling sick and having headaches, referring to himself in the third person (“Tommy”). A taped police interview after arrest showed the defendant crying, saying that he did not remember anything about the crime, and complaining of headaches. Both the notebook and tape were found to be inadmissible under section 1252. In death penalty cases, defendants’ statements of remorse, conscience or newfound faith are relevant mitigation evidence during the penalty phase of the trial. For example, in People v. Livaditis, a defendant’s mother, brother and uncle would have testified that defendant, while in jail awaiting trial, said that he was “sorry” about his crime and expressed “remorse.” This testimony was held inadmissible under section 1252.

D. The Reason for Exclusion of Defendants’ State of Mind Hearsay under Section 1252

The reasoning in the above two opinions, and in most of the case law reflected in Table 5, is remarkably similar. The appellate courts uphold the trial courts’ ruling that defendants’ statements lack trustworthiness under section 1252 because their sincerity is suspect. Exclusion regularly turns on the judicial finding that the defendants have a motive to deceive, or to exculpate themselves, or to minimize their responsibility, or to claim remorse. A paragraph from the California Supreme Court opinion in

15. CAL. EVID. CODE § 1250 (WEST 2007).
18. Id.
19. Id. These statements were offered by defendant during both the guilt phase and the death penalty phase of his trial. The Court assumed but did not decide that the statements qualified for admission as state of mind under CEC § 1250 and then found that exclusion under § 1252 was not an abuse of the trial court’s discretion.
21. Id. at 307-10.
22. Id. at 308-09.
People v. Edwards encapsulates the doctrinal standards which are applied in almost all of the sections 1250 and 1252 case law:

“A defendant in a criminal case may not introduce hearsay evidence for the purpose of testifying while avoiding cross-examination.”... That rule applies here. To be admissible under Evidence Code section 1252, statements must be made in a natural manner, and not under circumstances of suspicion, so that they carry the probability of trustworthiness. Such declarations are admissible only when they are “made at a time when there was no motive to deceive.”

In most of the reported cases, California courts apply section 1252 by inquiring into the above quoted tests from People v. Edwards – were the state of mind statements made “not under circumstances of suspicion,” and with “no motive to deceive.” In the cases involving statements made by a criminal defendant, that inquiry begins and ends if the statements were made at any time after the occurrence of the criminal act for which the defendant is charged. If made post-crime, whether made before the first police interrogation, during preliminary questioning, upon or after arrest, while in jail awaiting trial or even after conviction, defendants’ statements are found lacking in trustworthiness because of presumed self-serving motives to avoid criminal penalties. In People v. Edwards, for example, the California Supreme Court wrote:

When defendant made the statements, nine days had elapsed since the shooting. He knew he had killed one 12-year-old girl and had wounded a second. He had a compelling motive to deceive and seek to exonerate himself from, or at least to minimize his responsibility for, the shootings. There was “ample ground to suspect defendant’s motives and sincerity” when he made the statements.... The need for cross-examination is especially strong in this situation, and fully warrants exclusion of the hearsay evidence.

And in People v. Livaditis, the Supreme Court stated: “While defendant was in jail awaiting trial, he certainly had a motive to claim remorse. His sincerity in telling potential defense witnesses he was sorry was suspect.” Other examples of judicial imputation of a post-crime motive to deceive abound. In People v. Mendez, a defendant charged with carjacking was interrogated by police after his arrest. He made a statement at that time

23. Edwards, 819 P.2d at 456 (internal citations omitted).
25. Id.
26. Livaditis, 831 P.2d at 309.
28. Id.
that he was "on medication." His defense at trial was that he had blacked out before the crime due to an overdose of prescription drugs and beer. The appellate court upheld exclusion of the statement under section 1252 with the following analysis:

Could there possibly be a situation in which a person's statement that he was not in his right mind would be less trustworthy than when it is advanced to police who have just arrested him for a crime? Could there possibly be a clearer paradigm for application of section 1252 than a statement of a defendant, made after his arrest, to police about to interrogate him, which is meant to reduce or extirpate his culpability?

"We think not" said the court.

Whether or not one agrees with the court's generalization about a defendant's motive to deceive when making statements to police, what is troubling is that California appellate courts find a similar motive, and therefore reason to exclude under section 1252, with regard to virtually every post-crime statement. The following are examples of defendants' statements made in other circumstances, quite different from police interrogation, in which a disabling, self-serving motive is found:

(1) Statements of personal redemption were excluded from the penalty phase of a death case when made in a prison interview while defendant's first appeal was pending. The California Supreme Court held: "It was then possible for the case to be reversed and retried (as ultimately happened), or for the Governor to exercise his commutation power. Public professions of personal redemption could only benefit the defendant in the event either of these contingencies occurred."

(2) Statements of remorse made to defendant's wife in a taped conversation that defendant did not know was being recorded have also been excluded. The statements were made just after defendant confessed to a murder, expressed concern for his wife and the people he had hurt, and stated that he was very sorry. The court wrote: "Here, the [trial] court reasonably found the statements... were untrustworthy because his primary motivation in making them was to placate her. There was 'ample ground to suspect defendant’s motives and sincerity’

29. Id. at *1.
30. Id.
31. Id. at *2.
32. Id.
33. Whitt 798 P.2d at 860-63 .
34. Smith, 68 P.2d at 334.
when he made the statements.\textsuperscript{35}

(3) A statement tending to show that defendant’s shooting of the victim was accidental was excluded because it was made to alleged accomplices while they were “hiding out and trying to avoid apprehension.”\textsuperscript{36} The court held: “[Defendant] had a compelling motive to either deceive [his accomplices] or concoct a story that they could agree on that would minimize all their liability for the shooting . . . [Defendant] ‘was savvy enough to know how to plant apparently exonerating evidence with [an accomplice who was]’ a wannabe [EHP gang] member.”\textsuperscript{37}

(4) A defendant’s self-exculpating statements, made to his sister on the telephone, were likewise excluded. The defendant’s companion, a friend of his sister, had just called the sister to accuse defendant of raping her. The sister immediately asked her brother “What did you do?”\textsuperscript{38} The appellate court found that this “confrontational telephone question to appellant . . . was, effectively, a reiteration of the accusation that [victim] had just made to her, i.e. appellant ‘just raped me.’ The trial court could reasonably conclude that under the suspicious circumstances appellant would have an obvious and compelling motive to fabricate exonerating responses to his sister concerning his conduct with her best friend.”\textsuperscript{39}

These cases demonstrate that almost every defendant’s statement of state of mind will be found untrustworthy because of its content (self-serving) and its timing (post-crime). To whomever the statement is made, and under whatever circumstances, generalizations are employed to infer motive to deceive or to manufacture evidence. The inference of motive operates without more to exclude defendants’ statements of state of mind hearsay under section 1252 for lack of trustworthiness.

\textsuperscript{35} Id. at 334-35. See also Cisneros, 2006 WL 17695996, at \textsuperscript{*}11 (defendant’s girlfriend’s testimony that defendant “didn’t say they planned to kill him (the victim), that what they planned to do was humiliate him” excluded due to defendant’s motive to “reassure and placate” his girlfriend).

\textsuperscript{36} Blancarte, 2006 WL 1769596 at \textsuperscript{*}20.

\textsuperscript{37} Id.

\textsuperscript{38} White, 2002 WL 541644, at \textsuperscript{*}5.

\textsuperscript{39} Id.
IV. IS THERE ANYTHING WRONG WITH THIS STATE OF "THE LAW"?

The following comments briefly state some observations and concerns about "the law" that emerges from the California case law on trustworthiness under section 1250 and 1252.

A. Focus on Sincerity

Under this case law, trustworthiness, or the lack thereof, is determined solely by the declarant's sincerity. There is no inquiry into testimonial qualities of perception, memory or narration. This is understandable. The state of mind/physical sensation exception is justified largely by the lack of perception and memory dangers. A declarant is assumed to perceive her own mental state accurately; and if that mental state is "then existing" there is no memory problem.

1. Creating a doctrinal rule vs. exercising discretion

In common law personal injury cases, a doctrinal rule - post litem motam, meaning "after the case begins" - was used to exclude hearsay statements about pain and suffering made by the plaintiff after the accident had occurred. The justification for this "bright line" rule of exclusion sounds familiar: The plaintiff's obvious self-serving motive to fabricate or exaggerate pain and suffering rendered the statement untrustworthy. This is the doctrinal rule that seems to be replicated today in the case law discussed above. The fact of post litem motam - that a criminal defendant's own statements are made after the criminal act begins "the case" against him - is determinative.

However, the trustworthiness inquiry under section 1252 is supposed to be an exercise of discretion. For example, in People v. Edwards the California Supreme Court describes the kind of inquiry that the question of "trustworthiness" requires:

"The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep

40. CAL. EVID. CODE § 1250 (West 2007).
41. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1721 at 114 (James A. Chadbourn, ed., 1976) discusses this rule and criticizes it: "A strict application of the post litem limitation would practically exclude entirely this class of evidence in the majority of cases, and would thus exclude even the most unfeigned statements of pain because of a mere general possibility of falsification." Id.
42. See supra Part III.B and C.
acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion."... A reviewing court may overturn the trial court’s finding regarding trustworthiness only if there is an abuse of discretion.43

Even while quoting this language, courts applying section 1252 do not investigate “the peculiar facts of the individual case” in any depth, nor do the courts’ generalizations about motive based on post litem motam bespeak a “broad and deep acquaintance with the ways human beings actually conduct themselves.” The doctrinal rule that has evolved is short and simple – to whomever, wherever, and whenever the defendant speaks about his then existing state of mind after the crime in question has been committed, if the defendant then wants to use his statement in his own defense, it is untrustworthy.46 And while the holding of Edwards is that appellate courts should apply the abuse of discretion standard of review to exclusion decisions under section 1252, what is there to defer to? The section 1252 inquiry has devolved into a single factor, virtually per se rule.

2. Common law sources of the trustworthiness approach to state of mind hearsay

The California Supreme Court established the trustworthiness criterion for state of mind hearsay in People v. Hamilton, prior to the California Evidence Code. The Court cited common law precedent for the state of mind exception in general, and noted that “eminent scholars in the law saw the many difficulties in its application...” due to risks of untrustworthiness. The Court therefore followed the common law approach of giving trial courts discretion to exclude state of mind hearsay.

43. Edwards, 819 P.2d at 456 (internal citation omitted).
44. Id.
45. Id.
46. The one case included in Table 5 in which exclusion of a criminal defendant’s state of mind hearsay was reversed is People v. Harris, 679 P.2d 433, 454-55 (Cal. 1984). In Harris, poetry written by the criminal defendant, offered in mitigation during the penalty phase of trial, was found by a plurality of the California Supreme Court unlikely to have been written with “a motive to manufacture self-serving evidence.” The three members of the plurality (Justices Broussard, Bird and Reynoso) took a close look at the surrounding circumstances. The result in Harris is thus something of an exception.
47. 362 P.2d 473 (Cal. 1961).
48. Id. at 480-81.
49. Id.
statements based on these risks.\textsuperscript{50} It held that such statements should be admitted "only where there is at least circumstantial evidence that they are probably trustworthy and credible."\textsuperscript{51} The \textit{Hamilton} opinion, and the prior California cases it cited, relied heavily on Dean and Professor John Henry Wigmore's treatise on evidence. \textit{Hamilton} included quotes to the effect that statements of a presently existing state of mind "made in a natural manner and not under circumstances of suspicion, carry the probability of trustworthiness,"\textsuperscript{52} and that such statements are admissible only when "made at a time when there was no motive to deceive."\textsuperscript{53}

These two propositions form the basic standard for lack of trustworthiness applied today under CEC section 1252, as we saw in the quotation from \textit{People v. Edwards} above. However, section 1252 now places the burden on the opponent of state of mind hearsay to produce evidence and persuade the court of its lack of trustworthiness.\textsuperscript{54} The Law Revision Commission Comment to section 1252 states: "If a statement of mental or physical state was made with a motive to misrepresent or to manufacture evidence, the statement is not sufficiently reliable to warrant its reception in evidence."\textsuperscript{55}

3. Problems of unfairness in applying the "post-crime motive" test

Reading the section 1252 cases reveals several problems of unfairness in the application of the post-crime motive test. First, appellate courts appear to apply a double standard regarding the "self-serving" nature of

\textsuperscript{50} An early article analyzing common law doctrine stated that the danger of "untruthfulness . . . is lessened by a power of discretion in the court to refuse the evidence if the statements were made under circumstances at all suspicious." Eustance Seligman, \textit{An Exception to the Hearsay Rule}, 26 HARV. L. REV. 146, 154 (1912).

\textsuperscript{51} \textit{Hamilton}, 362 P.2d at 481.

\textsuperscript{52} \textit{Id.} (quoting VI WIGMORE, § 1725).

\textsuperscript{53} \textit{Id.} (quoting 6 WIGMORE, EVIDENCE, § 1730 (3d ed. 1940).

\textsuperscript{54} \textit{Cf. CAL. EVID. CODE} § 405 (West 2007). The California Supreme Court held in \textit{People v. Karis}, 758 P.2d at 1202: "We reject at the outset defendant's claim that his statement to Ms. Steuben [offered by the prosecution] should have been excluded under Evidence Code section 1252, on grounds that there was no showing [by the prosecution] that it was made in circumstances such as to indicate that it was trustworthy. Section 1252 requires exclusion only if the circumstances are such as to suggest that a statement is not trustworthy." The burden is on the opponent of the statement to object under section 1252 or to waive the objection, \textit{Brigance}, 2001 WL 1641242, at *12, and to prove lack of trustworthiness. \textit{See also} HON. EARL JOHNSON JR., \textit{CALIFORNIA TRIAL GUIDE} § 40.42[4][f] (2d ed. 2006)(trustworthiness is an issue that should be raised by the proponent "only to rebut a claim by the opponent that the statement offered is made inadmissible by Evidence Code section 1252").

\textsuperscript{55} \textit{CAL. EVID. CODE} § 1252, Comment – Law Revision Commission, (West 2007).
state of mind hearsay. Criminal defendants' own state of mind hearsay, offered by the defense for the purpose of exculpation, reduction in degree of the crime, or mitigation in punishment, is typically found to be "self-serving." But does the self-serving content of other state of mind hearsay statements make them equally untrustworthy? In cases not involving statements by criminal defendants, the current answer to this question is "no." 56

For example, plaintiffs' own hearsay statements of pain and suffering in personal injury cases, if made after the accident when plaintiffs have knowledge of their potential claims, are also self-serving. The circumstances certainly trigger a motive for plaintiffs to fabricate or exaggerate for their own advantage, analogous to the motive attributed to criminal defendants under section 1252. But courts no longer apply the post litem motam doctrine to exclude such statements; rather, the effect of such a motive is left for the jury to evaluate. 57 Other self-serving statements, even those made after a plaintiff has seen a lawyer, are also not excluded as untrustworthy. 58

56. See People v. Farr, 63 Cal. Rptr. 477, 483 (Ct. App. 1967).

57. By the early 20th century, such statements were held to be admissible by California courts. In Professor J.P. McBaine's thorough analysis of this case law, Admissibility in California of Declarations of Physical or Mental Condition, 19 CAL. L. REV. 231, 240 (1931), the cases do not support the use of judicial discretion to exclude individual statements for lack of trustworthiness due to a self-serving motive. McBaine even rejects the existence of this motive with a sweeping generalization:

"For the most part people do not complain of pain and suffering unless it exists. So due to 'fair necessity' of the situation, and the trustworthiness of such testimony, it would seem that it is quite safe to admit statements or declarations of pain or suffering to prove the physical condition of the declarant at the time such statements are made." Id.

58. In a recent case, a male prison guard was charged with sexual assault on two female guards. Davis, No. F036806, 2002 WL 1558497 at *12 - 15 (Cal. Ct. App. July 15, 2002). The defendant claimed that the two female guards concocted their accusations against him in order to secure a monetary injury claim against the State. The two female guards consulted with a rape counselor, who advised them to see a lawyer. The prosecution offered evidence of the two guards' state of mind statements to the counselor to the effect that their interest was not "for the money" but to see changes made within the Department of Corrections. These statements, offered at trial as then existing state of mind to bolster the two female guards' credibility, were not found to be untrustworthy under section 1252. The appellate court wholly ignored the women's self-serving financial motive, described their statements as "natural," and stated that nothing suggested a possible self-serving motive to fabricate their intent. Id. at *44.

Cf. Hunio v. Tishman Constr. Corp. of Cal., 18 Cal. Rptr. 2d 253 (Ct. App. 1994). In this civil case, plaintiff made self-serving written statements in his diary after his lawyer suggested that he keep the diary. In the context of applying the exception for prior consistent statements, the court hotly rejected the defendant's attribution of an untrustworthy motive to the plaintiff:

The implication raised by Tishman, that a person seeking counsel thereby creates a "motive for fabrication" is shocking. Seeking counsel does not equate with a motive to fabricate. Given that Hunio was told that he was to receive a "severance pay," the attorney's advice to keep a diary was simply sound legal guidance. Id. at 262.
Second, courts dismiss criminal defendants’ contentions that they have motives other than a self-serving interest in exculpation that might make their statements trustworthy. When possible motives conflict, the burden under section 1252 is on the objecting party – the prosecutor – to persuade the court that the untrustworthy motive predominates and requires exclusion. Instead, courts mistakenly burden the defendant with showing that his trustworthy motive is more compelling.

Third, California courts also ignore analogous motives and other indicia of unreliability when it comes to evaluating the trustworthiness of statements of state of mind offered by the prosecution. Examples include a victim’s statement that reflected possible “fear” of the defendant, made casually while drinking with friends, where there was no evidence of prior animosity between them; statements made during moments of upset and clearly, the appellate court was incensed by an implication that the lawyer might have suggested fabrication. But the court wholly failed to acknowledge that the circumstances under which the diary was written could easily have triggered the client’s own self-serving motive to fabricate or exaggerate ensuing events about which he wrote. See supra note 54.

60. In Blancarte, the defendant argued that his statements showing the shooting of the victim to be accidental did not lack trustworthiness because he would have no motive to fabricate “accident” to his fellow gang members; to the contrary, he would have wanted to brag to them about an intentional shooting. Blancarte, 2006 WL 1769596 at *20. The appellate court held as follows: “Blancarte had the burden at trial to establish that his statement was trustworthy .... Although his analysis may not be unreasonable, it is not obviously more compelling than the trial court’s implicit analysis” (that Blancarte was planting the false story of “accident” with his accomplices). Id. at *20.

The court had it wrong. The opponent, here the prosecution, has the burden of showing the more compelling motive. When two equally reasonable inferences about motive compete, the prosecution’s burden to show “lack of trustworthiness” under section 1252 should fail, the hearsay statement should be admitted, and the issue of trustworthiness should be resolved by the jury. See also Williams, 2006 WL 1738080, at *6. The court dismissed defendant’s interpretation of a statement that was made by Leighton, the person who allegedly hired defendant to commit a murder. Id. Leighton’s statement was to the effect that he wished the victim were alive. The court noted that “the [exonerating] interpretation Williams gave to the statement is not the only or even the most plausible interpretation.” Id. at *7.

Cf Jimenez, 2004, WL 928312, at *2. Defendant offered a statement made by the victim of the murder charged against him. Id. The victim’s statement was to the effect that the victim wanted defendant’s girl friend “to leave with him” and that “he would be willing to kill or die for her.” Id. The defendant argued that this statement of state of mind helped explain the victim’s aggressive conduct toward the defendant before the murder. The appellate court held that the trial court had not abused its discretion in finding that “this statement merely amounted to expressions of a paramour’s devotion to his lover, and was not made under circumstances which would demonstrate its trustworthiness ....” Id. at *3.

61. Thompson, 753 P.2d at 45-47. Victim was said to have asked a friend, while having drinks at a pizza parlor, “Do you think Tom would kill me?” Id. This was construed as a statement of fear and used by the prosecution to prove nonconsensual sex that evening (rape) as a special circumstance in the death penalty murder case. Id.
rage; and statements made in circumstances that would support a self-serving motive to fabricate. While it may be a proper exercise of discretion for courts to give the issue of trustworthiness to the jury in these cases, their application of a per se rule to keep the issue of criminal defendants' trustworthiness from the jury is unfair.

4. Conclusion: Something is Wrong with "The Law"

In conclusion, then, it appears that the case-by-case inquiry under section 1252 permits courts to apply the trustworthiness standard in a manner that is not open-minded and may be unfair. "The law" as portrayed in Tables 4 and 5 above may judge too leniently the prosecutor's offers of hearsay statements of state of mind and judge too harshly the untrustworthiness of defense statements. Appellate courts could take corrective measures. They could, instead, require trial courts to be at least open-minded toward a criminal defendant's own statements, to look beyond the post litem motam generalization for specific indicia that a motive to manufacture evidence is operative, and to weigh properly any circumstances that indicate trustworthiness. They could articulate the correct burden of persuasion under section 1252 and require trial courts to apply it, particularly against the prosecution. They could take more seriously the indicia of untrustworthiness in the state of mind hearsay offered by prosecutors, largely statements of victims, which would give

62. Howard, 749 P.2d at 293-95. Several statements made by Lemcock, who allegedly hired defendant to commit a murder, were admitted. Id. In each, Lemcock expressed his desire to "snuff" the victim, or "get his hands on his neck," and that he "could no longer handle the situation" and wanted to kill the victim. Id. In each situation, Lemcock was reported as being "in a distressed state of mind," "an extremely upset condition," and "in a rage of sorts." Id. Defendant contended that the statements lacked trustworthiness because "they were merely expressions of his [Lemcock's] rage at that time." Id. In other words, they were exaggerations. The Court ignored this theory of untrustworthiness. Id.

63. Gabarrete, 2002 WL 27283 at *4.. Victim made statements to her supervisor to the effect that she did not want to receive calls and attention from the defendant. Id. Defendant claimed that victim had a motive "to deny wanting to receive them" when her supervisor asked about the number of phone calls she was receiving at work. Id. The court discounted this possible motive because the victim testified that the calls never caused her trouble at work. Id. The fact that she was speaking to the supervisor, however, and in response to his question, seems analogous to the situation described in People v. White, supra note 38, 2002 WL 541644, at *5.

In People v. Jenkins, 2004 WL 171193, at *7-8, the court upheld the admission of a statement from one deputy sheriff to another deputy, stating that the second deputy's daughter had just been released from jail "because she was not involved other than being with" defendant. Id. at *7. Defendant claimed there was an obvious motive to exculpate a fellow deputy's family member. Id. The court denied this, stating that "nothing in the record" demonstrates a motive to exculpate. Id. Of course, it is the deputy-to-deputy relationship itself (not denied) that generates the possible motive.
lower courts more guidance in making their own assessments. However, the lax “abuse of discretion” standard of review and the “harmless error” standard of reversal make all of these correctives less likely to occur.

Another possibility, of course, would be for California to abandon the trustworthiness test altogether and to move to the categorical admission of all statements of then existing mental and physical condition. This categorical approach is the policy adopted by the Federal Rules of Evidence in general and made explicit in the terms of the state of mind exception, Rule 803(3), in particular. However, as we shall see, some courts import a “trustworthiness” test into federal “state of mind” case law as well.

V. ADMISSION OF STATE OF MIND HEARSAY UNDER RULE 803(3): IS THERE A TRUSTWORTHINESS TEST?

FRE 803(3), the hearsay exception for statements of then existing state of mind and physical condition, includes no criterion of “trustworthiness:”

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) Then existing mental, emotional, or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will. 64

The exception is thus “categorical” – requiring courts to admit or exclude hearsay because it falls within or outside of categories of statements that are defined by relatively bright-line terms. One attribute of this categorical approach is that it curtails the “discretion” of trial court judges to admit or exclude hearsay on the basis of the trustworthiness of individual witnesses or declarants. 65 Another attribute is that interpretations of the scope and meaning of the categorical terms of the exceptions can be reviewed on appeal as matters of law.

64. FED. R. EVID. 803(b)(3).
65. See supra Part III.D and see infra Part VI.B.
A. The Categorical Approach to Rule 803(3)

United States v. DiMaria\textsuperscript{66} is an example of the rigorous application of the general categorical approach under the FRE. This opinion, written by Judge Henry Friendly in 1984, contains a strong statement of the policy underlying this approach.

In DiMaria, the District Court had excluded the statement of the defendant which expressed his then existing state of mind when he was apprehended driving a car with half a case of [stolen] cigarettes.\textsuperscript{67} The statement expressed defendant’s belief that he had picked up the cigarettes thinking they were “bootleg” – from a low tax state – rather than stolen ones.\textsuperscript{68} The District Court recognized that the statement was relevant to disprove defendant’s requisite knowledge that the cigarettes were stolen, but excluded it nevertheless.\textsuperscript{69} The Second Circuit reversed the judgment below on the ground that the defendant’s statement should have been admitted.\textsuperscript{70} On appeal, the Government had contended, among other arguments, that the defendant’s statement was “an absolutely classic false exculpatory statement.”\textsuperscript{71} In short, just the sort of self-serving statement made, after the fact of the alleged crime, which would be excluded as untrustworthy under California case law applying sections 1250 and 1252. Instead, Judge Friendly wrote as follows:

False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that Rule are read to mean what they say, its truth or falsity was for the jury to determine . . . . It is true that Dean Wigmore would permit the exclusion of a statement of existing state of mind if “the circumstances indicate plainly a motive to deceive” . . . [However,] McCormick, Evidence §294, at 695 n. 56 (Cleary 2d ed. 1972), cited two cases . . . [one] which required that, in applying the state of mind exception, there be “no apparent motive for misstatement” . . . and another which held that the self-serving nature of such a declaration went only to its weight. The Federal Rules of Evidence have opted for the latter view. The Advisers’ Introductory Note: The Hearsay Problem, endorses Professor Chadbourn’s criticism of §63(4)(c) of the Commissioner’s proposed Uniform Rules of Evidence, saying, “For a judge to exclude evidence because he does not believe it has been described as ‘altogether

\textsuperscript{66} 727 F.2d 265 (2d Cir. 1984).
\textsuperscript{67} Id. at 270.
\textsuperscript{68} Defendant said to FBI agents who approached his car: “I thought you guys were just investigating white collar crime; what are you doing here? I only came here to get some cigarettes real cheap.” Id. at 270.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 273.
\textsuperscript{71} Id. at 271.
This result, and the policy that it reflects, differ significantly from the trustworthiness inquiry under CEC sections 1250 and 1252 that has just been discussed in Part III.73

Judge Friendly had no illusions about the nature of the hearsay that he believed must be admitted under the categorical approach of Rule 803(3). It was self-serving, could have been made with a motive to exculpate, and could be untrustworthy. He wrote:

It is doubtless true that all the hearsay exceptions in Rules 803 and 804 rest on a belief that declarations of the sort there described have “some particular assurance of credibility . . . .” But the scheme of the Rules is to determine that issue by categories; if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge, save for the “catch-all” exceptions of Rules 803(24) and 804(b)(5) and the business records exception of Rule 803(6) . . . even though this excludes certain hearsay statements with a high degree of trustworthiness and admits certain statements with a low one. This evil was doubtless thought preferable to requiring preliminary determinations of the judge with respect to trustworthiness, with attendant possibilities of delay, prejudgment and encroachment on the province of the jury. There is a peculiarly strong case for admitting statements like [defendant’s], however suspect, when the Government is relying on the presumption of guilty knowledge arising from a defendant’s possession of the fruits of a crime recently after its commission.74

The DiMaria opinion reflects a strict categorical approach to admitting hearsay, even self-serving statements by criminal defendants, under Rule 803(3). The opinion has been cited and followed, particularly in the Second Circuit.75 In the case of United States v. Harris,76 for example, the court found that it had been error to exclude statements made by defendant to his attorney and parole officer.77 These statements reflected defendant’s continuing and then existing state of mind of belief that a government agent was trying to set him up, raising a defense of duress.78 The Government

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73. See supra Part III.D.
74. DiMaria, 727 F.2d at 272.  
75. See, e.g., United States v. Cardascia, 951 F.2d 474, 487 (2d Cir. 1991) (“the likelihood that the declarant is misrepresenting his state of mind is not an additional qualification to the admissibility of state of mind hearsay statements.”). See also United States v. Peak, 856 F.2d 825, 832-33 (7th Cir. 1988).
76. 733 F.2d 994 (2d Cir. 1984).
77. Id. at 1004.
78. Id. at 1000.
argued that a motive to deceive could readily be inferred from the circumstances of defendant's statements, and that "the admissibility of a particular statement should depend on whether the surrounding circumstances 'negative the likelihood of deliberate or conscious misrepresentation.'" The court firmly rejected the Government's argument and its contention that courts were entitled to impose additional qualifications on statements falling within the terms of Rule 803(3), citing extensively from DiMaria.

B. Some Courts Impose a Trustworthiness Test Under Rule 803(3)

There is conflicting federal authority, however. A line of cases from various District and Circuit Courts include an element of "timeliness" in the elements of Rule 803(3). For example, the District Court stated in Metropolitan Enterprise Corp v. United Technologies International that

> [Your requirements must be met before such a statement is admissible: it must be contemporaneous with the mental state; it must be timely such that the declarant had no time to fabricate; it must be relevant to an issue in the case; and it must relate to the declarant's own state of mind.]

Contemporaneity between mental state and making the statement has always been an element of the exception that indicates trustworthiness, and it is a requirement under the "then existing" term of Rule 803(3). State of mind statements about a past state of mind are not "then existing" and do not fall within the exception; they are excluded by the specific language "but not including a statement of memory or belief to prove the fact remembered or believed" in the Rule.

The "timeliness" requirement, however, goes one step further by requiring contemporaneity between an event, the declarant's state of mind about the event, and the declarant's statement. Courts have articulated the requirement of "timeliness" as "no time to reflect;" or, declarant "had no time to [reflect and possibly] fabricate or misrepresent his thoughts." The "time to reflect" referred to is any time lapse between the event which

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79. Id. at 1004.
80. Id.
82. Id.
83. FED. R. EVID. 803(3).
85. United States v. Reyes, 239 F.3d 722, 743 (5th Cir. 2001) (citing United States v. Jackson, 780 F.2d 1305, 1315 (7th Cir. 1986)).
triggers the declarant’s state of mind and the making of the hearsay statement. “[T]he passage of time may prompt someone to make a deliberate misrepresentation of a former state of mind . . . the requirement [of timeliness ensures] that hearsay evidence be reliable in order for it to be admissible under Rule 803(3).”

The significance of the timeliness requirement is clear; it permits courts to exclude as untrustworthy state of mind hearsay that otherwise fits within Rule 803(3).

A good example of this additional requirement is the recent case of United States v. Naiden. Defendant was found guilty of attempting to entice a minor through the internet to engage in unlawful sexual activity and to travel for that purpose. Unfortunately for Defendant, his chat room correspondent was in fact a police detective who presented himself to defendant online as a fourteen-year-old girl.

Key to the conviction was whether Defendant “knew” that the person with whom he was corresponding by email was under 18 years of age. On appeal, Defendant claimed that the District Court’s exclusion of his exculpatory statement that he “didn’t believe” his correspondent was fourteen, made to a friend on February 14, 2003, was error. Defendant had initiated the email contact only the day before, on February 13. In upholding the conviction, the majority opinion discussed Rule 803(3)’s requirement that the defendant’s statement be made contemporaneously with his then existing state of mind. The dissenting opinion gives a direct quote of what the defendant allegedly said to his friend: “I am corresponding with someone online who says they are fourteen but I do not believe it.” This sounds like a statement of then existing state of mind that was made contemporaneously with the state of mind of belief that the defendant then held, one day after his first email exchange. It was relevant to show that, some time later, he did not have intent to have sex with a minor. Under the terms of Rule 803(3), and the categorical approach of DiMaria, the defendant’s statement should have been admitted.

87. Id. at 725.
88. Id. at 719.
89. Id. at 720.
90. Id. at 721.
91. Id. at 721-22.
92. Naiden, 424 F.3d at 720.
93. Id. at 722.
94. Id. at 724.
The majority held otherwise. Importing a “timeliness” factor into the Rule, the majority opinion quoted from the Advisory Committee’s Note to Rule 803(1) (the exception for present sense impressions), and reasoned that 803(3), like 803(1), demanded “substantial contemporaneity of event and statement [to] negate the likelihood of deliberate or conscious misrepresentation.” Thus the opinion reasoned:

[T]he evidence was properly excluded because [defendant’s] statement to his friend on February 14 was not substantially contemporaneous with his [email] conversation . . . on February 13. His statement that he did not believe his new acquaintance to be fourteen was not made as an immediate reaction to his communication with her, but after he had had ample opportunity to reflect on the situation.

The dissenting opinion in Naiden challenged the majority’s argument by pointing out that so long as the proffered statement expresses a then existing state of mind, there is no additional requirement of timeliness or absence of opportunity to reflect in the text of Rule 803(3) nor in any Eighth Circuit opinion. The dissent reasoned, just as did Judge Friendly in DiMaria, that “if a hearsay statement meets the requirements of Rule 803(3), and is not excluded under another Rule, then the jury should consider evidence of the self-serving nature of the statement in determining

95. Id. at 719.
96. Id. at 722 (citing FED. R. EVID. 803(1) advisory committee’s note). The Rule 803(1) exception is used to prove events that occurred in the real world, not inside the mind of the declarant. Its requirement of substantial contemporaneity between event and statement reduces an otherwise significant memory danger, as well as a sincerity danger. The state of mind exception bears no memory danger. See infra Part V.B.1. Reliance on the Advisory Committee’s Note to Rule 803(1) to impose a requirement of contemporaneity between event and statement under Rule 803(3) has been rejected by other courts. See United States v. Harris, 942 F.2d at 1004.
97. Naiden, 424 F.3d at 722. For authority, the majority relied on an Eighth Circuit case, United States v. Partyka, 561 F.2d 118 (8th Cir. 1977), which had held that exclusion of a defendant’s out of court statements that showed his present state of mind was error; they were “manifestations of [defendant’s] present state of mind, his immediate reaction to the proposal of Faircloth.” Id. at 125 (emphasis added). The majority in Naiden used this descriptive language to impose a contemporaneity requirement between the expressed state of mind and the event which may have triggered it, a requirement which Partyka did not articulate.
98. Naiden, 424 F.3d at 724. The dissent also distinguished the circumstances in which defendant Naiden’s statement had been made to his friend from criminal cases in which other Circuits had imposed a “timeliness” test to exclude a defendant’s state of mind statement. Id. at 725. In these cases, the defendant’s statements had been made after the criminal conduct had been completed and the defendant/declarant knew he was the subject of a criminal investigation — in other words, the statements were post litem motam. In the Naiden case, the defendant’s statement was made just as his course of criminal conduct was beginning and was to continue for three weeks with more online communication. Id. at 723-24. Defendant did not yet know, concluded the dissenting opinion, that he was the target of an undercover police operation. Id. at 724-25.
99. See supra Part V.A.
how much weight to give it." 100

The Naiden case, in its majority and dissenting opinions, exemplifies
the split that exists in federal courts' application of Rule 803(3). The
majority opinion represents a version of California's trustworthiness
approach to state of mind hearsay; the dissent represents the traditional,
federal categorical approach.

VI. THE CATEGORICAL VERSUS THE TRUSTWORTHINESS APPROACH

Most of the federal appellate cases that import a "timeliness"
requirement into Rule 803(3) do so when the defense is offering a criminal
defendant's own state of mind statements. 101 And, not surprisingly, all of
these cases have upheld the exclusion of defendants' statements. But under
the FRE, unlike in California, exclusion based on untrustworthiness may be
illegitimate. Rule 803(3), unlike CEC sections 1250 and 1252, does not
explicitly grant this authority to federal courts.

A. How Major Evidence Treatises Treat the Problem of Legitimacy

The major evidence treatises have different views on the proper
resolution of this problem of legitimacy. Professors Saltzburg, Martin, and
Capra acknowledge in their Federal Rules of Evidence Manual the concern
that underlies the trustworthiness approach but assert that it is
"inappropriate to superimpose a trustworthiness requirement on the
provisions of Rule 803(3)." 102 At the other extreme, Weinstein's Federal
Evidence ignores the problem of legitimacy when it states flatly that to

100. Naiden, 424 F.3d at 725.

101. The key criminal cases espousing this approach are, in chronological order: United States
v. Ponticelli, 622 F.2d 985, 991 (9th Cir. 1980); United States v. Jackson, 780 F.2d 1305, 1315
(7th Cir. 1986); United States v. Faust, 850 F.2d 575, 585-86 (9th Cir. 1988); United States v.
Carter, 910 F.2d 1524, 1530-31 (7th Cir. 1990); United States v. Harris, 942 F.2d at 1130 n.5;
United States v. Harvey, 959 F.2d 1371, 1375 (7th Cir. 1992); United States v. Neely, 980 F.2d
1074, 1083 (7th Cir. 1992); United States v. Macey, 8 F.3d 462, 467-68 (7th Cir. 1993); United
States v. LeMaster, 54 F.3d 1224, 1231 (6th Cir. 1995); United States v. Carmichael, 232 F.3d
510, 521 (6th Cir. 2000); Reyes, 239 F.3d at 743; United States v. Newell, 315 F.3d 510, 523 (5th
Cir. 2002); United States v. Naiden, 424 F.3d 718, 722 (8th Cir. 2005). The petition for certiorari
in Cianci v. United States, 378 F.3d 71, 97 (1st Cir. 2004) raised the split of authority interpreting
Rule 803(3). The petition was denied, 126 S.Ct. 421 (2005).

102. STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, & DANIEL J. CAPRA, in 4 FEDERAL
RULES OF EVIDENCE MANUAL § 803.02[4][d] at 803-30 (9th ed. 2006). Accord, Peter F. Valori,
Special Topics in the Law of Evidence: The Meaning of "Bad Faith" Under the Exceptions to the
satisfy Rule 803(3) "[t]here must be no suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his or her thoughts."\textsuperscript{103} This reading of existing case law ignores the Second Circuit's strongly and consistently articulated view, beginning with DiMaria, that categorical application of the state of mind exception is required.

Two other major evidence treatises, McCormick on Evidence\textsuperscript{104} and Professors Mueller and Kirkpatrick's Evidence,\textsuperscript{105} report accurately on the case law conflict between the strict categorical approach of DiMaria and the trustworthiness approach exemplified by Naiden. Both struggle with the problem of legitimacy and resolve it somewhat equivocally in favor of the categorical approach.\textsuperscript{106}

Both agree that the Federal Rules of Evidence did enact the categorical approach to the admission of hearsay, and that this approach should be honored in the general run of Rule 803(3) cases.\textsuperscript{107} However, neither treatise wholly rejects the notion that courts possess a small reservoir of discretion to exclude state of mind statements which have low probative value due at least in part to their self-serving nature\textsuperscript{108} or to considerations

\textsuperscript{103} Jack Weinstein & Margaret A. Berger, 5 Weinstein's Federal Evidence Second Edition: Commentary on Rules of Evidence for the United States Courts, § 803.05(2)[a] at 803-29 (Joseph M. McLaughlin ed. 2006)(2d ed. 2007). However, the four appellate opinions cited in support of this proposition do not support such a "motive" test of untrustworthiness test. Instead, they all recite the "timeliness" test discussed in Part IV.B supra. See Macey, 8 F.3d at 467; Neely, 980 F.2d at 1082-83; Ponticelli, 622 F.2d at 991; Naiden, 424 F.3d at 722-23. In addition, the statements in Neely appear to be statements of past facts, excluded by the very terms of Rule 803(3).


\textsuperscript{105} Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 8.38 at 819 (3d ed. 2003).

\textsuperscript{106} Both treatises reject any per se principle that "self-serving" content justifies the exclusion of state of mind statements. Mueller and Kirkpatrick opine that "the weight of authority holds that doubts on candor do not justify refusing to apply the exception," citing the DiMaria line of cases. Id. Accord, Michael C. Graham, 30B Federal Practice and Procedure 7044 at 440-41 n.16 (Interim ed. 2006) (bad faith or motive to falsify will probably not be firmly decided to be a proper consideration in applying Rule 403, citing the DiMaria line of cases). The McCormick treatise carefully analyzes some of the major opinions that allegedly take the "trustworthiness" approach and finds their exclusion of hearsay is actually based on grounds such as irrelevancy and impermissible content, such as past facts and past state of mind. 2 McCormick supra note 104, § 274 at 267 and n.8. Professor Michael Graham also concludes that many of the cases excluding statements of state of mind as untrustworthy in fact involve statements of a past state of mind which do not fall within the "then existing" requirement of Rule 803(3) on strictly categorical grounds. See Graham, 30B Federal Practice and Procedure 7044 at 440-41 n.16.

\textsuperscript{107} See Mueller & Kirkpatrick, supra note 105, § 8.38 at 819, and 2 McCormick, supra note 104, § 270 at 249, § 273 at n.12, and § 274 at 267 and n.8.

\textsuperscript{108} See 2 McCormick, supra note 104, § 270 at 249-50 and § 274 at n.8. Although it flirts with the idea of resting such discretion in Rule 403, the treatise appears to conclude that
of the declarant’s candor.  

B. The Categorical Approach Is Preferable to the Trustworthiness Approach

In drafting the FRE, the Advisory Committee chose to regulate the flow of hearsay to the jury through categorical exceptions. One virtue of the categorical approach is that it restricts judges’ ability to impose any additional limits on this flow, such as the addition of the timeliness factor to Rule 803(3). This virtue represents a pro-jury policy. As stated in DiMaria, hearsay that fits within the categorical terms is to be evaluated by the jury, a policy approved in McCormick on Evidence:

Under the structure of the Federal Rules, judgments about credibility should generally be left to the jury rather than preempted by a judicial determination of inadmissibility. Leaving the issue to the jury is particularly appropriate when the credibility issue can be readily appreciated by the jury, as is generally the case when the reason to question credibility rests upon the declarant’s self-serving motivation.

This pro-jury policy is based on two premises: First, that the jury is just as good or better at evaluating the trustworthiness of hearsay that falls within the exceptions, and second, that there are dangers in giving discretionary power to judges. Both of these premises deserve explication.

discretionary exclusion should rarely, if ever, occur if the hearsay statement has significant probative value. Section 270 of the treatise then closes with a strong statement that favors the categorical approach: “[J]udgments about credibility should generally be left to the jury rather than preempted by a judicial determination of inadmissibility.” Id. § 270 at 250.

109. See Mueller & Kirkpatrick, supra note 105, § 8.38 at 819, where the authors suggest that in unusual cases, where a statement is not only self-serving but also “contrived (spoken for use in suit), or fabricated (likely false)” courts should be able to exclude.

110. We know from the Federal Rules’ Advisory Committee’s Introductory Note: The Hearsay Problem, that the system of categorical class exceptions in Rule 803 and 804 was established in preference to the “individual treatment” of hearsay statements “in the setting of the particular case.” An individualized process of admission had been proposed by a member of the first Advisory Committee and the original drafts in 1969 of then Rules 8-03 and 8-04 contained a discretionary standard of admission and used the list of standard common law exceptions as illustrations only. This approach was rejected by later Advisory Committees in favor of the system of categorical exceptions found today in Rules 803 and 804, tempered by the residual exception in Rule 807. FED. R. EVID 803, 804, 807. The justification for the categorical approach is stated in the Introductory Note, quoted above in DiMaria, 727 F.2d at 271.

111. FED. R. EVID. Article VIII advisory committee’s note.

112. DiMaria, 727 F.2d at 271.

113. 2 McCormick, supra note 104, at 250.
1. The jury can evaluate state of mind statements

However the test of untrustworthiness is articulated – bad faith, motive to deceive or to manufacture evidence, statement made in suspicious circumstances, or statement made with time to reflect – the jury is capable of applying these indicia of untrustworthiness on its own. There is no cognitive difficulty in identifying the existence of an opportunity to fabricate, or in evaluating the strength of a motive or bias which might encourage a declarant to do so. The inference that declarant has a reason to fabricate is grounded in evidentiary facts that are presented to the jury anyway, such as the content of the statement, the events that may have triggered the statement, and the circumstances and timing of the making of the statement. California’s “motive” test under section 1252, and the timeliness test under Rule 803(3), are not subtle inquiries. A criminal defendant’s exculpatory interest, for example, is obvious and all too human. There is no reason to think that juries will undervalue the “motive” inference and overvalue the trustworthiness of the state of mind statement.

In addition, information is often available to the jury concerning the genuineness of a declarant’s current mental state. A declarant’s oral statements of state of mind are admitted through the testimony of a foundation witness, the person to whom the declarant was speaking. If the statement was made in person, which is usually the case, then this witness can testify from firsthand knowledge about the declarant’s demeanor, manner of speaking, voice and physical condition. All these

114. Robert Hutchins and Donald Slesinger’s pathbreaking articles on state of mind hearsay emphasize the crucial role of “the introspection of twelve jurymen” in drawing the inference from spoken words to the mental state: “The only guarantee of the accuracy of the result is that it requires the unanimous agreement of twelve separate introspectors.” Robert M. Hutchins & Donald Slesinger, State of Mind to Prove an Act, 38 YALE L.J. 283, 291 (1929). Accord, MCCORMICK, supra note 104 § 270 at 250: “[T]he credibility issue can be readily appreciated by the jury . . . when the reason to question credibility rests upon the declarant’s self-serving motivation.”

115. See MCCORMICK, supra note 104, § 270 at 250: “[T]he credibility issue can be readily appreciated by the jury . . . when the reason to question credibility rests upon the declarant’s self-serving motivation.”

116. See supra Part IV.A.3.

117. See supra Part V.B.

118. The Advisory Committee’s Note on Rule 803(1) explicitly includes the availability of the testifying foundation witness as a significant justification for admission of present sense impressions. FED. R. EVID. 803(1) advisory committee’s note. It has been noted that “[c]ircumstances surrounding the making of the statement [testified to by the foundation witness] that suggest the declarant was not [or was] genuinely upset can be considered by the trial court in ruling on the admissibility of such evidence” and that such witnesses will also be available for cross-examination. People v. Ortiz, 44 Cal. Rptr 2d 914, 923 n. 20 (Ct. App. 1995). See also Eleanor Swift, A Foundation Fact Approach to Hearsay, 75 CAL. L. REV. 1339, 1355-61 (1987).
data furnish clues about trustworthiness and could be explored on both direct and cross-examination. When judges make rulings based exclusively on the fact that a defendant made the state post-crime, in contrast, they may actually cut off a beneficial full inquiry into the circumstances surrounding the defendant’s statement.119

2. Giving the trustworthiness test to judges yields unfair results

The reported California cases demonstrate that when criminal defendants offer their own hearsay, the appellate courts have relied on a rule of thumb that has the effect of a rule of law. The post litem motam generalization is applied in these cases in a way that can be unfair and reflects belief in a stereotype to which not all defendants conform. What is the stereotype? It starts with the assumption, witting or unwitting, that the defendant committed the criminal act charged with the requisite mental state; therefore, his motive to deceive is compelling; therefore, he was probably lying or manufacturing evidence when making the out of court statements that he proffers; therefore, the statements should be excluded for lack of trustworthiness.120 By invariably adhering to this chain of inferences, judges are more dismissive of the possible sincerity of defendants’ out of court statements than jurors might be. They are not applying to the “peculiar” facts the “broad and deep acquaintance with the ways human beings actually conduct themselves” as postulated by the California Supreme Court in People v. Edwards.121

This may be understandable. After all, appellate courts are looking at hearsay statements in the context of records replete with evidence of the defendant’s guilt that is hard to ignore. However, trial judges in California should not exclude defendants’ state of mind hearsay statements on the basis of a prejudgment of their guilt. Yet, that is what “the law” set forth in the California appellate cases encourages them to do. They are told that all it takes to generate the inference of a compelling motive to self-exculpate is the fact that a defendant’s statement was made post-crime.122

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119. See, e.g., Rivas, 2005 WL 2742809, at *6 (before hearing any testimony from a police officer about circumstances surrounding the defendant’s statement, the trial court ruled “I’m sorry, it looks like 1252, in the court’s opinion... this statement under these circumstances would be inherently untrustworthy...”).

120. It is true that even those who are not guilty may fear punishment and may thus have a motive to make false exonerating statements. But this inference is far weaker than the “compelling” motive presumed to exist in California cases decided under section 1252.

121. Edwards, 819 P.2d 436 at 456.

122. See supra Part III.D.
The same potential for unfair application exists under the federal timeliness requirement. When a criminal defendant offers his own post-crime state of mind statement, there is always a lapse of time between the crime and the statement and thus always ground for exclusion. But it is only the criminal defendant's own exculpatory statements that can always be so "timed" in relation to a specific external event. Other relevant states of a declarant's mind are not triggered by specific external events that are known to the judge and jury.\footnote{123. Accord, Peter F. Valori, Special Topics in the Law of Evidence: The Meaning of "Bad Faith" Under the Exceptions to the Hearsay Rule, 48 U. MIAMI L.REV. 481, 503-04 (1993): The trustworthiness line of Rule 803(3) cases employs an "impracticable analysis . . . . In the case of a statement of emotion, motive, plan, or design, no single underlying event may exist . . . [or] may be so abstract that it is impossible to pinpoint."}

In California, for example, admissible statements of fear, or marital discord, by crime victims are often stated in the abstract, without specific triggering events.\footnote{124. See, e.g., Thompson, 753 P.2d at 45-47, discussed in note 61, supra.} Triggering events may be cumulative, recalled upon reflection, and would likely remain unknown because they are inadmissible at trial anyway. Statements of state of mind that reflect such past events may bear risks of untrustworthiness that simply cannot be evaluated under the "timeliness" test because the periods of time in which the declarant could reflect and fabricate are unknown. The resulting uneven application of the "timeliness' criterion raises serious questions about the legitimacy of the test.

3. Another \textit{per se} rule

In practice, the timeliness test will always exclude a criminal defendant's post-crime exculpatory statement. The reported federal cases demonstrate that the "time" between event and statement that is deemed to create an unacceptable risk of fabrication can be whittled down to nothing. Findings of unacceptable "timeliness" include statements made two years after the completion of the crime,\footnote{125. United States v. Jackson, 780 F.2d 1305, 1315 (7th Cir. 1986).} one hour after confessing,\footnote{126. Carter, 910 F.2d at 1530-31.} four hours after executing an alleged fraudulent invoice,\footnote{127. Macey, 8 F.3d at 467-68.} at the very start of three weeks of illegal enticement,\footnote{128. United States v. Naiden, 424 F.3d 718, 722 (8th Cir. 2005).} and in the middle of a business lunch conversation during which the defendant may or may not have learned that he was speaking to an undercover FBI agent.\footnote{129. Cianci, 378 F.3d 71.} In short, it seems that the timeliness "inquiry" yields only a foregone conclusion. Like the California
results under the post *litem motam* standard, any exonerating statements made by criminal defendants will be held to be untimely. A "test" that has only one outcome for criminal defendants' exculpatory statements of state of mind is in practice a *per se* rule.

4. Wigmore Advocated Admission of Criminal Defendants' Own State of Mind Statements

In his original treatise, Wigmore criticized *per se* rules rejecting criminal defendants' otherwise admissible exculpatory statements of state of mind. He contended that these *per se* rules repudiated the presumption of innocence and unfairly excluded relevant information:

"[It is further suggested by these rules] that . . . the accused, if guilty, *may* have falsely uttered these sentiments in order to furnish in advance evidence to exonerate him from a contemplated crime. But here the singular fallacy is committed of taking the possible trickery of guilty persons as a ground for excluding evidence in favor of a person not yet guilty; in other words, the fundamental idea of the presumption of innocence is repudiated. We elaborate this presumption in painful and quibbling detail; we expend upon it pages of judicial rhetoric; we further maintain, with sentimental excess, the privilege against self-crimination; in short, we exhaust the resources of reasoning and strain the principles of common sense to protect an accused person against an assumption of guilt until the proof is irresistible; and yet, at the present point, we throw these fixed principles to the winds and make this presumption of guilt in the most violent form. Because (we say) this accused person *might* be guilty and therefore *might* have contrived these false utterances, therefore we shall exclude them, although without this assumption they indicate feelings wholly inconsistent with guilt, and although, if he is innocent, their exclusion is a cruel deprivation of a most natural and effective sort of evidence. To hold that every expression of hatred, malice, and bravado is to be received, while no expression of fear, goodwill, friendship, or the like, can be considered, is to exhibit ourselves the victims of a narrow whimsicality . . ."  

These comments addressed courts' refusals to admit criminal defendants' offers of their own state of mind hearsay statements made before the crime had occurred. Wigmore extended his argument to include judicial exclusion of statements made by criminal defendants after the charged crime had been committed, so long as those statements were of a

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130. JOHN HENRY WIGMORE, 3 A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 1732 at 2230 (1904).
then existing, and not a past, state of mind:

[S]ubsequent statements predicking a then existing state of mind are properly admissible under the present [state of mind] Exception. No question is made about this when they are offered against the accused, because they are at any rate available as admissions. But they should be equally admissible in his favor. In both cases the object is to ascertain his subsequent state of mind, and thence to infer... his state of mind at the time of the act. It is true that these declarations may not be thought to fulfill the requisite of the present Exception... that there should be no apparent motive to deceive; but this argument, as before, seems to involve the assumption of guilt.131

It appears, then, that Wigmore was advocating that, for reasons of fairness, a criminal defendant’s state of mind hearsay should be considered for admission free from the common law’s requirement that there be “no apparent motive to deceive.” Wigmore would also have rejected the “timeliness” test because its concern about sincerity is likewise based on the defendant’s assumed motive to deceive. Strict adherence to the categorical approach in the application of Rule 803(3) would accomplish the result suggested by Wigmore.

5. Need for Defendants’ Statements of Their Own State of Mind

Wigmore’s position is grounded in need as well as fairness.132 The state of mind of the defendant is an essential element in many criminal cases. Indeed, the critical importance of the state of mind issue in many legal disputes is perhaps the most significant justification for the state of mind hearsay exception.133 The categorical approach, rather than the trustworthiness approach, would result in more relevant evidence being submitted to the jury on this issue. Wigmore noted that the prosecution is able to present to the jury all of the criminal defendant’s relevant out of court utterances as party admissions and seemed to contend this has a one-sided impact on the jury.134 Perhaps for this reason Wigmore proposed equal admission of relevant, then existing statements of state of mind

131. Id. § 1732 at 2231.
132. Id., § 1714 at 2204.
133. “Wherever the state of a person’s affections in important his words may be used to prove it. In domicile, in bankruptcy, in the law of gifts this type of evidence may be resorted to for the purpose of showing with what intention a person did an act which it is admitted he performed.” Robert M. Hutchins & Donald Slesinger, Some Observations on the Law of State of Mind in Issue, 29 COLUM. L. REV. 147, 148 (1929).
134. WIGMORE, supra note 123, § 1732 at 2231.
offered by criminal defendants.

6. The problem of a “narrative gap”

A recent United States Supreme Court opinion authored by Justice Souter, *Old Chief v. United States,* supports the view that criminal defendants are unfairly disadvantaged when statements of their own state of mind are always excluded from trial. The concept of probative value, according to Justice Souter’s opinion, should take account of the “narrative integrity” of evidence—that is, the importance of parties being able to present evidence of the complete story of their side of the case. In *Old Chief,* Souter hypothesized that “gaps” in the prosecutor’s factual story of the defendant’s guilt could be created if the court were regularly to require the prosecutor to accept defendants’ stipulations on key facts in the case. Such stipulations would not only exclude admittedly relevant facts, they might also leave the jury’s expectations about story of guilt unsatisfied. The jury might be left wondering about the missing proof and why it was not presented. Justice Souter, supported by academic commentary, argued that the jury could hold this “narrative gap” against the prosecution, the party expected to fill it, by assuming that the gap signaled a weaker overall case.

Similarly, the jury may also be left wondering about a “gap” in the story it would expect to hear from the criminal defendant. In many cases, criminal defendants do not testify, which of course is their right under the Fifth Amendment. If the prosecution uses a defendant’s relevant out of court statements as party admissions, the defendant’s voice heard by the jury is wholly inculpatory. If the defendant still does not testify, the jury certainly might think there is an unexplained gap in the defense’s story. If the defendant’s own exculpatory out of court statements—not of past facts, which would violate the hearsay rule, but of state of mind, which would not—are not admitted, the gap is even more glaring. The defendant is completely silent. The jury may wonder about this out of court silence, may hold it against the defendant, and may be even more likely to convict under the assumption that the defendant had nothing exculpatory to say. Using the hearsay exceptions to admit a defendant’s out of court statements is the

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135. 519 U.S. 172 (1997) (plurality opinion).
136. *Old Chief,* 519 U.S. at 188-90.
137. *Id.* at 188.
138. *Id.*
139. *Id.* at 188-90.
non-testifying defendant's only opportunity to close this "narrative gap."

7. Why Reject the Defendant's State of Mind Hearsay?

The *per se* rules under the CEC ("no motive to deceive") and the FRE (no time to fabricate) exclude the defendant's state of mind hearsay, foreclose the defendant's opportunity to fill the "narrative gap," and help keep criminal defendants silent. Courts have sometimes justified this silencing effect by holding that criminal defendants who refuse to take the witness stand and be subjected to cross-examination should not be allowed to "testify" or "put on a defense" by means of their out of court hearsay statements. These courts imply that this would give defendants an unfair advantage. But all parties use all types of hearsay under the Rule 803 hearsay exceptions to, in effect, have declarants "testify" even when they are available to be witnesses. These declarants are not subject to cross-examination and this is not treated as a ground to exclude their out of court statements, except under the Sixth Amendment's confrontation clause. Pursuant to this clause, the government's use of victim and witness hearsay statements that are "testimonial" are inadmissible for lack of confrontation and cross-examination.

But, hearsay offered by criminal defendants is not subject to the confrontation clause. Why then should defendants' use of their own otherwise admissible hearsay statements be rejected as unfairly "testifying?" I see several possible explanations. Courts may simply think it is "fair" to create a reciprocal "confrontation" burden on the criminal defendants themselves, even though the Constitution does not require it. Or perhaps courts punish criminal defendants for exercising their Fifth Amendment rights: If they "choose" not to testify, they cannot "choose" to present their own hearsay. Under either explanation, the judicial effort to rectify what they see as unfairness is itself unfair.

Or, it may be that criminal defendants' own exculpatory state of mind hearsay statements are in fact among the most "risky" statements that courts confront in administering the hearsay exceptions. When faced with this

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140. See, e.g., Edwards, 798 P.2d at 455 (trial court found that "seeking to admit the evidence without defendant testifying . . . really is an attempt to put on a whole defense without ever putting the defendant on the stand subject to cross-examination").

141. Wigmore also observed that some courts excluded defendants' state of mind statements as "mak[ing] evidence for himself." But, Wigmore wrote, the same objection applies to many classes of statements under the state of mind exception and "is not fatal." *Wigmore, supra* note 123, § 1732 at 2229-30.

degree of risk, courts think they must do something— they do not feel comfortable with the admission of hearsay they think is highly likely to be unreliable. Thus they impose some extra test, like “motive” or “timeliness.” But the per se application of these tests, posing as the exercise of discretion on the issue of trustworthiness, interfere too much with the proper role of the jury.\(^{143}\)

8. McCormick’s Intent Test Would Not Work

The McCormick treatise emphasizes that “spontaneity” is the basis for Rule 803(3)’s requirement that the declarant’s statement describe a “then existing” state of mind, and notes the Advisory Committee’s statement that Rule 803(3) is a specialized application of the exception for present sense impressions, “the cornerstone of which is spontaneity.”\(^4\)\(^4\)\(^4\) Thus, according to the treatise, “[i]f circumstances demonstrate a lack of spontaneity, exclusion should follow.”\(^1\)\(^4\)\(^5\)

However, according to McCormick, exclusion would be based on a judicial finding of “intent” to manufacture evidence, not on judicial suspicion of the declarant’s motivation: “[E]xclusion is warranted where an intention to manufacture evidence demonstrates that the statement lacked contemporaneousness.”\(^1\)\(^4\)\(^6\) This is because such “intent” would justify a finding that the statement cannot be a “then existing” statement of state of mind. Exclusion of the statement would be based on its failure to “fit” within the terms of the exception altogether rather than on lack of trustworthiness, a more straightforward matter of interpreting Rule 803(3) as written.\(^1\)\(^4\)\(^7\)

However, courts cannot be expected to apply this intent test with the necessary rigor. “Specific intent” to manufacture a statement for use at trial is an extremely difficult factual finding to make. It would likely be diluted to whether “a reasonable person would think” her out of court statement could be so used. Worse still, “intent” to create evidence could devolve into “motive” to create it, affording courts an even broader standard for exclusion, as we have seen.

\(^{143}\) The McCormick and Mueller and Kirkpatrick treatises also seem reluctant to take a position on Rule 803(3) that would completely bar federal judges from excluding hearsay that they are convinced is untrustworthy. But the reservoir of discretion they would allow to judges is both exceptional and ad hoc, not a per se rule of exclusion. See 2 MCCORMICK, supra note 104, § 270 at 249-50 and § 274 at n.8., and MUELLER & KIRKPATRICK, supra note 105, § 8.38 at 819.

\(^{144}\) 2 MCCORMICK, supra note 104, § 273 at 266.

\(^{145}\) Id.

\(^{146}\) Id. § 273 at n.12.

\(^{147}\) Id. § 270 at 249 and n.9.
VII. CONCLUSION

This study of the hearsay exceptions for state of mind has shown that the California rule and the federal rule, in those federal circuits that import the timeliness test into Rule 803(3), are similar in effect. The result under both is that criminal defendants are unable to submit their own out of court statements of then existing state of mind to the jury. I argue that this is not a good result. In the particular context of criminal prosecution, this result unfairly rejects only the criminal defendant’s hearsay and deprives the jury of information that it can fairly evaluate. Whether greater admission of defendants’ exculpatory state of mind hearsay would then significantly change outcomes or help prevent the innocent from being convicted is difficult to predict.

But I do contend that more careful attention by California courts to applying the discretionary concept of “lack of trustworthiness” under section 1252 would yield more fair results and would, in the spirit of Old Chief, give the jury more of the “whole story” on the defendant’s state of mind in some greater number of cases.148 Moreover, the California appellate cases demonstrate a certain lack of judiciousness in practice, applying a one-sided per se rule in the teeth of the discretionary text of section 1252.

On the federal level, the divide in case law between the categorical and trustworthiness approaches to Rule 803(3) is a bad result on other grounds as well. This significant split in the Circuits produces very different results in similar cases. And it raises a more general question: Should the categorical approach to hearsay exceptions espoused in the Advisory Committee’s Note be maintained or should the Federal Rules move toward a more flexible, discretionary standard of admitting “trustworthy” hearsay in place of the categorical approach?

In this paper, I have contended that the categorical approach to Rule 803(3) is preferable and should be maintained, and that the “timeliness” per se rule of exclusion is unjustified. My reasons, based on values that underlie much of our system of evidence law - fairness to criminal defendants, accuracy of outcomes through jury reasoning, and the proper allocation of power between judge and jury, may suggest an answer to the more general question as well.