B. Federal Rules of Evidence

Rule 403 — Unfair Prejudice. — The Supreme Court has seldom scrutinized Federal Rule of Evidence 403,¹ which allows exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice,”² despite the rule’s position as “the cornerstone” of the Federal Rules of Evidence.³ While commentators have debated Rule 403’s impact on the common law of evidence,⁴ the constitutional presumption of innocence,⁵ and the structure of trials,⁶ the Court has avoided providing detailed guidance as to the proper application of the rule.⁷ Last Term, in Old Chief v. United States,⁸ the Court addressed one outstanding issue under Rule 403, ruling that a trial court abuses its discretion when, in a prosecution for possession of a handgun by a felon, it admits evidence of the name or nature of the defendant’s prior conviction despite the defendant’s offer to stipulate to his or her felon status. In holding that the risk of unfair prejudice from such evidence outweighs its probative value, the Court correctly resolved one aspect of the “most frequently litigated issue under Rule 403”⁹ and provided a useful framework for analyzing other applications of the rule. Yet the Court’s broad reaffirmation of the prosecution’s right to narrative integrity muddied the Court’s ruling.

After Johnny Lynn Old Chief took part in an altercation involving a gunshot, federal prosecutors charged him with violating 18 U.S.C. § 922(g)(1), which makes it a crime for a person “who has been convicted in any court of[] a crime punishable by imprisonment for a term

¹ Nine Supreme Court opinions have mentioned Rule 403 since the Federal Rules of Evidence came into effect in 1975. Search of Westlaw, SCT Database (Aug. 21, 1997).
² "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.
⁷ The Court’s statements regarding Rule 403 have generally emphasized the rule’s grant of discretion to trial judges. See, e.g., United States v. Abel, 469 U.S. 45, 54 (1984).
⁹ Gold, supra note 3, at 524 (citing 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5215 (1978)). Lower courts had long been divided on the right, vel non, of a defendant to stipulate to the fact of a prior conviction in a felon-in-possession case. See Old Chief, 117 S. Ct. at 649 (listing circuit court decisions).
exceeding one year” to “possess in or affecting commerce[] any firearm . . . or to receive any firearm . . . which has been shipped or transported in interstate or foreign commerce.”

This “felon-in-possession” charge stemmed from Old Chief’s prior conviction for assault causing serious bodily injury.

Prior to trial, Old Chief moved for an order preventing the prosecution from mentioning, “offering into evidence[,] or soliciting any testimony from any witness regarding the prior criminal convictions of the Defendant, except to state that the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year.” Old Chief argued that his willingness to stipulate to the fact of a previous conviction made the name and details of the prior crime inadmissible under Federal Rule of Evidence 403. The district court ruled that the prosecution was not required to accept Old Chief’s stipulation and permitted the prosecution to present the jury with details of Old Chief’s prior conviction. Old Chief was subsequently convicted of all three charged counts.

In a terse opinion, the Ninth Circuit affirmed. Relying on circuit precedent, the court stated that “the government is entitled to prove a prior felony offense through introduction of probative evidence.” The court refused to inquire into the possible prejudicial effect on jurors that introduction of the nature of a prior conviction may produce, declaring that “[u]nder Ninth Circuit law, a stipulation is not proof, and, thus, it has no place in the FRE 403 balancing process.”

In a 5-4 decision, the Supreme Court reversed. Writing for the Court, Justice Souter first rejected Old Chief’s claim that the name of his prior offense was irrelevant and thus inadmissible under Federal Rule of Evidence 402. He noted that a record of Old Chief’s conviction would make his status as a felon “more probable than it would have been without the evidence,” and thus was relevant.

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10 U.S.C. § 922(g) (1994); see Old Chief, 117 S. Ct. at 647.
11 See Old Chief, 117 S. Ct. at 647.
12 Id. (internal quotation marks omitted).
13 See id.
14 See id.
15 See id.
17 See United States v. Breitkreutz, 8 F.3d 688, 692 (9th Cir. 1993).
18 Old Chief, 1995 WL 325745, at *1 (citing Breitkreutz, 8 F.3d at 690).
19 Id. (citing Breitkreutz, 8 F.3d at 691–92).
20 See Old Chief, 117 S. Ct. at 649.
21 Justices Stevens, Kennedy, Ginsburg, and Breyer joined Justice Souter’s opinion.
22 See Old Chief, 117 S. Ct. at 649. Rule 402 states that “[e]vidence which is not relevant is not admissible.” FED. R. EVID. 402. Rule 401 defines relevant evidence to be “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401.
23 Old Chief, 117 S. Ct. at 649.
Having established the pivotal issue to be whether admission of the name of Old Chief’s prior conviction had been unfairly prejudicial under Rule 403, Justice Souter entered into a four-step analysis. First, he established that the prejudicial effect at issue in a felon-in-possession case — “generalizing a defendant’s earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged” — clearly was one that Rule 403 is designed to prevent.24 He noted that evidence of prior wrongdoing is rejected not because such evidence is irrelevant, but rather because such evidence is excessively persuasive; admitting such evidence might lead the jury “to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.”25

Second, Justice Souter outlined two possible methods for weighing unfair prejudice against probative value: evidence may be viewed “as an island,”26 or in “the full evidentiary context of the case as the court understands it when the ruling must be made.”27 Rejecting the former method because it would admit unfairly prejudicial evidence,28 Justice Souter declared that the Advisory Committee’s note to Rule 403 makes clear that “when Rule 403 confers discretion by providing that evidence ‘may’ be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item’s twin tendencies,” but also by comparing those tendencies with “evidentiary alternatives.”29

Third, the majority examined the probative value and possible prejudicial effect of evidence of “the name or nature of the prior offense” under 18 U.S.C. § 922(g)(1).30 Justice Souter stated that such evidence risks being unfairly prejudicial “whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning.”31 Exclusion of the evidence was particularly appropriate in Old Chief’s case, because Old Chief’s proffered stipulation presented the district court “with alterna-

24 Id.
25 Id. at 650–51 (quoting Michelson v. United States, 335 U.S. 469, 475–76 (1948)) (internal quotation marks omitted). Justice Souter noted that Rule of Evidence 404(b) explicitly bars the admission of evidence of past wrongs or crimes to prove character. See id. at 651.
26 Id. When viewed as an island, the probative value and unfair prejudice of a piece of evidence are “the sole reference points in deciding whether the danger substantially outweighs the value” of the evidence. Id.
27 Id.
28 See id. at 651–52. Justice Souter argued that a party might be enticed to offer prejudicial evidence because “[t]he worst [a party offering such evidence] would have to fear would be a ruling sustaining a Rule 403 objection, and if that occurred, he could simply fall back to offering substitute evidence.” Id. at 652.
29 Id.
30 Id.
31 Id. Justice Souter noted that the risk “would be especially obvious” when the “prior conviction was for a gun crime.” Id.
tive, relevant, admissible evidence" of a prior conviction that was "not merely relevant but seemingly conclusive evidence" of the charge.32

Fourth, the Court considered and rejected the government’s argument that the prosecution’s right to prove its case as it sees fit means that a defendant cannot compel the prosecution to accept a stipulation to felon status. Justice Souter acknowledged that evidence may have "force beyond any linear scheme of reasoning" and that a detailed narrative may build its persuasiveness not only on facts, but also on the intricate relationship between those facts.33 Moreover, a stipulation may not meet the jury’s expectations. The jury, Justice Souter noted, expects stories and not syllogisms, and the introduction of a stipulation when jurors expect narrative detail may not just fail to advance the prosecution’s case; it may even undermine its case by provoking the jury’s distrust.34 Thus, in general, "the prosecution is entitled to prove its case free from any defendant’s option to stipulate the evidence away."35 Yet Justice Souter found this general rule inapplicable to determinations of a defendant’s legal status: "Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant’s subsequent criminality" and does not "confuse or offend or provoke reproach."36 The only functional difference between Old Chief’s offered stipulation and the prior conviction record the prosecution entered into evidence was "the [prejudicial] risk inherent in the one and wholly absent from the other."37 Therefore, Justice Souter concluded, the trial court abused its discretion when it admitted the name and nature of Old Chief’s prior conviction.38

In a sharply worded opinion, Justice O’Connor dissented.39 Criticizing the majority for both pronouncing "a rule that misapplies [Rule] 403" and upsetting "longstanding precedent regarding criminal prosecutions," Justice O’Connor noted that the mere fact that evidence harms a defendant does not automatically make such evidence unfairly prejudicial under Rule 403.40 Justice O’Connor argued that § 922(g)(1)’s structure demonstrates that Congress intended that jurors

32 Id. at 653.
33 Id.
34 See id. at 654.
35 Id.
36 Id. at 655. The Court acknowledged that evidence of prior acts might be admissible under Rule 404(b) if used "to prove ‘motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’" Id. (quoting FED. R. EVID. 404(b)).
37 Id.
38 See id. Justice Souter noted that the holding did not affect cases not involving proof of status: "the prosecutor’s choice [of evidence] will generally survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried." Id. at 656.
39 The Chief Justice and Justices Scalia and Thomas joined Justice O’Connor’s dissent.
40 Old Chief, 117 S. Ct. at 656 (O’Connor, J., dissenting).
learn the name and nature of a defendant’s prior conviction.\(^{41}\) Relying on § 922(g)(I)’s exclusion of “certain business crimes and state misdemeanors,”\(^{42}\) the dissent claimed that “[w]ithin the meaning of § 922(g)(I) . . . ‘a crime’ is not an abstract or metaphysical concept”; a defendant’s prior conviction “connotes not only that he is a prior felon, but also that he has engaged in specific past criminal conduct.”\(^{43}\)

Justice O’Connor continued by critiquing the majority’s analysis of Rule 404(b). Although Rule 404(b) excludes character evidence, it “expressly contemplates the admission of evidence of prior crimes for other purposes.”\(^{44}\) Introducing evidence of prior crimes directed at establishing a necessary element of the crime charged is one such purpose.\(^{45}\) The majority’s conclusion to the opposite effect, Justice O’Connor opined, “defies common sense.”\(^{46}\)

The dissent also took issue with Justice Souter’s discussion of the prosecution’s right to present its case in the manner that it sees fit. Justice O’Connor noted that “[a] jury is as likely to be puzzled by the ‘missing chapter’ resulting from a defendant’s stipulation . . . as it would be by the defendant’s conceding any other element of the crime.”\(^{47}\) Moreover, Justice O’Connor maintained that the constitutional requirement that the prosecution prove all elements of a charged crime beyond a reasonable doubt necessarily implies the government’s prerogative to reject a defendant’s offer to stipulate to an element of the charged crime.\(^{48}\) “[A] defendant’s stipulation to an element of an offense does not remove that element from the jury’s consideration . . . [T]he defendant’s strategic decision to ‘agree’ that the Government need not prove an element cannot relieve the Government of its burden” to provide proof beyond a reasonable doubt.\(^{49}\)

\textit{Old Chief} serves as an important reminder that principles of fairness lie at the heart of the American criminal justice system. The Court was right to recognize that evidence of the name or nature of past crimes in § 922(g)(I) prosecutions unfairly prejudices juries

\(^{41}\) See \textit{id.}\n
\(^{42}\) Id.\n
\(^{43}\) Id. at 656–57. Justice O’Connor added that it is fundamental to “our system of justice [that] a person is not simply convicted of ‘a crime’ or ‘a felony,’ but rather is convicted ‘of a specified offense.’” \textit{Id.} at 657.\n
\(^{44}\) Id.\n
\(^{45}\) See \textit{id.}\n
\(^{46}\) Id. at 658. The dissent contended that a limiting jury instruction could be used to mitigate any prejudice that resulted from the introduction of evidence of prior crimes. \textit{See id.}\n
\(^{47}\) Id. at 659.\n
\(^{48}\) See \textit{id.}\n
\(^{49}\) Id. (citing Estelle v. McGuire, 502 U.S. 62, 69–70 (1991)). The dissent also noted that to permit a defendant to compel the government to accept a stipulation “runs afoul” of Federal Rule of Criminal Procedure 23(a), which states that a defendant may not waive her right to a jury trial absent government agreement. \textit{Id.} at 660.
against defendants. Additionally, the Court’s decision provides needed guidance to lower courts applying Rule 403 both within and beyond the context of felon-in-possession cases. Despite these positive steps, however, Old Chief eventually may be remembered more for its broad statements regarding the prosecution’s right to prove its case as it sees fit. This broad language threatens not only to obscure the clarity offered by the Court’s Rule 403 analysis, but also to increase trial courts’ willingness to admit unfairly prejudicial evidence.

The decision in Old Chief, although limited to cases involving proof of felon status, significantly clarifies Rule 403 jurisprudence. The Court explicitly stated that the probative value of evidence under Rule 403 may “be calculated by comparing evidentiary alternatives.” Although the Advisory Committee’s note to Rule 403 likewise suggests that a proper inquiry into probative value requires consideration of evidentiary alternatives, prior to Old Chief lower courts had at times failed even to conduct the Rule 403 balancing test, much less to compare evidentiary alternatives. The Court’s mandate that lower courts weigh the probative and prejudicial values of evidentiary alternatives along with the evidence in question should add structure to trial court decisionmaking and facilitate review of such decisions.

Old Chief also furthers evidence jurisprudence by using a Rule 403 balancing test to create a rule barring admission of the name of a past crime in most felon-in-possession cases, thus erecting concrete limits to trial court discretion. Justice Souter declared that refusing to admit the name of a prior conviction “will be the general rule when proof of

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50 Empirical evidence demonstrates that evidence of prior crimes is likely to bias jurors against a defendant. See Tanford, supra note 6, at 838. As the court in United States v. Tavares, 21 F.3d 1 (1st Cir. 1994), recognized, evidence of the nature of a past crime serves little purpose other than prejudicing the jury against a defendant: “there exists no reason, other than the government’s desire to color the jury’s perception of the defendant’s character, for revealing the nature of the defendant’s prior felony.” Id. at 5.

51 See Old Chief, 117 S. Ct. at 651 n.7.

52 Cf. Gold, supra note 3, at 498 (noting that “the courts have generally reacted to claims of unfair prejudice on an ad hoc basis” and that “[t]he search for unfairly prejudicial evidence has thus been reduced to the often tried but seldom very true approach: ‘I know it when I see it’”).

53 Old Chief, 117 S. Ct. at 652.

54 See FED. R. EVID. 403 advisory committee’s note.


56 Cf. Robert H. Aronson, The Federal Rules of Evidence: A Model for Improved Evidentiary Decisionmaking in Washington, 54 WASH. L. REV. 31, 42 (1978) (“[The] tension between the desirability of formal and nonformal evidentiary rules ... manifests itself on at least two levels: a code versus case-by-case determination by appellate courts, and strictly defined rules ... versus loosely defined guidelines and greater trial court discretion, reviewable only for abuse thereof.”); Gold, supra note 3, at 500 (“Unbridled judicial discretion leads to unpredictability, inequality of treatment and elevation of individual whim over principles validated by experience as well as by the popular will.”).

57 Evidence of the nature of the prior crime may still be admissible under Rule 404(b). See Old Chief, 117 S. Ct. at 655.
convict status is at issue." Justice Souter's use of a Rule 403 balancing test to arrive at a rule that effectively eliminates trial court discretion in felon-in-possession cases establishes that there are limits to the discretion Rule 403 grants to trial judges, and also that Rule 403 itself may be used to construct such limits. Such a formulation marks a departure from previous Rule 403 jurisprudence, because Rule 403 "was designed as a guide for handling situations for which no specific rules have been formulated." Prior to Old Chief, commentators noted that appellate courts have often wrongly interpreted Rule 403 to confer an unreviewable grant of discretion to trial courts. Old Chief suggests that the Court may have recognized a need for both clear boundaries to trial court discretion and new methods of creating such boundaries.

The Court did not, however, resolve all ambiguities in Rule 403 jurisprudence. The Court failed to specify whether alternative evidence must be equally probative to the evidence in question, noting only that "a mere showing of some alternative means of proof" is insufficient to show abuse of discretion. The Court also failed to provide guidance regarding how courts should weigh probative value against unfair prejudice. The Court's avoidance of further details of the Rule 403 balancing test may reflect a desire not to intervene too deeply in the discretion Rule 403 grants to trial courts. In fact, the Court's imposition of a rule for felon-in-possession cases may actually strengthen trial court discretion generally: by imposing a clear limit in one type of case, the Court may have signaled that within such limits appellate courts should avoid interfering with the wide discretion of trial courts. The Old Chief Court's failure to specify whether alternative evidence must provide all of the probativeness offered by the original evidence may limit the applicability of Old Chief outside the felon-in-possession context because most of the time both the original and the alternative evidence will have varying degrees of probativeness and prejudice. In the absence of clearer direction concerning the appropriate balance be-

58 Id. at 655–56.
60 See 22 Wright & Graham, supra note 9, § 5223, at 316; Leonard, supra note 6, at 1162–63; cf. Lewis, supra note 5, at 343–44 ("Appellate courts apply a deferential standard of review to trial court evidentiary rulings in general and regard rulings under Rule 403 as particularly deserving of deference.").
61 Old Chief, 117 S. Ct. at 651 n.7.
62 The majority stated that evidence is unfairly prejudicial when it tends to "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged," Old Chief, 117 S. Ct. at 650, but this statement was simply a reiteration of the Advisory Committee's statement that unfair prejudice "means an undue tendency to suggest decision on an improper basis," Fed. R. Evid. 403 advisory committee's note; cf. Gold, supra note 55, at 60 (stating that Rule 403 "neither defines probative value or unfair prejudice, nor suggests how these seemingly noncompa-

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tween prejudicial effect and probative value, trial courts will continue to apply the open-ended balancing test they applied prior to *Old Chief*.

A more important weakness of the majority opinion was its broad reaffirmation of the prosecution’s right to achieve “the full evidentiary force” of its case by using “evidence of its own choice.”63 The Court’s conclusions regarding the role of narrative in criminal trials may lead lower courts astray. In an attempt both to respond to the dissent’s criticism and to cabin the Court’s holding, Justice Souter dedicated a significant portion of his opinion to explaining why the prosecution is generally entitled to prove its case as it sees fit. This analysis of narrative suffers from four flaws.

First, the Court failed to recognize that Rule 403 itself sufficiently safeguards the prosecution’s interest in narrative integrity. Instead of considering the probative and prejudicial values of narrative coherence as part of the Rule 403 balancing test, the Court argued that the prosecution’s interest in narrative coherence does not apply when, as in felon-in-possession cases, the evidence in question relates to a defendant’s legal status.64 As the dissent noted, however, the absence of evidence regarding the prior felony may confuse a jury just as much as the absence of evidence of a nonstatus element of the crime would.65 Indeed, the exclusion of evidence will almost always invite jurors to fill in informational gaps.66 Juror confusion alone cannot be determinative of admissibility; the relevant inquiry, in all Rule 403 contexts, is into probative value and unfair prejudice.

Second, the Court erred when it implied that the prosecution’s interest in narrative integrity is inapplicable when the evidence in question “goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense.”67 Much evidence that is admissible pursuant to the

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63 *Old Chief*, 117 S. Ct. at 653.
64 See *id.* at 654–55.
65 See *id.* at 659 (O’Connor, J., dissenting). Jurors may infer that the prior crime was a serious crime, or they may conclude that it was unimportant. Cf. Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1060 (1978) (noting that “jurors[] often develop expectations about the proof that . . . will be offered,” and thus “[a] party’s failure to satisfy those expectations may result in negative inferences, often unfair ones, being drawn against that party”).
66 The *Old Chief* decision did not address whether a defendant has the right to introduce the name and nature of the prior felony when such information is beneficial to him or her. Cf. United States v. Tavares, 21 F.3d 1, 4 (1st Cir. 1994) (arguing that permitting a defendant “to introduce evidence that his prior conviction was for a technical, non-violent or white collar crime” would be “no more appropriate than the reverse tendency”).
67 See, e.g., William Finnegan, Doubt, NEW YOKER, Jan. 31, 1994, at 48, 51 (recounting that the jury the author served on “gessed and speculated about the lives and motives of the alibi witnesses, trying to put ‘the evidence’ into some narrative context that made sense”).
prosecution’s right to prove its case with full evidentiary force — such as the introduction of photos of a murder victim — encompasses elements unrelated to the defendant’s thoughts and actions.\(^\text{68}\) Instead of arguing that narrative integrity was irrelevant, the Court should have acknowledged that any additional probative value that results from narrative coherence is properly considered by a district court weighing the probative and prejudicial values of evidence; narrative integrity may contribute more to prejudice than to probative value.

Third, the Court overstated the force of the “standard rule that the prosecution is entitled to prove its case by evidence of its own choice.”\(^\text{69}\) The Federal Rules of Evidence limit the ways in which a prosecutor may construct a story.\(^\text{70}\) The presumption of admissibility embodied in Rule 403’s requirement that unfair prejudice substantially outweigh probative value is sufficient to protect the prosecution’s interest in narrative integrity. The American adversarial system provides incentives for parties to introduce evidence that is helpful to their cases, rather than evidence that assists the jury in ascertaining the truth.\(^\text{71}\) Rules of Evidence limitations reflect both mistrust of juries and recognition that incentives to mislead juries are built into the adversarial system. Thus, although the majority was correct to distinguish felon-in-possession cases from other cases in which Rule 403 plays an important role, the Court erred in its explanation of the distinction. The difference lies not in the role such evidence plays in the integrity of the prosecution’s narrative, but rather in the fact that, due to the availability of evidence with identical probative value, the Rule 403 balancing test will almost always weigh against admitting the name and nature of the prior conviction in a felon-in-possession case.

Fourth, the Court wrongly equated the role story-creation plays in criminal trials with the prosecution’s right to construct a story. Narrative is at the heart of the criminal trial process, but trials consist of

status evidence and evidence of actions and state of mind is that in the former, the issue being stipulated to is “not merely true, but [is] so clearly true that it would [be] a proper subject for judicial notice”).

\(^{68}\) Similarly, although evidence relating to the identity of a murder victim is often relevant to proving intent or motive, even when such evidence is not relevant, almost any judge would “admit evidence of [a murder victim’s name] over a defendant’s objection . . . even if it was . . . a popular celebrity.” Duane, supra note 67, at 432; accord Old Chief, 117 S. Ct. at 657 (O’Connor, J., dissenting).

\(^{69}\) Old Chief, 117 S. Ct. at 653; cf. Duane, supra note 67, at 435 (“[I]t is far from obvious . . . that the Government generally enjoys a right to prove any relevant facts any way it pleases . . . .”).


\(^{71}\) See DAMAŠKA, supra note 70, at 77–86.
competing narratives, and the crucial story is the one that jurors create in their own minds, not the story the prosecution presents to the jury.\textsuperscript{72} Tension between the Court’s formulaic approach to the Rule 403 balancing test and the majority’s broad statements regarding narrative reflects the structure of a criminal trial itself. American evidence law is atomistic: it lets the jury construct a story out of the myriad of information presented in a trial.\textsuperscript{73} Rule 403 is one mechanism serving to filter information presented to the jurors to aid their story construction.

The Court’s opinion reflects the competing values of fairness interests under Rule 403 and narrative coherence. Ensuring narrative coherence does not correspond to truth-finding.\textsuperscript{74} Jurors are, however, more likely to regard coherent narratives, not nontraditional or nonlinear tales, as truthful stories. More importantly, jurors reach decisions not only on the basis of information presented at trial, but also on the basis of preexisting knowledge and world views\textsuperscript{75} as well as preconceived storylines.\textsuperscript{76} Rule 403 lessens the risk that such preconceptions pose to the fairness of a trial by excluding evidence that is likely to trigger bias against a defendant. Thus, rather than ensuring narrative coherence, Rule 403 restricts the manner in which stories are told.

The Court reached the correct result in \textit{Old Chief} but engaged in a flawed discussion of the role of narrative in criminal trials. The Court’s unnecessary emphasis on the prosecution’s right to narrative coherence risks sending the wrong signal to lower courts. Outside the context of felon-in-possession cases, lower courts may believe that \textit{Old Chief} instructs them not to take active roles in evidentiary questions.\textsuperscript{77}

\textsuperscript{72} See Reid Hastie, Steven D. Penrod & Nancy Pennington, \textit{Inside the Jury} 15 (1983) ("The trial produces ‘data’ . . . that the jurors have to utilize in their decision-making task."); Nancy Pennington & Reid Hastie, \textit{The Story Model for Juror Decision Making}, in \textit{Inside the Juror: The Psychology of Juror Decision Making} 192, 194–95 (Reid Hastie ed., 1993) (arguing that "jurors impose a narrative story organization on trial information" from evidence that is "unwieldy and unstory-like").

\textsuperscript{73} See Damaška, supra note 70, at 93.


\textsuperscript{75} See Hastie, Penrod & Pennington, supra note 72, at 36 (arguing that jurors attempt to "construct[] a credible narrative by integrating trial testimony and arguments with general world knowledge"); Taslitz, supra note 74, at 475 ("[E]mpirical data . . . strongly suggests that jurors will rarely deviate from cultural themes."); Finnegan, supra note 66, at 51.

\textsuperscript{76} See Sherwin, supra note 74, at 77 ("The array of deeply ingrained, culturally inherited, and socially instilled storylines that we carry, often subconsciously, in our heads recapitulate an equally deep sense of how truth and justice operate in the world.").

\textsuperscript{77} Cf. United States v. Cottman, No. 96-1774, 1997 WL 340344, at *4 (2d Cir. June 20, 1997) (stating that the \textit{Old Chief} decision "confirms the vitality of the general rule" that the prosecution is not required to accept a stipulation to elements of a criminal offense).
If so, the Court’s discussion of narrative may weaken the principles of fairness that are at the heart of the Federal Rules of Evidence, and thus may undermine an otherwise principled resolution of the issue presented in *Old Chief*.

C. Federal Sentencing Guidelines

**Sentencing Adjustments Based on Acquitted Conduct.** — Sentencing proceedings are nothing like criminal trials. Most of the constitutional protections that shape criminal litigation do not apply to the determination of a convicted defendant’s sentence.¹ Perhaps most crucially, a federal sentencing court is governed by a lower standard of proof than is a criminal jury;² thus, a defendant’s sentence will often depend on some facts about which a reasonable doubt exists. Most recently, in *United States v. Watts*,³ the Supreme Court held that a sentencing court may increase a defendant’s sentence on the basis of the conduct underlying related charges of which the defendant was acquitted, as long as that conduct is established by a preponderance of the evidence.⁴ Before *Watts*, almost every circuit had concluded that a sentencing court could increase a defendant’s sentence for acquitted conduct — that is, conduct underlying a crime of which a jury found the defendant not guilty.⁵ In order to mitigate the potential unfairness of this rule, two circuits had held that a district court may depart downward from an otherwise applicable sentencing range that takes account of acquitted conduct.⁶ After *Watts*, this practice is still viable. *Watts* established that a sentence based in part on acquitted conduct is permissible under the Constitution, the United States Code, and the Federal Sentencing Guidelines. But even under *Watts*, a sentencing court has discretion to fashion a just sentence and not merely to calculate a permissible one.

¹ See Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1219–20 (1993); cf. Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 356 (1992) (noting that the Court has taken a "laissez-faire attitude" toward factfinding at sentencing). The Due Process Clause does not require sentencing facts to be proven beyond a reasonable doubt. See McMillan v. Pennsylvania, 477 U.S. 79, 91–92 (1986). At sentencing, a defendant does not have the right to a jury trial, see id. at 93, or the right to confront witnesses, see United States v. Kikumura, 918 F.2d 1084, 1102–03 (9th Cir. 1990). Sentencing courts may consider prior convictions that were obtained through unconstitutional criminal proceedings, see Custis v. United States, 511 U.S. 485, 497 (1994), as well as evidence seized in violation of the Fourth Amendment, see United States v. Tejada, 956 F.2d 1256, 1263 (2d Cir. 1992).
⁴ See id. at 638.
⁵ See id. at 634 & n.1 (citing cases).
⁶ See United States v. Lombard, 72 F.3d 170, 185 (1st Cir. 1995); United States v. Concepcion, 983 F.2d 369, 389 (2d Cir. 1993).