MISIÓN JURÍDICA

Argument and narrative in the evidence context
Critical dialectical study on the *Hybrid Formal Theory of Arguments and Stories* and the antecedent theories that deal with evidence in criminal proceedings

Argumento y narrativa en el contexto de la prueba
Estudio crítico dialéctico sobre la *Hybrid Formal Theory of Arguments and Stories* y las teorías antecedentes que tratan sobre la prueba en el proceso penal

Autor: Antonio Sanches Sólon Rudá

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Argumento e narrativa no contexto da evidência Estudo dialético crítico sobre a *Teoria Formal Híbrida de Argumentos e Histórias* e as teorias antecedentes que tratam da prova no processo penal

Antonio Sólon Rudá [a]
antoniosolonruda@gmail.com

ABSTRACT

In this work I seek to investigate the use of arguments and narratives within the scope of theories that deal with the question of evidences, specifically in the *Story Model, the Anchored Narratives Theory and the Hybrid Formal Theory of Arguments and Stories.* I question whether the normative-instrumentalized verification process of evidence, formulated in *hybrid theory,* meets the need to treat the evidence in order to identify the nature of the imputation of the crime committed by the agent. I argue that the *hybrid theory* does not address the question of proof as to the nature of the imputation of the agent's criminal liability, which is it does not seek to identify whether the criminal fact was perpetrated by way of *intention* or *recklessness*. I conclude adducing that the *hybrid theory* does not meet the need to treat the evidence to identify the nature of the imputation of the crime committed by the agent.

KEYWORDS:

Criminal procedure; hybrid theory; argument; narrative; history.

ARGUMENTO Y NARRATIVA EN EL CONTEXTO DE LA PRUEBA Estudio crítico dialéctico sobre la *Hybrid Formal Theory of Arguments and Stories* y las teorías antecedentes que tratan de la prueba en el proceso penal

RESUMEN

En este trabajo se busca investigar el uso de argumentos y narrativas en el ámbito de las teorías que se ocupan de la cuestión de la prueba: la *Story Model,* la *Anchored Narratives Theory* y la *Hybrid Formal Theory of Arguments and Stories.* Se cuestiona si el proceso normativo-instrumentalizado de verificación de la prueba, formulado en la teoría híbrida, responde a la necesidad de tratar la prueba para identificar la naturaleza de la imputación del delito cometido por el agente. Se sostiene que la *hybrid theory* no aborda la cuestión de la prueba en cuanto a la naturaleza de la imputación de la responsabilidad penal del agente; es decir, no busca identificar si el hecho delictivo fue perpetrado por dolo o imprudencia. Se concluye, argumentando que la teoría híbrida no responde a la necesidad de tratar la prueba para identificar la naturaleza de la imputación del delito cometido por el agente.

PALABRAS CLAVE:

Procedimiento penal; teoría híbrida; argumentación; narrativa; historia.

RESUMO

Este artigo procura investigar o uso de argumentos e narrativas no campo das teorias que lidam com a questão da evidência: a *Story Model, a Anchored Narratives Theory e a Hybrid Formal Theory of Arguments and Stories.* É questionado se o processo normativo-instrumentado de verificação de provas, formulado na teoria híbrida, responde à necessidade de lidar com provas para identificar a natureza da imputação do crime cometido pelo agente. Argumenta-se que a teoria híbrida não aborda a questão da prova quanto à natureza da imputação da responsabilidade criminal do agente; ou seja, não procura identificar se o ato criminoso foi perpetrado intencionalmente ou de forma imprudente. Conclui, argumentando que a teoria híbrida não aborda a necessidade de lidar com o teste para identificar a natureza da imputação da infração cometida pelo agente.

PALAVRAS-CHAVE

Procedimento criminal; teoria híbrida; argumento; narrativa; história.

1. INTRODUCTION

This investigation is inserted in the dogmatic context, which involves alternative proposals to the problems of imputation of criminal responsibility, having as protagonist the judicial artificial intelligence that, along with neuroscience, has sought to better make responsible the offending agent, acting as auxiliary sciences of the criminal sciences, in the search of evidentiary truth in matters of imputation. In this context, the search for a scientific truth in the imputation of criminal responsibility – based on discourse and narrative – inserts the hybrid formal theory of arguments and stories, by Floris Bex and colleagues, among the mandatory reading of legal literatures, and it is about this modern evidentiary perspective that this work deals with.

In this way, the objective of this work will be to investigate the use of arguments and narratives in the scope of theories that deal with the question of proof, namely the *Story Model*[1], the *Anchored Narratives Theory*[2] and the *Hybrid Formal Theory of Arguments and Stories*[3], this last one, formulated from the first two. Despite the fact that the authors of the *hybrid theory* claim to have solved the problems presented by the antecedent theories, at least one question arises: have the problems presented in the antecedent theories, such as the possibility of error in the process, been overcome (as their authors assert) heuristic of anchoring stories, which appeared in *Anchored Narratives,* especially in complex cases, the *hybrid theory,* as the last figuration of the state of the art, presents itself free from other critical problems, such as the issue of lack of evidentiary treatment, aiming to identify the nature of the agent's imputation of criminal liability? In other words: The normative-instrumentalized verification process of evidence, along the lines formulated by *hybrid theory,* based on the joint use of arguments and narratives, considering the evidence (taken

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1. *Pennington, N., & Hastie, R. 1993.*

2. *Wagenaar, W. A.; Van Koppen, P. J.; & Crombag, H. F. M. 1993.*

3. *Bex, 2011.*

here as constructors of frames of reference[4]) and the general knowledge of common-sense world around us, as tools to establish the facts of the case), meets the need for treatment of the evidence in order to identify the nature of the imputation of the crime committed by the agent?

Using the bibliographic-qualitative research method, in an exploratory and dialectical way, within the scope of the preceding theories, and in the context of a practical rationality, I will argue that *hybrid theory,* like the theories that preceded it, does not face the question of proof as much as to the nature of the imputation of the agent's responsibility, i.e., it does not seek to identify whether the criminal fact was perpetrated by way of *intention* or *recklessness.* In this way, I think that pointing out irrefutably the nature of this imputation is fundamental for the subsumption between the factual-evidence context and the respective reprimand on the agent causing the harmful result to the protected legal interest. Therefore, with the possibility of verifying the absence of treatment of this issue, the relevance of this investigation is evidenced.

Despite the fact that *hybrid theory* is eminently a *normative theory of proof and evidence,* which in this scope is of interest to criminal proceedings, one cannot lose sight of the fact that, apparently, what its authors (Bex and colleagues) intend to do is to a counterpoint to practical rationality (in addition to using scientific rationality as a normative parameter). And because of this *dual rationality* and the psychological approach present in the theories visited, for the investigation of the problem posed, it will be necessary to dialogue with both philosophy and psychology, considering for this, that it is a theory whose theoretical basis is in an empirical rational context, where there is the formation of a proof process that needs to attend no longer to the free conviction of a judge[5], but, apparently, to a set of algorithms that, in addition to leading to the imputation of facts to the agent, needs to indicate with the same precision the nature of this imputation, as a *conditio sine qua non* to a fair punishment and the realization

of the right, which is embodied in the delivery of justice.

Thus, considering the complexity presented by this theory, mainly for its logical character in the formation of a proof process managed from algorithms in the scope of scientific rationality, there is no way to incur in it without first weaving, even if in a perfunctory way, a historical foreshortening of its dogmatic precedents. Therefore, discussing the question of evidence as a necessary element for criminal instruction, imposes the presence of interdisciplinarity, since more and more areas of science are included in the theoretical context of the evidentiary field, and because of that, its study progressively presents a multidisciplinary character, such as what is observed when a judge, for example, makes use of mental processes in the form of representations that allow them to infer situations and then form a judgments of values when deciding. This activity is better understood in the doctrinal context of psychology, where the perception of this entire mental process is possible.

It is well known that the emergence of theories dedicated to investigating the question of proof has as its main source the dissatisfaction verified from the results of processes that often offend common rationality, that is, our common understanding of the world in our social context, about what is *right* and *wrong* or *fair* and *unfair.* In this area, the main focus of this dissatisfaction is the judge's discretion in the activity of appreciating and evaluating the evidence, where his conviction often touches the real values of the evidence that emanate from a process, and in this problem lies the need to increasingly investigate and present feasible alternatives to better appreciate the evidence in a process, because: First, it is not credible people still believe in the dogma of judgment according to the judge's conscience (based on his free will to appreciate and value the evidence); second, we cannot ignore the fact that the histories constructed in a processual march from the evidence there, reach different echoes depending on who interprets them.

And it is with this perception that evidence tells stories, and these stories lead to evidence that, if well argued, allow us to safely point out both the authorship of the fact and the type of imputation to be attributed to the agent in the form of criminal responsibility for the result of a crime. conduct, which also supports the relevance of this investigation. And it is with this perception

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4. *Haldar, 1991, p. 189. According to HALDAR, not only constructors of frames of reference, but, by its very nature, evidence "splits/connects the internal world of the courtroom with the external world of reality".*

5. *Understood in this work as the recipient of the evidence in any of the phases, it can be either the Police Authority in the presidency of the Investigation, the Public Ministry or the Authority of the Judiciary in the presidency of the process. All these actors, therefore, at some point and within the limits of their respective competence, are dedicated to judging the elements of evidence.*

that evidence tells stories and they lead to evidence that, if well argued, make it possible to safely point out both the authorship of the fact and the type of imputation to be attributed to the agents in the form of criminal responsibility for the result of their conduct, which also supports the relevance of this investigation.

In this sense, it is a fact that the theories that deal with the evidence, namely the *hybrid theory,* are only dedicated to studying and pointing out ways for the effectiveness of the evidence that concern the authorship of the fact, and apparently, not to the modality of imputation of responsibility that must be attributed to the agent.

This work is divided into two parts, the first part will deal with the argument and narrative in the evidentiary context, where I will analyze the theories that preceded the *hybrid theory,* such as the *story model* and the *anchored narratives theory.* And in the second part I will deal with the *hybrid theory* itself, where the main criticisms made to this conception of proof reasoning will be faced, such as the question of the preponderance of the episteme in this entire dogmatic context. The second theme of this part concerns the lack of treatment of the nature of the imputation of criminal responsibility in the agent's conduct.

2. ARGUMENT AND NARRATIVE IN THE EVIDENCE CONTEXT

2.1.   Preliminary and conceptual considerations

The hybrid theory deals with a way of reasoning the proof from evidence, normatively, from approaches that focus on both argument and narrative. The conceptions verified in it show it is a conceptual product formed from several antecedent legal theories that deal with the evidence in the process. Therefore, until Floris Bex, first individually as part of a doctoral thesis[6], and then, more consistently and with colleagues, formulated his *hybrid theory,* a number of authors were committed to standardizing and reducing bureaucracy in the question of proof. In this first part of the investigation, within the scope of argumentation and narrative in the evidentiary context, I will deal with the historical precedents of hybrid theory and the set of doctrines that preceded it, however, I will first make some

conceptual and explanatory comments on narrative and argumentative discourse, and on the evaluative methods of proof from a holistic and atomistic view. Then, after visiting Wigmore's method[7], I will deal with the theory of Bennet and Feldman[8], and then address some aspects of the *story model theory* and the *anchored narratives theory.* The main objective of the incursion into each of these topics will be to verify the treatment given to the question of proof, as well as, to what extent, they dealt or not with the nature of the imputation in the agent's conduct. And if the aforementioned methods of proof defended as sufficient to point out the link between the fact and the author would also serve to establish the nature of the agent's imputation, whether from arguments or narratives, that is, from a holistic or atomistic nature.

2.1.1. Narrative discourse

It is no secret that the constant evidence in a process allows narratives to be constructed, but that they do not always meet the rational expectations expected from the systematic use of causality and coherence as tools for this. In fact, coherence is the least possible to be expected in a discursive narrative, as it is in the process, considered as a dialogue between the parties and the evidence contained therein, or even as "a situation in which people tell stories that are fundamentally similar to a romance"[9], is that you have the credibility of what is said as a protagonist. As Taruffo states, "the only criterion that can be used to give credibility to a specific utterance is its coherence in the global context of the judicial dialogue or within the specific <<narrative>> told by a subject in the course of the process"[10]. In this context, eventually, when constructing their narratives, the judges would only be touching the narrative that, in fact, emanates from the evidence in the process, since such a narrative is the product of an individual judgment of values and not immune to possible personal contamination. The power of a narrative discourse ('a good story') can also be seen in the real possibility that the creation of generalizations dissociated from the evidence set, serves only to form pre-established and gradually structured judgments, from contextualized complements in the absence of factual reality, to

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6. Bex, 2009.

7. Wigmore, 1937.

8. Bennet, 1981.

9. Taruffo, 2014. p. 27

10. Taruffo, 2014. p. 27.

the total detriment of principles such as legality and contradictory, as if it were the best choice of a game of narratives, as if the process ended in that game, as if the process ended in such a game, which is not believable to be admitted[11]. In fact, on the power of a well-told story, there is the opinion of Bennet and Feldman, for whom true stories can be replaced by "good stories"[12] and, as Taruffo warns, "coherent and persuasive narratives can be false or [...] may not claim to be true[13]" This gap that is often seen in the process of assessment and evaluation of the evidence is what has motivated theoretical studies increasingly closer to the factual-procedural reality, and which has offered important contributions to judges, helping them to understand and build narratives. Also, allowing their decisions to be increasingly aligned with what the facts and evidence say. In this context, asking coherent and reasoned questions is no longer just a simple activity and becomes something essential for the formation of an organized narrative discourse linked to the knowledge of the judges.

To a large extent, the construction of a narrative requires a previous prudential analysis of all the facts brought to the process, which will constitute evidence, however, as products of a rationally structured reasoning on the judge's previous knowledge. This need was already pointed out by Anderson and colleagues[14], for whom, in large cases, the sources of doubt in reasoning should be identified and substantiated based on these concerns. It is not by chance that it was from the exercise of this discursive practice in judgments of concrete cases that researchers sought an explanation for the preponderance of narrated stories as an instrument of evidence, especially theories such as the *story model* and the *anchored narratives theory*. In the same sense, the argumentative discourse gained special prominence as an object of study, often presented as a systematic opposition to the narrative discourse.

2.1.2. Argumentative speech

Differing from the narrative discourse by the presence of one or more interlocutors, the argumentative discourse, as a dialectical communicative process, aims, from the application of the best rhetoric, to establish the truth of those who argue and sustain a certain point of view, or idea that shows itself relevant not only for judgments in the legal field, but in the political environment, given its importance for the maintenance of the democratic system itself[15]. Arguments, as well as narratives, whether expository or descriptive, lack the same form of foundation and rationality from the understanding of the world in general. An argument of denial or acceptance of a certain thesis can use as a basis (foundation) another argument, as long as it is in the same way consistent with the rational understanding of the world pertaining to the society where it is presented; not forgetting that a bad argument can severely compromise a good next argument.

The use of arguments in isolation in a legal context of a trial can compromise the truth of the narrated facts, depending on the persuasive degree of the rhetoric, and in moments like this, there is the importance of counter-arguments. The most frequent example is the argumentative speeches between the prosecution and the defense in the search for conviction or acquittal, respectively, where rhetorical language is the only and consequently the main tool and the quality of the argumentative speech is often fundamental for a "victory" of the prosecution or defense, to the detriment of the truth (set of evidence) that emanates from the facts contained in the case file. This is because, first of all, the argument seeks to convince, which is the establishment of the truth of the one who emanates it, regardless of the evidentiary truth, based solely on the logic traced by the speaker. As Canzio and colleagues teach: "the process needs to be oriented towards the search for the truth of the facts, because it is necessary for the purpose of the correct application of the rules that regulate the case, since this application presupposes and requires

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11, Canzio, Taruffo & Ubertis. 2018, p. 316. As Canzio and colleagues assert, "Contrary to what philosophers think, the process does not end in a game of narratives or interpretations. In the process, very real things like the life, liberty, rights and wealth of real people are at stake and therefore an ontological option of a realistic nature is inevitable. The process is concerned with real-life and real-world events, even if it has only to do with statements or narratives about them, and therefore necessarily tends to reconstruct these events.

12. Bennett & Feldman, 1981, p. 66 and following.

13. Taruffo, 2014. pp. 27 - 28. According to the author: "This is the main argument for rejecting any theory of truth as simple coherence in the judicial context". Ditto, p. 28.

14. Anderson, Schum & Twining, 2005.

15. Martins, Roesler & Jesus, 2011. Discussing this topic, Martins and colleagues will add that: "with the loss of the explanatory force of tradition and authority as justifications for political power, what remained, as a source of legitimacy, was the rational argument, the persuasive force of reasons, the possibility of demonstrating the point of view. In fact, it is possible to say that the debate of opposing arguments and points of view is constitutive of the idea of democracy. Hence, the interest in knowing how to argue well appears almost as a natural consequence of life in this type of society".

the existence of facts, which are on the basis of the legal situations shaped by the rules"[16].

2.1.3. Evaluative methods of proof (holistic and atomistic)

The search for the best way (method) to obtain the desired truth of the facts has been the most important beacon of researchers who dedicate themselves to investigations on the general theory of proof. In this sense, finding the best way of evaluating evidence has been the object of study of these researchers who, in addition to seeking the truth of the facts, seek to show the best way to obtain it. And it is in this context that the *atomistic* and *holistic* ways of rationing the evidence arise, ways that have guided the main theories emerged to help in the search for the aforementioned truth, either from the analysis part by part of the evidence whole (atomistic method), or from this whole as *one* (holistic method).

In the atomistic method, the set of evidence in the midst of a process, also called evidence, is assessed by the judge individually, isolated (independently) from the others, one by one. This critical analysis of each piece of evidence individually allows its valuation and use in the process. In this method, arguments and stories are considered in isolation, allowing the judge to substantiate and value item by item of the set of evidence, in order to form a judgment. A pioneer in this model of assessment and evaluation of evidence is Wigmore, which uses symbols and signs as useful tools to identify the nexus between arguments, generalizations, propositions and assertions.

When using the holistic model of evidence, the judge's intention is to form a narrative that gives the answers required by the evidence, explaining them and linking them to the respective causalities, where in the end the doubt about "what happened" remains in the specific case; thus, allowing greater accuracy and coherence between the value judgment and the reality of the facts. In this method, the probationary set of evidence is assessed as a whole, and no longer individually, and in this way, facts and versions are assessed globally, without any distinction between the elements of proof. Thus, eventual contradictions or simple mismatches are not taken on a case-by-case basis, but as a whole. Starting from the narrative presented, the judge

appreciates the elements of proof, as a evidence uniqueness, seeking to confront them to verify eventual contradictions and impertinence, confirming in the end the presence of coherence and causality.

While in the atomist model there is greater diversity of stories, given the individualized analysis of each element of evidence, in the holistic method there is the complete story of the case in a narrative context that makes it, depending on the discursive quality, attractive and convincing, where what listeners most want is to believe the narrative. A well-constructed story is the product of the best argumentative rhetoric techniques, and depending on the exposition, they close the eyes of judges and jurors to other important elements of evidence, such as other facts and important details that would deserve and should be observed. In this context, they can play the role of apparent completeness to gaps that arise in certain situations.

However, well-articulated stories based on the evidence set (facts and evidence) can function as an essential element for the formation of the judgment of those who judge. They are called stories with a beginning, middle and end, as they link the different elements of evidence (facts and evidence) in a logical-temporal chronology. And it is concretely in this context of the union of good narratives and good arguments that the "truth" (yes, in quotation marks, given its relative nature) arises in trials, and this has been the reality of the courts – a reality that has functioned as motor-traction for researchers in the scope of the general theory of evidence.

2.2. Precedents of the stories

The rhetoric that gained contours and logical foundations at the hands of the humanist Rudolphus Agricola (1444-1485) in his work *"De inventione dialectica"* is a systematic critical essay on various ideas related to dialectics, which has been fundamental for the development of the argumentation. Agricola's work on dialectics served as a foundation for the construction of arguments that do not always lead to the logical truth of the facts, however, they present strong rational foundations that allow their acceptance. For Hamilton, the meaning of *"De invente dialectica* for the history of argumentation is that dialectics came to be associated not so much with truth and

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16. Canzio, Taruffo & Ubertis. 2018, pp. 315 – 316.

logic, but with what could be said within reason[17]." According to Moss, "for Agricola, dialectics was an open field: the art of finding 'everything that can be said with any degree of probability on any subject'"[18]. The quasi-promoting of an argument devoid of logic and contrary to the evidentiary context, that is, to the truth of the facts, and yet capable of supporting narratives, convincing and influencing decisions in court, finds its roots in Agricola's teachings. Perhaps therein lies the justification for the criticism of Aroso Linhares who, dealing with the possibility of considering the *factum probandum* as a real factual constellation, will assert that this possibility is partly due to the Agricola's work, in which a "specific subordination of topics and rhetoric to dialectics and the reinvention of dialectics under the spell of the necessary syllogism[19]."

However, according to Twining, for Bentham, "the field of evidence is none other than the field of knowledge[20]" and Bentham himself is the one who best represents a rationalist tradition of thinking evidence based on evidence. In this regard, Twining brings us three specific postulates of Bentham. According to this author, "a method of judicial fact-finding is 'rational' if, and only if, judgments about the likely truth of claims about the facts in question are based on inferences from relevant evidence presented to the decision maker.[21]" For Bentham, "the validity of inferences from evidence is governed by the principles of logic, the characteristic mode of reasoning appropriate for forming and justifying probability judgments about alleged facts is induction, with deduction playing a secondary role"[22]. Finally, "the application of the principles of induction to present evidence makes it possible to assign a probable truth value to a present proposition about a past event"[23]. It is from Bentham and his theory of evidence stamped in his main work on evidence[24], which there is greater depth in the evidentiary theme. The special emphasis is on Wigmore[25], who fought for a reformulation of the rational principles that lend themselves to reasoning evidence from

evidence, independently of rules and laws. The pioneering spirit and importance of this author in the context of argumentation through evidence can be measured by his legacy, especially by what became known as *Wigmore Diagram*, which aims to give prominence to the relationship between the evidence and the propositions necessary for the argumentation from mentioned elements. In this author's method, all arguments are organized and handled from symbols and signs, pointing out links between arguments, generalizations, propositions and assertions. Seen from this point of view, the arguments represent links that need to be permanently connected; they need to be based on the whole of the narrative, otherwise it is not sustainable and undermines the argumentation as a whole.

However, despite allowing the deepening of important issues in their smallest details, this method is not reasonably accepted in terms of normative requirements, as it has some weaknesses, insofar as it does not satisfactorily indicate the admissibility criteria of the elements of evidence, and how they should be presented in court. With an eminently atomistic bias, Wigmore's method suggests a series of questions, apparently simple, aiming to build a narrative, to a large extent, segmented point by point from the analysis of the concrete case, which allows the individual evaluation of each element of evidence contained in the case file, and only at the end is a clear image of the entire case obtained.

2.3.   Story model theory

One of the first works to support the importance of stories in the legal environment, defending that criminal trials are organized around narratives, were Bennet and Feldman's[26], who, however, did not present any normative scheme, but a descriptive one for the appreciation of the evidence. However, the work of these authors was of paramount importance to their contemporaries, Pennington and Hastie[27], who developed the *story model* theory, with a special focus on the cognitive processing of jurors during the trial. It is a causal theoretical model of events, in which they hold that a story is essential for the construction of an understanding of evidence and its implications, which is capable of altering the jurors' understanding of them, using the judges' instructions. One of the points of support

17. Hamilton, 2001.

18. Moss, 1996, p. 77.

19. Aroso Linhares, 2012, p. 68.

20. Twining, 2019.

21. Twining, 1985, p. 14.

22. Twining, 1985, pp. 14 –15.

23. Twining, 1985, p. 15.

24. Bentham, 1827, 1838 – 43.

25. Wigmore, 1937.

26. Bennett, 1981.

27. Pennington, N., & Hastie, R. 1993.

of the *story model*, which makes it relevant by allowing greater confidence in the stories[28], is the path presented by the authors for the certainty of their evidentiary conclusions, defending that it should be anchored in the following principles: authenticity, coherence, coverage[29], and contextualization – determining factors to point out which story and decision should be accepted, as well as the level of confidence in the decision made. Dividing the possible verdicts into categories, the *story model* uses as main components the evaluation of the evidence, the representation of possible decisions and the making of a decision based on the classification of the historical, considering the most appropriate category of verdict. They affirm that the final decisions of the judges are made from stories that they build during the trial, considering the causal and intentional relationships between the events. From the understanding of "what happened" in the specific case, and considering the plausibility of the stories, meanings are attributed to the evidence of the respective stories, and in this way, the judges' understanding for decision making has been facilitated.

In essence, the *story model*, as has been said, is a descriptive theory, like the model created by its predecessors Bennett and Feldman, it presents the roadmap followed by the judges for decision making, and not a conclusive opinion, about the way in which the evidence must be appreciated and valued. And so, at this point, it is a theory that may serve well as a basis for any other evidentiary model based on the evidence, because they show that the stories considered by the judges for decision-making are, to a large extent, connected to each other, despite the predominance of the quality of the story being presented with great preponderance. This relationship of rational interdependence will serve as the basis for the proposition of the *Anchored Narratives Theory*, which will be discussed next.

2.4. Anchored Narratives Theory

Created by Wagenaar, Koppen and Crombag, the *Anchored Narratives Theory*[30] is namely a normative theory of proof and evidence, and was based on previous conceptions, seeking to improve them in their weak points, such as the lack of appreciation not only in relation to the quality of the story, but also its logical-rational relevance, being this aspect what they consider most original. These authors, in addition to using stories in their bases, adopted a strong empirical-scientific foundation, as they analyzed 35 concrete cases, thus offering "a solid basis for a natural theory of evidence and proof[31]." In this theory, the stories are anchored to each other from the evidence (interpreted from the stories), almost as a rational-empirical necessity and as a condition of valuing one in relation to the other, they lack rational dependence between them, considering for that, criteria such as coverage[32], coherence[33], originality, and contextualization.

The use of narrative anchored in another narrative does not put an end to the empire of "good stories", because if the evidence does not provide the necessary clarification, the good and well-told story ends up influencing the formation of the evaluative judgment[34], however, the theory establishes the paradigm that a story not only needs to be good, to be accepted, but also based on evidence that originates from another story, which passes like this, becomes evidence too, in a hierarchical and vertical structure in stories, sub-stories, sub-sub-stories etc., that is, in a chain formation (1-1.1-1.1.1-1.1.1.1-....). The limit that is imposed on this deepening of anchoring is the emergence of a story that is accommodated in common sense, that is, when it is accepted

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28. Bex, 2011, p. 72. Pennington and Hastie provide a model that is primarily descriptive: the criteria that determine confidence in a story (i.e., evidence coverage, consistency, and, coherence) can be used as guidelines or heuristics in a normative theory, but the main focus of these authors is to describe how people reason with evidence.

29. Bex, 2011, p. 240. Regarding coverage, as a principle conceived by these authors, Bex points out a criticism of the lack of definition, both in relation to coverage itself, as to evidentiary support, adding that "Bennett and Feldman say nothing about evidential support or coverage. and no longer define their notion of "ambiguous connections" (i.e., implausible stories)".

30. Based on the previous book Dubieuze Zaken: De Psychologie Van Strafrechtelijk Bewijs, H. F. M. Crombag, P. J. van Koppen, and W. A. Wagenaar, Amsterdam: Contact, 1992.

31. Bex, 2011, p. 238.

32. Bex, 2011, p. 240. Bex, 2011, p. 240. Regarding coverage, as a principle conceived by these authors, Bex points out a criticism of the lack of definition, both in relation to coverage itself, as to evidentiary support, adding that "Bennett and Feldman say nothing about evidential support or coverage. and no longer define their notion of "ambiguous connections" (i.e., implausible stories)".

33. Taruffo, 2014. p. 28. On this criterion Taruffo will say that to some extent, the narrative coherence of statements and reports is relevant in the judicial context. According to him, "in fact, coherence can function in some cases as a criterion for choosing one among different reconstructions of the fact based on the same evidence". However, the author, exercising caution, maintains that "the narrative coherence of the judicial reports" does not "need to be considered the only relevant dimension in which judicial truth can be conceived".

34. Wagenaar, Van Koppen e Crombag, 1993, p. 231.

without dispute by the parties, considered as uncontested. According to Boer, anchors "are actually propositions or supporting facts derived from general rules; these rules are in turn derived from the general and indisputable common-sense knowledge of the world[35]." Not being considered safe by any of the parties, the anchors are naturally destroyed, as they lose support. In this anchoring process, the story or narrative is used as a starting point for all evidentiary reasoning, where the judge seeks in the evidence produced in the trial, the necessary support to confirm the story[36].

According to Wagenaar and colleagues, the difference is that, given the possible fragility of a "good story", it is necessary to appeal to the notion of knowledge about the world, as a parameter for certifying this story. In other words, they demand that the story should be anchored in generalizations based on general, common and rational knowledge about the world, which means it cannot be a story with no sense. This connection is called the anchoring of story. If this anchoring is not possible (either because of the fragility of the story, or because of the impossibility of anchoring), the process is interrupted at the mercy of the judge. To solve this problem, the authors propose an analytical process as a means of improving the story. However, the authors go further and offer a kind of manual that teaches how to reason and interpret stories based on evidence, and in a heuristic process they present 10 (ten) rules called *universal rules of proof*, in order to avoid errors[37].

In the sequence (logical, vertical and hierarchical) of anchoring the stories, the evidence is analyzed from the criteria for accreditation[38], and based on universal rules, seeking consensus (common sense) between the parties as a means to recognize them as true, which implies understanding that the stories are anchored from rules accepted by the parties, which is, from a consensus between them, coming from the mentioned chain of sub-stories, where, in fact, what you have is an anchoring process, where each trial faced is, in fact, a sub-story of the previous story, until reaching the main one.

Silva points out that, on the basis of the decision-making processes, there are no differences between the *story model* and *Anchored Narratives* because, while "the first assumes that prior knowledge of the world is at the base of the construction of stories, the second argues that the narratives constructed and the evidence found must be anchored in general rules of common sense"[39]. And so, according to this author, the *anchored narratives* "do not really innovate in relation to what is already naturally done by the judges. It may succeed in improving the valuation of narrative-based evidence, but it still fails for lack of concern for the empirical evidence of the claimed data"[40]. Another criticism pointed out in this theory is regarding the evaluation of the quality of a story as a whole. According to Bex and colleagues, the exact role of models such as the one proposed by Pennington and Hastie for this purpose is still unclear[41]. Bex also points out some problems regarding the ambiguity that would exist in some cases, such as in a main story in relation to a general story, where, according to Bex and colleagues, "the main story in a case is the same as Pennington and Hastie's general story, the sub-stories are of an unspecified form"[42]. Another ambiguity cited by this author is the lack of clarity about the anchoring of stories, because Wagenaar and colleagues, while sometimes maintain that

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35. Boer, 1995, p. 327.

36. Calheiros, 2015. p. 181.

37. Bex, 2011, p. 237. About the rules of Anchored Narratives, we will not go into the merits, but we will list them here. These are: 1. The prosecution must present at least one well-formulated narrative; 2. The prosecution must present a limited set of well-formed narratives; 3. The essential components of the narrative must be anchored; 4. Anchors for different load components must be independent of each other; 5. The judge must actually justify the decision, specifying the narrative and the anchor that accompanies it; 6. An investigator's decision on the level of evidence analysis should be explained through an articulation of general beliefs used as anchors; 7. There should be no competing stories with equally good or better anchoring; 8. There must be no falsifications of the prosecution's narrative and nested sub-narratives; 9. There must be no anchoring in obviously false beliefs; 10. The charge and the verdict must contain the same narrative; Bex adds that: "the ANT authors do not claim that the list of rules is exhaustive or that using these rules will not lead to errors; rather, the list should be considered complementary to the anchoring process". Also, according to Bex, about the authors of Anchored Narratives, "they also recognize that in complex cases it is easier to make mistakes in the anchoring process and that therefore heuristics may not be enough".

38. Bex, 2011, p. 240. At this point, we have the criticism of Bex, who adds that "in their rules of evidence, Crombag and colleagues provide various criteria for judging a story, but they no longer define them". As a result, they add that "the criteria for the quality of a story are more extensive and clearly defined in the hybrid theory than in any of the story-based models".

39. Silva, 2017, p. 43.

40. Silva, 2017, p. 43.

41. Bex, Prakken & Verheij, 2006, p. 9.

42. Bex, 2011, p. 238. According to this author, "the ambiguous presentation of ANT can cause some misunderstandings about the theory". Ditto, p. 239. Bex also cites Twining (1995, p. 110), who points out that the theory of anchored narratives does not consider concrete evidence or generalizations of specific cases".

a story is anchored in common knowledge, at times maintain that a story must be anchored in evidence[43]. In yet another critique, Bex will say that "theories purely based on stories require observations to be explained by the story, but it is unclear whether these observations are the actual evidential data itself or the events that follow from the evidence"[44]. Still according to this author, "this implicit connection with the evidence makes stories dangerous, because a coherent story can be more believable than an incoherent story, but supported by evidence"[45].

The *anchored narrative theory,* before being opposed by the *hybrid theory,* was confronted by the so-called *theory of dialectical argumentation[46]*, conceived individually by Verheij that, likewise, it was supported by a computational model based on arguments, the *ArguMed.* According to this author, some differences were noticeable between both theories, because while the theory of anchored narratives is based on stories, his theory of dialectical argumentation was based on arguments. According to this author, some differences were noticeable between both theories, because while the theory of anchored narratives is based on stories, his theory of dialectical argumentation was based on arguments. Furthermore, the theory of anchored narratives was formally less explicit than the theory of dialectical argumentation; while the stories would be formulated in natural language, the arguments would have a formal and logical structure. And yet, while the theory of anchored narratives would be empirically supported by real and doubtful cases, the theory of dialectical argumentation was supported by computational models. Still, according to Verheij, the theory of anchored narratives would also discuss 'non-logical' elements of legal decision-making, as in the discussion of the quality of stories, where the particular elements of a good story are prescribed. Punctually, this author criticized the illogical way of dealing with the question of imputation (*mens rea*), while the theory of dialectical argumentation would do it in a totally logical way, however, our

author does not explain how[47]. Finally, this author points out that the theory of anchored narratives speaks of anchors, while the theory of dialectical argumentation deals with guarantees and supports.

Criticism aside, as a matter of fact, what we have is that the *Anchored Narratives Theory* represented a great advance in the treatment of evidence through stories, raising the narrative discourse to an important level of relevance. The anchoring of stories from evidences and generalizations is, to a large extent, with the exception of exceptions, an argumentative practice presented by theory. Allied to this, the fact that Pennington and Hastie, still in 1993, defended the possibility of inferring events in a story from evidences combined with knowledge of the world[48], this theory is considered substantial and quite relevant to the formulation of the hybrid theory. As Bex asserts, "both the Model of Story and the Theory of Anchored Narratives can be considered as a first step towards an argumentative approach based on fused stories"[49].

3. FORMAL HYBRID THEORY OF STORIES AND ARGUMENTS

As its name implies, the formal hybrid theory is about *arguments and narratives*. Improved by Bex, Koppen, Prakken and Verheij, from Bex's initial studies, the *hybrid theory*, as the author announces in his book, improves both the *story model* and the *anchored narratives* in several aspects, such as the problem of ambiguity in the concepts of argument and narrative, using them as tools in the proof process[50], which in theory corrects the problem. In *hybrid theory,* stories are handled in the form of causal chains and serve to explain what the authors call *explananda,* serving to offer a broad notion of what actually happened[51], while arguments based on evidence (on which the stories are anchored) and in common sense knowledge are used (in a different way from *anchored narratives[52]*),

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43. Bex, 2011, p. 239. For this author, "none of the models (story model and anchored narratives) is a purely story-based approach" (Parenthesis ours).

44. Bex, 2011, p. 239.

45. Bex, 2011, p. 239. Still for this author, "the link between a story and evidence can be very strong, while other evidence can have only a weak connection with the story. Pennington and Hastie's coherence principles provide some clues for determining the inherent plausibility of an explanation, but they do not define criteria precisely."

46. Verheij, 2001, p. 11.

47. Verheij, 2001, p. 11.

48. Pennington & Hastie, 1993a.

49. Bex, 2011, p. 239.

50. Bex, 2011, p. 239.

51. Bex, 2011, p. 101. The explanation of what may have happened, according to these authors, is based on the "combination of hypotheses and causal theory" which, according to them, "can be seen as a story about what may have happened".

52. Bex, 2011, p. 240. Instead of taking generalizations or common-sense rules as a foundation, as in anchored narratives,

to support and at the same time attack these stories[53], reasoning about their plausibility and coherence[54], functioning as a test factor that, if approved, come to bear a kind of evidentiary veracity seal, however, keeping the argumentative approaches and individual narratives intact, also naming the connection between evidence and history as an anchor chain[55]. It is, therefore, a theory that reasons with evidence in order to determine the facts as reliable as possible in a criminal case, using the arguments and narratives related to the case as tools.

Emphasizing eminently legal-procedural issues, such as the admissibility or not of certain evidence, the hybrid theory focuses on the evidentiary process, where facts of the concrete case are determined from connections carried out between arguments and narratives. In this context, the real story of a crime is never the same as another, because time, place and facts (*modus operandi*) matter and make the difference, thus, being told by police authorities, the Public Ministry or the Judiciary, can be covered it in different ways depending on the arguments and narrative presented. If, for example, the approach to the facts is based on arguments, which requires reasoning with evidence, the motivational factors (for and against) that led to the occurrence of the result are considered relevant, and in this area, the importance of testimony of witnesses. If, on the other hand, it is an approach based on a story, the evidence assumes the leading role, since it is evaluated from a factual story perspective. As the authors point out, in the hybrid theory, the use of the story schema as a general model of story in abductive reasoning is a differential in relation to

the *theory model*, which uses the schemes to judge the quality of the story or match that story to the respective quality of the verdict[56].

In the end, the hybrid theory, as its authors assure, "is the basis for software design developed as a tool to make sense of evidence in complex cases"[57]. Hybrid theory, therefore, is "a logical model of abductive inference"[58], which takes as a starting point a causal theory and a set of observations that must be explained, called *explananda*, producing as an output a set of hypotheses that explain explananda in terms of causal theory[59].

3.1. Hybrid nature (holistic and atomistic)

By bringing together two distinct conceptions to deal with evidence, one based on arguments (*theory model*), and consequently with an atomistic bias in its process of treatment of the evidence, and another based on narratives (*anchored narratives theory*) and, therefore, with treatment of the evidence from a holistic perspective, Bex and colleagues justify the denomination of hybrid to their theory. According to these authors, arguments and stories need to be combined in a hybrid theory that fully combines atomistic and holistic approaches, as, according to them, there are cases where "a causal, holistic and more story-based approach works better", and there are others, in which "an evidential, atomistic and argumentative approach is the most natural"[60]. It is important to emphasize the relativity of this distinction between atomistic and holistic approach methods, since, in practice, what defines an atomistic or holistic approach is the modeling that is carried out during the treatment of evidence. This is the case, for example, of an approach to arguments based on abstract structures, when, in this case, the application of the holistic and non-atomistic method would be applied, understandably, as it would provide an overview of how the evidence interacts, sacrificing the details of exactly how conclusions

in hybrid theory there are two types of anchoring: internal and external, i.e., from causal generalizations representing the relationships in the stories and evidential generalizations in evidence arguments, which are not necessarily part of that story.

53. Bex, 2011, p. 53. According to Bex, "These arguments can be attacked and defeated, thus making it possible to reason in detail about the extent to which a story agrees with the evidence."

54. Bex, Koppen, Prakken e Verheij, 2010, p. 15. According to Bex, "The coherence of a story is also a matter of argument: arguments that are not based on evidence, but rather on general common-sense knowledge, can be given to support or attack a story. In this way, the plausibility of a story (that is, its conformity to our common-sense world knowledge) can also be discussed in detail. Finally, stories can be compared according to their consistency and the extent to which they agree with the evidence of a case".

55. Bex & Verheij, 2010, p. 4. What Bex and Verheij argued were "communicating vessels". According to these authors: One of the lessons learned from working on hybrid theory is that stories and arguments are essentially 'communicating vessels': when dealing with the complex reasoning involved in large criminal cases, a narrative approach works best for some points in a case, while in other cases an argumentative approach is the most natural."

56. Bex, 2011, p. 240.

57. Bex, Koppen, Prakken & Verheij, 2010, p. 1. According to Bex, 2011, p. 240. "The theory must be formally specified with an eye to software development, so that it can act as a proper foundation for AVERS." AVERS (Story-Based Argument View for Evidential Reasoning).

58. Bex, Koppen, Prakken & Verheij, 2010, p. 15. Also in Bex, 2011, p. 101.

59. Bex, 2011, p. 85.

60. Cf. Bex, 2011, pp. 84-85.

would be drawn from the evidence[61]. Otherwise, it could be said that a story-based approach (which would commonly be considered holistic), where all causal links between events and observations are presented in detail, would be more atomistic than holistic[62]. As a result, this hybrid form, as defended by the authors, could also be called methodological symbiosis (atomistic and holistic), because, on the one hand, it allows, conveniently, and for the sake of treatment and use of the evidence, an *instrumental upgrade* insofar as, for example, in the absence of enough evidence available to the judge, it would be possible to raise the hypothesis of narratives aimed at the complementary orientation of the investigation. On the other hand, arguments would play a leading role when the objective was to organize favorable and unfavorable reasons for, for example, the credibility of a single and important witness.

3.2. Main criticisms on the hybrid theory

3.2.1. The question of the preponderance of the episteme

Still far from becoming an instrumental reality for the issue of evidence in the context of criminal proceedings, as the authors' intention, the hybrid theory has some relevant points of questioning that deserve some attention on my part, such as is the case of compulsory delivery of the treatment of evidence to episteme. At this point, there is Aroso Linhares's work[63] on evidence, due to his intervention at the *III International Conference on Quantitative Justice and Fairness,* at the Faculty of Law of the University of Lisbon, on May 22, 2012, and later presented in two more extensive conferences, in November at the Universities of Warsaw and Lódź, where he raises relevant questions to Bex and colleagues' proposal. This author highlights the importance of not losing sight of the impossibility of separating the modern idea of episteme from the patent reduction of types of rationality. Linhares points out the hybrid theory in the (apological) current of return to the Aristotelian matrix, where the symbiotic relationship among philosophy, individual and society allows new questions and, consequently, new advances, especially in the face of the identity crisis that philosophy often

suffers, whether by dogmatic upsurges coming from academic centers, or by the malevolent ideological politicization of the universities themselves that are subject to state excesses and dismantling. In this context, the rehabilitation that took place from the 1970s onwards, and hailed by Linhares as a *fruitful reinvention*, with the happy combination of the "possibility of an autonomous *praxis-phronesis* with the recovery of the plurality of types of rationality[64]."

In this context, one of the author's main criticisms to the hybrid theory is the prevalence of an incapacity that gives rise to a "need to confine arguments and narratives to the broad horizon of the episteme[65]", which for him does not mean "only reducing the types of reasoning to the Peircean triangle, but also presupposes that the dialogue or even the dialectical scenario (argument and counter-argument) must be directly identified with a formally translatable dialogue game or with the aforementioned defeasible reasoning[66]." According to Linhares, it is possible to speak of "domestication of the argument and narrative to the exclusivity of the episteme", if someone starts from the idea that Bex "accepts without discussion the formalist counterpoint between the law and the facts, regarding the correction of a correspondence theory of truth[67]." In fact, the hybrid theory, when effecting the integration of facts to the norm, does impose a counterpoint to the prevailing praxis of an arbitration model where the knowledge of the judge's common sense is imposed on said facts, leaving no room for any other truth, but that emanates from such knowledge, which evidences the submission of a verifiable truth from the evidence set to the judge's truth, and in this case, unequivocally, there is the acceptance of an "unquestionable" truth, however, relativized by the absence of logical-rational appreciation and valuation, which seems to me to be intended to correct Bex, with his theory, which does not mean to say that there is a total surrender of the system to the episteme, nevertheless, I think it is possible to speak of its preponderance.

There are, however, those who argue that the legal system must go through a kind of "epistemic filtering", aiming to adjust the evidence in the

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61. Bex, 2011, p. 84.

62. Bex, 2011, p. 84.

63. Aroso Linhares, 2012.

64. Aroso Linhares, 2012, p. 71.

65. Aroso Linhares, 2012, p. 76.

66. Aroso Linhares, 2012, p. 76. "Which would still involve reducing reasoning 'to an epistemologically conceived dialectical investigation.'"

67. Aroso Linhares, 2012, p. 78.

legal context to the extra-legal reality of the facts, obviously within legal limits[68]. According to Matida and colleagues, procedures and tools aimed at instrumentalizing or automating the evidence in the process need to be submitted to an epistemic assessment, without, however, neglecting the procedural guarantees, so that, in this way, the process itself is structured from epistemic parameters[69]. Also, according to these authors, "the way in which the evidence is produced matters in the quality of the result they are able to offer. Its objective is to contribute to epistemic institutional designs, that is, conducive to the determination of facts sensitive to extrajudicial reality[70]."

Another issue raised by LINHARES concerns universally rational propositions, which are objects of the reordering proposed by the Bex system, concerning the treatment of evidence that, as we have seen, occurs through the so-called "communicating vessels", which are connections between the evidence and stories. Thereby, is this author interested in knowing whether such connections are "selectively assumed in the generic presupposed claims recognizable in the materials or the empirical data, so that these data can be included in these claims, thus generating the corresponding conclusions?"[71]   In this regard, it is possible to affirm that Bex's proposal contemplates the full evaluation of all evidence elements, submitting them to a careful (hybrid) analysis exams, with the maximum rational control from a predefined and logically plausible model, coming from the common general knowledge accepted in society, and substantiated in the propositions, both the norms previously inserted in the system and the norms that would justify the judicial reasoning of the evidence[72].

Based on these two critical observations, Linhares lists a series of suggestions that, in his opinion, should be part of a system of legal evidence, which, according to the author, would be "an open set of several layers of warrants, licenses of inference, and criteria (principles, policies, rules, canons, mandatory precepts and exemplary practices) that address all possible questions of admissibility, relevance, evaluation,

and materiality[73]." Also according to Linhares, it would be a system composed of "rules of inadmissibility, the principles of *audiatur et altera pars* and free evaluation, the rules of exclusion and *onus probandi* criteria, but also the maxims of experience and all the pertinent canons of common sense knowledge and types of narrative[74]." There should still be interference "within the possibilities of objectification and the different binding presumptions that benefit legal rules, judicial precedents or dogmatic criteria, or at least within the global framework normatively opened through the principle of free evaluation and its dogmatic reconstructions[75]." It would be, then, "a system whose specification must be determined by the explicit objective of guaranteeing the rational conditions necessary to respond to the controversy of evidence, as if they built internally an interdiscourse, but also as if this construction assumed the *modus operandi* of an authentic system/problem dialectic[76]."

Linhares' conclusions, as exposed above, indicate, at the very least, the need to approach results that allow a better evaluation of the Bex's proposal, especially regarding the treatment and results obtained from the narratives against the norms inserted as parameters of appreciation and assessment of evidence. This author denies, therefore, that in his conclusions there is any convergence between narrative and normative or even between two different types of rationality, claiming that the aforementioned narrative paradigm intervenes as a metaparadigmatic resource of a claim (understood as "a constitutive dimension of the autonomous world of the law"[77] of representation and fidelity), insofar as their ways of making sense assume the task of reconstituting practical-normative human events[78], which is precisely what the hybrid theory is about, a claim to make law (at least in theory) in the most correct and fair way possible. In this context, what Aroso Linhares proposes is the development of an argumentative theory, based on a theory of methodological unity[79],

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68. Matida, Nardelli & Herdy, 2020, 8h00, p. 2.

69. Matida, Nardelli & Herdy, 2020, 8h00.

70. Matida, Nardelli & Herdy, 2020, 8h00.

71. Aroso Linhares, 2012, p. 70.

72. On this specific point, check Aroso Linhares, 2012, p. 70.

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73. Aroso Linhares, 2012, p. 87.

74. Aroso Linhares, 2012, p. 87.

75. Aroso Linhares, 2012, p. 88.

76. Aroso Linhares, 2012, p. 88.

77. Aroso Linhares, 2012, p. 88.

78. Aroso Linhares, 2012, p. 88.

79. Aroso Linhares, 2012, p. 88. According to Linhares, the methodological unit has to do with the priority of the controversy - as a specific practical structure, requiring judgment and the constitutive input of the Third Comparator -, while the specificity of the evidentiary judgment corresponds to the irradiance of

dialoguing with Bex[80], Jackson's theory[81] and Boyd White's theory[82], in which he intends to explore possibilities of dealing with the adjudication of evidence simultaneously as a narrative use of language and as a practical-prudential[83] *judicium*. Regarding the latter two, Aroso Linhares understands that despite these exemplary different perspectives, Jackson and Boyd White's understandings of narrative discourse are close, as they provide two powerful parallel paths to overcome the tradition of evidence science[84]. For Aroso Linhares, the methodological unit model provides new opportunities for evidence to be understood and experienced in direct connection with the need to identify the specific project of law and its autonomous practical world as an unmistakable cultural acquisition[85].

Other criticisms are present in the academic doctrinal context, such as that of PEREIRA, who based on what he calls *factual causality*, proposes an argumentative-narrative model, aiming to prove causality in Law[86]. For this author, the problematic aspects of Bex and colleagues' theory do not arise in Fischer's narrative paradigm and, if Jackson's proposal of narrativization of pragmatics is used in conjunction with Linhares's thesis (methodological unit), it will be possible to sustain a theory argumentative-narrative without running the risk of being pointed out the same criticisms that were leveled at the *hybrid theory*[87]. However, like the others, it does not point out or mention the problem of imputation of criminal

responsibility, but only the evidentiary model itself.

3.2.2. From the absence of treatment to the nature of the imputation of the agent's criminal liability in the *hybrid theory*

Treating evidence with the dimension that *hybrid theory* deals with, aiming to discuss it normatively and systematically, represents a great leap in the application of law and in judicial provision, namely in the delivery of the desired justice. It is undeniable that the concern with the predominance of the episteme over the cognitive aspects of the subject, which in other words means that it is a subversion of the human evaluative judgment (the subject's) to the episteme (appreciation and scientific valuation of the evidence), and because of that, it deserves all the attention and questions that are being asked. However, another equally relevant problem deserves equal attention: it deals with the lack of treatment of the question of imputation of responsibility, evidenced not only in the hybrid theory, but in the theories that preceded it, which were limited to the scope of culpability and the imputation of criminal responsibility, itself, touching on the question of the nature of this imputation, if the crime committed was done with *intention* or *recklessness*.

In his 2011 work, Bex perfunctorily mentions (and only mentions) the problem of imputation, when dealing with *mens rea*, in the context of explaining rule 3 of the *anchored narratives*, within the scope of the universal rules of proof, which advocates "the essential components of the story must be anchored"[88], when he criticizes this theory, calling attention to the need to explain at least three issues, manifesting himself, in the third, on the issue of *mens rea*, where he asks *"whether the defendant acted intentionally or recklessly"*[89], when he appeals to the doctrine of Bennett and Feldman on the *actor-purpose-act* question, and that of Pennington and Hastie on psychological and objective states. However, Bex does not go into the merits of the question, that is, it does not say how his theory faces the problem of the nature of the agent's imputation; and if it does, apparently it does not address the issue in any book or article on *hybrid theory*.

the affirmation referential and the narrative intelligibility that identifies it.

80. Hybrid Theory.

81. Jackson, Bernard S. Narrative Models in Legal Proof, International Journal for the Semiotics of Law, vol. I, no. 3, 1988, in Aroso Linhares, 2012, p. 82. According to Linhares, Jackson understands the narrative in the light of Greimasian structural semiotics as a recreation of the data of the meanings actually presented, whose significant organization needs not only a stock of socio-environmental knowledge, but also a deep interaction of the paradigmatic and syntagmatic axes.

82. Boyd White, Heracles' Bow. Essays on the Rhetoric and Poetics of the Law, Madison: The University of Wisconsin Press, 1985, in Aroso Linhares, 2012, p. 78. According to Linhares, Boyd White, playing a decisive role in the invention of a certain literary turn, understands narrative as the archetypal form of praxis and practical thinking whose reassessment seems indispensable not only to guarantee an alternative type of discourse and rationality, but also to open up a renewed experience of community and community meaning.

83. Aroso Linhares, 2012, p. 89.

84. Aroso Linhares, 2012, p. 79.

85. Aroso Linhares, 2012, p. 83.

86. Pereira, 2016, p. 480.

87. Pereira, 2016, p. 481.

88. Bex, 2011, p. 237.
89. Bex, 2011, p. 237.

With the verification of the absence of treatment of the question of the nature of the imputation in Bex's proposal, there is the absence of discussion of an important theme related to the Criminal Procedure and that deserves all possible attention, since it is not enough to confirm the authorship, but indicate with certainty which modality of imputation the agents carried out their criminal action. Therefore, once this point has been identified, a window is opened for future investigations into the possibility of *hybrid theory,* through Vars, contemplating the imputation of criminal liability.

4. CONCLUSION

The objective of this work was to investigate the use of arguments and narratives in the scope of theories that deal with the question of evidence, namely the *Story Model*, the *Anchored Narratives Theory* and the *Hybrid Formal Theory of Arguments and Stories.* Considering Bex's claim that his theory had solved the problems presented by the previous ones, the question initially raised was whether the *hybrid theory,* in fact, would be free from other critical problems, such as the question of the lack of evidentiary treatment to identify the nature of the agent's imputation of criminal liability. The starting argument was that, like the theories that preceded it, the *hybrid theory* does not address this issue, i.e., it does not seek to identify whether the criminal fact was perpetrated by way of *intention* or *recklessness.* However, reviewing these theories, it is satisfactory to conclude that the *hybrid theory* presents an unquestionable evolution in relation to its predecessors, namely by the integrated handling of *arguments* and *narratives* in the task of rationing evidence from criminal evidence, in an atomistic/holistic symbiosis. Thus, after completing the research, the following considerations were reached:

a) The *hybrid theory* innovates, in fact, by simultaneously handling arguments and narratives in the treatment of evidence, a feat that previous theories did not perform.

b) The *hybrid theory* defines as a rational way of reasoning the evidence the combination of arguments and narratives, leaving these open to criticism, when they can even be discarded, if disconnected from the evidential reality. Used in the syllogistic form, the arguments become tools to support the narratives.

c) The integration of arguments and narratives justify a decision in the concrete and complex case and give meaning to the evidence and events that are inferred from the evidence, therefore, in this respect, *hybrid theory* recognizes this manifest interaction between evidence, arguments and narratives, fact ignored by antecedent theories.

d) In hybrid theory, arguments, stories, evidence, hypothetical stories, and common-sense knowledge are elements used as tools in the reasoning of the proof.

e) Like the theories that preceded it, the *hybrid theory* does not make it clear whether or not it seeks to identify if the criminal act was perpetrated as *intentional* or *recklessness*. Therefore, in response to the question-problem, the *hybrid theory* does not meet the need to treat the evidence in order to identify the nature of the imputation of the offense committed by the agent.

This research did not intend to be conclusive, but only to evaluate and make some objective considerations, namely on the hybrid theory, therefore, with the above observations exposed, some possibilities for future research are opened in order to answer questions, such as:

a) Would the *hybrid theory,* as a model of scientific rationality, be a counterpoint to practical rationality?

b) Once *hybrid theory* has been implemented as a computerized system for the epistemic treatment of the evidence and decision-making process, in an environment that could be called systematic and normative automation of evidence, would the judges be dispensable?

c) Would the *hybrid theory* contemplate the possibility of indicating the nature of imputation (*intention* and *recklessness*) within the scope of a scientific rationality, fully submitted to the episteme?

Antonio Sanches Sólon Rudá

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Antonio Sanches Sólon Rudá