Tennessee Law Review

Volume 86
Issue 2 *Winter 2019*

Article 5

2019

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Well, that's what I'm a-saying; all kings is mostly rapscallions, as fur as I can make out.[1]

–Mark Twain

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1. MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN 174 (Ignatius Press 2009) (1885).

On its face, Federal Rule of Evidence 801(d)(2) is elegantly simple. Distinguishing between neither private persons nor public entities, it renders admissible out-of-court statements made by an agent "authorized to make a statement on the subject" and by an agent or employee "on a matter within the scope of . . . [its] relationship" to the party per subparagraph (C) and (D), respectively. More colloquially, Evidence Rule 801(d)(2)(C) permits the introduction of an authorized representative's statements into a case's evidentiary record, and Evidence Rule 801(d)(2)(D) does the same for statements uttered by certain agents and employees. History partly vindicated the former, while a substantial trend favored the latter, at their official release in 1975.

Yet, to this day, an intractable doctrinal battle has raged over whether a federal prosecutor's statements, from the initiation of a

criminal investigation through and beyond a trial's conclusion, fall within either subdivision, all within the shadow of an ancient certitude. Invoking filaments of policy, a seeming majority has concocted a complicated test to avoid any chance of ready admission. Conjuring history, a minority has rejected the application of Evidence Rule 801(d)(2)(C) and (D) out of deference to the sovereign's historic role and hallowed prerogatives. A negligible handful have heeded neither and applied these procedural texts according to their plain terms, these opinions' persuasiveness perpetually undercut by their authors' patent tentativeness. Unfortunately, due to this interminable contest, the common law's historic ills, from stultifying formalism to maddeningly technical prohibitions, have been replicated in a world traversed by more modern codes and enamored of more flexible theories. Behind the scenes, a truth once loudly trumpeted enthralls, its effective dethronement ignored by one and all.

This Article wades into this debate, making three contributions to an oft-opaque literature and jurisprudence. First, it summarizes the relevant ethical, constitutional, and statutory provisions, so as to dispel the mist induced by too many one-side perorations. Strangely enough, no such updated compendium exists. Second, this Article collects and refines the relevant arguments and draws a necessary conclusion founded on every relevant rule, statute, and code, including a thorough examination of the interlocking nature of the federal rules in toto. Despite its length, it thereby achieves a comprehensiveness and a brevity sorely missing from extant authority. Lastly, it touches upon the utterly overlooked significance of the parties' powers and duties during criminal discovery.

Overall, therefore, the holistic analysis required by modern precedent and neglected by courts and scholars in weighing the application of Evidence Rule 801(d)(2) to prosecutorial statements appears in the pages herein. Notably, it is one that may yet be extended to other federal rules and other fields with little difficulty. With that objective achieved, the debate that has deformed an unambiguous mandate and defied modernity's rightful demands can move forward or even end. In other words, by this piece's end, the past has been mined, the present understood, and the future laid out, all as revered justice and unembellished meaning compel.

I. INTRODUCTION

Mildewed myth too easily enshrouds and effortlessly confounds. By some accounts, a British warlord known as King Arthur once ruled as a just and noble monarch. Many historians disagree, contending that no such personage ever breathed a sigh or held a magic sword. Constructs of evolving societies, legal verities often follow the same pattern, their anarchic origins obscured by catchy lore for reasons both base and benign.

This Article deals with another British-tainted—and infinitely less exciting—tale. Per longstanding legend, the prohibition on hearsay[2] ("hearsay rule") forbade the admission of out-of-court statements into a criminal case's evidentiary record for time immemorial. In the eyes of many, this interdiction simultaneously assumed and projected a sheer majesty endowed by time's passage; though mutable principles could and would be conjectured in its defense, its seemingly ancient character immunized it from all but the most dogged doubters.[3] In truth, however, the common law never saw a need to bar so-called "admissions," a historically amorphous class of hearsay statements, from a jury's ken. Thus, during the same span of centuries that witnessed the hearsay rule's ennoblement, exceptions to its ambit multiplied at an almost maniacal pace. Inevitably, with the coining of each exemption, more doubt about the hearsay rule's viability and propriety materialized. By the twentieth-century, a befuddling fog, the condensed sum of these bourgeoning uncertainties, hung over the laws of evidence and criminal procedure, faithful companions to civil procedure's strictures. So things stood until a fetish for codification swept the United States, eventually culminating in the adoption of the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence in 1937, 1944, and 1975, respectively, and the promulgation of the Model Rules on Professional Conduct[4] by the American Bar Association ("ABA") in

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2. Except where noted, this Article utilizes the traditional definition of "hearsay" as "testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness." *Hearsay*, BLACK'S LAW DICTIONARY (10th ed. 2014). For the relevant definition of the term "admission," see *infra* note 8.

3. Edmund M. Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 2 (1937) [hereinafter Morgan, *Rule*].

4. In this Article, any references to "Criminal Rules" or "criminal rules" is to two or more of the Federal Rules of Criminal Procedure, "Civil Rules" or "civil rules" to two or more of the Federal Rules of Civil Procedure, "Evidence Rules" or "evidence rules" to two or more of the Federal Rules of Evidence, "Model Rules" or "model rules" to two or more of the American Bar Association's Model Rules of Professional Conduct,

1983.[5] While the first two established interlocking procedural mechanisms and the fourth is no more than a manual, the third has defined "hearsay"[6] and demarcated categories of "admissions"[7] to this very day. In all likelihood, it will continue to do so in the years ahead.

In spite of these reformatory efforts, remnants of their forebearers still lingered within these provisions' text and commentary, awaiting either extirpation by the federal rules' drafters or recognition of such implied amputation by their judicial successors. No inherent difficulty, it should be noted, would have accompanied either task. The federal rules' drafters, after all, labor under little checks on their ability to devise new provisions, and courts routinely derive criteria, deemed essential for the implementation of statutorily-expressed standards, from otherwise mute texts. Nonetheless, within the evidentiary realm, the problem posed by such buried and unremoved relics has proven particularly acute and obstinate as to at least one bedeviling issue: whether statements by prosecutors ("prosecutorial statements"), uttered at the beginning of an investigation or at the midst of trial, could and should be classified as "extra-judicial admissions"[8] under Evidence Rule 801(d)(2)(C) or (D). Because the

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and "Federal Rules" or "federal rules" to the Civil Rules, Criminal Rules, and Evidence Rules collectively, unless otherwise noted. Similarly, unless otherwise noted, any references to "Criminal Rule" or "criminal rule" to a specific one of the Criminal Rules, "Civil Rule" or "civil rule" to a specific one of the Civil Rules, "Evidence Rule" or "evidence rule" to a specific provision of the Evidence Rules, "Model Rule" or "model rule" to a specific one of the Model Rules, and "Rule" or "rule" to any one of the federal rules. Finally, short of an explicit exception, any reference to "Rules Committee" is to the Advisory Committee on Rules of Civil Procedure, "Evidence Committee" to the Advisory Committee on Rules of Evidence, and "Criminal Committee" to the Advisory Committee on Rules of Criminal Procedure.

5. The federal rules became law pursuant to the process set forth in the Rules Enabling Act. The Civil Rules were adopted by the Court on December 20, 1937, transmitted to Congress on January 3, 1938, and effective September 16, 1938. The first Federal Rules of Criminal Procedure were adopted by order of the Court on December 26, 1944, for procedures up to verdict, and on February 8, 1946, for procedures after verdict; the full set, denominated the "Federal Rules of Criminal Procedure," then took effect on March 21, 1946. The Evidence Rules were adopted by order of the Court on November 20, 1972, and transmitted to Congress by the Chief Justice of the United States on February 5, 1973. Unlike the Civil or Criminal Rules, Congress choose to edit the Court's draft. For this reason, the Criminal Rules became federal law on January 2, 1975, when President Gerald R. Ford, Jr. signed An Act to Establish Rules of Evidence for Certain Courts and Proceedings.

6. FED. R. EVID. 801(c); Green v. Baca, 226 F.R.D. 624, 637 (C.D. Cal. 2005).

7. FED. R. EVID. 801(d)(2); Terry v. Laurel Oaks Behavioral Health Ctr., Inc., 1 F. Supp. 3d 1250, 1268 (M.D. Ala. 2014).

8. An "extrajudicial admission" means an admission made in proceedings outside court. BLACK'S LAW DICTIONARY, *supra* note 2. An "admission" is a statement in which someone admits that something is true or that he or she has done something

Evidence Committee's original notes purportedly "disclose[d] a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary,"[9] courts set one old principle—"Prior to adoption of the Federal Rules of Evidence, admissions by government employees in criminal cases were viewed as outside the admissions exception to the hearsay rule"[10]—beside a text—Evidence Rule 801(d)(2)—which alluded to no such exception.

Chaos has naturally ensued, as federal courts have battled over whether the plain meaning of Evidence Rule 801(d)(2) had transformed prosecutorial statements into pure admissions.[11] Some, including the influential Seventh Circuit, hewed to the past; according to the Second Circuit, this approach still captivated a majority in 2004.[12] Others struggled to craft a standard for admission that would honor past and prose, with the Second Circuit in *United States v McKeon*[13] and *United States v. Salerno*[14] ultimately fashioning today's arguably most popular touchstone. Fewer still abandoned any fealty to olden custom in favor of a literalism that earned others' denunciation. Whatever these discrete approaches' merits, uncertainties endure as to each's cogency and degree of juridical support.

Explicating a mostly barren literature and stubbornly flawed opinions, this Article attempts to end this stalemate over the proper reach of Evidence Rule 801(d)(2)(C) and (D) to prosecutorial statements in accordance with prevailing principles of construction and pertinent verities. Drawing on first-hand and secondary accounts, Part II tells three stories that demonstrate the courts' prevailing approaches to prosecutorial admissions. Part III summarizes the law's current state. So as to provide essential interpretive context, it

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wrong, especially any statement or assertion made by a party to a case and offered against that party. *Id.*

9. Tome v. United States, 513 U.S. 150, 160 (1995) (plurality opinion).

10. United States v. Kampiles, 609 F.2d 1233, 1246 (7th Cir. 1979); *accord, e.g.*, United States v. Pandilidis, 524 F.2d 644, 650 (6th Cir. 1975); United States v. Powers, 467 F.2d 1089, 1095 (7th Cir. 1972).

11. So as to avoid needless redundancy, the term "prosecutor" should be read to refer to federal prosecutors unless otherwise noted throughout this piece. While this Article focuses on federal prosecutors, the arguments made herein could easily be advanced against their state and local counterparts. The federal prosecutor may be unique, but all prosecutors are expected to seek justice. *See* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 235–42 (2000) [hereinafter Zacharias & Green, *Uniqueness*].

12. United States v. Yildiz, 355 F.3d 80, 81–82 (2d Cir. 2004).

13. 738 F.2d 26 (2d Cir. 1984).

14. 937 F.2d 797 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992).

first wanders through the federal rules' history and limns their fundamental and interlocking tenets. It then summarizes federal prosecutors' modern discovery obligations and the three prevailing approaches to prosecutorial statements, providing a sorely needed handbook for lawyers and scholars alike. Part IV summarizes differing views regarding the existence and prevalence of prosecutorial misconduct on the local, state, and federal levels, facts relevant to appositely contextual exegeses of the relevant federal rules. Part V offers a model usable for any rule and gives an answer to this Article's central query through three cumulative subsections. By necessity, especially in light of the seized courts' frequent cavalier regard for the Court's admittedly scattered and frequently obscure interpretive tenets, Part V.A summarizes those pendent principles of interpretation. Part V's next two sections propound a resolution to this divide consistent with these fundamental canons. Part V.B collects and amplifies the handful of preexisting, but oft-forgotten arguments for why prosecutorial statements must generally be classified as admissions; Part V.C raises novel objections to the courts' refusal to do so when such statements are made in the course of criminal discovery, ones rendered more significant due to modern law's rampant overcriminalization.[15] As the latter shows, in discovery, if nowhere else, certain principles should have already impelled courts to treat prosecutorial statements in the same manner as the words of private parties: as admissions, plain and simple, per prose enacted and policy embedded.

II. SNAPSHOTS: JUMBLED RULES AND MANUFACTURED STANDARDS

A. Olive

Prior to the fall of 1979, Stephen Rogers ("Rogers") was "a rising star in the United States Customs Service."[16] But, beginning on October 31, 1979, his luck changed with, strangely enough, an investigative coup. On that date, Dublin police seized crates filled with 151 machine guns, rifles, and handguns and 60,000 rounds of ammunition.[17] Aided by Britain's intelligence services, Rogers and his agents traced the illicit cargo to a fictive New York corporation,

15. *See generally* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

16. Nicholas M. Horrock, *A Feud Among U.S. Agents*, NEWSWEEK, Aug. 13, 1984, at 44.

17. Joseph P. Fried, *Ousted Customs Agent Fights to Get Back Job*, N.Y. TIMES, Mar. 31, 1985, at 39.

Standard Tools, headquartered in a building owned by Bernard McKeon ("Bernard"), a denizen of Queens.[18] In an exhaustive search of that gloomy compound, Rogers' small crew unearthed several shipping and warehousing documents relating to hardware seized, all signed by a man named John Moran ("Moran").[19] Because the incorporeal Moran was never identified or found, the United States Attorney's Office for the Eastern District of New York charged Bernard with arms smuggling.

After two mistrials, Bernard may have managed to permanently earn his freedom at the conclusion of his third prosecution if not for his own lawyer's creative turn of phrase. In the course of his opening statement at Bernard's second trial, his counsel had dryly declared: "The evidence will also indicate that [Ms. Olive McKeon ("Olive"), Bernard's wife,] had absolutely nothing to do with this case other than doing what many wives do, which is, picking up mail and opening it. That is the extent, the sum and substance of her involvement."[20] In his third opening peroration, however, this same advocate offered a newfangled take on Olive's role: Bernard gave a warehouse receipt and some Standard Tools stationery to his wife, his lawyer maintained, so that she might make two photocopies on the stationery using a bank's Xerox machine as a favor to the missing Moran.[21] She, not he, was Moran's true dupe.[22]

Seizing on this shift, the prosecution sought admission of the two inconsistent statements pursuant to Evidence Rule 801(d)(2).[23] The district court agreed[24] in a decision regarded as instrumental to Bernard's conviction.[25] The Second Circuit affirmed.[26]

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18. Horrock, *supra* note 16, at 44; United States v. McKeon, 738 F.2d 26, 28 (2d Cir. 1984).

19. *McKeon*, 738 F.2d at 28.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 29.

24. *Id.*; *see also* Beth Teitell, *What Price Justice? Courts Must Balance Constitutionality and Cost in Deadlocked Trials*, BOSTON HERALD, Apr. 5, 1995, at 40.

25. Ediberto Roman, *Your Honor What I Meant to State Was . . .: A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law*, 22 PEPP. L. REV. 981, 1001 n.125 (1995).

26. *McKeon*, 738 F.2d at 28.

B. Nicky

Standing at the courtroom's podium in the midst of two months' summation, the prosecutor parroted a witness' description of Nicholas Auletta ("Nick" or "Auletta"), a Westchester County businessman, at the end of another mob case[27]: "You can't really blame Nicky."[28] As to this purportedly "honest" victim of a corporatizing mafia,[29] the government's lawyer quoted more: "He is like a puppet on a string."[30] At Auletta's second trial, a new prosecutor mined something new from the "same evidentiary clay."[31] In his flowery retelling, Auletta transformed into "a culpable bid-rigger."[32] Whatever this second statement's truth, the jury ultimately convicted Auletta, and an appeal followed.

Beginning with a pregnant observation—"Defendants are often heard to complain that the government benefits from the ambiguity and confusion which accompanies these gargantuan indictments; despite the complaints, we have responded, sometimes grudgingly, by affirming the lion's share of the convictions in spite of our concerns about the unruliness of such cases"—the Second Circuit reckoned that the prosecutor's switch could not be dismissed as immaterial.[33] "The government, at different times, ha[d] urged" two juries to adopt incompatible characterizations of the same man.[34] Admittedly, it possessed the right to do so.[35] Nonetheless, "because the jury, and not the government, must ultimately decide which he was," they should have been informed of the government's changed pictorial.[36] The district court's refusal to admit the prosecution's opening and closing statements to the jury therefore constituted a most perilous blunder, compelling the Second Circuit to reverse Auletta's conviction.[37]

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27. James H. Rubin, *Supreme Court Says Wrong to Overturn Mob Convictions*, ASSOCIATED PRESS, June 19, 1992; William M. Reilly, *"Fat Tony" Salerno's Trial Opens*, N.Y. TIMES, Apr. 6, 1987.

28. United States v. Salerno, 937 F.2d 797, 812 (2d Cir. 1991).

29. Arnold H. Lubasch, *Salerno Prosecutors End Summation*, N.Y. TIMES, Mar. 8, 1988, at B4; Arnold H. Lubasch, *Near End of Yearlong Mob Trial, Pointed Remarks*, N.Y. TIMES, Apr. 17, 1988, at 53.

30. *Salerno*, 937 F.2d at 812; *see also* Constance L. Hays, *Federal Judge Given Rebuke for Mob Case*, N.Y. TIMES, June 29, 1991, at 25.

31. *Salerno*, 937 F.2d at 812.

32. *Id.*

33. *Id.* at 799, 810–12.

34. *Id.* at 812.

35. *Id.*

36. *Id.*

37. *Id.*

C. Forbes

Scion of a foundry family,[38] Walter A. Forbes ("Forbes") had managed Comp-U-Card International ("CUC"), the world's largest consumer-services company, since 1973.[39] In myths that he himself spun, Forbes appeared as "a laid-back visionary, said to pad about the office in sneakers and jeans, snacking on saltines, often playing softball or flag football on weekends with his staff."[40] But, as uncoiled in whispers, he was something else entirely: a man of "very high tastes" who savored a lifestyle "luxuriously consistent with his upbringing and background" and a "wheeler-dealer" who "lived beyond his means."[41] Questioned about his creation's reserves, this amalgam's "lips quivered," and, as "[h]is hands started shaking, he put his right hand on top of it to make it stop shaking, then he turned red, particularly in the neck."[42] Under his tenure, CUC's stock, a Wall Street darling, rose 1,287 percent from the end of 1989 through 1993, its revenue and assets ever growing.[43] But unbeknownst to Forbes' "wildly enthusiastic following on Wall Street,"[44] a simple trick explained these numbers' upward trajectory: furtive and endemic fraudulent accounting.[45]

Nearly five years after these improprieties' discovery, and within three months of the consummation of CUC's merger with Hospitality Franchise Systems, Inc. ("HFS") and the resultant creation of a new entity—Cendant—an indictment for conspiracy and wire fraud issued against Forbes and his former partner, E. Kirk Shelton ("Shelton").[46] Two mistrials followed, the fraud's complexity seemingly overwhelming.[47] Yet, with the United States Attorney's Office ("Government") unwilling to surrender, a third trial commenced in the

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38. *Caren Utzig Married to Walter Forbes*, N.Y. TIMES, Aug. 16, 1981, at 65.

39. FRANK PARTNOY, INFECTIOUS GREED: HOW DECEIT AND RISK CORRUPTED THE FINANCIAL MARKETS 190 (2010).

40. RICHARD PHALON, FORBES GREATEST INVESTING STORIES 125 (2004).

41. Greg Farrell, *Trial Digs Up Two Views of Walter Forbes*, USA TODAY, July 7, 2004, at 01B.

42. Floyd Norris, *A Conviction After a Jury Hears About What a Boss Is Supposed to Do*, N.Y. TIMES, Nov. 1, 2006, at C4.

43. HOWARD SCHILIT, FINANCIAL SHENANIGANS 4 (2002).

44. PHALON, *supra* note 40, at 131.

45. SCHILIT, *supra* note 43, at 4.

46. Lisa Marsh, *Biggest Fraud Ever? – Feds Indict Ex-Cendant Execs Forbes*, Shelton, N.Y. POST (Mar. 1, 2001), https://nypost.com/2001/03/01/biggest-fraud-ever-feds-indict-ex-cendant-execs-forbes-shelton/.

47. *See generally* Stacey Stowe, *Chief Guilty at Cendant in 3rd Trial*, N.Y. TIMES, Nov. 1, 2006, at C1.

fall of 2006.[48] On the eve of this prosecution, as indicated by a flood of pretrial motions, the parties thrice disputed the application of Evidence Rule 801.[49]

1. Phantom Immunity

In the first trial, Kevin Kearney, one of CUC's former accountants, played a starring role. Kearney had been characterized by Forbes as "a significant government witness in all three trials"[50] but by the United States Attorney's Office ("Government") as a "minor" one.[51] As to this witness, the juries in Forbes' first and second trial been informed of one seeming fact—that Kearney would testify pursuant to an informal immunity agreement—and instructed as to its significance—that such immunity could have engendered a motive to falsify.[52] To these instructions, the Government twice consented.[53] Then, rather unexpectedly, a "third team of prosecutors . . . determined that Kearney had not in fact been granted immunity."[54]

Having so realized, "[m]onths before the third trial, the government informed the district court that the jury instruction given in the prior trials was 'factually erroneous.'"[55] Its change, the United States insisted, was "result of an 'inadvertent failure, during the first two trials, to notice that the Kearney instruction was erroneous as a matter of fact.'"[56] Unsurprisingly, Forbes objected to this "stunning

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48. Minute Entry, United States v. Forbes, No. 3:02-cr-00264-SWT (D. Conn. Oct. 4, 2006), ECF No. 2489.

49. For a discussion of the third, see *infra* Part V.C.

50. Appellant's Br. at 37, United States v. Forbes, 249 F. App'x 233, No. 07-0348-cr (2d Cir. May 17, 2007) [hereinafter Appellant's Br.].

51. Appellee's Br. at 58, United States v. Forbes, 249 F. App'x 233, No. 07-0348-cr (2d Cir. July 18, 2007) [hereinafter Appellee's Br.].

52. Appellant's Br., *supra* note 50, at 38–39.

53. Supp. Memorandum of Defendant Walter A. Forbes in Opposition to Government's Proposed Supplemental Jury Instruction Concerning Kevin Kearney at 6, United States v. Forbes, No. 3:02-cr-00264-SWT (D. Conn. Sept. 27, 2006), ECF No. 2472; *see also* Brief for United States in Opposition to Petition for Cert. at 6, Forbes v. United States, 249 F. App'x 233, No. 07-1029 (Apr. 18, 2008) [hereinafter Opposition to Petition for Cert.].

54. Opposition to Petition for Cert., *supra* note 53, at 6–7; *see also* Government's Response at 7–9, United States v. Forbes, No. 3:02-cr-00264-SWT (D. Conn. Oct. 4, 2006), ECF No. 2479.

55. Opposition to Petition for Cert., *supra* note 53, at 7; *see also* Government's Response at 12, 14, United States v. Forbes, No. 3:02-cr-00264-SWT (D. Conn. Oct. 4, 2006), ECF No. 2479.

56. Opposition to Petition for Cert., *supra* note 53, at 8–9; *see also* Government's Response at 12, United States v. Forbes, No. 3:02-cr-00264-SWT (D. Conn. Oct. 4, 2006), ECF No. 2479.

about-face" and requested that the informal-immunity instruction be given in trial 3, just as it had in trials 1 and 2, the Government having "offered no basis, other than purported inadvertence, to explain away its [prior] position . . . ."[57] Those prior statements should be admitted, his lawyers asseverated, as a party-opponent's admissions.[58] Accepting the Government's view that its prosecutor had been innocently mistaken, the district court excluded all evidence of its prior representations in accordance with the judicial approach articulated during Bernard's and Auletta's appeals.[59]

2. Altered Notes

Mysteriously revised minutes, not purported offers, prompted Forbes' second apposite motion. On April 9, 1997, CUC's board of directors held a meeting in which Robert Tucker ("Tucker") took handwritten notes, later typed.[60] Sometime after Tucker's transcription, Amy Lipton ("Lipton"), CUC's general counsel, apparently extirpated two key sentences.[61] At the first trial, the Government promised to provide "direct evidence of Shelton's involvement with the deletions."[62] Eventually, it produced a witness who blamed either Shelton or Forbes but specified neither as the exclusive perpetrator.[63]

At Forbes' third trial, the Government elected a new tactic. It asserted that Forbes alone "ordered Lipton to edit the Board minutes, and had done so in a meeting at which Shelton was not even present."[64] As with Kearney's purported immunity, Forbes pushed for those contrary statements' admission.[65] Once more, the district court turned Forbes down, classifying the prosecution's previous

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57. Appellant's Br., *supra* note 50, at 39–40; *see also* Appellee's Br., *supra* note 51, at 64.

58. Supp. Memorandum of Defendant Walter A. Forbes in Opposition to Government's Proposed Supplemental Jury Instruction Concerning Kevin Kearney at 5, United States v. Forbes, No. 3:02-cr-00264-SWT (D. Conn. Sept. 27, 2006), ECF No. 2472.

59. Appellant's Br., *supra* note 50, at 40; *see also* Appellee's Br., *supra* note 51, at 63.

60. Forbes Third Trial Motion in Limine No. 23 at 1, United States v. Forbes, No. 3:02-cr-00264-SWT (D. Conn. Apr. 28, 2006), ECF No. 2312.

61. *Id.* at 3–4, 7–8.

62. Appellant's Br., *supra* note 50, at 41; *see also* Appellee's Br., *supra* note 51, at 60–61.

63. Appellant's Br., *supra* note 50, at 41; *see also* Appellee's Br., *supra* note 51, at 60–61.

64. Appellant's Br., *supra* note 50, at 41–42.

65. *Id.* at 42.

proclamations not as "statements of a party opponent" but rather as a lawyer's meaningless speculations.[66]

3. Circuit's View

In an unpublished opinion, the Second Circuit categorically affirmed the aforesaid rulings. "[T]he Government [had] offered a sufficient explanation for the mistaken jury instruction with regard to one witness' informal immunity," the panel explained.[67] Meanwhile, its "proffer with respect to another witness," it decided, was just "not an admission by a party opponent" according to any reasonable definition of that pregnant term.[68]

III. STATE OF THE LAW

A. Prelude

1. Admission of Extrajudicial Statements in Early Anglo-American Law

By the time of a farmer king,[69] the hearsay rule bore a hallowed imprint,[70] underlain by the venerable "assumption that all human testimony is untrustworthy."[71] To the chillingly bookish and portly Sir William Blackstone,[72] doubts about its wisdom merited not even an iota of entertainment.[73] Characterizing this traditional evidence as

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66. *Id.*

67. United States v. Forbes, 249 F. App'x 233, 236 (2d Cir. 2007).

68. *Id.* The Second Circuit ultimately affirmed Forbes' sentence of 151-months' imprisonment. *Id.* at 236–37.

69. JEREMY BLACK, GEORGE III: AMERICA'S LAST KING 137 (2008); *see also* ANDREW C. THOMPSON, GEORGE II: KING AND ELECTOR 294 (2011). Other kings embraced that sobriquet. A. SCOTT BERG, LINDBERGH 11 (1998) (referring to King Carl XV of Sweden).

70. *See, e.g.*, Edward R. Lev, *The Law of Vicarious Admissions—An Estoppel*, 26 U. CIN. L. REV. 17, 18 (1957); Morgan, *Rule*, *supra* note 3, at 2.

71. John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 485 (1937).

72. Allen D. Boyer, *Law's Architect*, 22 YALE J.L. & HUMAN. 127, 136 (2010); WILFRID R. PREST, WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY 161 (2008). As the author of "the first important and the most influential systematic statement of the principles of the common law," Blackstone set the parameters for its evidentiary doctrines for centuries. DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES 3 (1941).

73. 2 WILLIAM BLACKSTONE, COMMENTARIES *368; *see also* GEOFFREY GILBERT, THE LAW OF EVIDENCE 135 (1805) ("[A] mere Hearsay is no Evidence . . . .").

worse than any other, this first Vinerian Professor of English Law decried its use in words destined for centuries of repetition: "[N]o evidence of a discourse with another will be admitted," and hearsay should rarely, if ever, be "received" so as to prove "any particular facts."[74] "[I]n general, the want of better evidence" could "never justify the admission of hearsay," the British courts' past liberality "not founded on any principles of law."[75] Even one of the doctrine's most famed exceptions—entries in "books of account or shop-books"—incurred the chancellor's grave disdain, their contents grudgingly exposed to a jury's view only if "accompanied with such other collateral proofs of fairness and regularity" and assuming no better evidence "can then be produced."[76] In such terms, Blackstone sanctified the hearsay doctrine, "that most characteristic rule of the Anglo-American Law of Evidence, . . . the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure,"[77] and crystallized "the common law's malaise about hearsay" itself.[78] In time, other reasons than Blackstone's would be proposed to buttress the exclusion of such out-of-court statements, most especially the dual necessities of an oath's administration and a

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74. 2 WILLIAM BLACKSTONE, COMMENTARIES *368; *see also* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 179, 238 (2003) (quoting Omychund v. Barker, 1 Atk. 21, 46 (Ch. 1744)).

75. 2 WILLIAM BLACKSTONE, COMMENTARIES *368; *cf.* La Abra Silver Mining Co. v. United States, 175 U.S. 423, 498 (1899) (characterizing an agent's authorized "declarations and admissions" as "of the nature of original evidence, and not of hearsay").

76. 2 WILLIAM BLACKSTONE, COMMENTARIES *368; *see also* Ganahl v. Shore, 24 Ga. 17, 28 (Ga. 1858) (McDonald, J., dissenting) (quoting this language); Kent v. Garvin, 67 Mass. (1 Gray) 148, 150 (Mass. 1854) ("To permit the books of a party to be competent proof under such circumstances, would be extending the rule applicable to this anomalous and dangerous species of evidence quite too far.").

77. John H. Wigmore, *The History of the Hearsay Rule*, 7 HARV. L. REV. 437, 458 (1904). Wigmore also declared that the cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (Chadbourn rev. ed. 1974).

78. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 79 (1997). Jeremy Bentham, for one, took issue with Blackstone's rhapsody about the common law's wisdom. *See, e.g.*, Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569, 594 (1976); Dean Alfange, Jr., *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58, 59, 61, 65 (1969). The philosopher vigorously challenged every rule of exclusion. Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1177 (1990); *see also* 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 463 (1801). Bentham did not ignore the risks inherent in such a system and thus "emphasized the need for limits based on vexation, delay, or expense." Landsman, *supra* note 788, at 1181; *see also* BENTHAM, *supra* note 788, at 449.

cross examination's undertaking[79] in an effort to gauge a witness' true sincerity, memory, and perception.[80] By such accretion, "historical accident"[81] and "centuries of inertia"[82] imbued the hearsay rule with a relic's dignity and derivative unassailability.[83]

The truth was otherwise. As history attested, courts entertained "no thought of prohibiting hearsay" until the middle of the sixteenth century[84] and routinely received an ever-expanding array of "admissions" in proceedings simple and complex for centuries after its appearance.[85] Unsurprisingly, disagreements as to the basis of admissibility and the effect to be given to an admission perpetually raged,[86] as did disputes over whether admissions qualified as an exception to the hearsay rule or lay entirely outside its confines.[87] With relatively minimal dissent,[88] however, few questioned the justifications for such statement's admittance. Many cited the common sense instinct to punish a declarant for his or her own inconsistency (also termed "party estoppel").[89] Others made much of the fact that "[a]s the declarant is the one who made the statement he [or she] has no standing to complain that he [or she] was not under oath" or "that there was no confrontation or that he[or she] had no

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79. Lev, *supra* note 70, at 18; *see also* Freda F. Bein, *Substantive Influences on the Use of Exceptions to the Hearsay Rule*, 23 B.C. L. REV. 855, 856–57 (1982); Edward M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355, 360 (1920) [hereinafter, Morgan, *Exception*]

80. *See, e.g.*, Bein, *supra* note 79, at 857; Mason Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271, 280 (1952); *cf.* Note, *Erosion of the Hearsay Rule*, 3 U. RICH. L. REV. 89, 93–94, 101–02 (1968) [hereinafter *Erosion*] (discussing the Hearsay Rule's decline).

81. Morgan, *Rule*, *supra* note 3, at 12; *see also* Wigmore, *supra* note 77, at 444–45.

82. Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1436 (1966).

83. *See* Stephen Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 564–72 (1990); J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800 364–65 (1986).

84. Morgan, *Rule*, *supra* note 3, at 2.

85. Lev, *supra* note 70, at 28; *see also, e.g.*, James L. Hetland, Jr., *Admissions in the Uniform Rules: Are They Necessary?*, 46 IOWA L. REV. 307, 309 (1961) (citing, among others, Lev, *supra* note 70); Morgan, *Exception*, *supra* note 79, at 359–60.

86. Hetland, *supra* note 85, at 308.

87. Morgan, *Rule*, *supra* note 3, at 6; Lev, *supra* note 70, at 20; Hetland, *supra* note 85, at 309–10.

88. *See* JEROME MICHAEL & MORTIMER J. ADLER, NATURE OF JUDICIAL PROOF 309, 311 (1931).

89. Lev, *supra* note 70, at 29–30, 32 (characterizing this theory as "party estoppel"); *see also* Laurence H. Tribe, Comment, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 963–64 (1974) (contending that this justification "derives from a 'game' conception of the adversary trial process").

opportunity to cross-examine himself [or herself]."[90] And yet others perceived "an element of trustworthiness being provided from the probability that one would make a statement against his [or her] interest unless he [or she] believed it to be true."[91] Consequently, exclusion seldom befell a party opponent's admissions[92] despite their lack of any "inherent indicia of truth."[93] Tellingly, this reality was "at least as old as the hearsay rule itself"[94] and cohered with the jury's early inquisitorial role[95] and freedom from much, if any, behavioral restrictions.[96] Still, with Blackstone's word nearly undisputable and the common law disposed to glacial evolution, this reality faded first into memory and then into oblivion.

2. Law's Transformation: Problems' Multiplication and Codification's Ascendancy

Thus, for hundreds of years, these two contrary doctrines placidly endured.[97] While centuries passed, however, litigation itself changed. Adversarial confrontation overthrew a prior era's preference for less combative methods,[98] and an expectation of passivity was thrust upon the common juror. As parties "assumed ever greater responsibility for interrogations" and "judges retreated from inquisitorial activism and accepted a far more neutral and passive role," conflicts propagated,

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90. Edith L. Fisch, *Extra Judicial Admissions*, 4 SYRACUSE L. REV. 90, 90 (1952); *see also* Tribe, *supra* note 89, at 963.

91. Fisch, *supra* note 90, at 90; *see also, e.g.*, Ladd, *supra* note 80, at 282; Morgan, *Exception*, *supra* note 79, at 361.

92. Chris Blair, *Admissions (Don't Have to Be) Against Interest*, 40 TULSA L. REV. 751, 753 (2005).

93. Hetland, *supra* note 85, at 323.

94. Carl H. Harper, *Admissions of Party-Opponents*, 8 MERCER L. REV. 252, 253 (1957).

95. Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1202 (2014).

96. THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 286 (1985); *cf.* GREEN, *supra*, at 285–86; KARL N. LLEWELLYN, THE BRAMBLE BUSH 24 (11th ed. 2008) ("Because the jury are laymen, not trained in weighing evidence, not case-hardened by legal experience, they must not, save in peculiar cases, be permitted to hear mere statements of opinion nor hear repetition of reports about events, mere *hearsay*, lest they be led unduly into inference.").

97. *Cf.* Lee v. Illinois, 476 U.S. 530, 552 (1986) (Blackmun, J., dissenting) ("[S]tatements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience . . . .'").

98. Landsman, *supra* note 78, at 1150, 1172.

and "rules of evidence and procedure multiplied"[99] in the hopes of preserving the jury's role as an adversarial fact-finder.[100] As a result, the hearsay rule grew more muddled and opaque, and the common law's malleable "admissions," along with the rule's manifold *other* exceptions, proliferated.[101] Within the United States, which at first slavishly honored the well-entrenched[102] doctrine,[103] critiques mounted[104] until a certain conclusion acquired the patina of unquestionable truth: "[T]he law [of hearsay] is . . . encumbered with many troublesome remnants of the old doctrine and many ill-instructed decisions."[105] The year in which this declamation issued was 1898.[106]

For these problems, the legal profession offered the same solution: collation and simplification of the common law's variegated notions.[107] Certainly, many maintained, such evidentiary guidelines as the hobbled hearsay rule cried for this cleansing treatment.[108] Swept into

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99. Landsman, *supra* note 78, at 1150; *see also* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 123 (1983).

100. Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 918–22 (1937) (faulting Thayer and Wigmore for disregarding the influence on the hearsay doctrine of this transformation). Tellingly, "in common law jurisdictions outside the United States, a decline in jury trials had been accompanied by the abolition or diminution of rules excluding hearsay." Roger C. Park, *Exporting the Hearsay Provisions of the Federal Rules of Evidence*, 33 B.U. INT'L L.J. 327, 330 (2015).

101. *See* Paul F. Kirgis, *A Legisprudential Analysis of Evidence Codification: Why Most Rules of Evidence Should Not Be Codified—But Privilege Law Should Be*, 38 LOY. L.A. L. REV. 809, 827 (2004) ("[T]he common law of hearsay had been imprecise and highly elastic . . . ."); *Erosion*, *supra* note 80, at 122–23 (charting the divergent courses followed by courts in their liberalization of the hearsay rule).

102. David A. Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 28 (2009).

103. United States v. Graham, 391 F.2d 439, 447 (6th Cir. 1968); Gordon v. Robinson, 210 F.2d 192, 198 (3d Cir. 1954); Kenneth W. Barton & Richard G. Cowart, *The Enigma of Hearsay*, 49 MISS. L.J. 31, 81 (1978). "Hearsay evidence is in its own nature inadmissible," Chief Justice John Marshall wrote, "Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible." Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 295–96 (1813).

104. *See* Olin Guy Wellborn III, *Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 54 (1982) (summarizing the critiques).

105. James B. Thayer, *Present and Future of the Law of Evidence*, 12 HARV. L. REV. 71, 86 (1898); *accord* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 527–28 (1898); *see also Erosion*, *supra* note 80, at 91.

106. Thayer, *supra* note 105, at 86.

107. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 702, 706 (2017) [hereinafter Meyn, *History*].

108. *See, e.g.*, Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 979

this same "broad program for simplicity and efficiency in all branches of judicial administration,"[109] the impetus for the systematization of criminal and civil procedural rules grew just as potent.[110] For all its supporters' fervor, however, codification actually proceeded unevenly. With relative quickness, this systemizing instinct culminated in the Civil Rules' adoption on December 20, 1937,[111] and the Criminal Rules' acceptance on December 26, 1944, by the Court.[112] But, in the realm—the evidentiary one—most in need of decluttering, these efforts initially faltered until 1960, when a committee, appointed by Chief Justice Earl Warren, determined the development of a new evidentiary corpus to be both "advisable and feasible."[113] Although the Court's first version, promulgated on November 20, 1972, proved controversial,[114] the Evidence Rules, including one provision with which Congress did not tinker—Evidence Rule 801(d)(2)—became law in 1975.[115] This "usable tool by which justice [could] be more uniformly secured in court cases tried by means of [this nation's] adversary system,"[116] one incorporating "some innovations" but mostly amassing

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(1987); Jerome Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 744 (1942).

109. Arthur T. Vanderbilt, *The New Federal Criminal Rules: Foreword*, 51 YALE L.J. 719, 719 (1942).

110. *See, e.g.*, Lester R. Orfield, *The Federal Rules of Criminal Procedure*, 10 ST. LOUIS U. L.J. 445, 445 (1966); George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694, 700 (1946).

111. *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 4–5 (2010); Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 780 (1995); *In re* Watford, 192 B.R. 276, 279 (Bankr. M.D. Ga. 1996). As noted above, the Civil Rules became effective on September 16, 1938. *See supra* note 5; *see also* Amir Shachmurove, *Policing Boilerplate: Reckoning and Reforming Rule 34's Popular—Yet Problematic—Construction*, 37 N. ILL. U. L. REV. 203, 209 (2017) [hereinafter Shachmurove, *Boilerplate*].

112. *See* United States v. Noah, 594 F.2d 1303, 1305 (9th Cir. 1979) (Kilkenny, J., dissenting). The Criminal Rules went into effect on March 21, 1946. *See supra* note 5; Singleton v. Botkin, 5 F.R.D. 173 (D.D.C. 1946).

113. Glen Weissenberger, *The Proper Interpretation of the Federal Rules of Evidence: Insights from Article VI*, 30 CARDOZO L. REV. 1615, 1627 (2009); *see also* Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1319 (1992).

114. Jon R. Waltz, *The New Federal Rules of Evidence: Overview*, 52 CHI.-KENT L. REV. 346, 348 (1975). The controversy was attributed "largely" to its substantive labeling and foray into the realms of privilege. Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 159 (2008).

115. Waltz, *supra* note 114, at 346.

116. Robert Van Pelt, *Introduction*, 36 LA. L. REV. 66, 68–69 (1975); *see also* Edward J. Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal*

"relatively settled evidentiary principles and practices,"[117] would not again undergo "systematic reform,"[118] subject to no more than "fairly minimal" emendations for over forty years.[119] Finally, stability reigned within the federal world of evidence.[120] The Evidence Rules would henceforth diminish inconsistency and arbitrariness in federal courts' admission practices, or so many hoped and believed.[121]

3. Modern Framework

Today, away from the sirens' screams and the gavels' knocks, the legal landscape traversed by criminal defendants and prosecutors is a function of explicit rules and foundational precepts.[122] Three sources—federal regulation; federal statutes, including the Civil Rules and Evidence Rules where relevant; and various constitutional provisions—"regulate prosecutors and their agents in seeking [and utilizing] statements from witnesses, suspects, and defendants."[123] Similarly, the Criminal Rules, federal statutes, and the Due Process Clause of the United States Constitution impose discrete discovery obligations.[124] Lastly, codes of professional responsibility and conduct adopted by federal district courts pursuant to their rulemaking

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Rules of Evidence, 15 SAN DIEGO L. REV. 239, 242 (1978) (noting that the "federal rules as a whole" strive "to attain the goals of standardizing federal evidence practice while affording the trial judge sufficient discretion and flexibility to do justice in exceptional cases").

117. Waltz, *supra* note 114, at 349; *see also* Paul F. Kirgis, *A Legisprudential Analysis of Evidence Codification: Why Most Rules of Evidence Should Not Be Codified—But Privilege Law Should Be*, 38 LOY. L.A. L. REV. 809, 845 (2004) (contending that most of the Evidence Rules "enacted versions of the law prevailing at common law").

118. Robert P. Mosteller, *Evidence History, the New Trace Evidence, and Rumblings in the Future of Proof*, 3 OHIO ST. J. CRIM. L. 523, 527 (2006).

119. Eileen A. Scallen, *Proceeding with Caution: Making and Amending the Federal Rules of Evidence*, 36 SW. U. L. REV. 601, 610 (2008).

120. Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 FLA. ST. U. L. REV. 509, 510 (1997).

121. *See* William L. Hungate, *An Introduction to the Proposed Rules of Evidence*, 32 FED. B.J. 225, 228–29 (1973); Bein, *supra* note 79, at 855–56; *cf. Erosion*, *supra* note 80, at 195–96 (urging thoroughgoing reform).

122. While some of these rules appear permissive, courts rarely treat them so. *See generally* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006).

123. Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement*, 8 ST. THOMAS L. REV. 69, 72 (1995) [hereinafter Green, *Policing*] (discussing some of these sources); *see also, e.g.*, FED. R. CRIM. P. 16; 18 U.S.C. § 3500 (2018).

124. Green, *Policing*, *supra* note 123, at 72 (discussing the general ethical obligations for DOJ attorneys, not just in discovery); *see also, e.g.*, 28 C.F.R. § 77 (2001).

authority, rules promulgated by federal courts on an *ad hoc* basis, and internal guidelines adopted by the United States Department of Justice ("Department" or "DOJ") govern prosecutorial behavior.[125]

B. Building Blocks: Definition, Virtues, and Interpretive Lodestars

1. Pertinent Delineations

i. Evidence Rule 801(a)–(d)(1)

The Evidence Rules espouse a "narrow definition of hearsay" but have "broad rendering of hearsay exceptions."[126] Evidence Rule 801's first two paragraphs define "statement"[127] and "declarant";[128] while its third paragraph "sets forth the basic hearsay rule and is similar in principle to the basic rule in most states."[129] Per this rule, "hearsay" is any "statement" that "the declarant does not make while testifying at the current trial or hearing" and "a party offers in evidence to prove the truth of the matter asserted in the statement."[130] Axiomatically, "[r]elevant oral and written expressions made out of court . . . offered for an infinite variety of purposes other than to prove the facts

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125. Green, *Policing*, *supra* note 123, at 72.

126. William O. Bertelsman, *What You Think You Know (but Probably Don't) About the Federal Rules of Evidence: A Little Knowledge Can Be a Dangerous Thing*, 8 N. KY. L. REV. 81, 95 (1981).

127. FED. R. EVID. 801(a) ("'Statement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion."); United States v. Ibarra-Diaz, 805 F.3d 908, 922 n.7 (10th Cir. 2015) (citing Evidence Rule 801(a)). Absent such an intent, no verbal declaration or nonverbal conduct can rightly be defined as a "statement" for purposes of Evidence Rule 801. United States v. Kool, 552 F. App'x 832, 834 (10th Cir. 2014). In federal court, the party claiming that the intention to make an assertion existed bears the burden of its proof. United States v. Jackson, 88 F.3d 845, 848 (10th Cir. 1996) (quoting FED. R. EVID. 801 advisory committee's note).

128. FED. R. EVID. 801(b); *see also* Patterson v. City of Akron, 619 F. App'x 462, 480 (6th Cir. 2015) (refusing to classify "a report of raw data produced by a machine" as "a statement . . . made by a declarant").

129. Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 FORDHAM L. REV. 1485, 1485 (2016); *see also* Glen Weissenberger, *Reconstructing the Definition of Hearsay*, 57 OHIO ST. L.J. 1525, 1533 (1996) ("[T]he Federal Rules of Evidence have served as a model for many state evidence codes . . . .").

130. FED. R. EVID. 801(c); United States v. Rios, 830 F.3d 403, 430 (6th Cir. 2016); *cf.* Paul J. Brysh, Comment, *Abolish the Rule Against Hearsay*, 35 U. PITT. L. REV. 609, 610–13 (1974) (blaming two requirements—that the statement constitute an assertion and that it be introduced for the purpose of proving the truth of the matter asserted—for the confusion which has surrounded the concept of hearsay). The common law boasted a number of distinct definitions of "hearsay." *Erosion*, *supra* note 80, at 104.

asserted" remain outside this classification.[131] As to statements that qualify as hearsay,[132] including newspaper articles and television programs,[133] Evidence Rule 803 contains twenty-four exceptions[134] predicated on certain statements' supposed reliability,[135] while the next provision enumerates five more based on presumed necessity.[136] Both hearsay's expansive yet vague definition and these numerous exclusions have undercut the potency of the prohibition set forth in Evidence Rule 802[137] and defanged this once fearsome proscription,[138] effectively resurrecting the common law's pockmarked doctrine.[139]

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131. Richard C. Donnelly, *The Hearsay Rule and Its Exceptions*, 40 MINN. L. REV. 455, 455 (1956).

132. *See* Green v. Baca, 226 F.R.D. 624, 637 (C.D. Cal. 2005) (applying exceptions).

133. United States *ex rel.* Woods v. Empire Blue Cross & Blue Shield, 99 Civ. 4968 (DC), 2002 U.S. Dist. LEXIS 15251, at *4 n.1 (S.D.N.Y. Aug. 19, 2002); *In re* Columbia Sec. Litig., 155 F.R.D. 466, 474 (S.D.N.Y. 1994). Newspapers provide a good snapshot of the hearsay rule's practical complexity, as "[e]ven when the actual statements quoted in a newspaper article constitute nonhearsay, or fall within a hearsay exception, their repetition in the newspaper creates a hearsay problem." *Green*, 226 F.R.D. at 637–38; *see also* Larez v. City of Los Angeles, 946 F.2d 630, 642 (9th Cir. 1991) ("As the reporters never testified nor were subjected to cross-examination, their transcriptions of [a witness'] statements involve a serious hearsay problem.").

134. *See* FED. R. EVID. 803; Universal Elec. Co. v. U.S. Fid. & Guar. Co., 792 F.2d 1310, 1314 (5th Cir. 1986); United States v. Simmons, 773 F.2d 1455, 1459 (4th Cir. 1985). In contrast with the first twenty-three, the twenty-fourth one, the hearsay "catch all" exception, applies only in those novel or unusual circumstances where no other exception applies. Cent. Fid. Bank v. Denslow (*In re* Denslow), 104 B.R. 761, 766 (E.D. Va. 1989). "Its purpose is to provide a vehicle for the growth of the law in areas unforeseen by the Rule's drafters in enumerating the other 23 exceptions." *Id.*

135. *See generally* Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861 (2015). According to some, "[r]eliability has long been viewed as *the* primary justification for recognizing exceptions to the hearsay rule." Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 683 (1986) (emphasis added). For example, reliability was the reason why the Court classified the business records exception set forth in Evidence Rule 803(6) as "firmly-rooted." Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36, 62 (2004). Wigmore, for example, contended that trustworthiness legitimated all hearsay exceptions. *See Erosion*, *supra* note 80, at 116.

136. Sam Stonefield, *Rule 801(d)'s Oxymoronic "Not Hearsay" Classification: The Untold Backstory and a Suggested Amendment*, 5 FED. CTS. L. REV. 1, 13 (2011).

137. FED. R. EVID. 802; United States v. Borrasi, 639 F.3d 774, 779 (7th Cir. 2011).

138. Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 799–800 (1992); *see also* Sklansky, *supra* note 102, at 13.

139. *See, e.g.*, Richter, *supra* note 135, at 1874; *cf.* Ronald J. Allen, *The Hearsay Rule as a Rule of Admission Revisited*, 84 FORDHAM L. REV. 1395, 1402 (2016) (warning that an even more discretionary system may "regenerate the complex

One more fact has contributed to this substantial, albeit incomplete, evisceration: the Evidence Rules explicitly allow for the admission of five basic categories of hearsay,[140] codifying "an oxymoron: nonhearsay hearsay,"[141] whose capaciousness evokes the common law's penchant for needless complexity.[142] "[A] compromise"[143] that departed from tradition,[144] Evidence Rule 801(d)(1)(A) contains one—a witness' prior inconsistent statement[145]—rooted in concerns about investigators' "fabrications" and the value of a declarant's "immediate cross-examination."[146] A second—a witness' prior consistent statements offered either "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence motive in so testifying" or "to rehabilitate the declarant's credibility as a witness when attacked on another ground"—appears in Evidence Rule 801(d)(1)(B).[147] Next,

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common law of admissibility and encourage the judicial manipulation of the inferential process that were part of the objectives of the . . . [Evidence] Rules to eliminate").

140. Richter, *supra* note 135, at 1874.

141. Saltzburg, *supra* note 129, at 1485; *cf.* Stonefield, *supra* note 136, at 34 (discussing the creation of the "not hearsay category" embodied in Evidence Rule 801(d)); Joseph H. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1163 (1954) ("Once it was believed that admissions were not hearsay. Nobody today would adopt so naive a view."). This classification of admission as non-hearsay has been described as one of the rules' "most notorious idiosyncras[ies]." Park, *supra* note 100, at 327 n.1.

142. *See supra* Part III.A.1.

143. Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 79 n.113 (1987).

144. FED. R. EVID. 801 advisory committee's note to proposed rule ("Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence.").

145. FED. R. EVID. 801(d)(1)(A); Gilmore v. Palestinian Interim Self-Government Auth., 843 F.3d 958, 971 (D.C. Cir. 2016).

146. Park, *supra* note 143, at 79.

147. FED. R. EVID. 801(d)(1)(B)(i)–(ii); Miller v. Greenleaf Orthopedic Assocs., S.C., 827 F.3d 569, 574 (7th Cir. 2016). "Such statements are normally admissible if they satisfy a four-part test: (1) the declarant testifies at trial and is subject to cross-examination; (2) [her] prior statement is indeed consistent with [her] trial testimony; (3) the statement is offered to rebut an explicit or implicit accusation of recent fabrication; and (4) the statement was made before the declarant had a motive to fabricate." United States v. Alviar, 573 F.3d 526, 541 (7th Cir. 2009). Accordingly, "[a] prior statement does not fall within [Evidence] Rule 801(d)(1)(B), even if it is consistent with the witness's in-court testimony, unless it has some potential to rebut the alleged link between the in-court testimony and the witness's recent improper motive." *Miller*, 827 F.3d at 574. The second ground for admission in Evidence Rule 801(d)(1)(B) was added in 2014 so as "to extend [the rule's] substantive effect to consistent statements that rebut other attacks on a witness-such as the charges of inconsistency or faulty memory." FED. R. EVID. 801 advisory committee's note to 2014 amendment (explicating FED. R. EVID. 801(d)(1)(B)(ii)); United States v. Kubini, Crim.

Evidence Rule 801(d)(1)(C) "defines as not hearsay a prior statement 'of identification of a person made after perceiving the person,' if the declarant 'testifies at the trial or hearing and is subject to cross-examination concerning the statement.'"[148] History justified the codification of this category, "[t]he admission of evidence of identification [then] find[ing] substantial support, although it falls beyond a doubt in the category of prior out-of-court statements," in a slew of state-level cases.[149]

ii. Evidence Rule 801(d)(2)

As originally proposed, Evidence Rule 801(d)(2) honored and rejected the past, neither its departures nor its consistencies subject to congressional fiddling.[150]

As the embodiment of a basic and time-honored principle,[151] this provision sets out several categories of admissions by party-opponents with well-established historical antecedents.[152] Like its common law progenitor, it exempts personal admissions, which take place whenever a party-opponent or its representative actually makes the relevant statement, from Evidence Rule 802's denotation of "hearsay."[153] Although it fails to categorize the innumerable ways in which a party may make such admissions, statements admitted under Evidence Rule 801(d)(2)(A) "need neither be incriminating, inculpatory, against interest, nor otherwise inherently damaging to the declarant's case."[154] Equally wanting in novelty,[155] Evidence Rule 801(d)(2)(B)[156] codifies the common law of adoptive admissions,

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No. 11-14, 2015 WL 418220, at *9 (W.D. Pa. Feb. 2, 2015) (quoting FED. R. EVID. 801 advisory committee's note to 2014 amendment).

148. FED. R. EVID. 801(d)(1)(C); United States v. Owens, 484 U.S. 554, 661 (1988).

149. FED. R. EVID. 801 advisory committee's note to proposed rule; Puryear v. State, 774 So. 2d 846, 854 (Fla. Dist. Ct. App. 2000), *quashed by* 810 So. 2d 901 (Fla. 2002).

150. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1239 (E.D. Pa. 1980).

151. *See* FED. R. EVID. 801 advisory committee's note to proposed rule; Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 667 (10th Cir. 2016).

152. *See* Waltz, *supra* note 114, at 357.

153. FED. R. EVID. 801(d)(2)(A); United States v. Aviles-Colon, 536 F.3d 1, 23 (1st Cir. 2008).

154. United States v. Reed, 227 F.3d 763, 770 (7th Cir. 2000).

155. *See* FED. R. EVID. 801 advisory committee's note to proposed rule.

156. FED. R. EVID. 801(d)(2)(B).

including explicit and implicit adoption or acquiescence.[157] Like its unwritten predecessors, this provision "does not include an agency requirement," instead encompassing all statements made by "any declarant, regardless of [their] relationship to the party."[158] Similarly, the coconspirator rule then and now lodged in Evidence Rule 801(d)(2)(E)[159] dates to dicta inked in 1827.[160]

The next two classes of admissions specified in Evidence Rule 801(d)(2), the focus of this Article, more firmly deviated from past practice.[161] Evidence Rule 801(d)(2)(C) categorizes as authorized admissions statements "made by a person whom the [opposing] party authorized to make a statement on the subject."[162] Though characterized as an anodyne codification of the common law,[163] this provision actually expanded an old exception's reach, as it rendered statements between two agents, as well as between an agent and a principal, newly admissible.[164] For its part, Evidence Rule 801(d)(2)(D) excludes from the definition of hearsay such a statement if "made by the [opposing] party's agent or employee on a matter within the scope of that relationship while it existed."[165] In two ways, this provision forsook the common law: first, it "eliminat[ed] the requirement that the principal authorize[d] the statement" in

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157. *See* Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 414 (2002) [hereinafter Poulin, *Admissions*].

158. *Id.* at 425.

159. FED. R. EVID. 801(d)(2)(E).

160. *See* United States v. Gooding, 25 U.S. 460, 469 (1827); *see also* Bourjaily v. United States, 483 U.S. 171, 192 (1987) (Blackmun, J., dissenting) ("The Federal Rules of Evidence did not alter in any way this common-law exemption to hearsay."), *superseded by statute*, FED. R. EVID. 801(d)(2).

161. Waltz, *supra* note 114, at 357.

162. FED. R. EVID. 801(d)(2)(C); *see also* Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 817 F.3d 934, 944 n.6 (6th Cir. 2016) (quoting FED. R. EVID. 801(d)(2)(C)).

163. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1245 (E.D. Pa. 1980).

164. Waltz, *supra* note 114, at 357; *see also, e.g.*, Judson F. Falknor, *Vicarious Admissions and the Uniform Rules*, 14 VAND. L. REV. 855, 856–57 (1961) (objecting to a similar provision included in Uniform Rule 63 (9)(a) for departing from the common law). Prior to 1975, "[n]o authority [was] required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party," but a question then "ar[o]se[] whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal." FED. R. EVID. 801 advisory committee's note to proposed rule. Evidence Rule 801(d)(2)(C) was "phrased broadly so as to encompass both." *Id.*

165. FED. R. EVID. 801(d)(2)(D); Travers v. Flight Servs. & Sys., 808 F.3d 525, 532 n.2 (1st Cir. 2015).

question, and second, it admitted statements so long as the agent spoke "concerning an appropriate subject matter."[166] In so "go[ing] beyond the usual agency test for determining whether the principal is bound by admissions made by an agent," Evidence Rule 801(d)(2)(D) relaxed "the traditional rule" in the hope of "facilitat[ing] the admission of much reliable and illuminating evidence."[167]

2. Overlapping Scopes

The Evidence and Criminal Rules specify their relevant corpus' scope in their first paragraphs.[168] "[C]onsidered federal statutory law and [] codified" in the United States Code's twenty-eighth title,[169] the Evidence Rules "apply to proceedings in United States courts,"[170] defining a "civil case" to include either "a civil action or proceeding" and "a criminal case" to encompass "a criminal proceeding."[171] More particularly, they control in "civil cases and proceedings, including bankruptcy, admiralty, and maritime cases" and "criminal cases and proceedings."[172] "[T]he plain language of [Evidence] Rule 1101(b)," then, "renders each of the Federal Rules of Evidence,"[173] including the Evidence Rule's eighth article,[174] "generally applicable to criminal cases and proceedings."[175] Conversely, "where the drafters of the

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166. Poulin, *Admissions*, *supra* note 157, at 451; *see also, e.g.*, Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1565 (11th Cir. 1991) ("Rule 801(d)(2)(D) broadened the traditional view so that it is no longer necessary to show that an employee or agent declarant possesses 'speaking authority' . . . ."); Staheli v. Univ. of Miss., 854 F.2d 121, 127 (5th Cir. 1988) (finding Evidence Rule 803(d)(2)(D) to be "somewhat broader" than the traditional rule); Hoptowit v. Ray, 682 F.2d 1237, 1262 (9th Cir. 1982) ("[T]he rule does not require a showing that the statement is within the scope of the declarant's agency. Rather, it need only be shown that the statement be related to a matter within the scope of the agency.").

167. Waltz, *supra* note 114, at 357, 358.

168. FED. R. EVID. 101; FED. R. CRIM. P. 1.

169. Richardson v. Lemke, 745 F.3d 258, 266 n.3 (7th Cir. 2014).

170. FED. R. EVID. 101(a); *see also* Ward v. Beard, No. CV 11-8025 GAF (SS), 2013 WL 5913816, at *13 n.17 (C.D. Cal. Sept. 13, 2013) ("[T]he Federal Rules of Evidence simply do not apply to state criminal proceedings.").

171. FED. R. EVID. 101(b)(1)–(2); *cf.* TEX. R. EVID. 101(b), (d)–(f) (mirroring Evidence Rule 101).

172. FED. R. EVID. 1101(b); Sovereign Guns, Inc. v. U.S. Dep't of Justice, No. 5:16-CV-182-FL, 2016 WL 7187316, at *4 (E.D.N.C. Dec. 9, 2016) (citing FED. R. EVID. 1101(b)).

173. United States v. Arias, 431 F.3d 1327, 1336 (11th Cir. 2005).

174. Title VIII contains the hearsay rule and its many exceptions. *See* FED. R. EVID. 801–807.

175. *Arias*, 431 F.3d at 1336; *see also, e.g.*, United States v. Bailey, 327 F.3d 1131, 1146 (10th Cir. 2003) (finding Evidence Rule 403 applicable in a criminal matter

[Evidence] Rules intended to prevent the application of a particular Rule to criminal cases, they provided so expressly."[176] Still, the Evidence Rules do not bind completely, as "[a] federal statute or a rule prescribed by the Supreme Court may ['independently'] provide for admitting or excluding evidence."[177] "Primarily,"[178] the Criminal Rules "govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States"[179] and therefore set the "standards for federal agents."[180] By virtue of these provisions, both the Evidence and Criminal Rules apply in a criminal trial, their provisions often intersecting, sometimes even clashing, in its maelstrom.[181]

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because, among other reasons, "the Federal Rules of Evidence apply generally to both civil and criminal proceedings").

176. *Arias*, 431 F.3d at 1336–37; *see also Bailey*, 327 F.3d at 1146 n.6 (citing Evidence Rule 803(8)(B) as indicating that "the drafters of the Rules knew how to expressly exclude criminal proceedings from the Rules' application when they wanted to . . . ."); *cf.* United States v. Hays, 872 F.2d 582, 588–89 (5th Cir. 1989) (holding that Evidence Rule 408 prevents the introduction of settlement agreements in a criminal proceeding). *But see* United States v. Prewitt, 34 F.3d 436, 439 (7th Cir. 1994) (holding that defendant's statements were not barred by Rule 408).

177. FED. R. EVID. 1101(e); *see also* Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 378 n.39 (D.N.M. 2015) (citing FED. R. EVID. 1101(e)); United States v. Caro, 102 F. Supp. 3d 813, 833 (W.D. Va. 2015) (also citing FED. R. EVID. 1101(e))).

178. FED. R. CRIM. P. 1 advisory committee's note to 1972 amendment; *see also* Ali Hamza Ahmad Suliman Al Bahlul v. United States, 792 F.3d 1, 6 (D.C. Cir. 2015) (quoting the advisory committee's note), *rev'd per curiam*, 840 F.3d 757 (D.C. Cir. 2016).

179. FED. R. CRIM. P. 1(a)(1); *see also, e.g.*, Rodriquez v. Bush, 842 F.3d 343, 346 n.3 (4th Cir. 2016) ("The Federal Rules of Criminal Procedure apply to federal trials, not state trials."); United States v. Chase, 340 F.3d 978, 985 (9th Cir. 2003) ("The Federal Rules of Evidence apply only to proceedings in federal court.").

180. Rea v. United States, 350 U.S. 214, 217 (1956); United States v. Klapholz, 230 F.2d 494, 497 (2d Cir. 1956).

181. *Cf. In re* Merck & Co., Inc. Sec., Derivative & ERISA Litig., No. 05-2367 (SRC), 2012 WL 4764589, at *6 (D.N.J. Oct. 5, 2012) (noting that a party's argument that certain communications exchanged in the course of negotiating a resolution with the government are protected from disclosure "implicates the tension between" Evidence Rule 408 and Civil Rule 26).

3. Shared Virtues

The Criminal Rules' second provision fixes their interpretive touchstones.[182] Per Criminal Rule 2, every criminal stricture must be "interpreted" (1) "to provide for the just determination of every criminal proceeding," (2) "to secure simplicity in procedure" and (3) "fairness in administration," and (4) "to eliminate unjustifiable expense and delay."[183] Indeed, in 2002, the Criminal Rules were retooled, with "are to be interpreted" replacing "are intended," to accord with "the original intent of the drafters" and to "more accurately reflect[] the purpose of the rules."[184] A codification of "the inherent power of a district court to manage cases before it in a just and efficient manner,"[185] the Criminal Rules were designed "to promote economy and efficiency" by "avoid[ing] a multiplicity of trials"[186] and "simplify[ing] procedure."[187] Consistent with this mandate, with courts bound to consider "both to the needs of the individual litigants and to the public at large and approach procedural problems flexibly,"[188] the Criminal Rules do not constitute a "rigid code" with "an inflexible meaning irrespective of the

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182. *See infra* Part V.A; *see also* Carlisle v. United States, 517 U.S. 416, 424 (1996) (Criminal Rule 2 "sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives.").

183. FED. R. CRIM. P. 2; *see also* United States v. Del Valle-Fuentes, 143 F. Supp. 3d 24, 27 (D.P.R. 2015) (defending a ruling on a motion to dismiss an indictment as consistent with Criminal Rule 2's "mandate").

184. FED. R. CRIM. P. 2 advisory committee's note to 2002 amendment; *see also* United States v. Navarro, 169 F.3d 228, 237 (5th Cir. 1999) (quoting pre-2002 version of Criminal Rule 2).

185. United States v. Lynch, 227 F. Supp. 3d 421, 437 (W.D. Pa. 2017); *see also* United States v. Broadus, 664 F. Supp. 592, 596 (D.D.C. 1987) ("Rule 2 demands that a court attend both to the needs of the individual litigants and to the public at large and approach procedural problems flexibly so that justice, fairness in administration, and efficiency are accommodated.").

186. United States v. Mosquera, 813 F. Supp. 962, 966 (E.D.N.Y. 1993) (quoting 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 31, at 24 (2d ed. 1982)); *accord* Zafiro v. United States, 506 U.S. 534, 540 (1993) (emphasizing that Criminal "Rules 8(b) and 14 are designed 'to promote economy and efficiency and to avoid a multiplicity of trials'").

187. Contreras v. United States, 213 F.2d 96, 99 (5th Cir. 1954); *see also, e.g.*, Rua v. United States, 321 F.2d 140, 141 (5th Cir. 1963) (quoting *Contreras*, 213 F.2d at 99).

188. *Broadus*, 664 F. Supp. at 596; *see also, e.g.*, United States v. DiBernardo, 880 F.2d 1216, 1225 n.4 (11th Cir. 1989) ("The rules must be applied flexibly 'to provide for the just determination' of every case . . . .").

circumstances."[189] Rather, "[t]he Criminal Rules were framed with the declared purpose of ensuring that justice not be thwarted by those with too little imagination to see that procedural rules are not ends in themselves, but simply means to an end: the achievement of equal justice for all."[190] Thus, while Criminal Rule 2 cannot override other specific and explicit provisions,[191] it mandates an interpretive approach that is applicable regardless of a provision's clarity (though most potent in its dearth) and that is, at its core, both scornful of the law's "outmoded technicalities"[192] and sympathetic to "disposition on the merits."[193]

In its current cast, Civil Rule 1 enthrones a similar value.[194] That this congruence in functionality was intended is implicit in the Criminal Committee's decision to expressly reference Civil Rule 1 in its annotation to Criminal Rule 2:[195] "[The rules] should be construed, administered, and employed by the courts and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[196] Heeding this mandate, soon after their adoption[197] and with little variance over the ensuing decades,[198] federal courts have "uniformly treated [the Civil Rules] as designed to promote the ends of justice, not to defeat them, it being increasingly realized that orderly procedure does not require a sacrifice of fundamental

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189. Fallen v. United States, 378 U.S. 139, 142 (1964); *see also* Gov't of Virgin Is. v. Knight, 989 F.2d 619, 626 (3d Cir. 1993) (distinguishing this ethic from that applicable in cases of statutory interpretation).

190. Berman v. United States, 378 U.S. 530, 538 (1964) (Black, J., dissenting).

191. United States v. Diaz-Clark, 292 F.3d 1310, 1318 (11th Cir. 2002).

192. United States v. Personal Fin. Co. of N.Y., 13 F.R.D. 306, 311 (S.D.N.Y. 1952) (quoting 4 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 16 (1969)).

193. United States v. El-Gabrowny, No. S3 93 CR. 181 (MBM), 1994 U.S. Dist. LEXIS 2645, at *8 (S.D.N.Y. Mar. 9, 1994); *see also, e.g.*, United States v. Claus, 5 F.R.D. 278, 280 (E.D.N.Y. 1946) ("Adjudication on the merits should be the motivating policy in determining rights rather than technicalities of procedure or form.").

194. FED. R. CIV. P. 1 (The Civil Rules "should be construed, administered, and employed by *the court* and *the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.") (emphasis added).

195. FED. R. CRIM. P. 2 advisory committee's note (1944); *see also* United States v. Broadus, 664 F. Supp. 592, 596 (D.D.C. 1987) (describing Criminal Rule 2 as "the criminal procedure analogue" to Civil Rule 1); *cf.* United States v. Stein, 435 F. Supp. 2d 330, 379 n.238 (S.D.N.Y. 2006) (considering the two rules side-by-side).

196. FED. R. CIV. P. 1.

197. *See* Hormel v. Helvering, 312 U.S. 552, 557 (1941).

198. *See* Amir Shachmurove, *Disruptions' Function: A Defense of (Some) Form Objections Under the Federal Rules of Civil Procedure*, 12 SETON HALL CIR. REV. 161, 170–71 (2016) [hereinafter Shachmurove, *Function*].

justice."[199] As a result of repeated tinkering, this hortatory provision currently entrusts three entities—the court, the parties, and the attorneys—with this principle's realization. In the words of the Rules Committee, a court has "[an] affirmative duty . . . to exercise the authority conferred by the[] rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay," a responsibility shared with attorneys[200] and parties.[201]

Underscoring the federal rules' knitted character, Evidence Rule 102 employs the same language in delineating the purpose of its fifty provisions as Criminal Rule 2 and Civil Rule 1. To wit, every evidentiary condition must be "construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[202] Because the Criminal Rules incorporate other areas of federal procedural law so as to achieve a joint end[203]—the "shed[ding] . . . of . . . archaic formalism" in an "age of increasing emphasis on simplicity"[204]—to the extent Civil

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199. United States v. Claus, 5 F.R.D. 278, 280 (E.D.N.Y. 1946); *see also, e.g.*, Taft v. Pontarelli, 100 F.R.D. 19, 21 n.1 (D.R.I. 1981) ("The rules are designed to promote the ends of justice, not to defeat them, and orderly rules of procedure do not require sacrifice of the fundamental rules of justice.").

200. FED. R. CIV. P. 1 advisory committee's note to 1993 amendment; Atlas Res., Inc. v. Liberty Mut. Ins. Co., 297 F.R.D. 482, 485 (D.N.M. 2011) (citing FED. R. CIV. P. 1 advisory committee's note to 1993 amendment); Gipson v. Sw. Bell Tel. Co., No. 08-2017-EFM-DJW, 2008 U.S. Dist. LEXIS 103822, at *4 (D. Kan. Dec. 23, 2008) ("This Court's goal, in accordance with Rule 1[,] . . . is to administer the [Rules] in a 'just, speedy and inexpensive' manner. To assist the Court in accomplishing this goal, the parties are encouraged to resolve discovery and other pretrial issues without the Court's involvement."); David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH. J.L. & TECH. 1, 11–12, 15 (2012) ("There are now numerous opinions making the same point about cooperation, yet it appears that cooperation is not being used enough as a method of obtaining the 'just, speedy, and inexpensive determination of the action.'").

201. FED. R. CIV. P. 1 advisory committee note to 2015 amendment; Hyatt v. Rock, No. 9:15-CV-0089 (DNH/DJS), 2016 WL 6820378, at *2 (N.D.N.Y. Nov. 28, 2016).

202. FED. R. EVID. 102; *see also* United States v. Wilkens, 742 F.3d 354, 361 (8th Cir. 2014) (concluding that the district court's opinion accorded with the virtues set forth in Evidence Rule 102).

203. *See* FED. R. CRIM. P. 2 advisory committee's note (1944); *see also* Chairman Arthur T. Vanderbilt, Speech at New York University School of Law Institute Proceedings (Feb. 15, 1946) ("I regard [Criminal] Rule 2 as the most important rule of the whole set. . . . The rule in a sense corresponds with the last sentence or Rule 1 of the Federal Rules of Civil Procedure . . . ."), *cited in* Kennedy v. Reid, 249 F.2d 492, 497 n.21 (D.C. Cir. 1957).

204. United States v. King, 482 F.2d 768, 772 (D.C. Cir. 1973); *see also, e.g.*, United States v. Debrow, 346 U.S. 374, 376 (1953) ("The Federal Rules of Criminal Procedure were designed to eliminate technicalities in criminal pleading and are to be

Rule 1 bars an interpretation of the civil rules' ambiguities in a manner inimical to justice's pursuit,[205] "a seemingly plausible inference from a criminal rule cannot command blind adherence if it would deprive an accused person . . . of a just determination of his or her cause."[206] Yet, as with Civil Rule 1, this provision's core "object is to get at the truth as efficiently as possible,"[207] and courts thus regularly invoke "the elimination-of-unjustifiable-expense-and-delay purpose" of the Evidence Rules in making sundry determinations.[208] Still, "the premise of federal practice and procedure" within the evidentiary realm has been loudly affirmed in centuries of jurisprudence:[209] "a requirement for fundamental fairness,"[210] tempered by a utilitarian sensibility,[211] in seeming harmony with the philosophical core of the otherwise more mechanistic Civil and Criminal Rules.[212]

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construed to secure simplicity in procedure."); Inmates of Suffolk Cty. Jail v. Kearney, 788 F. Supp. 623, 625 (D. Mass. 1992) (describing the "public interest in [a] 'just, speedy, and inexpensive disposition'" to be equally embodied in Civil Rule 1 and Criminal Rule 2); United States v. Shea, 750 F. Supp. 46, 48 (D. Mass. 1990) (quoting FED. R. CIV. P. 1; FED. R. CRIM. P. 2).

205. *See* Cook v. Boorstin, 763 F.2d 1462, 1472 (D.C. Cir. 1985); Padovani v. Bruchhausen, 293 F.2d 546, 550 (2d Cir. 1961).

206. United States v. Broadus, 664 F. Supp. 592, 596–97 (D.D.C. 1987); *cf.* Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 609 (3d Cir. 1995) (The federal rules "repeatedly embody the principle that trials should be both fair and efficient.").

207. Hamilton v. Lee, No. 13-CV-4336, 2016 WL 1241851, at *1 (E.D.N.Y. Mar. 28, 2016).

208. United States v. Hoffman, Crim. No. 14-022 Section "F," 2015 WL 1509488, at *1 (E.D. La. Apr. 1, 2015); *see also, e.g.*, United States v. De Armas Diaz, No. 2:13-cr-00148-JAD-GWF, 2014 U.S. Dist. LEXIS 56572, at *15 (D. Nev. Apr. 23, 2014).

209. Putscher v. Smith's Food & Drug Ctrs., Inc., No. 2:13-cv-1509-GMN-VCF, 2014 WL 2835315, at *8 (D. Nev. June 20, 2014).

210. United States v. Thurman, 915 F. Supp. 2d 836, 870 (W.D. Ky. 2013); *accord* Wezorek v. Allstate Ins. Co., No. 06-CV-1031, 2007 WL 1816293, at *5 (E.D. Pa. June 22, 2007); *see also* Donald H. Ziegler, *Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence*, 2003 UTAH L. REV. 635, 677 (2003) ("[I]t plainly seems unfair to forbid impeachment under Rule 609[] but allow the defendant to be questioned about the underlying acts under Rule 608(b).").

211. *See* United States v. Algie, 503 F. Supp. 783, 791–92 (E.D. Ky. 1980), *rev'd*, 667 F.2d 569 (6th Cir. 1982).

212. *See, e.g.*, Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 609 (3d Cir. 1995).

C. Federal Prosecutors' Discovery Obligations

Unsurprisingly,[213] jurists in the British Isles first sketched the doctrine's contours, warts and all. In the 1792 case of *Rex v. Holland*,[214] an Indian board of inquiry detailed the evidence that it had collected during the course of a complex peculation investigation in a simple report.[215] When the offended defendant sought to inspect this singular piece of evidence,[216] a flummoxed attorney general replied with unmitigated outrage: "There never was yet an instance of such an application as to present, to give the defendant an opportunity of inspecting the evidence to be produced against him upon a public prosecution."[217] With this indictment, the judges of the Court of King's Bench concurred, their horror conspicuously conveyed.[218] To one, "[t]he practice on common law indictments, and on informations on particular statutes, shews it to be clear that this defendant is not entitled to inspect the evidence, on which the prosecution is founded, till the hour of trial."[219] The second added, "[I]f we were to assume a discretionary power of granting this request, it would be dangerous in the extreme,"[220] and the third continued: "Nor was it ever conceived to be necessary or fit that he should receive intelligence of the particular evidence by which the charge was to be made out. And I should be sorry if such a rule were to be laid down in any case."[221] Lloyd Kenyon, these men's Lord Chief Justice, beheld only phantasms of subversion: "There is not principle or precedent to warrant [this application]. Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of

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213. *Cf.* Amir Shachmurove, *The Consequences of a Relic's Codification: The Dubious Case for Bad Faith Dismissals of Involuntary Bankruptcy Petitions*, 26 AM. BANKR. INST. L. REV. 115, 119 (2018) (discussing the British roots of the United States' first bankruptcy laws).

214. (1792) 100 Engl. Rep. 1248, 1248–49 (K.B.). Though United States courts would repeatedly look to this case as guidance, England would slowly but surely liberalize its regime in the nineteenth century. *See* George H. Revelle & David L. Ashbaugh, *Criminal Pre-Trial Discovery—A Proposal*, 3 GONZ. L. REV. 48, 49 (1968); Sheldon Krantz, Comment, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 NEB. L. REV. 127, 128 (1962).

215. Revelle & Ashbaugh, *supra* note 214, at 48–49.

216. Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 294 (1960).

217. *Holland*, 100 Engl. Rep. at 1248.

218. Fletcher, *supra* note 216, at 294.

219. *Holland*, 100 Engl. Rep. at 1250.

220. *Id.*

221. *Id.* at 1249.

criminal law."[222] So as to preserve the law's majesty, the King's Bench declared, a defendant must remain in the dark for as long as possible, a constricted understanding of *criminal* discovery then consistent with the common law's distaste for *civil* discovery.[223]

From this early case rose the basic common law rule—an utter absence of any right of discovery by a criminal defendant[224]—to which federal and state courts in the United States adhered well into the twentieth century.[225] Indeed, such classically liberal luminaries as Learned Hand[226] and Benjamin N. Cardozo[227] defended this approach, which the Court too endorsed,[228] despite its pointed rejection by the equally venerable John Marshall.[229] Like the hearsay rule,[230] this conception of a criminal defendant's discovery privileges encountered little opposition,[231] and defendants' access to statements of government witnesses in criminal prosecutions was continuously stymied by a tide of conservative judicial opinions.[232]

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222. *Id.* at 1250; *see also* Jerry E. Norton, *Discovery in the Criminal Process*, 61 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 11, 12 (1970) (quoting the Chief Justice's observation).

223. *See* Shachmurove, *Boilerplate*, *supra* note 111, at 209–12 (detailing the history of the Civil Rules' discovery title); Shachmurove, *Function*, *supra* note 198, at 167–68 (discussing how the common law disfavored extensive civil discovery and even mythologizes the notion of trial by ambush).

224. *See, e.g.*, Daniel A. Rezneck, *Justice Brennan and Discovery in Criminal Cases*, 4 RUTGERS L.J. 85, 85 (1972); Revelle & Ashbaugh, *supra* note 214, at 48.

225. *See* Rezneck, *supra* note 224, at 85.

226. *See* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923); *see also* Michael A. Barbara, *Pretrial Discovery in Criminal Cases—A Case for Discovery in Kansas*, 9 WASHBURN L.J. 211, 213 (1967) (quoting *Garsson*, 291 F. at 649).

227. *See* People *ex rel.* Lemon v. Supreme Court of New York, 156 N.E. 84, 86–87 (N.Y. 1927); *see also* Barbara, *supra* note 226, at 212 (describing Cardozo's decision as the leading American case "holding that the defendant had no right to notes and memoranda of prospective government witnesses in possession of the prosecution where th[o]se items were not admissible at the trial").

228. Goldman v. United States, 316 U.S. 129, 132 (1942), *overruled by* Katz v. United States 389 U.S. 347, 352 (overruled on other grounds); *see also, e.g.*, Blevins v. State, 141 S.E.2d 426, 429 (Ga. 1965); State v. Spica, 389 S.W.2d 35, 51 (Mo. 1965).

229. *See* United States v. Burr, 25 F. Cas. 55, 68 (C.C.D. Va. 1807); *see also* Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U. L. REV. 601, 601 (1999) (discussing Marshall's opinion regarding a subpoena duces tecum directed at the President).

230. *See supra* Part III.A.

231. *See* Barbara, *supra* note 226, at 212; Fletcher, *supra* note 216, at 296; *see also, e.g.*, State v. Tune, 98 A.2d 881, 884 (N.J. 1953); State *ex rel.* Robertson v. Steele, 135 N.W. 1128, 1129 (Minn. 1912).

232. *See* Sharon Fleming, Note, *Defendant Access to Prosecution Witness Statements in Federal and State Criminal Cases*, 61 WASH. U. L.Q. 471, 473 n.12 (1983).

In time, the same liberalization which changed the tenor of civil discovery in full affected criminal discovery in part. Perhaps unsurprisingly, this loosening of an age-old asperity first gathered momentum in the states,[233] Louis Brandeis' famed laboratories of democracy.[234] To this trend, federal courts, as famously epitomized by William Brennan,[235] proved attentive.[236] Yet, though the Court's statements and the federal rules' revisions intimated this shift, criminal discovery continued to operate to the prosecution's advantage for many a year.[237] In the modern era, at the tail end of this unfinished evolution, "a patch-work of statutory and judge-made rules has evolved to govern criminal discovery" in federal matters,[238] and criminal defendants remain "entitled to rather limited discovery" under federal law according to the vast majority of federal courts.[239] To specifying those rules, this Article now turns.

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233. *See, e.g.*, State *ex rel.* Polley v. Superior Court, 302 P.2d 263, 265–66 (Ariz. 1956) (internal quotations omitted); People v. Davis, 18 N.W. 362, 363–64 (Mich. 1884); Fletcher, *supra* note 216, at 297–302; David O. DeGrandpre, Note, *The Bases for Pre-Trial Discovery in Criminal Cases*, 21 MONT. L. REV. 189, 189 (1960).

234. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

235. *Tune*, 98 A.2d at 894–98 (Brennan, J., dissenting); *see also* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U. L.Q. 279, 284–85 (1963) (explicating the famed liberal's theory). One author has given credit to Brennan for this shift. *See* Rezneck, *supra* note 224, at 86.

236. Irving R. Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113, 1113 (1957). The process proved uneven, subject to dizzying variations. *See* Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 229–30 (1964).

237. Traynor, *supra* note 236, at 231, 233, 239.

238. United States v. Salyer, 271 F.R.D. 148, 150 (E.D. Cal. 2010).

239. Degen v. United States, 517 U.S. 820, 825 (1996); *accord* United States v. Gonzales, 344 F.3d 1036, 1041 n.1 (10th Cir. 2003). In *Degen v. United States*, the Court asserted five rationales for disentitlement of fugitives in civil cases, including fear of "compromising of . . . criminal case[s] by the use of civil discovery mechanisms." Walsh v. Walsh, 221 F.3d 204, 215 (1st Cir. 2000) (citing *Degen*, 517 U.S. at 825–28). Of course, even if discovery could be an issue, a court retains the discretion to limit and manage discovery as the interest of justice requires. *Degen*, 517 U.S. at 826–27.

1. Mandatory Obligations

i. Constitutional Minimum

Regarding the issue of criminal discovery, the Constitution observes a strict silence. As the Court has stressed, "no general constitutional right to discovery in a criminal case" exists.[240] Meanwhile, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded."[241] Nonetheless, in two seminal decisions, the Court set forth the pertinent constitutional minimum.[242]

In *Brady v. Maryland*,[243] the Court emphasized the prosecutor's unique role as a protector of the Constitution's foremost ideals: "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant," thereupon "cast[ing] the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."[244] An individual defendant's guilt bore no direct relevance; the proper inquiry focused upon whether a certain prosecutor's conduct compromised the constitutional guarantee of a fair trial,[245] the federal government always a victor "whenever justice is done [to] its citizens in its courts."[246] Though surely a defendant's adversary, then, the

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240. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

241. Wardius v. Oregon, 412 U.S. 470, 474 (1973).

242. *See* Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 273 (2006).

243. 373 U.S. 83, 87 (1963).

244. *Id.* at 87–88; *see also* Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 307 (3d Cir. 2016) ("The rationale behind *Brady* itself rests on the principle that prosecutors bear an obligation to structure a fair trial for defendants . . . ."). The classic statement to that effect is the oft-quoted passage in *Berger v. United States*: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. 78, 88 (1935).

245. *Brady*, 373 U.S. at 87; *see also* Hunton v. Sinclair, 732 F.3d 1124, 1130 (9th Cir. 2013) (holding that the production of exculpatory evidence by the prosecution is "essential to a fair trial," as it is "critical to a criminal trial's essential 'function of adjudicating guilt or innocence'" (quoting Martinez v. Ryan, 566 U.S. 1, 12 (2012))).

246. *Brady*, 373 U.S. at 87; *see also, e.g.*, United States v. Ford, 550 F.3d 975, 992 (10th Cir. 2009) ("[T]he prosecutor 'is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. [The government's] chief business is not to achieve victory but to establish justice.'").

prosecutor's sole interest must be justice's pursuit.[247] On the basis of this premise, the Court thusly coined the *Brady* rule: "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[248] Nine years later, the Court extended this principle to impeachment evidence,[249] rejecting any distinction between such items and exculpatory materials.[250] Once more, the Court thundered: "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'"[251] Operating in tandem, *Brady* and *Giglio* establish a prosecutor's mandatory obligation, automatically triggered by the initiation of the most mundane criminal prosecution, to divulge all exculpatory evidence and any material information that casts a shadow of doubt on a government witness's credibility[252] "at a time when the disclosure would be of value to the accused,"[253] laying but a floor.[254]

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247. *Brady*, 373 U.S. at 87; *see also* United States v. Bagley, 473 U.S. 667, 675 n.6 (1985) ("The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'").

248. *Brady*, 373 U.S. at 87; *see also* United States v. Agurs, 427 U.S. 97, 97–98 (1976) (specifying the four situations to which *Brady* applies).

249. United States v. Giglio, 405 U.S. 150, 153–54 (1972). Indeed, *Brady* would be repeatedly expanded over the next fifty years. Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745 (2015).

250. *Bagley*, 473 U.S. at 676; *see also* United States v. Brumel-Alvarez, 991 F.2d 1452, 1461 (9th Cir. 1993) ("*Brady* information includes material . . . that bears on the credibility of a significant witness in the case.").

251. *Giglio*, 405 U.S. at 153.

252. *See, e.g.*, Reese v. Peters, 926 F.2d 668, 671 (7th Cir. 1991); United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978). Neither, however, has necessarily been consistently honored. *See* Bennet L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. 531, 538–64 (2007).

253. United States v. Davenport, 753 F.2d 1460, 1462 (9th Cir. 1985).

254. Kirsten Schimpff, *Rule 3.8, the Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1739 (2012).

ii. Statutory Requirements[255]

In a McCarthy Era prosecution for the filing of a false non-Communist affidavit, two federal informants provided critical testimony.[256] When the defense subpoenaed the government for these witnesses' written reports, the government refused, and both the district and circuit courts rejected the existence of any such right.[257] In *Jencks v. United States*, the Court declared otherwise and held that criminal defendants were entitled to access prior statements by government witnesses testifying against them during their trial.[258] "So far as . . . [the relevant documents] directly touch the criminal dealings," the Court asseverated, "the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter."[259] Henceforth, the government would alone choose whether to reserve or release, and dismissal would follow whenever "the [g]overnment, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial."[260] Unlike

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255. Most courts rightly classify the federal rules as statutory. *See, e.g.*, Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 107 n.14 (2d Cir. 2013); G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989); United States v. Christian, 660 F.2d 892, 899 (3d Cir. 1981); United States v. Orena, 811 F. Supp. 819, 825 (E.D.N.Y. 1992); *cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1976) ("Congress, of course, has plenary authority over the promulgation of evidentiary rules for the federal courts."); *cf.* Amir Shachmurove, *Purchasing Claims and Changing Votes: Establishing "Cause" under Rule 3018(a)*, 89 AM. BANKR. L.J. 511, 511 n.2 (2015) [hereinafter Shachmurove, *Claims*] (making this point). Nonetheless, most federal rules' actual provenance and technical elements markedly distinguish them from the typical congressional enactment passed in accordance with the Constitution's Presentment Clause. *See* Bowles v. Russell, 551 U.S. 205, 209–13 (2007) (distinguishing statutory prescriptions from procedural rules). In light of this formalistic distinction, the obligations imposed by the Criminal Rules are discussed separately from those set forth in an explicit congressional act. *See infra* Part III.C.1.iii.

256. *See* Reginald H. Alleyne, Jr., *The "*Jencks *Rule" in NLRB Proceedings*, 9 B.C. L. REV. 891, 893 (1968).

257. Jencks v. United States, 226 F.2d 540, 552 (2d Cir. 1955).

258. 353 U.S. 657, 670–72 (1957); *see also* United States v. Snell, 899 F. Supp. 17, 21 (D. Mass. 1995) (noting the Court's prior ruling in *Jencks*).

259. *Jencks*, 353 U.S. at 671 (quoting United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944)); *see also* United States v. Valenzuela-Bernal, 458 U.S. 858, 881–82 (1982) (quoting *Andolschek*, 142 F.2d at 506).

260. *Jencks*, 353 U.S. at 672; *see also* Gen. Dynamics Corp. v. United States, 563 U.S. 478, 484–85 (2011) ("If the Government refuses to provide state-secret

Brady or *Giglio*, no constitutional provision girded this decision, later depicted as an exercise of the Court's power to prescribe procedures for the administration of justice in federal court.[261] For a handful of months, therefore, criminal defendants could inspect government witnesses' prior statements, untrammeled by any codes of law[262] to make "use [of] it as he [or she] deem[ed] fit for trial purposes."[263]

In the year of *Jencks*, acting "principally to clarify" the Court's holding in that very case[264] and animated by "the fear that an expansive reading of *Jencks* would compel the undiscriminating production of agent's summaries of interviews regardless of their character or completeness,"[265] Congress passed the aptly-named Jencks Act,[266] "the exclusive, limiting means of compelling for cross-examination purposes the production of statements of a government witness to an agent of the [g]overnment."[267] Under this law, the defense may compel the production of any witness statement if (a) the witness is testifying for the government and (b) the statement "relates to the [same] subject matter" of the witness's testimony.[268] But caveats abound: the law contains three precise and narrow definitions of "statement";[269] any disclosure is conditional upon a witness's testimony;[270] and a federal prosecutor cannot be compelled to produce witness statements prior to the conclusion of that witness's testimony

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information that the accused reasonably asserts is necessary to his defense, the prosecution must be dismissed.").

261. *See, e.g.*, United States v. Augenblick, 393 U.S. 348, 356 (1969); Scales v. United States, 367 U.S. 203, 257–58, (1961); Triestman v. United States, 124 F.3d 361, 368–69 (2d Cir. 1997). *But see Snell*, 899 F. Supp. at 21 n.7.

262. *See* United States v. Jackson, 345 F.3d 59, 76 n.10 (2d Cir. 2003).

263. United States v. Meisch, 370 F.2d 768, 772 (3d Cir. 1966).

264. David B. Wexler, *The Constitutional Disclosure Duty and the Jencks Act*, 40 ST. JOHN'S L. REV. 206, 206 (2013); *see also* United States v. Dupont, 15 F.3d 5, 6 n.2 (1st Cir. 1994) (noting that the statute "codif[ies] *Jencks*").

265. Palermo v. United States, 360 U.S. 343, 350 (1959).

266. 18 U.S.C. § 3500; *see also* Schimpff, *supra* note 254, at 1737–39 (summarizing act).

267. *Palermo*, 360 U.S. at 350.

268. 18 U.S.C. § 3500(b); United States v. Brown, 595 F.3d 498, 509 n.15 (3d Cir. 2010).

269. 18 U.S.C. § 3500(e); United States v. Guerrero, 768 F.3d 351, 364 (5th Cir. 2014).

270. 18 U.S.C. § 3500(a); United States v. Brandon, 636 F. App'x 542, 546 (11th Cir. 2016); *see also* United States v. Pepe, 747 F.2d 632, 657 n.37 (11th Cir. 1984) (stating that Jencks Act "did not apply" to statements by two witnesses who did not testify); United States v. Medel, 592 F.2d 1305, 1316 n.12 (5th Cir. 1979) (holding that information contained in agents' reports that was "derived from interviews with persons who did not testify for the government . . . is not Jencks material.").

on direct examination at trial.[271] Heeding these provisions' severity, courts have strictly construed the Jencks Act[272] even when a witness statement includes *Brady* material.[273] In general, most judges view it as "a shield against premature discovery efforts."[274]

iii. Criminal Rules

Neither *Brady* and its issue nor the Jencks Act create a right to pre-trial criminal discovery.[275] Drafted on the basis of this assumption,[276] Criminal Rule 16 constituted "the product of a decade of trenchant and sustained criticism by judges, practitioners, and legal scholars with respect to the sparse discovery heretofore available to criminal defendants."[277] In the decades since its adoption, this provision has constantly evolved[278] in an attempt to correct for the law's indifference,[279] reflecting "[t]he strong trend in criminal

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271. 18 U.S.C. § 3500(a); Clancy v. United States, 365 U.S. 312, 313 n.1 (1961).

272. *See, e.g.*, United States v. Coppa (*In re* United States), 267 F.3d 132, 146 (2d Cir. 2001); United States v. Hanna, 55 F.3d 1456, 1459 (9th Cir. 1995); United States v. Lewis, 35 F.3d 148, 151 (4th Cir. 1994). Nonetheless, "nothing in the Jencks Act prevents the government from voluntarily agreeing to disclose witness statements prior to trial." *Lewis*, 35 F.3d at 151.

273. *See, e.g.*, United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988); United States v. Jones, 612 F.2d 453, 455 (9th Cir. 1979); United States v. Scott, 524 F.2d 465, 467 (5th Cir. 1975). Other courts disagree. *See Coppa*, 267 F.3d at 145–46; United States v. Tarantino, 846 F.2d 1384,1414–15 & n.11 (D.C. Cir. 1988); United States v. Starusko, 729 F.2d 256, 263 (3d Cir. 1984).

274. United States v. Claudio, 44 F.3d 10, 14 (1st Cir. 1995).

275. *See, e.g.*, United States v. Presser, 844 F.2d 1275, 1282–84 (6th Cir. 1988); FED. R. CRIM. P. 16 advisory committee's note to 1974 amendment.

276. United States v. Oxman, 740 F.2d 1298, 1307 (3d Cir. 1984); *see also* FED. R. CRIM. P. 16 advisory committee's note ("Whether under existing law discovery may be permitted in criminal cases is doubtful . . . .").

277. Daniel A. Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276, 1276 (1966).

278. United States v. Tucker, 249 F.R.D. 58, 61 n.12 (S.D.N.Y. 2008).

279. Although it originally only permitted the court to grant defendants leave to inspect documents that had been seized by the government, Criminal Rule 16 did "codify the most liberal discovery rules of decisions that existed before the promulgation of the Rules." United States v. Sermon, 218 F. Supp. 871, 872 (W.D. Mo. 1963). Subsequently, Criminal Rule 16 was "revised to expand the scope of pretrial discovery" three years after *Brady*, FED. R. CRIM. P. 16 advisory committee's note to 1966 amend.ment; *see also Oxman*, 740 F.2d at 1307 n.5 ("Rule 16 has since 1946 been modified from time to time so as to permit more discovery than the 1946 version authorized."), and "to give greater discovery to both the prosecution and the defense" two years after *Giglio*. FED. R. CRIM. P. 16 advisory committee's note to 1974 amendment.

prosecutions . . . towards greater discovery"[280] and towards minimization of the inconsistencies between the Civil and Criminal Rules.[281] Such discovery amounted to the cost of guaranteeing "fair and expeditious trial[s]."[282]

At present, Criminal Rule 16(a) requires prosecutors to disclose certain evidence to the defense, including: (1) the substance of a defendant's oral statements to the government that the prosecutor intends to use at trial;[283] (2) the defendant's written or recorded statements within the government's possession that the prosecutor knows or should know exist;[284] (3) the defendant's prior record;[285] (4) documents and objects "material to preparing the defense," intended to be used by the government at trial, or "obtained from or belongs to the defendant";[286] (5) the results or report of certain physical or mental examinations and scientific tests or experiments;[287] and (6) a written summary of any expert report which the government intends to use during its case-in-chief.[288] A continuing duty to mutually disclose, moreover, binds the government and the defense.[289] The primary discovery rule of federal criminal procedure,[290] Criminal Rule 16(a), covers but a handful of areas,[291] albeit subject to a low threshold for materiality.[292]

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280. United States v. Taveras, 436 F. Supp. 2d 493, 507 (E.D.N.Y. 2006); *see also, e.g.*, Rezneck, *supra* note 277, at 1276.

281. *See* Rezneck, *supra* note 277, at 1277–78.; *cf.* Christiansen v. Wright Med. Tech., Inc. (*In re* Wright Med. Tech. Inc.), 178 F. Supp. 3d 1321, 1344 n.13 (N.D. Ga. 2016) (similarly interpreting the standards for dismissal in Civil Rule 47(c) and Criminal Rule 23(b)).

282. *See* Rezneck, *supra* note 277, at 1282 (referring to the purpose of the pretrial conference required by Criminal Rule 17.1).

283. FED. R. CRIM. P. 16(a)(1)(A); United States v. Hisan Lee, 834 F.3d 145, 158 (2d Cir. 2016).

284. FED. R. CRIM. P. 16(a)(1)(B); United States v. Mercer, 834 F.3d 39, 44 (1st Cir. 2016) (describing provision as "a mandatory discovery rule").

285. FED. R. CRIM. P. 16(a)(1)(D); United States v. Breland, 356 F.3d 787, 796–97 (7th Cir. 2004).

286. FED. R. CRIM. P. 16(a)(1)(E); United States v. Hernandez-Meza, 720 F.3d 760, 768 (9th Cir. 2013).

287. FED. R. CRIM. P. 16(a)(1)(F); United States v. Bilus, 626 F. App'x 856, 869 n.22 (11th Cir. 2015).

288. FED. R. CRIM. P. 16(a)(1)(G); *see also* United States v. Garcia-Lagunas, 835 F.3d 479, 494 (4th Cir. 2016) (citing rule and explicating its purpose).

289. FED. R. CRIM. P. 16(c); United States v. Mackin, 793 F.3d 703, 707 (7th Cir. 2015); Rezneck, *supra* note 277, at 1293.

290. David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 CAL. L. REV. 56, 71 (1961).

291. Schimpff, *supra* note 254, at 1740.

292. *See, e.g.*, United States v. Lucas, 841 F.3d 796, 804 (9th Cir. 2016); United States v. Hernandez-Meza, 720 F.3d 760, 768 (9th Cir. 2013).

Restrictions on Criminal Rule 16's reach abound within its second numbered paragraph. First, it "does not authorize the discovery or inspection of reports, memoranda, or other internal government documents" generated by a prosecutor or an agent "in connection with investigating or prosecuting the case."[293] Second, it expressly exempts the statements of prospective government witnesses, covered by the Jencks Act, from its ambit.[294] Lastly, the trial court retains discretion to regulate discovery in the interests of justice, administrative efficiency, and the protection of the public.[295] To summarize, though it "behooves the government to interpret the disclosure requirement broadly and turn over whatever evidence it has pertaining to the case,"[296] "[a] federal criminal defendant generally has no right to know about government witnesses prior to trial" pursuant to Criminal Rule 16.[297]

At present, Criminal Rule 26.2 substantially (and confusingly) incorporates much of the Jencks Act.[298] In point of fact, both statute and rule require the United States to disclose prior recorded statements of its witnesses after their testimony,[299] a mandatory obligation triggered by a defendant's timely motion[300] and consistent with their shared purpose of permitting a trial lawyer to have the materials necessary for a witness's impeachment.[301] For this reason—

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293. FED. R. CRIM. P. 16(a)(2); United States v. Polk, 715 F.3d 238, 249 (8th Cir. 2013).

294. FED. R. CRIM. P. 16(a)(2); United States v. Maury, 695 F.3d 227, 249 (2d Cir. 2012).

295. *See* FED. R. CRIM. P. 16(d)(1) ("At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief."); FED. R. CRIM. P. 57(b) ("A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district.").

296. *Hernandez-Meza*, 720 F.3d at 768.

297. United States v. Altman, 507 F.3d 678, 680 (8th Cir. 2007); *see also, e.g.*, United States v. Sandoval- Rodriguez, 452 F.3d 984, 990 (8th Cir. 2006) (noting the general rule that "a defendant . . . has no right to require disclosure of government witnesses").

298. FED. R. CRIM. P. 26.2 advisory committee's note; *see also, e.g.*, United States v. Heilman, 377 F. App'x 157, 195 (3d Cir. 2010) ("Rule 26.2 was intended to replace provisions of the Jencks Act dealing with the discovery of prior statements of testifying witnesses on 'the notion that provisions which are purely procedural in nature should appear in the Federal Rules of Criminal Procedure rather than in Title 18.'" (quoting United States v. Smith, 31 F.3d 1294, 1301 n.6 (4th Cir. 1994))). Whether the Court could have revised the Jencks Act via its rulemaking power remains an open question. *See* Rezneck, *supra* note 277, at 1282.

299. 18 U.S.C. § 3500(b); FED. R. CRIM. P. 26.2; United States v. Weaver, 267 F.3d 231, 245 (3d Cir. 2001).

300. United States v. Hill, 976 F.2d 132, 140 (3d Cir. 1992).

301. United States v. Rosa, 891 F.2d 1074, 1076–77 (3d Cir. 1989).

and the odd fact that Congress has never repealed the Jencks Act—"courts and litigants [now routinely] rely on both the [Jencks] Act and [Criminal] Rule 26.2 when dealing with defense motions for production of prior statements."[302] Still, Criminal Rule 26.2 does extend the provisions of the Jencks Act by providing that the statements of both government and defense witnesses, other than the criminal defendant, are subject to production at trial.[303] Limited in scope, this provision neither alters Jencks' schedule for production of statements nor relieves a defendant seeking production from the necessity of making a request for production at the trial stage of the proceeding.

2. Hortatory Obligations

i. Internal Guidance for Federal Prosecutors

Binding all federal prosecutors, the United States Attorneys' Manual ("USAM"), which is produced by DOJ and "intended to ensure timely disclosure" and "that trials are fair," contains an explicit section governing the disclosure of exculpatory and impeachment information.[304] Although the USAM classifies such disclosure as part of the constitutional guarantee to a fair trial, "[n]either the Constitution nor this policy," it clarifies, "creates a general discovery right for trial preparation or plea negotiations."[305] The USAM does capaciously define "material" evidence as evidence for which there is a reasonable probability that effective use will result in a defendant's acquittal and explicitly urges prosecutors to adopt a broad view of materiality.[306] Furthermore, "[w]hile ordinarily, evidence that would not be admissible at trial need not be disclosed," the USAM

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302. *Heilman*, 377 F. App'x at 195.

303. FED. R. CRIM. P. 26.2(a); United States v. Lee, 723 F.3d 134, 141 n.5 (2d Cir. 2013).

304. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001(A). This section dates to October 2006, apparently "part of an ardent and, to date, successful effort of the Department to defeat a possible amendment to the Federal Rules of Criminal Procedure." United States v. Jones, 620 F. Supp. 2d 163, 171 (D. Mass. 2009).

305. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001(B); *cf.* United States v. Soltero, No. Cr. 13-00007 SI (LB), 2015 WL 1346309, at *2 (N.D. Cal. Mar. 21, 2015) (noting that the USAM endorses "a policy of broad disclosure of potential impeachment information").

306. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001(B)(1); *cf.* United States v. Wells, No. 3:13-cr-00008-RRB-JDR, 2013 WL 4851009, at *3 (D. Alaska Sept. 11, 2013) (directing prosecutors to follow the DOJ's own policies regarding discoverability).

"encourages prosecutors to err on the side of disclosure if admissibility is a close question"[307] and even requires disclosure of immaterial information so long as it is "significantly probative" of an issue before the court.[308]

In response to a series of prosecutorial mishaps,[309] the DOJ expanded upon the USAM's discovery guidance in three substantive memorandums released on January 4, 2010.[310] The first two memoranda are brief, listing several initiatives that will be implemented throughout the country to improve discovery throughout DOJ and directing various high-level officials to develop a discovery policy for prosecutors in their respective offices by March 31, 2010.[311] The most substantive, the third missive ("Discovery Letter") enumerates four steps that prosecutors should take in evaluating and disclosing material exculpatory and impeachment evidence.[312] In unmistakably blunt terms, the underlying purpose of this third communique, no more binding than the USAM,[313] appears: "[C]ompliance [with discovery obligations] will facilitate a fair and just result in every case, . . . the Department's singular goal in pursuing a criminal prosecution."[314]

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307. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001(B)(1); United States v. Vaughn, Cr. No. 14-23 (JLL), 2015 WL 6948577, at *16 (D.N.J. Nov. 10, 2015); *see also* United States v. Reyeros, 537 F.3d 270, 281 (3d Cir. 2008) ("It is well-settled that the prosecution has a duty to learn of and disclose information 'known to the others acting on the government's behalf in the case.'" (quoting Kyles v. Whitley, 514 U.S. 419, 437 (1995)).

308. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001(C).

309. *See* United States v. DeLeon, No. CR 15-4268 JB, 2017 U.S. Dist. LEXIS 17811, at *115–20 (D.N.M. Feb. 8, 2017) (detailing these setbacks).

310. Ellen S. Podgor, *Pleading Blindly*, 80 MISS. L.J. 1633, 1633 (2011).

311. *See, e.g.*, Memorandum Regarding Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group or Department Prosecutors from David W. Ogden, Deputy Attorney General, to Department Prosecutors (Jan. 4, 2010) [hereinafter First Letter]; Memorandum Regarding Requirement for Office Discovery Policies in Criminal Matters from David W. Ogden, Deputy Attorney General, to Department Prosecutors (Jan. 4, 2010).

312. Memorandum for Department Prosecutors Regarding Guidance for Prosecutors Regarding Criminal Discovery from David W. Ogden, Deputy Attorney General, to Department Prosecutors at 1 (Jan. 4, 2010) [hereinafter Discovery Letter].

313. *See* Discovery Letter, *supra* note 312, at 1; United States v. Mazzarella, 784 F.3d 532, 541 (9th Cir. 2015).

314. Discovery Letter, *supra* note 312, at 6; *cf.* United States v. Pasha, 797 F.3d 1122, 1141 (D.C. Cir. 2015) (quoting First Letter, *supra* note 311, at 2).

ii. Model Rules

The Model Rules, as well as the state rules based upon them, "are meant . . . to provide a means by which the courts and lawyers regulate conduct within the legal profession."[315] Adopted in nearly every state,[316] Model Rule 3.8 sets forth the "special responsibilities" of a prosecutor[317] and compels a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."[318] Because all federal prosecutors are subject to the ethics rules of "each State where such attorneys engage[] in [their] duties, to the same extent and in the same manner as other attorneys in that State" pursuant to the McDade Amendment,[319] "a federal prosecutor must abide by the version—or versions—of [Model] Rule 3.8(d) operating in each state in which [he or] she practices."[320] Its drafting history suggests that this provision's creators saw it as articulating an obligation already implicit in every prosecutor's duty to do justice.[321]

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315. United States v. Tapp, No. CR107-108, 2008 WL 2371422, at *17 (S.D. Ga. June 4, 2008).

316. Schimpff, *supra* note 254, at 1743.

317. MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (2009). Arguably, the rule merely replicates obligations "already imposed in large part by the Due Process Clause." Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1592 (2003) [hereinafter Green, *Prosecutorial Ethics*].

318. MODEL RULES OF PROF'L CONDUCT r. 3.8(d); *see also* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutions*, 89 B.U. L. REV. 1, 47–48 (2009) [hereinafter Zacharias & Green, *Duty*] (reiterating the demands of Rule 3.8).

319. 28 U.S.C. § 530B(a); United States v. Binday, 804 F.3d 558, 593 (2d Cir. 2015). For more on this amendment, see Zacharias & Green, *Uniqueness*, *supra* note 11, at 211–16. This effective congruence is not unusual. *See, e.g.*, Watkins v. Trans Union, LLC, 869 F.3d 514, 519 (7th Cir. 2017) (holding that federal common law should be read as consistent with a model rule); Huusko v. Jenkins, 556 F.3d 633, 636 (7th Cir. 2009) (observing that most federal courts incorporate the ethical codes of the states in which they sit into their local rules); Silicon Graphics, Inc. v. Ati Techs., Inc., 741 F. Supp. 2d 970, 980 (W.D. Wis. 2010) (noting that federal common law's ethical formulations derive from "multiple sources, including state . . . rules"); Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 875–76 (2012) [hereinafter Green, *Regulation*] (discussing this pattern).

320. Schimpff, *supra* note 254, at 1743–44; *see also, e.g.*, United States v. Singleton, 144 F.3d 1343, 1354 (10th Cir. 1998) ("The federal courts have unanimously rejected the notion that federal prosecutors are exempt from these ethical rules.").

321. Bruce A. Green, *Prosecutors' Ethical Duty of Disclosure in Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 57, 83 (2011) [hereinafter Green, *Memory*].

iii. Limited Significance of USAM and Model Rules

Though the USAM is extensive, it exhibits two flaws. First, while this compendium contemplates the disclosure of exculpatory and impeachment evidence beyond the constitutional minimum, it is an internal policy mandate and is thus purely advisory.[322] Moreover, though far more capacious than it once was, it still provides remarkably little detailed guidance on what should or should not be produced,[323] a weakness amplified by the Court's own minuscule jurisprudence.[324] Clearly, the always meager prospect of a systematic study of federal prosecutors' discovery snafus for purposes of improving disclosure practices and policies is unlikely.[325]

Model Rule 3.8 has its own bevy of blemishes. Primarily, as with the state rules patterned upon it, Model Rule 3.8 does not carry the same binding legal force as the Constitution, Jencks Act, or the Criminal Rules.[326] In addition, the process behind it raises credible doubts as to whether the ABA got it right or properly accounted for the specific limitations of courts' regulatory powers, on top of the traditional lawyerly discomfort with ethics codes.[327] The DOJ, for one,

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322. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 1-1.100 (1999) ("[The USAM] is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."); *see also, e.g.*, United States v. Apel, 571 U.S. 359, 368–69, (2014); United States v. Lopez-Matias, 522 F.3d 150, 155–56 & n.11 (1st Cir. 2008); United States v. Booth, 673 F.2d 27, 30 (1st Cir. 1982) (all noting that the USAM does not create any binding and enforceable right).

323. *See* Elizabeth C. Hernandez & Jason M. Ferguson, *The* Brady *Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems*, 67 A.F. L. REV. 189, 216 (2011).

324. *See* United States v. Snell, 899 F. Supp. 17, 22 n.9 (D. Mass. 1995) ("The Supreme Court has given limited guidance in defining when exculpatory information is material to the defense."). That observation remains accurate twenty-eight years later.

325. *Cf.* Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2170 (2010) [hereinafter Green, *Training*] (noting the lack of study of prosecution discovery errors).

326. *See, e.g.*, *In re* Grand Jury Subpoena, 533 F. Supp. 2d 602, 608 (W.D.N.C. 2007) (holding that Model Rule 3.8(e) is "not intended to create any substantive rights or procedural hurdles"); United States v. Acosta, 111 F. Supp. 2d 1082, 1095 (E.D. Wis. 2000) ("[T]he rules of professional conduct are not intended to create substantive rights.").

327. Green, *Memory*, *supra* note 321, at 85–86.

has loudly declined to follow it, fatally undermining its relevance to the policing of criminal discovery violations in federal court.[328]

D. Case Law: Prosecutorial Statements as Admissions

Since 1976, federal courts have sharply split on the extent to which prosecutorial statements may be treated as extrajudicial admissions[329] under Evidence Rule 801(d)(2)(B) and (D).[330] In that time, three general juridical approaches have arisen, with most courts espousing one of these well-developed ratiocinations.[331] Many courts apply a test pioneered and expounded by the Second Circuit. A substantial number still parrot the common law's hostile sentiment. Even fewer condemn either of the aforementioned lines of precedent. To this day, all draw support from some corner of the judiciary or academy.[332] Over this single issue, then, a stalemate now persists.

1. Most Popular Approach

i. Compromise: *McKeon/Salerno* Test

Today's most popular test originated not in one circuit's review of a government-sanctioned misstatement but in its analysis of a defense attorney's ill-fated slip.[333] In the Second Circuit's *McKeon*, the prosecutor sought the introduction of a factual averment, as advanced in a lawyer's opening statement during the defendant's first trial, in that retried gunrunner's second one in accordance with Evidence Rule 801(d).[334] As Judge Ralph K. Winter, Jr., writing for a unanimous panel, observed, "[t]he general admissibility of an attorney's statements, as well as the binding effect of an opening statement

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328. Joe Palazzolo, *Justice Department Opposes Expanded Brady Rule*, MAIN JUSTICE, Oct. 15, 2009.

329. *See, e.g.*, Poulin, *Admissions*, *supra* note 157, at 407; Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423, 1435 (2001) [hereinafter Poulin, *Inconsistency*].

330. Commonwealth v. Cepeda, 2014 MP 12, ¶ 25 (N. Mar. I. 2014) (canvassing case law). While Evidence Rule 801(d)(2)(A) and (E) clearly do not apply in these cases, the courts' failure to consider paragraph (B)'s reach is more inexplicable. *See* Poulin, *Admissions*, *supra* note 157, at 415 (faulting courts for not recognizing the admissibility of authorized admission against the government).

331. *See infra* Part III.D.1–3.

332. *See* Poulin, *Admissions*, *supra* note 157, at 407.

333. *See supra* Part II.A.

334. United States v. McKeon, 738 F.2d 26, 28–29 (2d Cir. 1984).

within the four corners of a single trial, are . . . well established."[335] Nonetheless, only "scant" authority then existed to justify "the evidentiary use against a criminal defendant of an attorney's seemingly inconsistent statement at an earlier trial to prove that fundamental portions of the defendant's present case are fabricated."[336] Confronting this silence, Winter's panel adopted a holistic rule—"prior opening statements are not *per se* inadmissible in criminal cases"—warranted by basic fairness and procedural justice: "To hold otherwise would not only invite abuse and sharp practice but would also weaken confidence in the justice system itself by denying the function of trials as truth-seeking proceedings."[337] Even so, while it countenanced "no absolute rule preventing use of an earlier opening statement by counsel as an admission against a criminal defendant in a subsequent trial," Winter and his colleagues refused "to subject such statements to the more expansive practices sometimes permitted under the rule allowing use of admissions by a party-opponent."[338]

So as "to avoid [en]trenching upon other important policies," including at least five dangers posed by the potentially "free use of prior jury argument"—"a substantial loss of time on marginal issues," the proliferation of "seemingly plausible but quite prejudicial inferences," deterrence of "vigorous and legitimate advocacy," impairment of a party's defense, and disqualification of "counsel chosen by the defendant"—the *McKeon* court devised three restrictions on the evidentiary use of prior jury argument.[339] First, the prior argument must "involve[] an assertion of fact inconsistent with

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335. *McKeon*, 738 F.2d at 30; *see also* United States v. Naranjo, 662 F. Supp. 874, 875 (S.D. Fla. 1987) (citing *McKeon*, 738 F.2d at 30); Hall v. Wal-Mart Stores E., LP, 447 F. Supp. 2d 604, 608 (W.D. Va. 2006) ("Though case law on the issue is scarce, the principle that an admission of counsel during trial 'may dispense with proof of facts for which witnesses would otherwise be called' has been recognized by the Supreme Court since 1880." (quoting Oscanyan v. Arms Co., 103 U.S. 261, 263 (1880)).

336. *McKeon*, 738 F.2d at 30; *cf.* United States v. Kendrick, 682 F.3d 974, 987–88 (11th Cir. 2012) ("'Statements and arguments of counsel are not evidence.'" (quoting *United States v. Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009))).

337. *McKeon*, 738 F.2d at 31; *see also* Commonwealth v. Keo, 3 N.E.3d 55, 67–68 (Mass. 2014) (applying *McKeon* and its progeny).

338. *McKeon*, 738 F.2d at 31; *see also* United States v. DeMizio, No. 08-CR-336 (JG), 2009 WL 2163099, at *3 (E.D.N.Y. July 20, 2009) (quoting *McKeon*, 738 F.2d at 31).

339. *McKeon*, 738 F.2d at 32–33; *see also, e.g.*, United States v. Valencia, 826 F.2d 169, 172 (2d Cir. 1987) ("Our concern [in *McKeon*] arose because the routine use of attorney statements against a criminal defendant risks impairment of the privilege against self-incrimination, the right to counsel of one's choice, and the right to the effective assistance of counsel."); United States v. Pappas, 806 F. Supp. 1, 5 (D.N.H. 1992) (summarizing the *McKeon* dangers).

similar assertions in a subsequent trial;[340] consequently, "[s]peculations of counsel, advocacy as to the credibility of witnesses, arguments as to weaknesses in the prosecution's case or invitations to a jury to draw certain inferences should not be admitted."[341] Second, the inconsistency must "be clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial.[342] Third, the prosecutorial statements must have been "such as to be the equivalent of testimonial statements by the defendant."[343] Occasionally amalgamated into two,[344] the *McKeon* factors, systemized in no explicit rule or statute, have attained rapid acceptability throughout the federal judiciary.[345]

In *Salerno*,[346] the Second Circuit extended *McKeon* to prosecutorial assertions via oft-cited dicta.[347] In the decades before, federal courts had routinely exempted government attorneys in criminal cases from the admissions doctrine eventually encoded in Evidence Rule 801(d)(2)(D).[348] But, in an opinion released less than six months before *Salerno*'s release, another panel had applied the *McKeon* test to a bill of particulars, a document produced by the

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340. *McKeon*, 738 F.2d at 33; *see also, e.g.*, United States v. Sattar, 314 F. Supp. 2d 279, 315 (S.D.N.Y. 2004) (emphasizing this factor's importance).

341. *McKeon*, 738 F.2d at 33; Basham v. United States, 109 F. Supp. 3d 753, 833 (D.S.C. 2013).

342. *McKeon*, 738 F.2d at 33; Johnson v. United States, 860 F. Supp. 2d 663, 825 (N.D. Iowa 2012).

343. *McKeon*, 738 F.2d at 33; *see also* United States v. Pursley, 577 F.3d 1204, 1226 (10th Cir. 2009) (summarizing but rejecting *McKeon*).

344. *See, e.g.*, Kowalski v. Anova Food, LLC, No. 11-cv-00795HG-RLP, 2015 WL 1117993, at *2 (D. Haw. Feb. 12, 2015).

345. *See, e.g.*, United States v. Blood, 806 F.2d 1218, 1221 (4th Cir. 1986) (adopting the reasoning of the Second Circuit as expressed in *McKeon*); Southmark Inv. Grp. 86, Inc. v. Turner Dev. Corp., 140 F.R.D. 1, 3 (M.D. Fla. 1991) ("[T]he law clearly allows counsel to elicit an opposing attorney's prior statement in a related state proceeding as an 'admission of party opponent.'"); Hoover v. Mississippi, 552 So. 2d 834, 840 (Miss. 1989) (applying the *McKeon* considerations to the record now before the court). The test's overall timidity—and conservatism—was often stressed. *See, e.g.*, United States v. Harris, 914 F.2d 927, 931 (7th Cir. 1991) ("The unique nature of the attorney-client relationship, however, demands that a trial court exercise caution in admitting statements that are the product of this relationship."); United States v. Arrington, 867 F.2d 122, 127–28 (2d Cir. 1989) (limiting *McKeon* to defense attorney's prior jury argument, as opposed to defense attorney's prior out-of-court statements).

346. 937 F.2d 797 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992).

347. Famously denounced by John Marshall, dicta have not infrequently remolded the legal world. Amir Shachmurove, *On Dicta's Trail:* Espinosa's *Messy Repercussions*, 2018 NORTON BANKR. L. ADVISER 1, 1 (2018).

348. *See, e.g.*, United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967); United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1564 (E.D. Tex. 1986).

government after its presumptive review of all relevant evidence.[349] Now, on behalf of Judges Frank X. Altimari and Roger Miner, Judge George C. Pratt forsook the old rule entirely and refused to adopt any "*per se* prohibition on the use of prior opening statements in criminal trials," quoting *McKeon*'s "appropriate[ly]" phrased denunciation of any such decree.[350] Of course, an indictment, unlike a bill of particulars, cannot be "admissible as an admission of a party-opponent, since it is the charge of a grand jury, and a grand jury is neither an officer nor an agent of the United States."[351] A prosecutor, however, is an entirely different creature, and "the jury is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims."[352] "The government, at different times, has urged" incompatible factual theories consistent with an unnecessarily "huge indictment," the court repeated, and "the jury was entitled to know that, because the jury, and not the government, must ultimately decide which . . . [theory] was" true.[353] From that point onward, the admissibility of a prosecutor's statement would be determined by application of the same factors enumerated in *McKeon* in 1984,[354] an approach embraced by multiple federal courts[355] and state tribunals[356] despite *Salerno*'s manifest limitations.[357]

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349. United States v. GAF Corp., 928 F.2d 1253, 1260–61 (2d Cir. 1991).

350. *Salerno*, 937 F.2d at 811; *see also, e.g.*, Wisconsin v. Cardenas-Hernandez, 579 N.W.2d 678, 685 (Wis. 1998) (endorsing this approach).

351. *Salerno*, 937 F.2d at 811 (internal quotation marks omitted); *accord* Falter v. United States, 23 F.2d 420, 425 (2d Cir. 1927).

352. *Salerno*, 937 F.2d at 812 (quoting *GAF Corp.*, 928 F.2d at 1260); *see also, e.g.*, United States v. Fell, No. 2:01-cr-12-01, 2006 U.S. Dist. LEXIS 24707, at *34–37 (D. Vt. Apr. 24, 2006) (discussing *McKeon*, *GAF*, and *Salerno*).

353. *Salerno*, 937 F.2d at 812; *see also* Johnson v. United States, 860 F. Supp. 2d 663, 832 (N.D. Iowa 2012) (quoting *Salerno*, 937 F.2d at 812).

354. *Salerno*, 937 F.2d at 811 (quoting *McKeon*, 738 F.2d at 31, 33).

355. *E.g.*, United States v. DeLoach, 34 F.3d 1001, 1005–06 (11th Cir. 1994). Thus, although the Eleventh Circuit insists it "did not expressly adopt" the *Salerno* test, it nonetheless repeatedly invokes it. *See, e.g.*, United States v. Kendrick, 682 F.3d 974, 986–88 (11th Cir. 2012); *DeLoach*, 34 F.3d at 1005–06. In *DeLoach*, moreover, it failed to mention the third *McKeon* factor. United States v. Stephens, No. 5:06-CR-13(HL), 2007 U.S. Dist. LEXIS 7599, at *12 (M.D. Ga. Oct. 11, 2007).

356. *E.g.*, Idaho v. Pearce, 192 P.3d 1065, 1074–75 (Idaho 2008); Bellamy v. Maryland, 941 A.2d 1107, 1116–17 (Md. 2008); Illinois v. Cruz, 643 N.E.2d 636, 665 (Ill. 1994); Utah v. Worthen, 765 P.2d 839, 848 (Utah 1988).

357. *See* United States v. Bakshinian, 65 F. Supp. 2d 1104, 1108 n.4 (C.D. Cal. 1999) (listing two).

ii. *McKeon/Salerno* Test's Omission

Whatever their substantive merits, *McKeon* and *Salerno* omitted one significant detail from their analyses. Expressly citing Evidence Rule 104 and 410, the former fails to specify whether paragraph (B) or paragraph (C) of Evidence Rule 801(d)(2) independently applied.[358] Instead, it said both could and did, leaving others to puzzle what to do if only one actually governed.[359] Although its adoption of the *McKeon* test arguably implicated both, *Salerno* hewed to this tradition, for it too neglected to identify the specific paragraph subject to its explication.[360] Not until 2004 would the Second Circuit again attempt, but fail, to rectify this lapse.[361]

2. Possible Majority Approach: *Santos'* Historicism

Despite *McKeon* and *Salerno*, some courts, possibly even a majority, continue to affirm their fidelity to the common law rule. Historically, as the Second Circuit acknowledged before *McKeon* and *Salerno*,[362] "no individual," even a prosecutor, "can bind the sovereign,"[363] and the law deemed "agents of the [g]overnment" to be personally "disinterested" in a particular case's outcome.[364] As such, "[p]rior to adoption of the Federal Rules of Evidence, admissions by government employees in criminal cases were viewed as outside the admissions exception to the hearsay rule,"[365] their statements seen as "less the product of the adversary process and hence less appropriately described as admissions of a party."[366] Crucially,

358. *See McKeon*, 738 F.2d at 30–34.

359. *Id.*

360. Jared M. Nelson, Note, *Government Admissions and Federal Rule of Evidence 801(d)(2)*, 103 VA. L. REV. 355, 378 n.132 (2017). The Second Circuit has not yet dispelled this ambiguity. *See, e.g.*, United States v. Ford, 435 F.3d 204, 215 (2d Cir. 2006); United States v. Orena, 32 F.3d 704, 716 (2d Cir. 1994).

361. United States v. Yildiz, 355 F.3d 80, 82 (2d Cir. 2004). In *United States v. Yildiz*, the Second Circuit asserted that *Salerno* was "consistent with [Evidence] Rule 801(d)(2)(B)," but also omitted any reference to *McKeon* and left unclear whether paragraph (D) applied to prosecutors, if not informers. *See id.*

362. United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967); *see also Yilidiz*, 355 F.3d at 81–82 (recounting the history behind *Santos*, *McKeon*, and *Salerno*).

363. United States v. Prevatte, 16 F.3d 767, 779 n.9 (7th Cir. 1994); *see also Yilidiz*, 355 F.3d at 81–82 (citing *Prevatte* as an example of this jurisprudence).

364. United States v. Kampiles, 609 F.2d 1233, 1246 (7th Cir. 1979) (relying in part on *Santos*, 372 F.2d at 180).

365. *Id.* (citing United States v. Powers, 467 F.2d 1089, 1095 (7th Cir. 1972)); *accord, e.g.*, United States v. Pandilidis, 524 F.2d 644, 650 (6th Cir. 1975).

366. *Kampiles*, 609 F.2d at 1246.

nothing in the text of Evidence Rule 801(d)(2) or the Evidence Committee's notes intimates otherwise;[367] in fact, the latter commentaries "disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary."[368] Accordingly, some of these wary courts continue to decline to apply this evidentiary provision to statements made by government employees in criminal cases without even attempting to classify the statement as an authorized, adopted, or agent's admission.[369] Others, meanwhile, discount the applicability of Evidence Rule 801(d)(2)(D) alone.[370] Whether adhering to the latter or the former course, in at least these juridical quarters, an antique conviction—"government agents are not party-opponents for purposes of Rule 801(d)(2)"[371]—reigns supreme.[372]

3. Clear Minority Approach: Literalism

Yet other jurists find no virtue in either the old prohibition or *McKeon*'s "rather elaborate series of rules to test admission of the evidence."[373] In these courts' view, the admissibility of prosecutorial statements must be determined by a standard no more demanding than that applied to all statements comprehended by the regular party-opponent rule[374] and subject to the constraints of Evidence

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367. United States v. Durrani, 659 F. Supp. 1183, 1185 (D. Conn. 1987).

368. Tome v. United States, 513 U.S. 150, 160–61 (1995) (plurality opinion); *see also* Bullock & Gardner, *supra* note 120, at 528–34 (summarizing the plurality and dissenting opinions in *Tome*); *cf.* United States v. Abel, 469 U.S. 45, 51–52 (1984) ("In principle, under the Federal Rules no common law of evidence remains. . . . In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers." (internal quotation marks omitted)).

369. *See, e.g.*, United States v. Arroyo, 406 F.3d 881, 888 (7th Cir. 2005); United States v. Nubuor, 274 F.3d 435, 442 n.7 (7th Cir. 2001); United States v. Zizzo, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997). Despite the generality with which the Seventh Circuit has spoken, it once made much of the fact that a contrary opinion from the DC Circuit dealt with Evidence Rule 801(d)(2)(B). *See Kampiles*, 609 F.2d at 1246 n.16.

370. *See, e.g.*, United States v. Booker, 375 F. App'x 225, 230–31 (3d Cir. 2010); United States v. Martinez-Saavedra, 372 F. App'x 463, 464–65 (5th Cir. 2010).

371. *Arroyo*, 406 F.3d at 888; *accord* United States v. Graham, No. Cr. 08-50079-02, 2009 WL 1346666, at *1–2 (D.S.D. Apr. 30, 2009).

372. *See* United States v. Yildiz, 355 F.3d 80, 81 (2d Cir. 2004) (observing that most courts continue to follow *Santos* and writing to reaffirm its holding); United States v. Somee, No. 2:10-cr-00273-MMD-RJJ, 2012 U.S. Dist. LEXIS 162618, at *5 (D. Nev. Nov. 13, 2012) ("The general rule . . . is that statements made by government employees in criminal cases cannot be admitted . . . .").

373. Illinois v. Cruz, 643 N.E.2d 636, 665 (Ill. 1994).

374. United States v. Bakshinian, 65 F. Supp. 2d 1104, 1109 (C.D. Cal. 1999).

Rules 401 and 403.[375] To defend this revolutionary position, these courts point to text and policy.[376]

They begin by stressing two literary facts. First, if one accords the natural denotations and probable connotations of its every word,[377] Evidence Rule 801(d)(2)'s "plain language" encompasses prosecutorial assertions, and neither its text nor its history contains indicates that it "does not apply to the prosecution in criminal cases."[378] Meanwhile, "the Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases[] and specifically provide that in certain circumstances statements made by government agents are admissible against the government as substantive evidence."[379] Because "[t]he Federal Rules of Evidence abolished, modified, or took a position on many common-law evidence rules and principles, including those governing admissions by party opponents," either deference or adherence to the common law rule is "unwise" after their adoption and in light of this particular rule's unequivocal ambit.[380] Second, the notion underlying the prosecutorial exemption amounts to an artifact, as government prosecutors have long possessed the power to bind the sovereign,[381] and Congress has specifically "given the United States Attorney's Office the general power to prosecute all criminal offenses against the United States."[382] Certainly, "[w]hether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases, the

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375. *See, e.g.*, United States v. Ganadonegro, 854 F. Supp. 2d 1088, 1106–07 (D.N.M. 2012); United States v. Johnson, 860 F. Supp. 2d 663, 835 (N.D. Iowa 2012); *Bakshinian*, 65 F. Supp. 2d at 1110.

376. *Cf.* Shachmurove, *Boilerplate*, *supra* note 111, at 247–51 (elaborating upon the proper theory for analysis of the Civil Rules).

377. *See* Sullivan v. Stroop, 496 U.S. 478, 482–83 (1990); *cf.* Medrad, Inc. v. MRI Devices Corp., 401 F.3d 1313, 1319 (Fed. Cir. 2005) ("We cannot look at the ordinary meaning of the term . . . in a vacuum." (quoting DeMarini Sports, Inc. v. Worth, 239 F.3d 1314, 1324 (Fed. Cir. 2001)). In statutory interpretation, the terms "connotation" and "denotation" are not synonymous. *See infra* Part V.A.; *see also* Hurston v. Dir., Office of Workers Compensation Programs, 989 F.2d 1547, 1554 (9th Cir. 1993) (Alarcon, J., dissenting) (maintaining that a particular word's intended meaning may be "different than its more expansive dictionary denotation").

378. United States v. Morgan, 581 F.2d 933, 937, 938 (D.C. Cir. 1978).

379. *Id.* at 937 n.10; *see also* United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988) (quoting *Morgan*, 581 F.2d at 937 n.10).

380. *Ganadonegro*, 854 F. Supp. 2d at 1117.

381. *See, e.g.*, Bellamy v. State, 941 A.2d 1107, 1118–19 (Md. 2008); United States v. Bakshinian, 65 F. Supp. 2d 1104, 1106 (C.D. Cal. 1999).

382. *Ganadonegro*, 854 F. Supp. 2d at 1119. As the court added, "Congress has expressly authorized the United States Attorney's Office to prosecute crimes in federal courts and thus to speak on the United States' behalf on these matters in a way that will bind the United States." *Id.* at 1120.

Justice Department certainly should be considered such."[383] So long as a prosecutor's statements exhibit some indicia of formality, a category which includes bills of particulars and sworn affidavits, and satisfy the criteria set forth in Evidence Rule 801(d)(2)(B)[384] or (D),[385] these federal courts, joined by some non-federal tribunals,[386] have seen no reason to bar their taxonomy as admissions.[387]

In addition, this coterie tends to question the policy justifications advanced by *McKeon*'s progeny and *Santos*' defenders. "The evenhandedness of justice as between subject and sovereign" and "its corollary: that, at a minimum the law of evidence regulates the mode of proof impartially for the subject and for the sovereign" undercut either approach.[388] As to *McKeon*, its "procedural safeguards keep out what would in some cases be probative evidence that comes directly from a party's mouth" and run counter to "the lenient rules regarding admissions by party opponents" encoded in the Evidence Rules.[389] In addition, "much of its analysis" appears "restricted to the use of a defendant's prior statements and," despite *Salerno*, as "thus inapplicable to prior statements of the government."[390] One of its justifications—"the possibility of wasting time"—logically applies to

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383. *Kattar*, 840 F.2d at 130 (internal citation omitted).

384. *See, e.g.*, United States v. Warren, 42 F.3d 647, 655–56 (D.C. Cir. 1994); *Kattar*, 840 F.2d at 131; United States v. Powers, 467 F.2d 1089, 1097 n.1 (7th Cir. 1972) (Stevens, J., dissenting).

385. *See, e.g.*, United States v. Barile, 286 F.3d 749, 758 (4th Cir. 2002); United States v. Reed, 167 F.3d 984, 989 (6th Cir. 1999); United States v. Branham, 97 F.3d 835, 850–51 (6th Cir. 1996); United States v. Van Griffin, 874 F.2d 634, 638 (9th Cir. 1989); *Morgan*, 581 F.2d at 938 n.15. In a fascinating example of the law's fractured state, the Second Circuit now allows for adoptive admissions under in criminal proceedings under Evidence Rule 801(d)(2)(B), United States v. GAF Corp., 928 F.2d 1253, 1260–62 (2d Cir. 1991), but excludes statements by government agents or employees under Evidence Rule 801(d)(2)(D). United States v. Yildiz, 355 F.3d 80, 82 (2d Cir. 2004). As an explanation, the Second Circuit wrote: "There is good reason, however, to distinguish sworn statements submitted to a judicial officer, which the government might be said to have adopted, and those that are not submitted to a court and, consequently, not adopted, for example, statements contained in an arrest warrant . . . and an informant's remarks." *Id.* (internal citations omitted).

386. *See, e.g.*, North Carolina v. Villeda, 599 S.E.2d 62, 66 (N.C. Ct. App. 2004); Harris v. United States, 834 A.2d 106, 120 (D.C. 1993).

387. In this jurisprudence, paragraphs (A), (C), and (E) are rarely implicated.

388. Garland v. Florida, 834 So. 2d 265, 267 (Fla. Ct. App. 2002) (quoting Irving Younger, *Sovereign Admissions: A Comment on* United States v. Santos, 43 N.Y.U. L. REV. 108, 115 (1968)), *quoted in, e.g.*, McClam v. Florida, 185 So. 3d 571, 574–75 (Fla. Ct. App. 2016); Allen v. Indiana, 787 N.E.2d 473, 479 (Ind. Ct. App. 2002).

389. United States v. Ganadonegro, 854 F. Supp. 2d 1088, 1125 (D.N.M. 2012); *cf.* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 667 (10th Cir. 2006) (setting forth the reasons for allowing admissions).

390. United States v. Bakshinian, 65 F. Supp. 2d 1104, 1107–08 (C.D. Cal. 1999).

the defendant and the government alike,[391] while another, dangers of a misled jury, does not.[392] In contrast, concerns related to deterrence of vigorous and legitimate advocacy are arguably relevant only when the admissibility of a defendant's prior statement is at issue.[393] Maybe most damningly, these "various practical and constitutional concerns," which lack any textual anchor, utterly ignore the "ample protection to guard against the prejudice that may accompany the admission of a prior jury argument" already afforded by the Evidence Rules.[394]

4. Analytical Trends

Apart from these distinct views of Evidence Rule 801(d)(2), two interpretive trends have taken shape in recent decades.

First, as *Santos* acknowledged,[395] the common law posed no hurdle to the use of government admissions in civil proceedings.[396] Due to the absence of any contrary historical insinuations, no substantial doubt as to such statements' classification in the context of a civil matter befouls modern precedent.[397] Freed from history's grasp, federal and state courts have therefore shown no willingness to exempt governmental actors from their statements' consequences in the civil arena.[398]

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391. *See, e.g.*, Johnson v. United States, 860 F. Supp. 2d 663, 830–31 (N.D. Iowa 2012); *Bakshinian*, 65 F. Supp. 2d at 1108.

392. *Bakshinian*, 65 F. Supp. 2d at 1108. *But see Johnson*, 860 F. Supp. 2d at 830–31 (disagreeing with *Bakshinian* as to this second factor).

393. *Compare Bakshinian*, 65 F. Supp. 2d at 1108 (denying this factor's relevance as a deterrent to prosecutor statements), *with Johnson*, 860 F. Supp. 2d at 830–31 (affirming its significance). As *Bakshinian* asserts, "[t]he government does not enjoy Fifth Amendment rights, it does not have a constitutional right to counsel, and while it enjoys attorney-client privilege, the burden on the government's privilege is not as harmful as the burden on that of a criminal defendant." *Bakshinian*, 65 F. Supp. 2d at 1108.

394. United States v. Pursley, 577 F.3d 1204, 1226 (10th Cir. 2009). Ultimately, the Tenth Circuit chose not to expressly disavow *McKeon*. *See id.* at 1227.

395. United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967).

396. *See, e.g.*, Lippay v. Christos, 996 F.2d 1490, 1497–98 (3d Cir. 1993); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 456 & n.159 (2007); Richard D. Geiger, Note, *Vicarious Admissions by Agents of the Government: Defining the Scope of Admissibility in Criminal Cases*, 59 B.U. L. REV. 400, 410 (1979).

397. *See* United States v. Durrani, 659 F. Supp. 1183, 1185–86 (D. Conn. 1987).

398. *See, e.g.*, Garland v. State, 834 So. 2d 265, 267 (Fla. Ct. App. 2002); United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1564 (E.D. Tex. 1986); Burkey v. Ellis, 483 F. Supp. 897, 911 n.13 (N.D. Ala. 1979). In some ways, this position is an odd one. A civil action by a government agency can also destroy a private citizen's

Second, while certain circuits and certain tribunals have hewed to a distinguishable track,[399] many courts do not unconditionally subscribe to a single strand.[400] Even the Second Circuit, *Santos*' author and *McKeon*'s conjurer, for example, has allowed for the admission of government agents' statement pursuant to Evidence Rule 801(d)(2)(B) so long as some formal and objective indication of adoption exists[401] but foreclosed their admission under Evidence Rule 801(d)(2)(D),[402] a distinction embraced by at least one more circuit.[403] For the most part, however, judicial interpretation of Evidence Rule 801(d)(2)(D), which covers agents statements, "has actually been colored by [Evidence] Rule 801(d)(2)(B)," which covers adopted statements.[404] The result has been an even more confused amalgam of irreconcilable precedent.[405]

IV. STATE OF THE WORLD

None of the federal rules deal with a prelapsarian world. Logically, different demons, posing dissimilar dangers, inhabit a universe in which defendants enjoy infinite resources and prosecutors possess infinite time and perfect morality than one in which imperfection and inefficiencies hobble "the best-laid schemes o' mice an' men [and women]."[406] In the words of the Honorable Richard Posner, well-settled legal concepts "furnish [the] major premises for the decision of cases," but actual facts constitute the necessary "minor premises" for cases.[407] The same can be said about a particular rule's

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livelihood, and government actors can often choose to initiate either a civil or criminal action based on the same underlying facts.

399. *See, e.g.*, United States v. Warren, 42 F.3d 647, 655–56 (D.C. Cir. 1994); United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988).

400. *See, e.g.*, United States v. Barile, 286 F.3d 749, 758 (4th Cir. 2002); United States v. Blood, 806 F.2d 1218, 1221 (4th Cir. 1986); United States v. Zizzo, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997).

401. *See, e.g.*, United States v. GAF Corp., 928 F.2d 1253, 1259–60 (2d Cir. 1991); United States v. Ramirez, 894 F.2d 565, 570 (2d Cir. 1990).

402. United States v. Yildiz, 355 F.3d 80, 81–82 (2d Cir. 2004).

403. United States v. Garza, 448 F.3d 294, 298–99 (5th Cir. 2006); *see also* Commonwealth v. Cepeda, 2014 MP 12, ¶ 25 (N. Mar. I. 2014) (emphasizing this difference); United States v. Ganadonegro, 854 F. Supp. 2d 1088, 1103–04 (D.N.M. 2012) (canvassing case law).

404. United States v. Bagcho, 151 F. Supp. 3d 60, 69 (D.D.C. 2015).

405. *See Cepeda*, 2014 MP ¶25 (denying the existence of a circuit split).

406. Robert Burns, *To a Mouse*, *in* POEMS & SONGS 33 (Courier Corp. 2012) (1786).

407. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 182 (1986).

construction: the world's true state helps direct the course of a text's deduction in the same way as a river's banks temporarily confine its passage.[408] Because, as a matter of precedent,[409] verifiable facts merit solicitude during any specific rule's construction, the realities of criminal prosecution in federal court merit painstaking review and diligent ascertainment. They are the minor premises crucial for any federal rule's properly contextual exegesis.

A. The Fierce Debate over Official Misconduct

The extent to which prosecutors, especially federal ones, contravene the foregoing sources' commandments is debatable.[410] In a depressing but telling review of the roughly 873 exonerations in the United States from January 1989 through February 2012, two scholars traced the causes of some false convictions to bogus or misleading forensic evidence and official misconduct,[411] conceivably hastened by the natural human susceptibility to cognitive biases.[412] In 2013, an appellate judge thundered about an "epidemic" of *Brady* violations by federal prosecutors, hitting upon the underlying cause: "A robust and vigorously enforced *Brady* rule is imperative because

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408. *Cf.* United States v. Whiffen, 121 F.3d 18, 22 (1st Cir. 1997) ("[A] true threat is not protected by the First Amendment." (citing United States v. Fulmer, 108 F.3d 1486, 1492–93 (1st Cir. 1997))); *accord* United States v. Orozco-Santillan, 903 F.2d 1262, 1265–66 (9th Cir. 1990).

409. *See infra* Part V.A.

410. *See, e.g.*, Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126 (1988) [hereinafter Green, *Ethical Prosecutor*] (arguing that critics exaggerate the prevalence and seriousness of prosecutorial misconduct); *cf.* Green, *Policing*, *supra* note 123, at 78 (noting the rarity of formal accusations of prosecutorial misconduct).

411. SAMUEL R. GROSE & MICHAEL SHAFFER, NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 65–67 (2012); *see also* Michael L. Perlin, *"Your Corrupt Ways Had Finally Made You Blind": Prosecutorial Misconduct and the Use of "Ethnic Adjustments" in Death Penalty Cases of Defendants with Intellectual Disabilities*, 65 AM. U. L. REV. 1437, 1452 (2016) (enumerating forms of misconduct).

412. GROSE & SHAFFER, *supra* note 411, at 43–49; *see* Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461, 463 (2017) [hereinafter Green, *Retrospect*] (discussing issues with unreliable evidence as they relate to prosecutorial misconduct); Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291, 301–06 (2004) (discussing selection bias with respect to eyewitnesses). For this reason, some have argued for the creation of units to investigate new evidence independent from the prosecutorial arm that obtained the underlying conviction. Bruce A. Green & Ellen Yaroshfsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 509–11 (2009).

all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence."[413] In practice, "[w]hen *Brady* violations are discovered pretrial, the court usually orders the government to disclose the suppressed evidence and, if necessary, grants a continuance in order to give the defense the opportunity to make effective use of the exculpatory information."[414] According to some, "[t]his is insufficient to curb prosecutorial misconduct because prosecutors experience no burden as a result of their nondisclosure."[415] Aside from a meager consequence, because judges and lawyers often protect one another from prosecution for their misdeeds,[416] internal codes of protection and secrecy mostly protect all but the most egregiously defiant prosecutors. By all credible accounts, the overwhelming majority of federal prosecutors comply with every apposite ethical tenet,[417] and prosecutors who suborn perjury or obstruct justice do face an incentive to act properly: the certain ruin to follow either a criminal prosecution for misconduct or a finding of contempt.[418] Still, numerous violations of prosecutors' discovery obligations have been documented,[419] and the criminal justice system, "not well designed to ensure compliance with *Brady*," much less the federal rules' more amorphous touchstones, effectively insulates the unscrupulous few from any consequences for their transgressions.[420]

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413. United States v. Olsen, 737 F.3d 625, 626, 630 (9th Cir. 2013) (Kozinski, J., dissenting).

414. Jones, *supra* note 396, at 443.

415. Cadene A. Russell, Comment, *When Justice Is Done: Expanding a Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of* Brady v. Maryland, 58 HOWARD L.J. 238, 254 (2014); *see also* Jones, *supra* note 396, at 443 ("Under this scheme, the consequences of noncompliance with Brady are identical to the consequences of compliance—disclosure of favorable evidence to the defense.").

416. *See* Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 28 (2015); Russell, *supra* note 415, at 254.

417. *See generally* Green, *Ethical Prosecutor*, *supra* note 410.

418. Baer, *supra* note 416, at 27.

419. Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 144, 156–57 (2016); *see also* Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 884–90 (2015) (outlining "a few of the many cases in which misconduct was discovered but went unpunished").

420. Michael Wines, *Lawsuit Cites 45 Cases of Prosecutor Misconduct*, N.Y. TIMES, Jan. 18, 2018, at A18; *cf.* Baer, *supra* note 416, at 27 ("[F]or most critics [of prosecutorial misconduct], criminal liability is far too rare to count as a true sanction.").

Sometimes, an entire office, frequently a state or local one, emits such a stench, such as the Orleans Parish District Attorney's Office.[421]

Though the extent of police misconduct remains marred in similar controversy, the objective data unfolds a far more plainly disturbing story. In recent years, jurors have seemingly become "ever more aware of stories in the media reporting police officers lying to justify false arrests and to convict criminal defendants."[422] Indeed, some experts on police practice treat lying by police at trials and in their paperwork as the "norm," "commonplace," or "routine."'[423] "[S]hocked, not only by the seeming pervasive scope of misconduct but even more distressingly by the seeming casualness by which such conduct is employed," a New York trial court judge condemned the apparently widespread culture of lying and corruption in the drug enforcement units of one of this nation's finest police forces.[424] Similarly convinced, one of this jurist's federal counterparts found sufficient evidence for a plaintiff to proceed to trial "on the grounds that (1) New York City's overtime policy incentivizes officers to make false arrests and (2) police malfeasance in general and as related to the overtime policy is inadequately monitored to prevent abuse."[425] A jury, he reflected, could yet "find that this practice is not isolated to a few 'bad' police officers, but is endemic, that [police] officials are aware this pattern exists and that they have failed to intervene and properly supervise."[426]

For two obvious reasons, prosecutorial and police misconduct go together. First, by forwarding false information to prosecutors, whether via testimony or affidavit, officers dictate the evidence upon

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421. *See* Compl. ¶¶ 8–11, 22–41, 50–165, Jones v. Cannizzaro, No. 2:18-cv-00503, ECF No. 1; Tiffany R. Murphey, *Federal Habeas Corpus and Systematic Official Misconduct: Why Form Trumps Constitutional Rights*, 66 U. KAN. L. REV. 1, 29–30 (2017); *see also* Harry M. Caldwell, *Everybody Talks About Prosecutorial Misconduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2017 U. ILL. L. REV. 1455, 1479 (2017) (noting that California's highest court found prosecutors guilty of 1.14 violations per case); *cf.* Green, *Regulation*, *supra* note 319, at 902 (discussing the dangerous cultural ramifications of prosecutors' anti-regulatory rhetoric). It is worth emphasizing that, subject to a handful of exceptions, federal prosecutorial offices seem far less prone to cultivating such fetid internal cultures. *See generally* Bennett L. Gershman, *Subverting* Brady v. Maryland *and Denying a Fair Trial: Studying the Schuelke Report*, 64 MERCER L. REV. 683 (2013).

422. Cordero v. City of New York, 282 F. Supp. 3d 549, 554 (E.D.N.Y. 2017).

423. Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES, Feb. 3, 2013, at S.R4.

424. *Id.*

425. *Cordero*, 282 F. Supp. 3d at 565.

426. *Id.*

which the latter must base their case and thus provide juries with the kind of tainted data "likely to influence" their deliberations.[427] In such situations, both "a prosecutor's knowing use of false evidence to obtain a tainted conviction" and "a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable 'corruption of the truth-seeking function of the trial process.'"[428] Whatever its reality, the perpetrators of such misdeeds rarely undergo the kind of questioning essential to revealing such cognitive imperfections as insincerity.[429] By such means, sloppy policework can lead to false prosecutions while merging the interest of the prosecutor with that of the officer (and vice versa). Second, the prevalent perception that "prosecutors are [mostly] unaccountable for their misdeeds" fuels a race to the ethical bottom on the part of every institutional and personal actor involved the criminal process. [430] In particular, cognizant of this effective immunity on the part of the people actually expected to present legally sufficient and proper evidence to judge and jury (i.e. prosecutors), law enforcement possesses a greater incentive to aid in the imprisonment of the obviously guilty (from their perspective), evidence and ethical codes be damned.[431] Certainly, they may feel equally free to become lax in minimizing or extirpating abuses that more efficiently net apparent evildoers (again, from their angle).[432] Even though the best of prosecutors regularly combat this degradation,[433] the close alliance between prosecutors and investigators, based primarily on a mutually shared belief in the necessity of punishing the guilty, renders it nearly impossible to inculcate such a harshly moral code within institutions practically focused on a rather narrow conception of justice.[434]

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427. Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 130 (2d Cir. 1997).

428. *Id.* (quoting United States v. Agurs, 427 U.S. 97, 104 (1976)); *accord* Manganiello v. City of New York, 612 F.3d 149, 162 (2d Cir. 2010); Cruz v. City of New York, 232 F. Supp. 3d 438, 459 (S.D.N.Y. 2017); *cf.* Keller v. Sobolewski, No. 10 CV 5198, 2012 WL 4863228, at *4 (E.D.N.Y. Oct. 12, 2012) ("[T]he harm suffered by an individual bringing a deprivation of the right to a fair trial claim is the 'deprivation of liberty' that occurs 'because of the fabrication.'" (quoting Zahrey v. Coffey, 221 F.3d 342, 348 (2d Cir. 2000))).

429. *See* Sanchirico, *supra* note 412, at 335–42, 347 (discussing "[t]he challenges for the insincere witness in maintaining internal consistency" when questioned at trial).

430. Murphey, *supra* note 421, at 33.

431. *See* Gershman, *supra* note 421, at 708.

432. *Id.*

433. *See* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 79 (2016).

434. Robert F. Kennedy may have liked to say he wanted "a Department of Justice, not a Department of Prosecution." ARTHUR M. SCHLESINGER, A THOUSAND

B. Institutional Reluctance to Enforce

Notwithstanding the degree of actual misconduct by the government's punitive organs, other aspects of the current disciplinary system often minimize the repercussions of such misdeeds. Primarily, though federal courts are better equipped as ethical rule-makers due to their greater access to and ability to assess relevant information and greater objectivity relative to state courts,[435] any actual regulation flounders due to many judges' personal disinclination, the existence of only a handful of penal devices, and the persistence of uncertainty regarding the extent of the federal judiciary's penal authority.[436] Indeed, as the judiciary has embraced the image of police expertise, many judges "identified police officers as stewards of professional insight worthy of deference in court."[437] Meanwhile, though "[p]rosecutors, their offices, and their representatives cannot be said to have a single attitude toward professional regulation and regulators," many have sought to secure effective immunity from all external professional conduct rules and their enforcement.[438] These facts dampen both the rigor of any judicial

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DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 697 (Houghton Mifflin Harcourt 2002) (1965). But even the best of people do not always live to their highest ideals, including, revealingly enough, Kennedy himself.

435. Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 425–35 (2002) (providing an overview of the advantages federal courts may have over state courts with respect to ethical rulemaking and enforcement) [hereinafter Green & Zacharias, *Regulating*].

436. *See* Green, *Policing*, *supra* note 123, at 80–83; Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of Theory*, 56 VAND. L. REV. 1303, 1318–36 (2003) (describing federal courts as possessing "four possible sources of independent authority [to regulate federal lawyers]: two well recognized, two potentially controversial, and all uncertain in scope.") [hereinafter Zacharias & Green, *Authority*]; *cf.* ALLIANCE FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS 4–6 (Mar. 18, 2016) (bemoaning the lack of judges with experience working for public interest organizations, as public defenders or indigent criminal defense attorneys, and representing individual clients in private practice, as such a lack of professional diversity risks silencing important "voices of justice").

437. Anna Lvosky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1997, 2016 (2017); *see also* Green, *Retrospect*, *supra* note 412, at 475 (discussing a similar deference offered to prosecutors and their agents). Arguably, such biases lead to judges systematically overestimate police officers' expertise. Lyvosky, *supra*, at 2075.

438. Green, *Regulation*, *supra* note 319, at 897–98. As one scholar observes, this indiscriminate opposition is contrary to prosecutors' professional obligation promote the law's positive development. *Id.* at 903. Perhaps relatedly, government lawyers rarely file amici briefs in favor of criminal defendants. *See generally* Bruce A. Green,

review of purported misconduct and an individual jurist's inclination to treat even a proven misdeed as anything but an inadvertent mistake.[439]

Judicial idiosyncrasies have not helped. Many "[a]n ethics rule may forbid contemplated conduct or appear to authorize the conduct, but judges evaluating the propriety of attorneys' actual behavior do not always defer to the codes' standards."[440] Whether based on a belief that a particular rule does not account for all relevant considerations or a belief in their superior ken, judges readily construct independent standards.[441] At a practical level, the result—a series of discrete and variable ethical standards—can confuse lawyers who are genuinely committed to acting properly and may inhibit any jurist's enthusiasm for punishing a wayward act.[442] For all these reasons, disciplinary authorities, including federal courts, seemingly do not effectively or rigorously regulate federal prosecutors.[443]

C. Snapshot of a Typical Prosecutor's Typical Day

Considering the foregoing, four certain facts merit emphasis. First, during any investigation, federal prosecutors often act as investigators, adjudicators, and litigators, distinct roles to which different expectations inevitably attach.[444] Second, "[a]lthough courts and commentators sometimes proclaim that prosecutors have higher ethical obligations than other lawyers, this principle is largely absent" from the aforementioned ethics rule.[445] Rather, "[i]n general,

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Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused, 122 YALE L.J. 2336 (2013).

439. *Cf.* Zacharias & Green, *Authority*, *supra* note 436, at 1374 (noting the federal courts' qualms about regulating prosecutors and thereby "entrench[ing] unduly on the independence and aggressiveness of federal advocates").

440. Bruce A. Green & Fred C. Zacharias, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 74 (2009) (footnote omitted) [hereinafter Green & Zacharias, *Rationalizing*]. Questions of professional regulation, after all, are always highly contextual. *See* Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 116 (1996).

441. Green & Zacharias, *Rationalizing*, *supra* note 440, at 98–100.

442. *Id.* at 75; *cf.* Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105, 1111 (2016) (discussing uncertainty surrounding the extent of a lawyer's duty of candor) [hereinafter Green, *Candor*].

443. Green & Levine, *supra* note 419, at 144, 155–57; Green, *Training*, *supra* note 325, at 2180–82. State courts appear less restrained in their willingness to inquire into prosecutorial motivation. Green & Levine, *supra* note 419, at 176.

444. Green, *Prosecutorial Ethics*, *supra* note 317, at 1576, 1587–88; Green & Zacharias, *Regulating*, *supra* note 435, at 455–56.

445. Green & Levine, *supra* note 419, at 149.

prosecutors are subject, at most, to the same rules as all other lawyers."[446] Exceptions, of course, overflow,[447] but the thrust is unmistakable. Third, as already discussed, "federal prosecutors' disclosure obligations have many sources,[448] and their scope is contested or uncertain in various respects."[449] Fourth, few decisions that prosecutors make are subject to legal restraints or judicial review.[450] This tetrad has fed the emergence of a once novel viewpoint: for an increasing number of judges, commentators, and prosecutors, a prosecutor's enormously broad and mostly discretionary power justifies the imposition of unique ethical constraints on his or her diurnal activities.[451]

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446. *Id.* at 149–50; *see also* Green, *Retrospect*, *supra* note 412, at 468.

447. Green, *Candor*, *supra* note 442, at 1115–19 (discussing a prosecutor's heightened duty to candor and disclosure); Bruce A. Green, *Access to Criminal Justice: Where Are the Prosecutors*, 3 TEX. A&M L. REV. 515, 526–27 (2016) (suggesting that prosecutors have "a general duty of competence, which presupposes that they will take reasonable steps to avoid convicting innocent people."); Bruce A. Green, *Why Should Prosecutors Seek Justice*, 26 FORDHAM URB. L.J. 607, 612–18 (1999) [hereinafter Green, *Justice*] (discussing a prosecutor's duty "to seek justice" and the extents and limitations of that duty). Arguably, these exceptions extend to all lawyers as well. *See generally* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, (2005) (discussing the distinction between professional and personal conscience and arguing that "lawyers' duties of zealous advocacy are limited by duties to the court that are implicit in the lawyer's professional role.").

448. *See supra* Part III.C.

449. Green, *Training*, *supra* note 325, at 2163–64.

450. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 837–38, 846–47 (2004) [hereinafter Green & Zacharias, *Neutrality*]; *see also* Zacharias & Green, *Duty*, *supra* note 318, at 9 (repeating this point); Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 315–16 (2017) (same); Caldwell, *supra* note 421, at 1456 & n.1 (same); Shima Bardadaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1085–86 (2017) (same); *cf.* Green & Zacharias, *Regulating*, *supra* note 435, at 449–50 (elaborating upon the relationship between prosecutorial independence, self-regulation, and self-enforcement). This fact, combined with the existence of few truly well-settled understandings regarding standards intended to govern such discretion, may often lead many to accentuate the observable aspects of what prosecutors do and to overlook the more momentous, but less public, decisions. Green & Zacharias, *Neutrality*, *supra* note 450, at 902–03.

451. Green, *Justice*, *supra* note 447, at 628. As Spider-Man's Uncle Ben purportedly said, "with great power comes great responsibility." BRIAN CRONIN, WAS SUPERMAN A SPY?: AND OTHER COMIC BOOK LEGENDS REVEALED 105 (2009) (noting that "Uncle Ben never actually says it" in the Spider-Man comic).

V. PROPER APPROACH

A. Interpretive Paradigm: Overview of (Some) Relevant Principles

1. First Set of Tools

As with statutes, any federal rule's terms are "give[n] . . . their plain meaning"[452] and "read in . . . [their] proper context."[453] If the language is both unambiguous and plain, no inquiry into a rule's obvious purpose and its drafters' intent may be undertaken.[454] Distinct concepts, ambiguity and plainness each require a discrete analysis.[455]

"A rule plainly read is one whose words have been accorded their ordinary meaning."[456] Depending on the pertinent term, such an import may equate with a text's "technical meaning, including the specialized connotations and practices common to the specialized sub-community of lawyers,"[457] including common-law terms' "full array of common-law connotations," thereby "supplement[ing] otherwise unqualified texts with settled common-law practices."[458] As such, even at the initial stage, an investigation into a rule's plainness often incorporates ordinary and expert meanings and grapples with semantic context.[459] In the typical case, however, this ordinary

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452. Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989) (as to the Civil Rules); *see also* Huddleston v. United States, 485 U.S. 681, 687 (1988) (applying plain meaning paradigm to Evidence Rules); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988) (same); Bourjaily v. United States, 483 U.S. 171, 175–79 (1987) (adhering to the plain meaning of Evidence Rule 104 despite its inconsistency with prior practice).

453. McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

454. Bus. Guides v. Chromatic Commc'ns Enters., 498 U.S. 533, 540–41 (1991) (citing *Pavelic & LeFlore*, 493 U.S. at 123), *superseded by* FED. R. CIV. P. 11 (1993 amendment); *see also* Hagan v. Rogers, 570 F.3d 146, 157 (3d Cir. 2009) (citing Berckeley Inv. Grp., Ltd. v. Colkitt, 259 F.3d 135, 142 n.7 (3d Cir. 2001)).

455. Stern v. Am. Home Mortg. Servicing, Inc. (*In re* Asher), 488 B.R. 58, 64 (Bankr. E.D.N.Y. 2013).

456. *See* Shachmurove, *Boilerplate*, *supra* note 111, at 247.

457. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 48 (2006); *cf.* William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. L. REV. 629, 632 (2001) (discussing the disparate theories of statutory interpretation and suggesting that "interpretive communities are the missing element" not considered in interpretive theory).

458. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 435 (2005) (discussing the textualist approach to statutory interpretation).

459. Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 1005 (2011); *see also* Lawrence M. Solan, *Theories of Statutory Interpretation: The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2046 (2005) ("To the extent that

meaning approach "requires the interpreter to put [himself or] herself in the shoes of a nonlegal audience," an idea with "a built-in form of impartiality, not to mention democratic appeal,"[460] and eschews equitable construction of any kind.[461]

For purposes of this process, ambiguity has a distinct meaning. Loosely defined as "vagueness," it arises in the statutory context whenever "several plausible interpretations of the same statutory text, specific and different in substance" yet equally plain in denotation, can be cohered with the relevant provision's context and structure.[462] In other words, it amounts to "[a]n uncertainty of meaning based not on the scope of a word or phrase but on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations."[463] It is commonly found in two situations. First, as to a single text, multiple "plain" definitions can be unearthed, though one must be selected.[464] Second, a particular plain definition's utilization seemingly produces dissonance within the relevant legal framework, requiring that specific delineation's contraction.[465]

In this first explication, well-established semantic and syntactic canons constitute the interpreter's exclusive gear.[466] Any meaning

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Scalia justifies his position on the premise that the ordinary meaning of a statute serves as an adequate proxy for the intention of the legislature, however, the reasoning is questionable. Legislators are not such consistent probabilistic reasoners that we can always assume that any instance of a statutory word that strays from the prototype is necessarily outside a statute's scope.").

460. Nourse, *supra* note 459, at 1004.

461. *See* Jerry A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 497 (2013). Debate as to the cogency of this resistance continues. *See generally* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (amassing historical evidence designed to convince even originalists that the phrase "the judicial Power," as used in the Constitution's third article, includes the power of equitable interpretation).

462. Stern v. Am. Home Mortg. Servicing, Inc. (*In re* Asher), 488 B.R. 58, 64 (Bankr. E.D.N.Y. 2013).

463. BLACK'S LAW DICTIONARY, *supra* note 2; *see also, e.g.*, Shires Hous., Inc. v. Brown, 172 A.3d 1215, 1225 (Vt. 2017) (Skoglund, J., dissenting) (using this definition); Crews v. State, 183 So. 3d 329, 334 (Fla. 2015) (same).

464. Shachmurove, *Claims*, *supra* note 255, at 530–31.

465. *Id.*

466. *See, e.g.*, GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY, AND AUTHORITY § 102.2 (6th ed. 2009) ("[N]ot once since 1989 has the [Supreme] Court been willing to disregard the plain meaning of any rule of Evidence or Procedure. On the contrary, other recent decisions have suggested an uncompromising commitment to attaching controlling significance to the text of any rule that is written in plain language.").

thereupon derived is subject to adoption, curtailment, or abandonment pursuant to one or more venerable exceptions.[467] With all other interpretive implements, including legislative history, verboten at the initial stage,[468] plain meaning consistently triumphs over both evidentiary history and legislative silence, and courts tend to be disinclined to contravene this expectation.[469] So bound, even if a "contrary practice ha[s] been long and widely-accepted" and "nothing in the legislative history show[s] any intention to change that practice," today's courts usually follow a rule's "literal words."[470]

2. Digressions

Regardless of the substantive dispute, certain deviations from this literalism hold an honored place in today's prevalent interpretive scheme.[471] Inevitably, many of these deviations rack and often

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467. Shachmurove, *Claims*, *supra* note 255, at 530–31. More specifically, "courts need not adhere to the plain and unambiguous meaning of a federal rule or statute if (1) an absurd result would follow; (2) there is clear evidence of contrary intent in reliable extrinsic sources; (3) no plausible purpose would be attained; (4) an unanticipated clerical or typographical error is at fault; or (5) a conflict with a constitutional provision would result." *Id* (internal quotations and footnotes omitted).

468. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."), *superseded by statute*, Riegle Community Development and Regulatory Improvement Act of 1994 § 411, Pub. L. No. 103-325, 108 Stat. 2160, 2253; *see also, e.g.*, Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 808–09 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.").

469. *See* Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 749 (1991); *see also* Warger v. Shauers, 135 S. Ct. 521, 525–26, 529 (2014) (according Evidence Rule 606(b)'s "terms their plain meaning").

470. Jonakait, *supra* note 469, at 752; *see also, e.g.*, Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004) ("With a plain, nonabsurd meaning in view, we need not proceed in this way. . . . Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."); INS v. Cardoza Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); United States v. Osazuwa, 564 F.3d 1169, 1173–74 (9th Cir. 2009) (turning to legislative history solely because a rule's plain meaning was not apparent from its text alone).

471. *See, e.g.*, Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1541 & n.7 (1999); Glen Weissenberger, *The Proper Interpretation of the Federal Rules of Evidence: Insights from Article VI*, 30 CARDOZO L. REV. 1615, 1616 (2009). Many, if not all, of these departures can be traced to the Court's repeated insistence that any initial determination of either unambiguity or plainness compels dissection of "the language itself, the specific context in which that language is used, and the broader context of the statute [or rule] as a whole." Robinson v. Shell Oil Co.,

complicate the relevant jurisprudence, engendering uncertainty as to both a text's construction and an outcome's likelihood. Three must be kept in mind.

First, jurists of all stripes often weigh "clear evidence of contrary legislative intent,"[472] and "unambiguous, clear, uncontradicted, and specific legislative history" frequently "serve[s] as a reliable interpretive guide."[473] In unusual cases, authoritative legislative history may also be summoned from amidst an otherwise ignoble crowd[474] so as to "confirm an interpretation that is otherwise grounded in the text and structure of the act [or rule] itself."[475] In fact, aside from this bolstering function, whenever it confronts an ambiguous legal text, a federal court is expected to consult such history as it "consider[s] the purpose, the subject matter and the condition of affairs which led to its enactment, and so construe[s] it as to effectuate and not destroy the spirit and force of the law and not to render it absurd."[476] Indeed, because even a mostly unambiguous

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519 U.S. 337, 340 (1997) (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v. Bronson, 500 U.S. 136, 139 (1991)).

472. United States v. DBB, Inc., 180 F.3d 1277, 1281 (11th Cir. 1999); *see also, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES 29 (2014).

473. McDow v. Smith, 295 B.R. 69, 78 n.18 (E.D. Va. 2003). Of course, "legislative history is itself often murky, ambiguous, and contradictory." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 569 (2005). With this caveat appended, "[w]hen reviewing the legislative history of enacted legislation, official congressional reports are an authoritative source for the [c]ourt to consider." Silva-Hernandez v. Swacina, 827 F. Supp. 2d 1352, 1358 (S.D. Fla. 2011); *accord, e.g.*, Zuber v. Allen, 396 U.S. 168, 186 (1969); Disabled in Action of Metro. N.Y. v. Hammons, 202 F.3d 110, 124 (2d Cir. 2000); *see also* Bingham & Taylor Div., Va. Indus., Inc. v. United States, 815 F.2d 1482, 1485 (Fed. Cir. 1987) ("Although not decisive, the intent of the legislature as revealed by a committee report is highly persuasive.").

474. *Cf.* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleagues [Judge] Harold Leventhal once observed, akin to 'looking over a crowd and picking your friends.'").

475. Murphy v. United States, 340 F. Supp. 2d 160, 171 (D. Conn. 2004); *see also, e.g.*, Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1218 (11th Cir. 2015) (examining legislative history of unambiguous statute because history was consistent with a statute's plain meaning); *cf.* Hadden v. Bowen, 851 F.2d 1266, 1268 (10th Cir. 1988) ("The weight given an item of legislative history, however, depends upon whether it is a contemporaneous expression of legislative intent and 'is sufficiently specific, clear and uniform to be a reliable indicator of intent.'" (quoting Miller v. Comm'r, 836 F.2d 1274, 1282 (10th Cir. 1988))).

476. Lambur v. Yates, 148 F.2d 137, 139 (8th Cir. 1945), *cited in, e.g.*, Haley v. Retsinas, 138 F.3d 1245, 1249 (8th Cir. 1998); *see also, e.g.*, Broderick v. 119TCbay, LLC, 670 F. Supp. 2d 612, 616 (W.D. Mich. 2009) ("The Court may resort to external indications of Congressional intent, such as legislative history, only when the language and intrinsic evidence fails to reveal such intent.").

federal rule's command may still prove uncertain as to "the particular dispute in the case" at hand,[477] such oft-disparaged snippets occasionally tip decisions.[478] Through 2010, authoring justices tended to cite legislative history in four situations: (1) the pertinent statutes were in some objective sense difficult to interpret; (2) as additional support for majority opinions; (3) legislative history favors their ideologically preferred outcome; or (4) colleagues have also cited legislative history.[479] In light of these judicially approved departures, reliable legislative history still retains a place in a federal rule's interpretation whenever the contested text "is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what . . . [its drafters] actually meant."[480] Put differently, whenever a rule appears plain, but ambiguous, history may be canvassed.

Second, the interpretation of federal rules generally requires devotion to the ascendant principle of trans-substantivity. Citing to the law of evidence, one famed scholar described it thusly: "The relation between an Evidentiary Fact and a particular Proposition is always the same, without regard to the kind of litigation in which that proposition becomes material to be proved."[481] More prosaically, this theory, occasionally denominated as a "canon," directs that rules be interpreted such that they apply neutrally across substantive contexts.[482] This principle boasts several benefits, including "protect[ing] process law against distortion otherwise produced by outsized political influence, capture, or bias" and "lower[ing] the barrier to entry for areas of practice."[483] Even interpretive doctrine

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477. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997); *see also* United States v. Wilson, 290 F.3d 347, 353 (D.C. Cir. 2002).

478. United States v. Cordova, 806 F.3d 1085, 1099 (D.C. Cir. 2015).

479. David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1739–40 (2010).

480. United States v. Gayle, 342 F.3d 89, 94 (2d Cir. 2003); *see also* Cashman v. Dolce Int'l/Hartford, 225 F.R.D. 73, 88 (D. Conn. 2004) (citing *Gayle*, 342 F.3d at 93–94).

481. 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 11 (1904).

482. *See, e.g.*, Shachmurove, *Claims*, *supra* note 255, at 532–33; David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 968 (2011) [hereinafter Marcus, *Methodology*]; David Marcus, *Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376–83 (2010).

483. David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1220–21 (2013) [hereinafter Marcus, *Processes*]. At the same time, trans-substantivity can create problems, from ignoring the need for specially tailored process law within certain substantive areas to foreclosing judges from tackling one

amounts to "an inherently trans-substantive task, to the extent it provides rules of grammar and usage to help vest the incomplete or indeterminate use of language with meaning."[484]

Third, certain specialized concerns matter differently to the construction of certain bodies of law, effectively limiting wholesale applications of the principle of trans-substantivity. In bankruptcy law, for instance, equitable notions related to a debtor's reorganization or creditors' recompense possess a relevance otherwise inapposite to a particular civil rule's elucidation.[485] The same can be said about the Criminal, Evidence, and Civil Rules.[486] As a matter of common practice, whenever "alternative interpretations consistent with . . . [the relevant provision's apparent] purpose are available,"[487] thereby engendering ambiguity,[488] or even "when the plain meaning [does] not produce absurd results but merely an unreasonable one plainly at variance with the policy of th[at enactment] as a whole,"[489] such unique norms can be utilized so as to select the apposite meaning from a panoply of viable connotations.[490] Consequently, although the principle of trans-substantivity infuses the federal rules, generalized patterns of results organized around certain substantive contexts, like evidence or criminal procedure, exist. This regular pattern of application in antecedent regimes can quickly morph—indeed, in many cases it has—into unambiguously substance-specific doctrine.[491] Consequently, a specific system's idiosyncratic goals and concerns for institutional efficacy can compel such departures and engender unexpected interpretive outcomes.

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area's unique dysfunctions via specialized rules. *Id.* at 1208. Legislators, however, may always enact substance-specific process law. *Id.* at 1234.

484. *Id.* at 1208.

485. *See* United States v. Cordova, 806 F.3d 1085, 1099 (D.C. Cir. 2015); Shachmurove, *Claims*, *supra* note 255, at 535–42. This issue arises due to the extensive incorporation of the Civil Rules into the Federal Rules of Bankruptcy Procedure. *See, e.g.*, FED. R. BANKR. P. 7002, 7004(a)(1).

486. *See infra* Part V.B–C; *see also* Marcus, *Methodology*, *supra* note 482, at 965–71 (positing adjustments to certain interpretive norms applicable to Civil Rules); *cf.* Shachmurove, *Claims*, *supra* note 255, at 531–35 (detailing the differences between rules and statutes and those deviations' interpretive significance).

487. *See* Shachmurove, *Claims*, *supra* note 255, at 535–43 (summarizing the interpretive requirements imposed by the Federal Rules of Bankruptcy Procedure).

488. *In re* Asher, 488 B.R. 58, 64 (Bankr. E.D.N.Y. 2013).

489. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940), *cited in, e.g.*, *Cordova*, 806 F.3d at 1099; Bongiovanni v. Comm'r, 470 F.2d 921, 924 (2d Cir. 1972).

490. Marcus, *Methodology*, *supra* note 482, at 969; *see also* Shachmurove, *Claims*, *supra* note 255, at 531–35.

491. *See* Marcus, *Processes*, *supra* note 483, at 1205.

B. Collation of the Common Objections to Existing Approaches

Having recounted the relevant history and summarized pertinent texts, this Article now corrects and improves upon an error-plagued jurisprudence by utilizing the interpretive paradigm just sketched. As case law attests, rarely have either courts or scholars classified and enumerated every flaw, whether subtle or obvious, endemic in the *Santos* and *Salerno* cases. For the sake of aiding future users, not to mention expanding upon these scattered objections, Part V.B gives such desperately needed and rarely offered synopsis.[492] It is, after all, difficult to combat a misimpression—or, in defending its accuracy, paint it true—if errata have been too scattered to be comprehensively digested.[493]

1. Misappropriation of History

As *Santos* and its ilk explained, the common law limitation on government admissions rests on two fundamental assumptions. First, in a criminal prosecution, when "the only party on the government side . . . [is] the government itself," its "many agents and actors" are "supposedly uninterested personally in the outcome of the trial"; second, these functionaries have always been "historically unable to bind the sovereign."[494] In light of these postulations, such persons' "statements seem less the product of the adversary process and hence less appropriately described as admissions of a party."[495] Indeed, unlike the typical lawyer, the prosecutor, perpetually bound "to seek justice,"[496] stands forth as "an officer of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost"[497] and thereby secure convictions tainted by virtue of coercion or

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492. *See generally* United States v. Ganadonegro, 854 F. Supp. 2d 1088 (D.N.M. 2012).

493. *Cf.* Amir Shachmurove, *Eligibility for Attorneys' Fees Under the Post-2007 Freedom of Information Act: A Onetime Test's Restoration and an Overlooked Touchstone's Codification*, 85 TENN. L. REV. 571, 592–633 (2018) (limning the reasons behind the Freedom of Information Act).

494. United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967); United States v. Yildiz, 355 F.3d 80, 81 (2d Cir. 2004) (reaffirming *Santos* rule).

495. United States v. Kampiles, 609 F.2d 1233, 1246 (7th Cir. 1979); *see also, e.g.*, United States v. Pandilidis, 524 F.2d 644, 650 (6th Cir. 1975); United States v. Powers, 467 F.2d 1089, 1095 (7th Cir. 1972).

496. Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. REV. 853, 870 (2002).

497. Shih Wei Su v. Filion, 335 F.3d 119, 126 (2d Cir. 2003).

manipulation.[498] Crucial to *Santos*' persuasiveness, neither of its underlying postulates survives scrutiny.

The first ignores practical reality. Of course, "prosecutors have special obligations to do justice and to maintain the fairness of the proceeding"[499] and "represent the government, and, as such, have no identifiable client."[500] At the same time, the United States' justice system is, whether by accident or design, overwhelmingly adversarial in orientation; *Santos* itself characterizes a "government prosecution" as the "exemplification of the adversary process."[501] As a matter of course, whatever their ethical obligations, "prosecutors literally mobilize the coercive power of the state against an individual to deprive him or her of life, liberty, and/or property."[502] An individual agent may have no direct personal interest in a certain proceeding's outcome,[503] as *Santos* facetiously claimed,[504] but he or she, as the government's chosen representative, acts as every defendant's party opponent in fact, if not in theory, once a prosecution commences.[505] At that point, a prosecutor can hardly be considered a disinterested party or his or her statements any less an admission on the government's part than the statements of any other attorney—and even though no corporate defendant in a criminal case wants its agents' statements used against it, they are so used.[506] Naturally, a prosecutor's close professional and personal ties to police officers and departments can often induce favoritism towards individual officers so as to remain in other officers' good graces, thereby allows for the undercutting of any

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498. Jenkins v. Artuz, 294 F.3d 284, 296 n.2 (2d Cir. 2002).

499. Poulin, *Admissions*, *supra* note 157, at 435.

500. Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525, 531 (1999).

501. United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967).

502. Jared M. Kelson, Note, *Government Admissions and Federal Rule of Evidence 801(d)(2)*, 103 VA. L. REV. 355, 384 (2017).

503. Younger, *supra* note 388, at 113.

504. Edward J. Imwinkelried, *Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution*, 71 MINN. L. REV. 269, 309 (1986); *cf.* Geiger, *supra* note 396, at 411 (deriding this "contention" as "incorrect").

505. *See, e.g.*, United States v. Gossett, 877 F.2d 901, 906 (11th Cir. 1989). Tellingly, the government often uses Evidence Rule 801(d)(2) against criminal defendants, "implicitly conced[ing]" its status as an adversary. Kelson, *supra* note 502, at 385.

506. State v. Worthen, 765 P.2d 839, 848 & n.6 (Utah 1988).

ostensible disinterestedness by biases both oblique and overt.[507] The same can be said about their personal interest in appearing successful to their colleagues, bosses, and communities.[508] Thus, regardless of the extent to which their special obligations constrain their adversarial inclinations,[509] the typical prosecutor practically serves as a criminal defendant's committed adversary, expected to employ their extraordinary powers to secure an end contested by another and desired by the governmental agency for which they work, whether the U.S. Attorney himself or herself, the district office they head, or the broader institution they service.[510] Indeed, the expansive breadth of prosecutorial discretion[511] cautions against exempting these uniquely empowered agents from the admissions principles enthroned in Evidence Rule 801(d)(2), themselves the product of the adversarial and lawyer-driven criminal trial's emergence,[512] in the midst of one more ineluctably adversarial contest.

Santos' second basis too suffers from at least three fatal weaknesses. Primarily, the fact that agents are historically unable to bind the sovereign "signifies nothing"[513] for one reason: because, like any opponent confronted with their own admission, the government would enjoy every opportunity to explain any discrepancies or persuade the factfinders of the admission's relative insignificance,[514] not one of its agents' admissions truly binds it[515] by any reasonable definition of that term. Additionally, the doctrine of sovereign immunity to which *Santos* pays such devotion "has been gradually

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507. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 473–75 (2017); *see also* Griffin & Yaroshefsky, *supra* note 450, at 324.

508. Green & Roiphe, *supra* note 507, at 480–81; *see also* Griffin & Yaroshefsky, *supra* note 450, at 312.

509. *See* English, *supra* note 500, at 541; Poulin, *Inconsistency*, *supra* note 329, at 1431.

510. *See* Kalina v. Fletcher, 522 U.S. 118, 118 (1997) (discussing prosecutor's role as advocate); United States v. Bakshinian, 65 F. Supp. 2d 1104, 1106 (C.D. Cal. 1999) (rejecting this historical explanation for this reason); Poulin, *Admissions*, *supra* note 157, at 467 ("[T]he Justice Department, as the litigation and enforcement arm of the government, is the adversary . . . .").

511. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); English, *supra* note 500, at 528; *cf.* Shatz & Whitt, *supra* note 496, at 868 (discussing divergent views as to the ethical propriety of prosecutorial use of inconsistent factual theories).

512. Sklansky, *supra* note 102, at 31; *see also* Richter, *supra* note 135, at 1874.

513. Younger, *supra* note 388, at 113.

514. Kelson, *supra* note 502, at 387.

515. *See, e.g.*, Poulin, *Admissions*, *supra* note 157, at 472; Geiger, *supra* note 396, at 410.

eroding over the last several decades."[516] "[T]he notion that the sovereign is immune from suit because its acts are beyond the reach of the law is an anachronism."[517] Surely, if the government is subject to Evidence Rule 801(d)(2) in civil proceedings implicating significant financial sums, little can justify extending its historical immunity into criminal proceedings.[518] In the latter, the stakes are arguably higher, the need for balance more crucial.

Most significantly, even though a private party's attorney "is perhaps the clearest imaginable example of an agent authorized to speak,"[519] prosecutors can (and regularly do) bind the government on sundry legal matters. They do so through, for example, stipulations and plea agreements,[520] and they "speak for the government in criminal cases" as a matter of statute and policy.[521] "With a few exceptions, the United States Attorneys have been delegated the authority to make [many] important and sensitive decisions that drive criminal prosecutions."[522] In most cases, "the prosecutorial discretion of the U.S. Attorney is vast and unchecked by any formal, external constraints or regulatory mechanisms."[523] As such, "[w]hether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases, the Justice Department," including its individual prosecutors, "certainly should be considered such."[524] "[T]he Justice Department, as the litigation and enforcement arm of

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516. Geiger, *supra* note 396, at 410.

517. *Id.*

518. *See, e.g.*, Kelson, *supra* note 502, at 387; Geiger, *supra* note 396, at 411.

519. Poulin, *Admissions*, *supra* note 157, at 430; *see also, e.g.*, United States v. Ganadonegro, 854 F. Supp. 2d 1088, 1119 (D.N.M. 2012) (noting "that, in the civil context, attorneys must generally be careful with written or oral statements they make during litigation, as those statements may later be used against their client").

520. *See, e.g.*, United States v. Bakshinian, 65 F. Supp. 2d 1104, 1106 (C.D. Cal. 1999) (discussing the use of plea agreements to bind the government); Poulin, *Admissions*, *supra* note 157, at 431 (discussing the use of stipulations to bind the government); *see also* Bellamy v. State, 941 A.2d 1107, 1118 (Md. 2008) ("All of the motions, filings, pleadings, and arguments (or lack thereof) made by a prosecutor in a criminal case may serve to bind the government to a course of action or outcome.").

521. Poulin, *Admissions*, *supra* note 157, at 431.

522. United States v. Giangola, No.07-706, 2008 WL 3992138, at *4 (D.N.M. May 12, 2008).

523. Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 303 (1980).

524. United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988); *accord, e.g.*, United States v. Ganadonegro, 854 F. Supp. 2d 1088, 1119 (D.N.M. 2012); *cf.* United States v. Zizzo, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997) ("We note, however, that a number of courts have rejected [the majority's restrictive] approach when dealing with statements made by government attorneys.").

the government," is a self-evident "adversary."[525] In short, once dissected, *Santos* and its ilk apparently espouse a vision falsified by reality itself.

2. Misapprehension of Text

In accordance with modern law's preference for "a generally textualist approach to interpretation,"[526] any attempt to classify a government lawyer's statement as an admission must begin with the plain language of Evidence Rule 801(d)(2). In its modern form, this provision establishes one condition which every potential admission must satisfy—that the statement must be "offered against an opposing party"[527]—and then requires that this statement either be "one the party manifested that it adopted or believed to be true"[528] or have been "made by the party's agent or employee on a matter within the scope of that relationship while it existed" before it merits that pivotal brand.[529] The mere existence of an agency relationship between the declarant and the opposing party satisfies the latter exception's every predicate so long as the statement concerned a topic within that extant association's ascertainable scope,[530] while the former exemption concerns itself solely with the extent to which an opponent has implicitly vouched for the verity of another's statement.[531] Evidence Rule 801(d)(2) requires no more than these minimal demonstrations before a statement may be admitted.[532]

So written, the text's plain import is not obscure but rather glaringly obvious. Not a syllable in paragraph (B) or (D) hints at the

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525. Poulin, *Admissions*, *supra* note 157, at 467.

526. Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 270 (1993); *see also* Bourjaily v. United States, 483 U.S. 171, 178 (1987).

527. FED. R. EVID. 801(d)(2); *see also* Kelson, *supra* note 502, at 394 (noting that this textual structure "suggests that the definition of 'opposing party' remain uniform throughout [Evidence] Rule 801(d)(2)").

528. FED. R. EVID. 801(d)(2)(B); United States v. Lomas, 826 F.3d 1097, 1105 (8th Cir. 2016).

529. FED. R. EVID. 801(d)(2)(D); United States v. Ballou, 59 F. Supp. 3d 1038, 1074 (D.N.M. 2014).

530. *See, e.g.*, English v. District of Columbia, 651 F.3d 1, 7 (D.C. Cir. 2011); United States v. Van Griffin, 874 F.2d 634, 638 (9th Cir. 1989); Poulin, *Admissions*, *supra* note 157, at 452, 480.

531. *See, e.g.*, United States v. Kattar, 840 F.2d 118, 130–31 (1st Cir. 1989); Poulin, *Admissions*, *supra* note 157, at 406.

532. *See, e.g.*, Kelson, *supra* note 502, at 394; Poulin, *Admissions*, *supra* note 157, at 417.

existence of a distinction between civil and criminal actions.[533] Seemingly, this silence reflected deliberate intention, for the Evidence Committee itself emphasized its disinclination to perpetrate such distinctions, particularly in the field of hearsay, even as it pondered how Evidence Rule 801(d)(2) would work in civil and criminal proceedings.[534] Fairly weighed, this unambiguity alone heavily foretells the rightful answer. Elsewhere, the Evidence Rules codify such distinctions, explicitly and unambiguously.[535] In this context, that fact clinches the case by triggering an old assumption's invocation: "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[536] Notably, while this maxim presumes congressional cognizance, no such leap need here be made. Instead, Congress' sensitivity to such distinctions and willingness to cabin a rule's effect are already evidenced by, for example, its decision to place a restriction on the use of inconsistent prior statements, one neither crafted nor endorsed by the Court, based upon concerns about its effect in criminal cases.[537] The same textual objections can be made as to the frequent transposition of a distinction between public and private actors into the otherwise silent text of Evidence Rule 801(d)(2).[538] Cinching this conclusion, no special definition of "opposing party" which exempts a governmental actor appears in any authoritative source,[539] no support for such a holding evident in either Evidence Rule 801 or its explanatory notes.[540] To summarize, Evidence Rule 801(d)(2)'s concrete language encodes no exception, making "[n]o distinction . . between the civil and criminal context, the government and other parties, or the government's attorneys and its other law enforcement agents."[541]

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533. Jonakait, *supra* note 469, at 778; *see also* Poulin, *Admissions*, *supra* note 157, at 406.

534. Kelson, *supra* note 502, at 398 & n.249.

535. *See, e.g.*, FED. R. EVID. 803(8); Park, *supra* note 143, at 87 (noting that the Evidence Rules "distinguish between civil and criminal cases in their treatment of declarations against interest, judgments of previous convictions, dying declarations, and former testimony").

536. Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

537. Park, *supra* note 143, at 87.

538. *See, e.g.*, Commonwealth v. Keo, 3 N.E.3d 55, 74 (Mass. 2014) (Gants, J., dissenting); United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988).

539. Kelson, *supra* note 502, at 394.

540. Poulin, *Admissions*, *supra* note 157, at 467.

541. United States v. Yildiz, 355 F.3d 80, 81 (2d Cir. 2004).

3. Defiance of Textualism's Longstanding Limitations

As a final nail, neither one of the Court's most dominant exceptions to its plain meaning creed can salvage the existing approaches' cogency.

The first exception—the Court's ready departure from a rule's plain meaning only in those rare cases in which (1) inequitable treatment of the parties and an uneven application of the law would surely follow[542] and (2) the Evidence Rules clearly emphasize the importance of according criminal defendants with additional protections[543]—cuts against the *McKeon* and the *Santos* positions.[544] The government regularly exploits the admissions exceptions against criminal defendants;[545] ever ready to invoke Evidence Rule 802(d)(2), it has consistently advocated sweeping definitions of its five categories in countless prosecutions.[546] For example, though "[c]o-conspirator statements are riddled with the very weaknesses the hearsay rule is designed to guard against," the government regularly urges—and courts routinely allow—such statements' prompt admission.[547] *Santos* thus seems particularly "perverse when the reliability of co-conspirators' and government agents' statements is compared."[548] Considering the government's "marked superiority in investigative resources," and the relative unlikelihood of the defense "hav[ing] proof of an exculpatory statement by a government agent,"[549] the *McKeon* and *Santos* courts' exempting of the government from Evidence Rule 801(d)(2)'s automatic operation reeks of the kind of inequity which the Evidence Rules, as customarily construed, instinctively abhor.[550] This differing treatment also "implicates another right that should be held fundamental: the criminal defendant's right to present trustworthy,

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542. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

543. *See, e.g.*, United States v. Dupee, 569 F.2d 1061, 1063 (9th Cir. 1978); Uniroyal Chem. Co., Inc. v. Syngenta Crop Prot., Inc., No. 3:02CV02-2253 (ANH), 2005 WL 677806, at *2 (D. Conn. Mar. 23, 2005); United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1562 (E.D. Tex. 1986).

544. Kelson, *supra* note 502, at 395–96.

545. *See* Poulin, *Admissions*, *supra* note 157, at 406.

546. Kelson, *supra* note 502, at 396.

547. Imwinkelried, *supra* note 504, at 275.

548. *Id.* at 280.

549. *Id.* at 315; *see also* Green, *Justice*, *supra* note 447, at 632–33.

550. *See, e.g.*, Wishnefsky v. Meyers, No. 4:CV-03-0417, 2005 WL 1498502, at *7 (M.D. Pa. June 22, 2005) (rejecting a proposed interpretation as "novel or exorbitantly inequitable"); Al-Site Corp. v. VSI Int'l, Inc., 842 F. Supp. 507, 513 (S.D. Fla. 1993) (refusing to apply a statute in a manner that "leads to forum shopping and an inequitable application of the law").

critical, exculpatory evidence."[551] Similarly, as certain courts have recognized, a prosecutor's advocacy of inconsistent theories based on contradictory facts offends any reasonable notion of due process.[552] Just as such presentations effectively allow "a prosecutor, the state's own instrument of justice, [to] stack[] the deck in his [or her] favor," the justice system to be "poorly served" and a defendant to be "deprived . . . of due process" and subjected to a "fundamentally unfair" trial,[553] so, too, does the selective application of Evidence Rule 801(d)(2) to the government favored by the *McKeon* and *Santos* lines of cases. In short, for a trial to be fair and the Constitution to be satisfied, the government cannot enjoy exercise of an evidentiary right otherwise denied to the criminal defendant, as the prosecution is no more deserving of protection from its errors than the defense.

The second familiar exception—that the Evidence Rules, as the Evidence Committee's notes divulge, were intended "to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary"[554]—is correspondingly feeble. First, this assertion ignores the Evidence Rule's frequently implicit departures from the common law's stringent strictures in such telling provisions as Evidence Rule 801(d)(2)(A), (C), and (D).[555] The latter two are at issue when prosecutorial statements' status as admissions is considered. More obviously, "[t]he material language of [Evidence] Rule 801(d)(2), derived from its predecessor publications, predates the development of the common law limitation in *Santos*"; no exemption

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551. Imwinkelried, *supra* note 504, at 299.

552. *See, e.g.*, United States v. Dickerson, 248 F.3d 1036, 1044 (11th Cir. 2001) ("'The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth.'"); Smith v. Groose, 205 F.2d 1045, 1051 (8th Cir. 2000) ("The State's use of factually contradictory theories in this case constituted 'foul blows,' error that fatally infected Smith's conviction."); Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir. 1997) ("From these bedrock principles, it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime."); Drake v. Kemp, 762 F.2d 1449, 1470 (11th Cir. 1985) (Clark, J., concurring) ("The prosecutor's totally inconsistent theories of the same crime at [two different defendants'] respective trials transgressed the Fourteenth Amendment's requirement that a criminal trial be fundamentally fair.").

553. *Groose*, 205 F.2d at 1051.

554. Tome v. United States, 513 U.S. 150, 160–61 (1995) (plurality opinion). *Tome v. United States* has elicited much criticism for this and other reasons. *See* Bullock & Gardner, *supra* note 120, at 511 n.12 (collecting sources).

555. *See supra* Part III.B; *see also, e.g.*, FED. R. EVID. 801(d)(2)(C), (D); Poulin, *Admissions*, *supra* note 157, at 451 (observing that Evidence Rule 801(d)(2)(D) "departed from the common law"); Waltz, *supra* note 114, at 357 (observing that these paragraphs "effect changes in existing law").

for governmental actors from the admission doctrine appeared in any preexisting evidentiary code; and *Santos* itself had been mentioned in only two cases prior to the Evidence Rules' adoption.[556] In actuality, by "immuniz[ing] the sovereign in criminal cases from application of the admissions exception . . . to the hearsay rule," the decision did not cohere but arguably "war[red] with the most deeply rooted common-law traditions."[557]

Of course, "where a common law principle is well established, . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'"[558] Such purpose, however, can always be discerned in any text's plain and unambiguous language.[559] Here, with *Santos*' version of the common law questionable, only a biased extrapolation from legislative silence, itself a dubious source[560] for justifying the conversion of a positive commandment only faintly elucidated at common law into a hoary practice,[561] can create a governmental exception to the facially neutral language of Evidence Rule 801(d)(2).[562]

Reinforcing this conclusion, the Evidence Committee's various papers indulge in a silence both gravid and peculiar. Simply put, though these documents consistently reference the Civil Rules,[563] not one line of text in these thousands of pages mentions the *Santos* rule

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556. Kelson, *supra* note 502, at 397; *see also* Harris v. United States, 834 A.2d 106, 120 (D.C. 2003); *cf.* United States v. Ramirez, 894 F.2d 565, 570 (2d Cir. 1990) (contrasting United States v. Morgan, 581 F.2d 933 (D.C. Cir. 1978), with United States v. Santos, 372 F.2d 177 (2d Cir. 1967), a "pre-Federal Rules of Evidence case").

557. Younger, *supra* note 388, at 115. Thus, the widespread agreement among the circuits about the common law rule prior to the adoption of the Evidence Rules may have been mistaken.

558. Astoria Fed. Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)).

559. *Cf.* Pa. Pub. Welfare Dep't v. Davenport, 495 U.S. 552, 563 (1990) ("We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.").

560. *Cf.* United States v. Wells, 519 U.S. 482, 496 (1997) (repeating the frequent admonition that "'it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law'" but adding that "if silence could speak, it could not speak unequivocally to the issue here").

561. *See supra* Part III.A.1.

562. Randolph N. Jonakait, *Biased Evidence Rules: A Framework for Judicial Analysis and Reform*, 1992 UTAH L. REV. 67, 78–80 (1992); *see also* Jonakait, *supra* note 469, at 775; Poulin, *Admissions*, *supra* note 157, at 417.

563. *See* FED. R. CRIM. P. 51 advisory committee's note (1944) ("This rule is practically identical with Rule 46 of the Federal Rules of Civil Procedure. It relates to a matter of trial practice which should be the same in civil and criminal cases in the interest of avoiding confusion." (citation omitted)).

or the need to exempt governmental entities from this particular provision's ambit.[564] Instead, this group displayed a striking aversion to treating hearsay-related rules differently in civil and criminal proceedings[565] and eschewed an alternate approach to hearsay partly because "it would require different rules for civil and criminal cases."[566] Tellingly, it rejected codifying such disparate treatment even as it recognized that the Hearsay Rule "may be used against as well as *for* an accused" in a criminal proceeding and proved admirably sensitive to "whether there ought to be a special provision made in a criminal case."[567] As one court thus concluded, "[t]here is no indication in the history of the [Evidence] Rules that the draftsmen meant to except the government from operation of [Rule 801(d)(2)] in criminal cases"[568] when the drafters set about reforming the common law's evidentiary canons.[569] Interpretive caveats aside,[570] such silence in the Evidence Rules' most influential external commentary cannot be dismissed as immaterial[571] considering the compelling—and bracing—commands of text and history.[572]

C. Unnoticed Flaws in Existing Approaches

The foregoing arguments against the *Santos* and *McKeon/Salerno* schools can be applied to prosecutorial statements made pre- and post-trial, before and after an indictment, up until a sentence issues, and perhaps ever after.[573] Another flaw, however, infects precedential and

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564. Kelson, *supra* note 502, at 397–98; *cf.* Agushi v. Duerr, 196 F.3d 754, 760 (7th Cir. 1999) (finding nothing in the text of Evidence Rule 404(b) or "any other consideration" indicating "that a court should distinguish between the criminal and civil contexts when determining the admissibility of such evidence").

565. *See* FED. R. EVID. 801 advisory committee's note to proposed rule.

566. Kelson, *supra* note 502, at 398; *cf.* State v. Long, 801 A.2d 221, 230 (N.J. 2002) ("The *res gestae* concept has been used to admit a wide variety of evidence in both the criminal and civil context under circumstances . . . .").

567. Kelson, *supra* note 502, at 398.

568. United States v. Morgan, 581 F.2d 933, 938 n.15 (D.C. Cir. 1978).

569. *See* Park, *supra* note 143, at 51.

570. *See* Senator Linie Gmbh & Co. Kg v. Sunway Line, 291 F.3d 145, 161 (2d Cir. 2002) ("Legislative silence can be made to tell many stories, of course, and we decline to force any specific conclusions from . . . [an incomplete or ambiguous] record.").

571. *Cf.* Mid-Con Freight Sys. v. Mich. Pub. Serv. Comm'n, 545 U.S. 440, 468 (2005) (Kennedy, J., dissenting) (denouncing the majority for drawing "dubious inference from legislative silence" instead of "heeding what Congress actually said").

572. *See supra* Part V.B.1–2.

573. *Cf.* Degen v. United States, 517 U.S. 820, 825–26 (1996) (stating the general rule).

scholarly work: by focusing upon the Evidence Rules' text and policies and in raising sundry constitutional concerns, all have failed to note how the principles and provisions applicable to criminal discovery in the modern day, with its mostly unregulated prosecutors and continual patterns of misconduct, compel a more nuanced analysis of prosecutorial statements made during such pretrial proceedings.

As a result of this indifference, the fact that criminal discovery (though different than the discovery system erected by the Civil Rules) was designed to proceed in general harmony with the principles honed within the civil arena earns no allusion in this literature. Nor does another fact—that the proper limits of criminal discovery cannot be rightly demarcated by rote reference to ancient practice but must instead account for precepts and dangers unique to the entire criminal adjudicatory process, ones hallowed by constitutionally definable strictures or historically-verified fears—seem to matter, rather inexplicably, to the possible taxonomy of a particular statement. Unfortunately, in failing to take account of such oddities, portent objections to *Santos* and *McKeon/Salerno* based on the federal rules' shared quiddity and criminal discovery's quirks have always been always overlooked and never articulated. Cumulatively considered, these objections strengthen the case against the application of *Santos* and *Salerno* to prosecutorial statements made in a prosecutor's response to a request made pursuant to Criminal Rule 16. To a summary and application of these principles, this section will turn after unfolding two final telling tales: the details behind Forbes' third Evidence Rule 801(d)(2)-themed motion and the outlandish series of accidents that ensnared a rum-running Dominican.

1. Two Tales

i. Forbes Again: Government's Response to Criminal Rule 16 Request

The third motion that centered on Evidence Rule 801(d)(2) in *Forbes v. United States* was prepared pursuant to Criminal Rule 16 and made much of a summary of a witness' supposed murmurings.

On April 11, 2003, the Government had responded to Forbes' request for additional information regarding its agents' interview of Casper Sabatino ("Sabatino"), a former accountant at CUC. Sabatino, as the prosecution then précised, characterized Forbes as "a visionary,

a large picture person, not a financial guy."[574] Sabatino "doubt[ed] he got the consolidation reports or that he looked at them if he did," as Forbes "was hands off, asleep as far as details."[575] "Walter Forbes was probably not involved," he adduced,[576] for he could not recall the fraud's architect "mentioning Walter Forbes' name . . . when giving Sabatino directions to make . . . adjustments."[577]

On September 8, 2006, on the eve of trial, Forbes sought a judge's authorization "to read some of these representations as to statements made by witnesses into the record when appropriate for impeachment purposes."[578] In particular, if Sabatino dared deny the veracity of the Government's surrendered synopsis, Forbes wanted to treat his paraphrased words as "admissions by the government that in fact . . . Sabatino stated just the opposite to the prosecuting attorneys."[579] In support, Forbes cited to the plain text of Evidence Rule 801(d)(2).[580]

ii. Forbes Redux: Vinas and His Mamajuana

Fleetingly, Forbes' shadow[581] fell on a very different case during a chilly Brooklyn week.

On December 5, 2016, in Brooklyn, New York, a jury convicted Francis Patino Vinas ("Vinas" or "defendant") of importing and possessing with intent to distribute cocaine following his arrival at JFK Airport on a flight from the Dominican Republic, his native land.[582] On November 15, 2006, the cocaine had been found, in the form of white powder stored in forty pellets, within a bottle of Mamajuana, an alcoholic Dominican beverage, stored within the defendant's suitcase and had been discovered after Vinas' baggage had been inspected by Francisco Santos ("Santos"), an agent with the Department of Homeland Security's United States Customs and Borders Protection ("CBP"). Aside from dueling motions *in limine*, "[t]he sole disputed issue" before the jury "was the defendant's

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574. Forbes Motion in Limine No. 25, Ex. 1 ¶ 4, United States v. Forbes, No. 3:02-cr-00264-SWT (D. Conn. Sept. 8, 2006), ECF No. 2444.

575. *Id.*, Ex. A ¶ 4.

576. *Id.*, Ex. A ¶ 8.

577. *Id.*, Ex. A ¶ 43.

578. *Id.* at 1.

579. *Id.* at 2.

580. *Id.*

581. *See supra* Part III.C.3.

582. *See* Compl. ¶¶ 1–2, United States v. Vinas, No. 1:16-cr-00043-FB-1 (E.D.N.Y. Nov. 16, 2015), ECF No. 1.

knowledge with respect to the presence of cocaine in [that] bottle [of Mamajuana]."[583]

On February 26, 2016, the United States provided Vinas with a copy of its discovery, as required by Criminal Rule 16(a)(1), via a six-page missive ("February Letter").[584] This first mandated disclosure included a post-arrest statement ("PA Statement") memorializing Vinas' interview with CBP Special Agent Kevin O'Malley ("O'Malley").[585] According to this document, Vinas claimed to have obtained the bottle from a friend named Chelo, a bald assertion seemingly "corroborated by texts in the defendant's cell phone."[586] In this conversation, he also denied any expectation of payment and any cognizance of the bottle's contents.[587] Instead, Vinas maintained that Chelo had asked him to deliver this seemingly benign liquid delicacy to an acquaintance in New York City.[588]

On October 20, 2016, 238 days *after* the PA Statement's release and forty-three days *before* the trial's commencement, the United States provided additional discovery material pursuant to Rule 16(c) in yet another letter ("October Letter"). Noting that "[t]he[] materials supplement . . . previous disclosures," this letter divulged a new factual tidbit to Michael D. Weil ("Weil"), Vinas' unsuspecting counsel, regarding his original interaction with Santos:

> During the initial inspection of his luggage by U.S. Customs and Border Protection officers, Vinas stated, in sum and substance, that he purchased the bottle of 'Mamajuana' at a store in the Dominican Republic.[589]

Two things appeared obvious upon perusal of this second Vinas statement ("IA Statement").[590] First, it arguably contradicted Vinas' explanation for the Mamajuana's presence in his luggage, as

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583. Defendant's Motion for a New Trial at 1, United States v. Vinas, No. 1:16-cr-00043-FB-1 (E.D.N.Y. Jan. 14, 2017), ECF No. 47 [hereinafter Def.'s Post-Trial Br.].

584. Government's Discovery Letter, United States v. Vinas, No. 1:16-cr-00043-FB-1 (E.D.N.Y. Feb. 26, 2016), ECF No. 11.

585. *Id.* at 2; *see also* Def.'s Post-Trial Br. at 1.

586. Def.'s Post-Trial Br. at 1.

587. *Id.*

588. *Id.*

589. Government's Discovery Letter, United States v. Vinas, No. 1:16-cr-00043-FB-1 (E.D.N.Y. Oct. 20, 2016), ECF No. 13; *see also, e.g.*, Def.'s Post-Trial Br. at 1; Government's Response in Opposition to Defendant's Motion for a New Trial at 2, United States v. Vinas, No. 1:16-cr-00043-FB-1 (E.D.N.Y. Feb. 17, 2017), ECF No. 48 [hereinafter Govn's Response].

590. *See* Government's Discovery Letter at 1.

encapsulated in the PA Statement and as conveyed by the United States to his counsel on February 26, 2016.[591] Second, it referenced an "initial inspection" that the Government had previously failed to acknowledge and distinguish from the post-arrest interview conducted by O'Malley or clarify the nature of this newly-disclosed inquest.[592]

In its opening statement, the United States again muddied this issue. The IA Statement, it now represented, had been made *after* Vinas had been moved to a private search room and been escorted by several agents and thus not during any kind of "initial" inspection, a factual contention corroborated by video gathered during discovery and admitted into evidence.[593] Whatever its cause, the inconsistency between the PA and IA Statements was thus "a major focus of the government's opening summation" and soon formed the centerpiece of its rebuttal.[594] Two days after the district court entered judgment, Vinas appealed—and ultimately won relief.[595]

2. Required Modifications to Pertinent Principles in Criminal Discovery

As summarized in Part V.A, the paradigm for construing any federal rule bears little difference from the one constructed for the typical statute's divination. In general, regardless of the compendium in question, significant differences do exist and can, often, on the margins, affect whether one connotation (amongst many) should be adopted or one denotation (among a multiplicity) should be rejected. Nonetheless, when the federal rule in question is an evidentiary one utilized by either a defendant or a prosecutor in a criminal trial, different areas of substantive law suddenly intermingle. It is no longer evidentiary precepts and policies which matter exclusively. Now, the tenets sanctified within criminal law's jurisprudence must be consulted. Of course, the fact that this body of precedent amounts to a cacophony of decisions in which the common law, statutes, and the constitution always mingle, often to an uncertain degree, cannot be ignored. Indeed, due to that very clatter, the interpretive burden

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591. Def.'s Post-Trial Br. at 1.

592. *Id.* at 5–8; *see also* Govn's Response at 5–6.

593. *See, e.g.*, Def.'s Post-Trial Br. at 2; Govn's Response at 5.

594. Def.'s Post-Trial Br. at 3–5.

595. United States v. Vinas, 910 F.3d 52, 54, 58–60, 61–64 (2d Cir. 2018). Tellingly, the Second Circuit rejected, just as this Article argues as to other federal rules in general, a "'literalism inappropriate to . . . Rule [16]'s purpose.'" *Id.* at 59 (quoting United States v. McElroy, 697 F.2d 459, 464 (2d Cir. 1982)).

grows more complex, a fact that too many courts and scholars ignore. Thus, application of basic interpretive canons may yield five separate reasonable connotations. Evidence law's unique procedural and substantive notions may then compel the rejection of two. Somehow, a court must now parse the remaining trio and elect one. In making this choice of the apposite meaning from the remaining handful, criminal law provides the yardstick. This section limns the adjustments to standard interpretive principles required in one such situation: criminal discovery, a realm in which the Evidence, Criminal, and Civil Rules interact and must be made to cohere.[596]

i. First Textual Adjustment: Federal Rules' Import

First and foremost, the limited relevance of a favored epigram, one so often invoked to justify any number of interpretations without regard to its constricted parameters, must be understood. True, even in 2018, criminal discovery remains "more restrictive than civil discovery."[597] Nonetheless, both the Criminal and Civil Rules' discovery titles reverence the same policies and exhibit the same ideological penchant.[598] To wit, just as modern civil discovery deplores unfair surprise via Civil Rules 1 and 26,[599] the purpose of criminal discovery is to prevent what was once disparaged as "trial by ambush" and to allow each side the opportunity to prepare and counter the evidence produced by the other side.[600] Enamored of this more modern understanding, courts have defended pretrial disclosure as likely to

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596. *Cf., e.g.*, United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."); United States v. Braxtonbrown-Smith, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("Where the language is subject to more than one interpretation and the meaning of Congress is not apparent from the language itself, the court may be forced to look to the general purpose of Congress in enacting the statute and to its legislative history for helpful clues.").

597. Denman v. City of Tracy, No. Civ. 2:11-cv-0310-GEB-JFM, 2012 WL 5349496, at *2 (E.D. Cal. Oct. 26, 2012); *see also* Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 642 (2013) [hereinafter Green, *Reform*]; *cf.* SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (recognizing the government's right to intervene in a civil case "in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter").

598. *See supra* Part III.B.3.

599. *See* Shachmurove, *Boilerplate*, *supra* note 111, at 209–12.

600. United States v. Noe, 821 F.2d 604, 608 (11th Cir. 1987); United States v. Martinez, 763 F.2d 1297, 1315 (11th Cir. 1985).

redound to the benefit of all parties, counsel, and court in most criminal cases.[601] Similarly, the Criminal Committee amended the Criminal Rules' discovery provisions in "direction of more liberal discovery" in 1974[602] and so as "to expand discovery" in 1993.[603]

Part and parcel with this objective, Criminal Rule 16(a) "protect[s] the defendant's rights to a fair trial,"[604] and "the degree to which th[e] rights [it protects] suffer as a result of a discovery violation is determined not simply by weighing all the evidence introduced, but rather by considering how the violation affected the defendant's ability to present a defense."[605] Thus, "[w]here the government at trial introduces undisclosed evidence that tends to undermine one aspect of the defense . . . the existence of actual prejudice often will turn on the strength of the remaining elements of the government's case," and if the government introduces evidence that attacks the very foundation of the defense strategy, then the defendant cannot be said to have enjoyed a fair trial.[606] Similarly, as the government is entitled to reciprocal discovery under Criminal Rule 16 in order to ensure that it will be able to prepare a "focused cross-examination" of defendant's expert testimony, a defendant must be given access to the government's own summary so as to prepare a "focused cross-examination" of the government's expert witness.[607] In case after case, courts have refused to "exalt form over substance" in construing the discovery obligations implied and imposed by the Criminal Rules.[608]

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601. United States v. Gallo, 654 F. Supp. 463, 468 (E.D.N.Y. 1987) (citing United States v. Percevault, 490 F.2d 126, 132 (2d Cir. 1974)).

602. FED. R. CRIM. P. 16 advisory committee's note to 1974 amendment.

603. FED. R. CRIM. P. 16 advisory committee's note to 1993 amendment; *cf.* William J. Erickson, *The Right to Discovery in a Criminal Case*, 3 INT'L SOC'Y BARRISTERS Q. 10, 25 (1968) (describing the federal rules and state analogues as tending "to simplify discovery rights in seeking justice by eliminating the fox-and-hounds theory of litigation").

604. United States v. Rodriguez, 799 F.2d 649, 654 (11th Cir. 1986).

605. *Noe*, 821 F.2d at 607; *see also, e.g.*, United States v. Pascual, 606 F.2d 561, 565–66 (5th Cir. 1979); United States v. Baum, 482 F.2d 1325, 1332 (2d Cir. 1973); United States v. Padrone, 406 F.2d 560, 561 (2d Cir. 1969).

606. *Noe*, 821 F.2d at 607; *see also* United States v. Chastain, 198 F.3d 1338, 1348 (11th Cir. 1999).

607. United States v. Jasper, No. 00 Cr. 825 (PKL), 2003 WL 223212, at *5 (S.D.N.Y. Jan. 31, 2003).

608. *See, e.g.*, United States v. Phillips, No. 1:11CR180, 2011 WL 5881192, at *2 (N.D. Ohio Nov. 23, 2011); United States v. Eichholz, No. 409-166, 2009 WL 2905245 (S.D. Ga. Aug. 31, 2009).

Indubitably, based purely on the relevant federal rules' texts, criminal discovery is more circumscribed than its civil kin,[609] with defendants not entitled to the statements of government witnesses, government attorneys, or government agents.[610] Indubitably, criminal discovery reform looked to the civil discovery system at first, but ultimately suppressed any attempt to establish a robust discovery regime; mostly, if not completely, the drafting committee acceded to the historical resistance to considering the rights of criminal defendants.[611] Yes, by judicial inclination, as much as textual ambiguity, criminal discovery may still be inadequate, and a sporting approach still prevails.[612] Nonetheless, its modern strictures forsake, rather than endorse, a contraction reminiscent of a prize tribunal,[613] and its limitations reflect a belief that the criminal justice had become fair and just once—and only once—the common law's needless impediments to truth's adjudication had been deracinated.[614] Behind both its constriction and its conception, then, flickered a view more similar to the one embedded in the Civil Rules' fifth title than sketched by Blackstone's hand. Criminal law had been "almost savage in its ferocity";[615] the Criminal Rules sought to ameliorate that barbarity.[616]

When considered along with the broader thrust of the federal rules and varied ethical codes, criminal discovery's extant limitations, in

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609. *Compare* FED. R. CRIM. P. 16(b), *with* FED. R. CIV. P. 26(b); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 45–46 (2014) [hereinafter Meyn, *Lightness*].

610. Mark D. Hunter, *SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends*, 68 MO. L. REV. 149, 164 (2003).

611. Meyn, *History*, *supra* note 107, at 720–24, 732.

612. Green, *Reform*, *supra* note 597, at 644.

613. *See, e.g.*, Stinnett v. Nevada, 789 P.2d 579, 582 (Nev. 1990); Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1141 (1982); Lisa K. Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 187 (2016); J. Jeffrey Lacy, *Criminal Discovery: Disclosure of Police Internal Affairs Division Documents and Police Personnel Files*, GA. ST. BAR. J. 34 (Aug. 1992); Meyn, *History*, *supra* note 107, at 734. For example, Rule 21(b) has been construed in light of precisely these amorphous values. *See, e.g.*, United States v. Wright, 603 F. Supp. 2d 506, 509 (E.D.N.Y. 2009); United States v. Sablan, No. 1:08-CR-00259-PMP, 2014 WL 7335210, at *3 (E.D. Cal. Dec. 19, 2004).

614. Meyn, *History*, *supra* note 107, at 734–35.

615. Alexander Holtzoff, *Reform of Federal Criminal Procedure*, 12 GEO. WASH. L. REV. 119, 123 (1944).

616. *Cf.* United States v. Snell, 899 F. Supp. 17, 21 (D. Mass. 1995) ("Put otherwise, in seeking to harmonize the Jencks act and *Brady*, it makes no sense to indulge in a crabbed interpretation of a constitutional right, like *Brady*, and an expansive interpretation of a statutory one, like Jencks.").

turn, boost, rather than reduce, the necessity for securing any defendant's identifiable prerogatives. In effect, they compel concern for the few rights guaranteed in the Criminal Rules and the Evidence Rules' facially neutral language.[617] This is especially so considering three more factors: (1) the ease with which witness coaching and pretrial preparation can distort the truth-seeking process by impeding a jury's ability to comprehend the specifics of a reconstructed past;[618] (2) even the most focused and aggressive defense lawyers' efforts to obtain discovery materials will prove futile if a prosecutor is bent on concealing such evidence;[619] and (3) even as reformers have sought to achieve a balance of power in the civil pretrial period, the interests of criminal defendants during this stage have been left to the mercy of on-the-ground pressures, including a state monopoly that inherently favors non-competitive transaction, a political climate favoring aggressive prosecution, and the professionalization of law enforcement.[620]

With criminal discovery so limited, a facially-neutral construction of other federal rules applicable to criminal defendants has enhanced appeal in the relatively closed pretrial environment. Simply put,

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617. *Cf.* Green, *Reform*, *supra* note 597, at 665–69 (enumerating the burdens under which criminal defendants labor). A recent bill's course underscores the urgency of this effort. On March 15, 2012, Senator Lisa Murkowski introduced the Fairness in Disclosure Evidence Act of 2012. S. 2197, 112th Cong. (2012). The bill would have expanded defendants' discovery rights while simultaneously protecting countervailing public interests in individual cases, Green, *Reform*, *supra* note 597, at 652, and grew from the shocking evidence of prosecutorial misconduct in the prosecution of former Alaska senator Ted Stevens. *See* Gershman, *supra* note 421, at 685. As the Alaskan explained, criminal defendants had an interest in a fair trial, and such an interest presupposes a right to evidence in the hands of the government that is either exculpatory or that would show that government witnesses "might not be forthright and truthful." Green, *Reform*, *supra* note 597, at 654. Arguing that the bill would "radically alter the . . . balance between ensuring the protection of a defendant's constitutional rights and . . . safeguarding the equally important public interest in a criminal trial process that reaches timely and just results" and more, the Department of Justice objected. Green, *Reform*, *supra* note 597, at 660; *see also Hearing on the Special Counsel's Report on the Prosecution of Senator Ted Stevens: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 109–16 (2012) (statement of Department of Justice) [hereinafter *Stevens Hearing*]. *See generally* Jacquelyn Smith, *The Proposed Fairness in Disclosure Evidence Act of 2012: More Cons than Pros with Proposed Disclosure Requirements in Federal Criminal Cases*, 64 MERCER L. REV. 723 (2013) (explicating these objections).

618. *See* Bruce A. Green, *The Whole Truth: How Rules of Evidence Make Lawyers Deceitful*, 25 LOY. L.A. L. REV. 699, 705–06 (1992); *see also* Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 797, 806–07 (2014).

619. Gershman, *supra* note 421, at 707–08.

620. Meyn, *Lightness*, *supra* note 609, at 40–41.

beyond its telling consistency with the Civil Rules' more obvious impetus, it is more likely to ensure the achievement of efficient and acceptably accurate outcomes by an American criminal law system[621] in which trials are increasingly rare.[622] To parrot the old adage, as *Santos* did, or to manufacture an atextual test, as *McKeon* and *Salerno* did, is, to put it mildly, to tinker with Evidence Rule 801(d)(2)(C) and (D) without accounting for why and how the Criminal Rules were molded and their implicit, but very real, congruence with the philosophical thrust of the Civil and Evidence Rules. The law's narrow allotment of discovery rights for criminal defendants, combined with both the Criminal and Civil Rules' consecration of discovery's inextinguishable necessity and august purpose, therefore compel a construction of Evidence Rule 801(d)(2)(C) and (D) that does not further penalize a defendant wading through a system imperfectly policed by today's moral mores.

ii. Second Textual Adjustment: Literalism's Underappreciated Plasticity

In addition, literalism's preeminence in the Court's construction of varied rules has proceeded apace with the erection of pivotal safety valves. Significantly, in the law of evidence, courts have many times based their interpretations of an evidence rule on "legislative history, the common law, and evidentiary policies."[623] Relatedly, where one set of federal rules wanders into another's realm, i.e. where an evidentiary ruling may affect a criminal defendant's constitutionally recognizable ability to construct their defense, their construction must take account of that area's constraints on *any* law's effect.[624] Otherwise, a morass will ensue, no rule able to achieve its intended aims. Thus, the Court has itself endorsed one rationale: that liberal discovery enables adversaries, as equals, to prepare and present

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621. *Cf.* Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998); *see also* Darryl Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1589 (2005) (explaining that "[m]ost contemporary adjudication fits Judge Gerard Lynch's account of an 'administrative system of criminal justice'").

622. Meyn, *Lightness*, *supra* note 609, at 44; *cf.* David Marcus, *Finding the Civil Trial's Democratic Future After its Demise*, 15 NEV. L.J. 1523, 1526–30 (2015) (collecting evidence suggesting the civil trial's own disappearance).

623. Jonakait, *supra* note 469, at 762.

624. In legal parlance, the term "law" encompasses any obligation imposed by federal rule, statute, or administrative regulation. *See, e.g.*, United States v. Place, 693 F.3d 219, 228 (1st Cir. 2012); ICG Commc'ns, Inc. v. Allegiance Telecomm., 211 F.R.D. 610, 612–13 (N.D. Cal. 2002); Shachmurove, *Claims*, *supra* note 255, at 511 n.2.

opposing narrative for the jury to evaluate. In the context of notice of alibi requirements, this imputes the spirit of the Civil Rules into at least one criminal opinion.[625] It is, in the end, an idea implicit within the concept of due process itself, as conjectured by a mostly conservative, rather than a liberal, judicial establishment.[626]

Hence, in criminal cases, precedent favors a construction of any applicable federal rule, including any single Evidence Rule, that most likely ensures the realization of the Criminal Rules' core policies and accords with that applicable rule's textually embedded intent. As to these issues, little uncertainty confronts the diligent interpreter. The Criminal Rules today favor a fair trial in which all material evidence is freely disclosed so as to provide a jury with enough sufficiently credible evidence to determine an allegation's likelihood. The Evidence Rules, in turn, link any bit of evidence's admission with the extent to which it aids the pursuit of truth and minimizes the chances of a trial's corruption by dint of impermissible or improper considerations. This theory lies behind Evidence Rule 801(d)(2) as a whole. Unlike Evidence Rule 801(d)(2)(A), (B), and (E), however, subparagraphs (C) and (D) represent a distinct departure from a much more constricted historical understanding of admissions. As a result, while the former three paragraphs construction must account for the common law, in all its infamy and glory, the latter two paragraphs are not anchored to any pre-codification understanding. They represent explicit departures and can be rightly construed consistent with the dominant policies of the applicable procedural codes—the Evidence and Criminal Rules most obviously, but the Civil Rules too—without paying undue fealty to an irrelevant past. It thus becomes enormously significant that the Evidence Rules, as proposed and drafted, sought to reduce inconsistency and unpredictability in federal practice and maximize the jury's access to data shorn of any false gloss by adversarial fires.[627] Both these overarching principles, in turn, cohere with the Civil Rules' and Criminal Rules' first command and the Criminal Rules' subtle, but very real, opening of criminal discovery. Criminal discovery's traditional understanding may still bind lower courts, but where no such curb automatically applies, these

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625. Wardius v. Oregon, 412 U.S. 470, 473–74 (1973) (Douglas, J., concurring); Daniel S. McConkie, *The Local Rules of Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 69–70 (2017).

626. *Wardius*, 412 U.S. at 474 ("Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, . . . it does speak to the balance of forces between the accused and his accused." (internal citations omitted)).

627. *See supra* Part III.A.2.

contextually pertinent factors decidedly favor a specific interpretive approach. When applying Evidence Rule 801(d)(2)(C) and (D) to prosecutorial statements, then, modern jurisprudence's literalism is far more plastic than opponents and proponents of *Santos*, *Salerno*, or *McKeon* have ever realized.

iii. Three Contextual Adjustments: Prosecutors' Early Preeminence

As part of a truly holistic construction of the relevant federal rules, a contextual modification follows on the heels of these textually compelled alterations. In general, any analysis of the deficiencies in these approaches must account for three more facts, ones whose importance is accentuated by the troubling trends detailed in this Article's fourth part.

First, during the discovery period of a criminal trial, both officers and prosecutors enjoy a freedom subject to little, if any, true subsequent review.[628] At the same time, no accepted standard for delineating prosecutors' obligations to evaluate the bona fides of unreliable evidence, including witnesses, binds them, and as with all fallen mortals, they cannot keep biases from creeping into their deliberations.[629] With prosecutors, like all lawyers, eager to win,[630] their near total immunity during discovery can cloak failures of evidentiary production and presentation rooted in these factors. "The difficulty of discovering and sanctioning [any such] violations means [that] there is currently little effective punishment to deter, educate, or incapacitate prosecutors who violate their [ethical] obligations."[631] Simply put, federal criminal discovery gives prosecutors nearly unfettered control over disclosures and operates within a disciplinary system bereft of sufficient oversight by judges and participation by defense attorneys.[632]

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628. *See* Laurin, *supra* note 618, at 792, 812, 818; *see also* Meyn, *Lightness*, *supra* note 609, at 58.

629. Zacharias & Green, *Duty*, *supra* note 318, at 9, 20–21; *see also* Griffin, *supra* note 613, at 171–72; Laurin, *supra* note 618, at 796; Meyn, *Lightness*, *supra* note 609, at 50.

630. *Stevens Hearing*, *supra* note 617, at 12 (statement of Henry F. Schuelke III); Baughman, *supra* note 450, at 1124.

631. Kevin C. McMunigal, *Prosecutorial Disclosure Violations: Punishment v. Treatment*, 64 MERCER L. REV. 711, 721 (2013); *see also* Baughman, *supra* note 450, at 1135 (accusing the judiciary of abandoning enforcement of individual constitutional rights for criminal defendants). Crucially, in the civil realm, judges do assess claims, review mutual disclosures, and manage discovery without unduly disrupting a perception of neutrality. Meyn, *Lightness*, *supra* note 609, at 78–79.

632. McConkie, *supra* note 625, at 68.

Second, *Brady* and its progeny have broadly failed to seriously mitigate the criminal justice system's extant, yet perilously deficient, ethical incentives. In this regard, proponents of discovery reform voice two principal concerns: first, disclosure is simply too limited to ensure fair outcomes and provide a fair process in criminal cases, and second, prosecutors do not universally comply even with their existing obligations for a variety of reasons.[633] As commonly applied, moreover, *Brady* has not greatly helped to pry open the government's investigatory files, especially in the pretrial, discovery stage. Primarily, that case's materiality threshold to trigger disclosure has proven to be malleable, easily misapplied by innocent prosecutors yet manipulated by amoral ones,[634] within a system not subject to the disclosure safety valves embodied in such normal executive constraints as the Freedom of Information Act or the Administrative Procedures Act and in which the pressure to plead precedes any disclosure of material information.[635] Just as problematically, underlying *Brady* is a presumption—that prosecutors would not delegate the review that it requires to persons unqualified to identify favorable information or unfamiliar with *Brady*'s mandate, i.e. non-lawyers—that commonly proves false.[636] As one United States Senator wrote, few can muster truly formidable resources against "abusive prosecution, which is why the *Brady* issue is so important" and "transparency and accountability" so crucial.[637] So moved, some states have experimented with open-file models, authorizing defendant access to "favorable evidence" in government files without

633. Green, *Reform*, *supra* note 597, at 639; *see also, e.g.*, McConkie, *supra* note 625, at 68, 71–72; Meyn, *Lightness*, *supra* note 609, at 76.

634. Green, *Reform*, *supra* note 597, at 645–46; *see also Stevens Hearing*, *supra* note 617, at 120 (statement of National Association of Criminal Defense Lawyers); David Crump, Brady v. Maryland, *Attorney Discipline, and Materiality: Failed Investigations, Long-Chain Evidence, and Beyond*, 45 HOFSTRA L. REV. 515, 519 (2016); Griffin, *supra* note 613, at 179; Sullivan & Possley, *supra* note 419, at 915–20. Prosecutors, it cannot be forgotten, also carry an overwhelming caseload. *See* Crump, *supra*, at 533.

635. Baughman, *supra* note 450, at 1086; Janet C. Hoeffel & Stephen I. Singer, *Activating a* Brady *Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. REV. L. & SOC. CHANGE 467, 477–78 (2014).

636. Gershman, *supra* note 421, at 698.

637. *Stevens Hearing*, *supra* note 617, at 27, 29 (statement of Sen. John Cornyn), 65 (statement of Sen. Lisa Murkowski); *see also* Baughman, *supra* note 450, at 1098 (stressing *Brady*'s ineffectiveness); Griffin & Yaroshefsky, *supra* note 450, at 330–31 (emphasizing transparency's importance).

any express requirement for materiality.[638] Some districts have joined this crusade; many have reformed discovery by expanding Criminal Rule 16's scope, setting early deadlines for automatic evidentiary disclosures, and demanding prosecutorial certification.[639] By 2018, a critical mass of judges and lawyers had come to believe that the benefits of broader criminal discovery outweigh the losses,[640] particularly in light of the misconduct detailed in Part IV of this Article.

A third truth arises from these twin realities: the federal prosecutor's pre-trial perch accords them some rather glaring advantages, ones often impossible for the typical defendant to surmount. In general, the executive wields impressive pre-complaint investigatory powers, free from judicial review and largely shielded from any defendant's eyes.[641] At plea-bargaining especially, the prosecutor effectively wields the powers of not just the executive but also the judicial branch and jury without being unduly hampered by timely disclosure requirements.[642] At that point, the informational disparity between the defense and the prosecution is enormous and highly susceptible to manipulation.[643] In particular, in contrast with trial statements, a prosecutor summarizing a witness' statements in response to a defendant's discovery requests or in accordance with applicable rules operates from an eminent vantage point, one enjoyed by neither defendant nor defense counsel. Long before either person could access such information, they not only knows of the witness' identity but the content of any potential testimony; both before and after any investigation, "the government enjoys a marked superiority in investigative resources."[644] So positioned, he or she thus possesses

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638. *See* Jennifer D. Olivia & Valena E. Beety, *Discovering Forensic Fraud*, 112 NW. U. L. REV. 121, 134–37 (2017); *see also* Crump, *supra* note 634, at 520–24; Hoeffel & Singer, *supra* note 635, at 484–85; Jennifer E. Laurin, Brady *in an Age of Innocence*, 38 N.Y.U. REV. L. & SOC. CHANGE 505, 514–15 (2014); Meyn, *Lightness*, *supra* note 609, at 83–86; Sullivan & Possley, *supra* note 419, at 908; Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 288, 294 (2016). Such systems do not necessarily reduce the incidence of *Brady* violations. Turner & Redlich, *supra*, at 296.

639. McConkie, *supra* note 625, at 79–104.

640. *Id.* at 71.

641. Meyn, *Lightness*, *supra* note 609, at 49; *see also* Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1122–27 (2014) [hereinafter Meyn, *Darkness*] (emphasizing the discrepancies in investigatory powers between the government and defendants).

642. McConkie, *supra* note 625, at 74.

643. *See* Meyn, *Darkness*, *supra* note 641, at 1126.

644. Imwinkelried, *supra* note 504, at 315; *see also* Green, *Reform*, *supra* note 597, at 648–49 (emphasizing the prosecution's "superior investigative resources" and

a mythmaker's greatest asset: the privilege of first formulating and first presenting that witness' impressions to an interested world. This enhanced cognizance may be inevitable, for the existence of a substantial identity of interest between investigators and prosecutors is a logical, even salutary, feature of the criminal process.[645] Its dangers, however, stay inextirpable and cannot be fairly ignored when the government is often "the only possible source of evidence helpful to the defense," underfunded defenses often "lack[] access to witnesses and to investigative methods comparable to the prosecution,"[646] and relative darkness precedes most plea colloquies.[647] A prosecutor's large insulation from review and near total control of the pretrial record thus provides him or her with the greatest possible opportunity to manipulate information, with any subsequent attempt to correct the record involving a police officer's word against a witness' account.[648] That such dissimulation already takes place is an unfortunate matter of public record.[649]

3. Application

i. A Strengthened Evidence Rule 801(d)(2)

In light of the foregoing, apart from and in addition to the other objections rightly lodged against *Santos* and *McKeon/Salerno*, the resistance to the admission of prosecutorial statements in discovery cannot stand.

By definition, a specialized exception for prosecutorial misstatements in discovery limits the admission of relevant evidence and impairs a defendant's ability to mount a credible defense. Yet, while courts fondly repeat the old saw—"criminal discovery is more

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"its ordinarily superior access to evidence and information"); Laurin, *supra* note 618, at 794 (same).

645. *Cf.* Geiger, *supra* note 396, at 407, 412 (characterizing an identity between agent and principal as the "key to the admissibility of vicarious admissions"); Poulin, *Admissions*, *supra* note 157, at 467, 469 (extending this logic to prosecutors).

646. Green, *Reform*, *supra* note 597, at 664; *see also, e.g.*, Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and* Brady *in the Balance*, 28 GEO J. LEGAL ETHICS 1, 20–27 (2015); Meyn, *Lightness*, *supra* note 609, at 49–52, 73–75; *cf.* Gershman, *supra* note 421, at 700 (stressing that the failure to record witness notes denies a defendant the opportunity to confront the witness and damage the prosecution's case).

647. Meyn, *Lightness*, *supra* note 609, at 68.

648. *Id.* at 49, 75–78, 84.

649. *See supra* Part IV.

restrictive than civil discovery"[650]—both the Criminal and Civil Rules operate in tandem so as to ensure fair treatment of all parties by preventing surprise of all implicated person and affording each participant a reasonable opportunity to prepare for trial.[651] As a natural corollary of this collective predisposition, as indicated by "decades of debate over the expansion of criminal discovery,"[652] the Criminal Rules actually created a regime "favoring disclosure in criminal cases analogous to [that applicable in] civil practice"[653] and codified a generous definition of relevance.[654] In ordinary criminal case, as in the typical civil one, suppression of even minimally relevant materials merits much disfavor, as admission "promotes the proper administration of criminal justice."[655] True, a criminal defendant may not exploit civil discovery mechanisms to obtain

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650. Denman v. City of Tracy, No. Civ. 2:11-cv-0310-GEB-JFM, 2012 WL 5349496, at *2 (E.D. Cal. Oct. 26, 2012); *cf.* SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (recognizing the government's right to intervene in a civil case "in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter").

651. *Compare* Hickman v. Taylor, 329 U.S. 495, 507–08 (1947) (setting forth the principles behind the Civil Rules' discovery provisions), *and* Reese v. Herbert, 527 F.3d 1253, 1265 (11th Cir. 2008) (identifying the intent behind the Civil Rules' expert disclosure provisions), *with* Taylor v. Illinois, 484 U.S. 400, 411–14 (1988) (identifying the principles behind pretrial criminal discovery).

652. United States v. Hughes, 413 F.2d 1244, 1249 (5th Cir. 1969).

653. Dennis v. United States, 384 U.S. 855, 870–71 (1966); *see also, e.g.*, United States v. Gallo, 654 F. Supp. 463, 466 (E.D.N.Y. 1987) ("'In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact.'" (citing *Dennis*, 384 U.S. at 873)).

654. United States v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993) (quoting *Dennis*, 384 U.S.at 870).

655. *Dennis*, 384 U.S. at 873; *see also* United States v. Douglas, 336 F. App'x 11, 13 (2d Cir. 2009) (citing *Stevens* and *Dennis*). Many exceptions have been hewn in light of certain concern unique to criminal law, both substantive and procedural. *See* FED. R. CRIM. P. 6(e); United States v. Matos-Luchi, 529 F. Supp. 2d 292, 294 n.1 (D.P.R. 2007) (discussing the circuit split over whether grand jury transcripts of prospective government witnesses need only be released in accordance with the Jencks Act). The same articulable reasons—prevention of perjury and manufactured evidence; protection of potential witnesses from harassment and intimation; and leveling of the playing field between the government and a defendant able to shield certain discovery by virtue of the Fifth Amendment—once validated their formulation and continue to warrant their existence, no others' cogency widely and consistently acknowledged by state or federal court. S.E.C. v. Nicholas, 569 F. Supp. 2d 1065, 1072 (C.D. Cal. 2008) (citing Campbell v. Eastland, 307 F.2d 478, 487 n.12 (5th Cir. 1962)); *see also, e.g.*, Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); State Comp. Ins. Fund v. Drobot, Nos. SACV 13-0956 AG (CWx), SACV 15-1279 AG (JCGx), 2016 WL 3546583, at *4 (C.D. Cal. Feb. 29, 2016).

disclosures otherwise unavailable in a criminal case.[656] But, where settled law compels no departure for purposes of a uniquely criminal concern,[657] neither a tactical advantage nor the desire to insulate its witnesses from discovery or questioning in anticipation of a criminal trial can support criminal discovery's unnecessary constriction.[658] As one court noted, the Criminal Rules "were not designed with the intention of stymieing a defendant's ability to mount a complete defense,"[659] and "a liberal system of reciprocal discovery" is now "a central feature of modern criminal practice in both federal and state courts."[660] Logically, these interpretive axioms extend to the varied strictures of yet another code wedded to a matching end, the Evidence Rules, whose interpretation can affect, for good or ill, "the framework within which the trial proceeds."[661] Per these intertwined tenets, an interpretation of any relevant federal rule applicable in a criminal matter, whether of evidence or procedure, must be crafted to so that (1) fairness for all concerned—the defendant, the prosecution, and the public—is secured[662] and (2) "trial . . . reliably serve[s] its function as a vehicle for the determination of guilt or innocence."[663]

To deny a defendant the ability to make use of a prosecutor's inconsistent statement, made when the prosecutor possessed the greater access to the relevant data, undercuts these principles. So long

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656. *See, e.g.*, Degen v. United States, 517 U.S. 820, 825–26 (1996); Doe v. City of Milwaukee, No. 14-C-200, 2014 WL 3728078, at *6 (E.D. Wis. July 29, 2014); *Nicholas*, 569 F. Supp. 2d at 1073.

657. *See* Michigan v. Lucas, 500 U.S. 145, 149 (1991) (holding that a criminal defendant's right to present relevant testimony may be limited "'to accommodate other legitimate interests in the criminal trial process'" (quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987))).

658. SEC v. Kanodia, 153 F. Supp. 3d 478, 481 (D. Mass. 2015); *see also* S.E.C. v. Oakford Corp., 181 F.R.D. 269, 272–73 (S.D.N.Y. 1998).

659. *Nicholas*, 569 F. Supp. 2d at 1072.

660. Thomas v. Wyrick, 687 F.2d 235, 239 (8th Cir. 1982).

661. United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)); *cf.* United States v. Boesen, 541 F.3d 838, 844 (8th Cir. 2006) ("The Federal Rules of Evidence empower district court judges to control the mode and order of examining witnesses."); Logue v. Dore, 103 F.3d 1040, 1045 (1st Cir. 1997) ("[A] judge is not a mere umpire; he is the governor of the trial for the purpose of assuring its proper conduct, and has a perfect right—albeit a right that should be exercised with care—to participate actively in the trial proper.").

662. *Nicholas*, 569 F. Supp. 2d at 1072 n.8; *cf.* United States v. Baker, 432 F.3d 1189, 1236 (11th Cir. 2005) ("[A] district court must balance the right of the defendant to a fair trial against the public's interest in efficient and economic administration of justice.").

663. Rose v. Clark, 478 U.S. 570, 577–78 (1986), *cited in, e.g.*, *Fulminante*, 499 U.S. at 310; *cf.* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one.").

as "[t]he prosecutor has more information about the background of witnesses and the defendant, and the availability of . . . admissible and non-admissible evidence,"[664] the ability to manipulate this knowledge via carefully couched statements, in a manner consistent with Criminal Rule 16, but without fear of contravening the punitive aspects of the Evidence Rules endangers a criminal defendant's own ability to mount a credible defense. Whatever defects in perception and opportunity to observe on the part of key witnesses to which the prosecution first has access can too easily be obscured by artful, whether intentional or not, discovery responses.[665] A prosecutor's or witness' chosen characterization can thereby discourage further discovery by those with less knowledge about the entire record's every minutiae and with fewer resources and opportunities for such details' detection, even as the government faces no potential cost for any inconsistency's later (and improbable) demonstration. There is, simply put, a power in being able to first frame any person's comprehension of a case, always held by federal prosecutors, that cannot be wished away.[666] It is, above all else, a power whose abuse cannot be curtailed without the effective punishment embodied in Evidence Rule 801(d)(2). Admittedly, a prosecutor may not be able to "bring to the jury's attention purported facts that are not in evidence."[667] Still, by these means, certain inconsistencies may never be known and introduced by an unwitting defense, and the prosecution would thereby be enabled to win a jury's reliance on fact for which no evidentiary counter practically exists—for it is unknown—due to the government's own obfuscation. Having spent more time studying the evidence than a jury, developed more experience than a jury in judging the credibility of particular witnesses, and acquired an expertise in specialized areas of prosecution that a jury lacks,[668] any prosecutor can paint an image whose factual predicates will enjoy that presumptive label regardless of their actual truth, thereby effectively amplifying the defendant's preexisting burden and minimizing their own.[669] With criminal

664. Shatz & Whitt, *supra* note 496, at 865.

665. Park, *supra* note 143, at 96.

666. *Cf.* People v. Birks, 960 P.2d 1073 (Cal. 1998) ("[B]ecause . . . [the prosecution] has the power to frame the charges at the outset, can usually 'foresee' whether the evidence will favor a lesser offense . . . .").

667. United States v. Solivan, 937 F.2d 1146, 1151 (6th Cir. 1991).

668. Shatz & Whitt, *supra* note 496, at 865.

669. *See* Saltzburg, *supra* note 129, at 1506 ("[T]he reality is that when impeached witnesses deny making prior inconsistent statements or claim not to remember them, . . . there is no way for a jury to assess the reliability of the statements.")

discovery already subject to a multitude of formal constraints,[670] the courts' repeated departures from literalism in cases dealing with government impressions in the service of exempting it from any inconsistency's assertion augments one more incontestable advantage disproportionally enjoyed by federal prosecutors by virtue of their pre-indictment access to every bit of potential evidence. The Evidence Rules, when read in light of their procedural cohorts, offer no refuge to such a gross manipulation of their plain text[671] in the service of a history rejected, not validated, by Evidence Rule 801(d)(2)(C) and (D).[672] After all, both went beyond the common law in the interest of "equal justice, "[673] their hope for adjusting a historically unequal dynamic contravened by *Salerno*'s effective re-tilting in favor of prosecutorial discretion and against the fact-finder's rightful access to all relevant, non-prejudicial evidence that a defendant can present.[674]

Just as importantly, certain that he or she cannot be held accountable for discrepancies, an "officer[] who could freely testify about the statements of others would be tempted to fabricate or exaggerate, with little fear of exposure."[675] In a telling contrast, co-conspirators' every statement does not even constitute hearsay;[676] instead, the Evidence Rules classify such words as "vicarious admissions," while no explicit rule or common law doctrine bars their introduction by the government.[677] Logically, just as "[a] police report that claims personal knowledge and recounts detailed facts that incriminate a defendant cannot, in the absence of cross-examination, be effectively impeached,"[678] an investigator's prior mistaken statements, as encapsulated by a prosecutor and offered to the defense, cannot be dissected without effective cross-examination, their impressions immune to one of the most valuable means of

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670. *See supra* Part III.C.1.

671. *See, e.g.*, United States v. DiBernardo, 880 F.2d 1216, 1225 n.4 (11th Cir. 1993); United States v. Broadus, 664 F. Supp. 592, 596 (D.D.C. 1987).

672. *See supra* Part III.B.1.

673. Berman v. United States, 378 U.S. 530, 538 (1964) (Black, J., dissenting).

674. *Cf.* Applebaum v. Am. Export Isbrandtsen Lines, 472 F.2d 56, 62 (2d Cir. 1972) ("[W]hatever the inference to be drawn from . . . [witness'] self-contradiction, the consistent statement, made so soon after the . . . [relevant event] had occurred, was necessary to give the jury a complete basis upon which to judge the credibility to be attached to his trial deposition's version . . . .").

675. Park, *supra* note 143, at 96.

676. *See* FED. R. EVID. 801(d)(2)(E).

677. *See, e.g.*, United States v. Ammar, 714 F.2d 238, 255–56 (3d Cir. 1983); United States v. Nelson, 603 F.2d 42, 46 (8th Cir. 1979); Imwinkelried, *supra* note 504, at 275.

678. Park, *supra* note 143, at 96.

impeachment in any party's arsenal. Consistency may not be a paramount constitutional value.[679] Still, the chance to inform the jury of such an inconsistency must be so classified if that contradiction could reasonably undercut the persuasiveness of a prosecutorial witness' testimony in the eyes of laymen, rather than jurists or lawyers.[680] Based on these basic facts, the shared principles implanted within the federal rules' disparate text do more than expose the hollowness behind the mechanical incantation of an old truism;[681] they simultaneously impel a new approach to prosecutorial discovery statements.

Clinching its validity, such a result accords with the carefully tailored exceptions to literalism honed by the courts over the last century. In the evidentiary realm, application of an honored principle—"[t]he burden is on the party opposed to admission of evidence to show a reason for its exclusion"[682]—compels the opposite of the distribution of burdens for admission favored by *Salerno* and its progeny. It should be the government, not the defendant, who proves its statements' inadmissibility. The Constitution's Sixth and Fifth Amendments, in turn, guarantee a criminal defendant certain fair trial rights, such as the right of confrontation and the "limitation on the use of [an accused's] extrajudicial confessions and exculpatory statements," that are superior to any prerogatives either awarded or hampered by any plainly read rule of procedure.[683] In part due to this fundamental quiddity, the requirement that a greater degree of proof be offered to sustain a guilty verdict has underlain particularly liberal constructions of the law's evidentiary and criminal injunctions.[684] The deprivation of a right to cross-examination cannot but undermine the defendant's right to a fair trial, that greatest of tools fundamentally weakened. This fact is wedded to another: in the absence of an explicit textual prohibition, equitable interpretations of the Evidence Rules in

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679. Poulin, *Inconsistency*, *supra* note 329, at 1428.

680. *See* Saltzburg, *supra* note 129, at 1506 (pointing out this danger); *cf.* United States v. Salerno, 937 F.2d 797, 812 (2d Cir. 1991) (mandating disclosure of inconsistent statements as "the jury, and not the government, must ultimately decide" which version was accurate and true).

681. *See* Degen v. United States, 517 U.S. 820, 825 (1996) ("A criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified.").

682. United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1562 (E.D. Tex. 1986); *accord* United States v. Dupee, 569 F.2d 1061, 1063 (9th Cir. 1978).

683. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989).

684. *See Erosion*, *supra* note 80, at 148.

the criminal context have been favored.[685] Not one aspect of the existing exception for prosecutorial statements satisfies any standard authorizing departure from the plain text of Evidence Rule 801(d)(2). In other words, with the text itself having demarcated no government exception, that provision must alone apply, its authority boosted by the true, if obscure, nature of criminal discovery.

ii. Immateriality of Common Objections to Expanded Criminal Discovery

Further solidifying this case, two common objections to more criminal discovery—first, the need to protect public safety and prevent obstruction of justice, and second, the need to limit the administrative burden on prosecutors[686]—are inapposite.

Aside from the fact that witness tampering is a meager risk, and that the category of information that might precipitate such concerns is rather limited,[687] holding either a prosecutor or an officer accountable for their own words endangers neither their safety nor the pursuit of justice. The administrative burden may, theoretically, be greater,[688] but there is no legitimate reason for federal investigators under current law to fail to make contemporaneous record of information favorable to defendants[689]—and hence little greater inconvenience in subsequently defending those records. In fact, such a mechanical application would likely circumvent the myriad disputes that bedevil trial and reviewing courts concerning the completeness of materials produced by the prosecution and the necessity of retrials when the courts determine that inadequate discovery had taken place. As a result, such an unquestionably mechanical approach would almost surely lead to the faster prosecution of a defendant and the quicker closing of a case upon

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685. *See, e.g.*, Uniroyal Chem. Co., Inc. v. Syngenta Crop Prot., Inc., No. 02-2253, 2005 U.S. Dist. LEXIS 4545, at *5, 2005 WL 677806, at *2 (D. Conn. Mar. 23, 2005). These substantive areas' idiosyncrasies occasionally compel certain specialized maxims' invocation; *cf.* Shachmurove, *Claims*, *supra* note 255, at 535–42 (explaining the unique consideration applicable to judicial interpretation of the Federal Rules of Bankruptcy Procedure).

686. Green, *Reform*, *supra* note 597, at 649; Sullivan & Possley, *supra* note 419, at 921. Other arguments have been advanced; these are merely the most cited. Meyn, *Darkness*, *supra* note 641, at 1122–38.

687. Green, *Reform*, *supra* note 597, at 669–70.

688. McConkie, *supra* note 625, at 70–71.

689. Green, *Reform*, *supra* note 597, at 670; *see also* McConkie, *supra* note 625, at 69–70.

appeal.[690] Similarly, by aligning with the plain language of Evidence Rule 801(d)(2)(C) and (D), this approach necessarily eliminates any chance of repeating the convoluted disputes triggered by the *McKeon/Salerno* test. Criminal managerial judging may be less cursory and thus less time-intensive than the current system anticipated, but magistrate judges have exercised such powers in the civil sphere without endangering their impartiality or causing too much delay.[691] In fact, the opposite appears true.[692]

Even more advantages to the extension of Evidence Rule 801(d)(2)(C) and (D) to prosecutorial statements can be adduced. To the extent prosecutor stands as an advocate for justice, a role befitting the federal prosecutor if not his or her state counterpart,[693] this regime poses no hindrance to a defendant's just prosecution and may actually facilitate a fair contest.[694] It is, by all reasons, even more moderate than the modest role of formal regulation to which so many prosecutors have objected.[695] Conversely, to the extent the prosecutor is purely an advocate for a partisan side, this regime treats him or her no differently than their identical counterpart in the private sector. Lastly, this approach utterly averts any angst-filled debate over the rightful ambit of criminal discovery and avoids any messy probing of a prosecutor's good-faith explanation for an inconsistent statement. It does not, in other words, expect more from prosecutors than their modern ethical compasses demand, day in and day out.

In sum, a commitment to application of Evidence Rule 801(d)(2)(C)'s and (D)'s plain text as to all pre-trial prosecutorial statements provides all the benefits desired by proponents of expanded criminal discovery, and none of the costs feared by its opponents. Arguably, it may even serve to minimize the criminal justice system's extant incentives for misconduct. With both officers and prosecutors now compelled to answer for their words and

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690. *See* Sullivan & Possley, *supra* note 419, at 922; Turner & Redlich, *supra* note 638, at 290; *see also* Johnson, *supra* note 646, at 31–36; McConkie, *supra* note 625, at 111–13.

691. *Cf.* McConkie, *supra* note 625, at 93–104 (discussing the specifics and advantages of local rules allowing for such management of criminal cases).

692. *See* Ruth Dapper, *A Judge by Any Other Name: Mistitling of the United States Magistrate Judge*, 9 FED. CTS. L. REV. 1, 4–5 (2015) (contending that the creation of the magistrate judge has been "an unqualified success").

693. *Cf.* Zacharias & Green, *Uniqueness*, *supra* note 11, at 235–42 (setting forth the reasons why federal prosecutors are unique).

694. *See* McConkie, *supra* note 625, at 69–70; Turner & Redlich, *supra* note 638, at 291.

695. *Cf.* Green, *Regulation*, *supra* note 319, at 902 (faulting prosecutors for charged rhetoric against such reforms).

representations in open court, like all others who opt to testify in this nation's ninety-four federal trial courts, the inducement to be more careful and precise will only grow. Perhaps equally worthwhile, this approach makes no assumptions as to the degree of misconduct by either police officers or prosecutors, thereby avoiding the politically charged debates over the reality of such misdeeds. It assumes nothing, in fact, by subjecting one and all to the same mechanism set forth in Evidence Rules 801(d)(2) and 403. That result, in fact, accords with this corpus' core belief in the value of direct and cross-examination—and both the equality favored by the Civil Rules and every one of the Criminal Rules' original goals: "the simplification of procedure through the elimination of unnecessary work, expense and delay," "the improvement of procedure as an instrument for the objective ascertainment of facts," "a more complete fulfillment of democratic values," and "greater uniformity of procedure in the federal courts on a nationwide basis."[696]

VI. CONCLUSION

For years, federal courts have fought over the precise extent to which an old evidentiary edict—the federal prosecutors' invulnerability to the clutches of the admissions doctrine for any inconsistent statements, whenever and wherever made—retains its force. *McKeon/Salerno* and their progeny elected to modify the proscription, while others, *Santos* most famously, invoked the government's historical immunity as a means of avoiding the unappetizing task of cohering seemingly untidy history with plainer text. Amidst this cacophony, only a lonely minority has heeded the latter's fundamental command.

In support of this coterie's conclusion, this Article has posited and defended two arguments. First, regardless of a criminal trial's phase, neither text nor history support any other approach, with the federal rules' few cognizable policies equally revelatory. Second, the case against prosecutorial immunity only improves as to those statements uttered during criminal discovery, as the Criminal Rules, read in tandem with their procedurals cohorts and criminal discovery's strange character, decisively undercut the deferentially inclined. The interpretive framework erected by the Court over last three decades allows for no other decision.

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696. Lester B. Orfield, *The Federal Rules of Criminal Procedure*, 33 CAL. L. REV. 543, 544 (1945). Orfield was an original member of the Criminal Committee.

Admittedly, recognizing these inferences may offend a wizened view. If the dead can truly hear, one can imagine hostile grumblings from the belletristic Cardozo, the generous Hand, and the acidic Blackstone most of all. Still, such fealty secures a purer justice for the feeble and the mighty, paying rightful reverence to a founder[697] and a dramatist alike.[698] More likely than not, after some unknown number of years have passed, what it "this day justif[ies] by precedents, will be itself a precedent,"[699] perhaps as grand as any inscribed by the British poet who became a revered scholar in the republic whose independence he so opposed.[700]

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697. James Madison, Speech at the Virginia Ratifying Convention (June 6, 1788) ("I believe there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations."), *cited in, e.g.*, Klayman v. Obama, 957 F. Supp. 2d 1, 42 n.67 (D.D.C. 2013).

698. According to doubtful legend, to Emperor Nero's question—"Am I forbidden to what all may do?"—Seneca, the tragedian behind *Medea* and *Thyestes*, replied: "From high rank high example is expected." VILLY SØRENSEN, SENECA: THE HUMANITY AT THE COURT OF NERO 289 (W. Glyn Jones trans. 1984).

699. THE ANNALS OF TACITUS 193 (Alfred John Church & William Jackson Brodribb trans. 1876).

700. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 7 n.33, 15–16 (1996).