1992

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Recommended Citation
Utah Law Review, Vol. 1992, Issue 1 (1992), pp. 67-100

BIASED EVIDENCE RULES: A FRAMEWORK FOR JUDICIAL ANALYSIS AND REFORM

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I. INTRODUCTION

Biased evidence rules, those that permit one party to use a kind or class of evidence while prohibiting the other from using it, give adversaries unequal weapons. Truth seems less likely to emerge from an adversarial testing when participants do not have the same devices to demonstrate strengths and weaknesses in the competing claims.[1] Since a good evidence law should aid the determination of truth,[2] neutral evidence rules should be required.

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1. *Cf.* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 185 (1948) ("The theory of the system is that in the contest between the parties, each interested to demonstrate the strength of his own contentions and to expose the weakness of his opponent's, the truth will emerge."); *see also* 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 (1986). Professor Imwinkelried stated:

> [A] key tenet of the adversary system is that both litigants must stand on equal footing before the judge. If the adversaries realize that they stand on equal footing, all sides have the same incentive to collect evidence before trial and attempt to introduce the evidence at trial. Equalizing the incentive level for all the litigants ideally results in the fullest factual record at trial and the most thorough airing of the issues in the case.

Id. at 314 (footnotes omitted).

2. *See* Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223 (1966). In the article, the author states:

> Once the judicial framework has been established, the [evidence code] draftsman must strike a balance among the goals desirable and achievable within that framework. Truth finding must be a central purpose whatever the tribunal. Unless we are to assume that the substantive law is perverse or irrelevant to the public welfare, then its enforcement is properly the primary aim of litigation; and the substantive law can be best enforced if litigation results in accurate determinations of facts made material by the applicable rule of law. Unless reasonably accurate fact finding is assumed, there does not appear to be any sound basis for our judicial system.

Id. at 243; *see also* Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 577 (1988) ("Although evidence law may have subsidiary purposes, its prime goal is to advance the accuracy of the courts' fact finding function.").

In reality, however, all evidence principles are not impartial between the parties.[3] The Federal Rules of Evidence sometimes grant evidentiary mechanisms to just one class of parties. Although principles of our adversary system ought to make such rules suspect, the courts can and should reform only some of them. Courts and legislators, driven by differing reasons, have produced the biased provisions. Categorizing those reasons provides the analytical starting point for the judicial treatment of biased evidence rules.

II. EXPLICITLY BIASED RULES

A. Rules Explicitly Favoring Criminal Defendants

Evidentiary provisions that intentionally aid criminal defendants are the most defensible category of biased evidence rules. Even though biased, such rules may actually assist accurate factfinding or otherwise further our notions of justice. The general character evidence rules serve as an example.

The prosecution, as part of its case-in-chief, cannot introduce character evidence to show that the accused committed the crime by acting in conformity with his character. Defendants, however, can introduce character evidence to show that they did not commit the crime.[4] One reason for this bias is that the jury will be overly influenced by the negative character evidence and will, therefore, less likely reach an accurate verdict if allowed to consider such evidence.[5] In contrast, the accused's introduction of the compara-

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3. The majority of evidence rules, however, are not biased. *See* Imwinkelried, *supra* note 1, at 313 ("In most cases, whatever the identity of the proponent of the evidence, the foundational requirements for admitting the evidence and the possible objections to admission remain the same.").

4. *See* FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . . Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same . . . .")

5. *See* Michelson v. United States, 335 U.S. 469, 475-76 (1948) ("The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.")

ble character evidence can assist accuracy because "with the danger of prejudicing the defendant gone, the probative value of the evidence outweighs the disadvantages of allowing admission."[6] This biased rule, then, while seemingly cutting against the tenets of the adversary system, actually improves factual determinations.[7]

A good evidence law, however, does more than promote truth. It also serves justice.[8] As one commentator notes:

> Central to the Anglo-American system of criminal law is the concept that the accused must be protected against inculpation through proof of his past misdeeds. Closely analogous is the familiar rule that a person is innocent until proven guilty of the particular act charged. One form of protection is constitutional—the privilege against compelled self-incrimination. A second—which may not be constitutionally guaranteed but which is accepted by all American jurisdictions—is the exclusionary rule embodied in Rule 404;

> The Court of Appeals of New York, in *People v. Zackowitz*, stated:
> There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."

254 N.Y. 192, 198; 172 N.E. 466, 468 (1930) (quoting 1 WIGMORE, EVIDENCE, § 199).

6. R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 237 (2d ed. 1982).

7. For a related example, see FED. R. EVID. 609 committee note to 1990 amendment ("[T]he rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying [criminal] defendant, the defendant faces a unique risk of prejudice—i.e., the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes.").

8. *See* S. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 27 (1988) ("Truth is not the end the courts seek. Truth is nothing more than a means of achieving the end, justice."); *cf.* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 2 (1975) ("A trial is, in part, a search for truth. . . . Actually, however, a trial is far more than a search for truth, and the constitutional rights that are provided by our system of justice may well outweigh the truth-seeking value . . . .").

Rule 102 has the twin goals of truth and justice and states that "[t]hese rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined."

> it renders inadmissible, as part of the prosecution's evidence in chief, character evidence offered solely to show the accused's propensity to commit the crime with which he is charged.[9]

With our firm, constitutionally based concern about convicting the innocent,[10] justice may require procedures, including evidence rules, that are specially protective of criminal defendants.[11] Even if such rules may harm accurate factfinding, the biased provisions created to serve this aspect of justice should be preserved by the courts. Judges should not tamper with biased evidence rules favoring criminal defendants, especially when rational arguments indicate that these provisions actually enhance correct trial determinations.

B. Rules Explicitly Favoring a Civil Party

The reasons that justify biased rules for criminal defendants do not support a rule that expressly favors one class of civil parties over the other. While only the defendant might be unfairly prejudiced from a category of evidence in criminal trials, a comparable dynamic is not likely in civil cases. Character evidence, for example, should not prejudice civil plaintiffs as a class

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9. J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 7.01[01] (1987).

10. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[W]e do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

11. *But see* Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647 (1986). Saltzburg asserts:

> That incidents of trial may differ somewhat in civil and criminal cases does not mean that the goals of the process also differ. Because of concern for the individual and realization of the power of the state to stigmatize and punish criminal offenders in special ways, the American legal system gives the benefit of uncertainty to the criminal defendant. This means that the government bears the risk of an erroneous decision in a very special way, but it does not mean that the goal of the criminal trial is different from the goal of a civil trial.

Id. at 660.

any more than civil defendants. Because our sense of justice does not favor one group of parties over another in civil disputes,[12] preferential evidence rules in noncriminal matters make little sense. Consequently, courts should be hostile to such biased evidence rules.

The United States Supreme Court demonstrated such hostility to biased evidence rules in civil disputes in *Green v. Bock Laundry Machine Co.*,[13] where it encountered Rule 609 governing impeachment by convictions in civil cases. Rule 609(a) had required that evidence of a felony conviction be admitted to impeach the testimony of a witness if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant . . . ."[14] Read literally, this rule was biased because it always permitted impeachment of a plaintiff, but not a civil defendant. The provision allowed the evidence to be excluded only when the court determined that the prejudice from the evidence "to the defendant" outweighed its probative value. Impeaching the plaintiff, of course, will not prejudice the defendant. In contrast, evidence impeaching the civil defendant could be excluded because the prejudicial effect to the defendant may outweigh its probative value.[15]

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12. *See Winship*, 397 U.S. at 371 (Harlan, J., concurring) ("In a civil suit between two private parties for money damages, . . . we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in plaintiff's favor.").

13. 490 U.S. 504 (1989).

14. Before the 1990 amendment, Rule 609(a) provided:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted . . . but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant . . . .

FED. R. EVID. 609(a).

15. Justice Stevens, writing for the majority, noted:

> The Rule's plain language commands weighing of prejudice to a defendant in a civil trial as well as in a criminal trial. But that literal reading would compel an odd result in a case like this [a product liability suit]. Assuming that all impeaching evidence has at least minimal probative value, and given that the evidence of plaintiff['s] . . . convictions had some prejudicial effect on his case—but surely none on defendant Bock's—balancing according to the strict language of Rule 609(a)(1) inevitably leads to the conclusion that the evidence was admissible. In fact, under this construction of the Rule, impeachment detrimental to a civil plaintiff always would have to be admitted.

Green, 490 U.S. at 509-10.

Confronting the explicitly biased provision of Rule 609, the Court concluded that distinguishing between the rights of civil plaintiffs and defendants did not further a rational purpose and was probably unconstitutional.[16] The rule could not mean what its literal words said. The Court noted: "No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant."[17] Consequently the Court went on to do what all courts should do when faced with such a biased rule in the civil context;[18] it interpreted the provision so that it would be neutral between civil plaintiffs and defendants.[19]

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16. Justice Scalia, concurring in the judgment, stated:

> We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. . . .
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> . . . .
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> The word "defendant" in Rule 609(a)(1) cannot rationally (or perhaps even constitutionally) mean to provide the benefit of prejudice-weighing to civil defendants and not civil plaintiffs. Since petitioner has not produced and we have not ourselves discovered even a snippet of support for this absurd result, we may confidently assume that the word was not used (as it normally would be) to refer to all defendants and only all defendants.

Id. at 528-29 (Scalia, J., concurring in the judgment).

17. *Id.* at 510 (Stevens, J., for the Court). The Court continued:

> The Sixth Amendment to the Constitution guarantees a criminal defendant certain fair trial rights not enjoyed by the prosecution, while the Fifth Amendment lets the accused choose not to testify at trial. In contrast, civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause. . . . Denomination as a civil defendant or plaintiff, moreover, is often happenstance based on which party filed first or on the nature of the suit. Evidence that a litigant or his witness is a convicted felon tends to shift a jury's focus from the worthiness of the litigants's position to the moral worth of the litigant himself. It is unfathomable why a civil plaintiff—but not a civil defendant—should be subjected to this risk.

Id. at 510-11 (footnotes omitted).

18. Professor Imwinkelried commented on the *Green* decision:

> Justice Stevens' reasoning is sensible. It is a "cardinal principle" that when a statute is subject to two interpretations—one which raises significant doubts about its constitutionality and another which moots those doubts, the court should prefer the latter construction. . . . In *Green*, Justice Stevens essentially advanced the argument that interpreting Rule 609(a)(1) to protect civil defendants but not civil plaintiffs would give rise to significant doubts about the constitutionality of the provision.

Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L.J. 341, 361-62 (1991) (footnotes omitted).

19. The Court, after examining the provision's legislative history, concluded that the then Rule 609(a)(1) required a trial judge to allow impeachment by evidence of prior

C. *Rules Explicitly Favoring the Prosecution*

If courts ought to be hostile to explicitly biased rules in civil cases, the courts should be even more antagonistic to provisions explicitly favoring the prosecution in criminal cases. Provisions purposely advantaging the prosecution conflict with the basic constitutional values that protect criminal defendants. If possible, courts should find ways to interpret such biased rules favoring the prosecution in a neutral fashion. The hearsay exception for statements against interest found in Rule 804(b)(3) provides an example.

Rule 804(b)(3) imposes a corroboration requirement on an accused seeking to admit a statement against penal interest, but not on the prosecution introducing such hearsay.[20] Commentators have denounced the asymmetric corroboration requirement as "constitutionally suspect,"[21] and a number of courts have re-

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felony convictions of all civil witnesses regardless of the prejudice resulting to the party offering the testimony. See *Green*, 490 U.S. at 527. The Rule, effective December 1, 1990, now reads:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. . . .

FED. R. EVID. 609(a).

20. *See* FED. R. EVID. 804(b)(3). Rule 804(b)(3) excepts from the hearsay rule:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Id.

21. *See* Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851 (1981). Professor Tague argues:

> As formulated, the rule is constitutionally suspect in four respects. First, Congress relied on several unwarranted assumptions to justify the high corroboration burden imposed on the defendant. Second, the rule improperly discriminates between the defendant and the Government because the defendant alone must satisfy the corroboration requirement. Third, if

sponded by, in effect, rewriting the rule and creating a corroboration requirement for the prosecution as well.[22]

A correct rule would not favor the prosecution. The only question is whether the courts have the authority to impose neutrality on the explicitly biased provision. The parallels between *Green v. Bock Machine Laundry Co.* and the penal interest provision indicate that courts do possess that power. In *Green* the Supreme Court noted that the impeachment provision had no reasonable purpose and was probably unconstitutional.[23] Similarly, the biased portion of Rule 804(b)(3) does not enhance accurate factfinding and cuts against constitutional values.[24] Because the

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> the defendant does not satisfy the corroboration requirement, the rule forecloses jury assessment of the declarant's credibility. Finally, the rule clashes with the defendant's fifth and sixth amendment rights to introduce evidence.

Id. at 980.

22. *See* E. CLEARY, MCCORMICK ON EVIDENCE 826 (3rd ed. 1984) ("Some courts have imposed an additional factual safeguard upon the use of statements inculpating an accused person by requiring that they be corroborated, thus in effect reading into Federal Evid. Rule 804(b)(3) with regard to inculpatory statements the same provision there expressly stated with regard to exculpatory statements."); *see, e.g.*, United States v. Garcia, 897 F.2d 1413, 1420 (7th Cir. 1990); United States v. Koskerides, 877 F.2d 1129, 1135-36 (2d Cir. 1989); United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978). Some courts have not formally resolved the issue. *See, e.g.*, United States v. Holland, 880 F.2d 1091, 1093 (9th Cir. 1989) (court did not have to decide whether inculpatory statements must be corroborated because sufficient corroboration present).

23. *See supra* notes 16-19 and accompanying text (discussing *Green*).

24. *See* Sharp, *Military Rule of Evidence 804(b)(3)'s Statement Against Penal Interest Exception: Can the Rule Stand on Its Own?* 130 MIL. L. REV. 77, 118 (1990) ("There is no logical reason to explain why the government's witnesses should be considered more reliable than those of the defense. Indeed, the government has many more ways to induce persons to testify falsely than does the defense.").

Another parallel between the former version of Rule 609(a)(1) and the present version of Rule 804(b)(3) is that the explicit bias in each seems to have come about more from inattentiveness or inadvertence than by design. The *Green* Court's review of Rule 609(a)(1)'s history indicated that the drafters had meant to protect criminal defendants from certain impeachment by prior convictions. Nothing indicated, however, that they intended to distinguish between civil plaintiffs and defendants. *See Green*, 490 U.S. at 511-24.

Similarly, the drafters of Rule 804(b)(3) did not address the biased nature of the rule they created. One commentator explains:

> During the course of the expansion of the hearsay exception to include declarations against penal interest, the situation principally in contemplation and raised in the cases was a confession . . . offered by the defense to *exculpate* the accused. . . . While the possibility was recognized that statements against penal interest might *inculpate* an accused person, . . . the question of their admissibility was raised infrequently in cases or the literature.

Court had the power to disregard the literal language of the former version of Rule 609(a)(1) to avoid the constitutional problem,[25] courts have a similar power to produce neutrality in the present version of Rule 804(b)(3).[26]

E. CLEARY, *supra* note 22, at 824. Another commentator notes:

> [O]ne looks in vain in the legislative history for a discussion of how the proposed rule was meant to affect a defendant's rights under the confrontation clause. The rule restricts a defendant's use of statements against penal interest, but not the government's . . . . [T]he rule . . . had not been considered carefully.

Sharp, *supra*, at 97. The Fifth Circuit, after reviewing the legislative history of Rule 804(b)(3) concluded, "Thus, while specifically addressing exculpatory statements, the draftsmen of the new rules left to the courts the task of delineating prerequisites to the admissibility of inculpatory against-interest hearsay." United States v. Alvarez, 584 F.2d 694, 700 (5th Cir. 1978). For the fullest discussion of the history of the rule, see Tague, *supra* note 21.

At least some drafters, after the adoption of the Federal Rules of Evidence, confronted the bias in the penal interest exception and did away with it. *See, e.g.*, OHIO R. EVID. 804(B)(3), which provides in part, "A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

25. *See supra* note 18 (when statute is subject to two interpretations, court should favor one that moots doubt of constitutionality).

26. The conclusion that courts should interpret Rule 804(b)(3) to end the bias in favor of the prosecutor does not indicate how that bias should be eliminated. Two choices are apparent. Courts can remove the corroboration requirement for criminal defendants or they can require corroboration from the prosecution. Recent Supreme Court decisions on the Federal Rules of Evidence favor interpretations that allow more evidence to be admitted. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 526 (1989) (permitting impeachment of civil witnesses with evidence of prior felony convictions); United States v. Owens, 484 U.S. 554, 563 (1988) (adopting interpretation of Rule 801(d)(1)(C) that made it easier to have prior identification testimony admitted); Huddleston v. United States, 485 U.S. 681, 688-89 (1988) (accepting interpretation that made it easier to admit prior crime evidence under Rule 404(b)); Bourjaily v. United States, 483 U.S. 171, 183-89 (1987) (interpreting coconspirator hearsay provision to allow more hearsay to be introduced); United States v. Abel, 469 U.S. 45, 49 (1984) (permitting extrinsic evidence of gang membership to prove bias of witness); *cf.* Haddad, *The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?*, 81 J. CRIM. L. & CRIMINOLOGY 77 (1990). Haddad observed: "Professor Ronald Allen has pointed out that the [confrontation] hearsay cases and the [confrontation] impeachment cases are compatible in one sense: both favor the admissibility of evidence, whether offered by the prosecution or the defense." *Id.* at 90. *But see* Idaho v. Wright, 110 S. Ct. 3139, 3152 (1990) (holding admission of hearsay evidence of child victim under Idaho's residual exception violated Sixth Amendment's Confrontation Clause).

The tendency to favor the admission of evidence might indicate that courts ought to interpret the penal interest exception to allow more evidence to be admitted. That would mean dropping the corroboration requirement for exculpatory hearsay. The reasoning of *Green*, however, demonstrates that corroboration should be imposed on both sides. In *Green*, the Court held that the biased impeachment provision of Rule 609(a)

III. RULES MADE BIASED BY JUDICIAL INTERPRETATION

Judicial interpretation can transform a facially neutral evidence rule into a biased one. Courts can add a gloss to a provision that permits one group of parties to use evidence while forbidding or making it difficult for other parties to use the same or comparable evidence. Judges might rationally defend their moves away from neutrality when the judicial action assists accurate factfinding or otherwise serves justice. The Supreme Court, however, in *Huddleston v. United States*[27] has indicated that courts cannot create biased rules out of facially neutral ones.

In *Huddleston*, the Court considered Rule 404(b), which is impartial on its face. The Rule expressly permits the introduction of prior crime evidence in all cases and by all parties when that evidence tends to prove something other than the character of a person.[28] In practice, however, the benefits and dangers of the

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could not be interpreted as written. *See supra* notes 15-19 and accompanying text. Having come to that conclusion, however, the Court still had to decide how the Rule should be interpreted. The Court examined the structure of the Rule and its history and concluded that "Rule 609(a)(1)'s exclusion of civil witnesses from its weighing language is a specific command that impeachment of such witnesses be admitted, which overrides a judge's general discretionary authority under Rule 403." *Green*, 490 U.S. at 505.

The corroboration requirement for exculpatory statements against penal interest is a specific mandate of Rule 804(b)(3) put in place to mediate differing concerns about the provision. As the advisory committee stated:

> The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, . . . but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. . . . The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations.

FED. R. EVID. 804(b)(3) advisory committee's note. To follow this legislative intent and to eliminate the bias, the correct solution is to impose corroboration on both inculpatory and exculpatory statements.

27. 485 U.S. 681 (1988).

28. *See* FED. R. EVID. 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause

rule are not equal to all parties. It is the prosecution that most often seeks to use the Rule and the accused who most often will be unfairly prejudiced by it. Indeed, the dangers of unfair prejudice to the accused are present every time the prosecutor introduces such evidence.[29] Even when the other-crimes evidence properly establishes something apart from the character of the accused, it still brands the accused as a criminal and is likely to be misused by the jury.[30] Such misuse, of course, interferes with the evidence law's goal of obtaining just and accurate verdicts. Consequently, some courts believed that justice and accuracy would be furthered by engrafting special requirements onto Rule 404(b). Even though not explicitly required by the Rule, these courts allowed the prosecution to introduce other-crimes evidence only after first establishing by a preponderance of the evidence or by clear and convincing evidence that the accused had committed the other crime.[31] These courts were, in effect, creating a biased

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> shown, of the general nature of any such evidence it intends to introduce at trial.

Id.

29. These dangers are significant, as evidenced by the fact that Rule 404(b) is more frequently litigated in the appellate courts than any other provision of the Federal Rules of Evidence. *See* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5239, at 427 (1978).

30. *See, e.g.*, United States v. Byrd, 352 F.2d 570, 574 (2d Cir. 1965) ("[T]here can be no complete assurance that the jury even under the best of instructions will strictly confine the use of [evidence of other crimes] to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar criminal act, probably committed the one with which he is actually charged."); G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.15, at 162 (2d ed. 1987) (discussing "the great potential for prejudicial consequences inherent in other-crimes evidence").

> Professor Imwinkelried surveyed the literature and concluded:
> Numerous empirical studies document the risk that the jury will misuse the evidence and try the person rather than the case. The judge may ostensibly admit the evidence on a limited, noncharacter theory of relevance, but the jury might treat the evidence as proof of the accused's bad character and penalize the accused for his or her character.

Imwinkelried, *supra* note 18, at 373 (footnotes omitted).

31. The United States Supreme Court surveyed the circuits and concluded:

> The First, Fourth; Fifth, and Eleventh Circuits allow the admission of similar act evidence if the evidence is sufficient to allow the jury to find that the defendant committed the act. . . . Consistent with the Sixth Circuit, the Second Circuit prohibits the introduction of similar act evidence unless the trial court finds by a preponderance of the evidence that the defendant committed the act. . . . The Seventh, Eight, Ninth, and District of Columbia Circuits require the Government to prove to the court by clear and convincing evidence that the defendant committed the similar act.

rule in favor of criminal defendants by placing a special burden on the prosecution. Although the additional requirement might have enhanced accurate factfinding and served important constitutional values, the Supreme Court eliminated it. The *Huddleston* Court held that the added requirement was "inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b). . . . The text [of Rule 404(b)] contains no intimation . . . that any preliminary showing is necessary before such [other-crimes] evidence may be introduced for a proper purpose."[32]

The courts could not create a Rule 404(b) biased in the accused's favor even though the result may have served the purposes of evidence law better than the express wording of the Rule.[33] Similarly the courts cannot create preferential rules out of impartial provisions in other, less justifiable, situations. Rules made biased by judicial interpretation must be changed.

For example, the judicially created bias prohibiting criminal defendants from introducing agency admissions by government employees should cease. The leading case of *United States v. Santos*[34] demonstrates this bias. In *Santos* the defendant was charged with assaulting a federal drug agent.[35] Another agent, in a sworn affidavit, had identified someone other than Santos as the assailant. The Second Circuit, however, held that Santos could not introduce the sworn affidavit as an admission of an agent.[36] The court did recognize the biased nature of its ruling. It conceded that while statements by an accused's agents may come in as agency admissions, the sworn affidavit by a government agent did not constitute an agency admission by the government because of the government's unique status as a party.[37]

Huddleston, 485 U.S. at 685 n.2; *cf.* C. MUELLER & L. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 508 (1988) ("Most other acts proved pursuant to FRE 404(b) are themselves crimes, and most courts require the government to prove these extrinsic offenses by 'clear and convincing evidence.'").

32. *Huddleston*, 485 U.S. at 687-88.

33. *Huddleston* held that other-crimes evidence should be treated like any other question of conditional relevancy, which is governed by Rule 104(b). *See id.* at 689. Under Rule 104(b) the "court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the [act was a crime]—by a preponderance of the evidence." *Id.* at 690.

34. 372 F.2d 177 (2d Cir. 1967).

35. *See id.* at 178-80. The facts are taken from the court's opinion in *Santos*.

36. *See id.* at 179.

37. In *Santos* the Court concluded, "This apparent discrimination is explained by the

The *Santos* court's interpretation must be changed. Even if there is merit in the logic of *Santos*, the controlling factor is that the applicable rule is facially neutral.[38] The text of Rule

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peculiar posture of the parties in a criminal prosecution—the only party on the government side being the Government itself whose many agents and actors are supposedly uninterested personally in the outcome of the trial and are historically unable to bind the sovereign." *Id.* at 180.

Professors Louisell and Mueller criticize this logic:

> To the suggestion that government agents are "uninterested personally" in the outcome of government litigation, it may be replied that much the same may usually be said of agents employed by private entities. It may be true that to some extent the sheer size of the government and the protections accorded by the civil service system may combine to dissociate any one agent from success or failure in any one case, but there exist similar factors in private industry, which sometimes involves massive entities and restrictions in the form of federal and state regulations and clauses in union contracts which similarly dissociate any one employee from success or failure in a single case. To the suggestion that agents are "unable to bind the sovereign," it may be replied that this principle only restates (indeed, overstates) the question, which is whether an agent should be able not to "bind" but to make statements admissible against the sovereign.

4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 426, at 328 (1980).

The United States Court of Appeals for the District of Columbia Circuit also criticizes the logic of *Santos*. In United States v. Morgan, 581 F.2d 933 (D.C. Cir. 1978), the court stated:

> [*Santos*] seemed to be distinguishing government agents from nongovernment agents (whose statements regarding matters within the scope of the agency may be attributed to their principals . . .) on the rationale that government agents are "supposedly uninterested *personally* in the outcome of the trial." . . . The court did not explain the significance of this premise. We are not told whether it follows that (a) it would be unfair to impute to the government responsibility for the statements of its agents, or (b) such statements lack the special assurances of trustworthiness that attend the out-of-court statements of nongovernment agents.

Id. at 937-38 n.11.

38. *See* FED. R. EVID. 801(d)(2)(D). Rule 801(d)(2)(D) provides that a statement is not hearsay if the statement is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." *Id.*

Santos was decided before the adoption of the Federal Rules of Evidence, but courts continue to utilize its biased interpretation of the agency admissions exception to the hearsay rule. For example, in United States v. Kampiles, 609 F.2d 1233 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980), the United States Court of Appeals for the Seventh Circuit recognized the pre-Rules doctrine that "admissions by government employees in criminal cases were viewed as outside the admissions exception to the hearsay rule." *Id.* at 1246. The court then summarized *Santos* and concluded: "Nothing in the Federal Rules of Evidence suggests an intention to alter the traditional rule and defendant has cited no truly contrary case indicating such a trend." *Id.*

Other courts have accepted *Kampiles'* reasoning that the *Santos* doctrine survives because of legislative silence. *See, e.g.*, United States v. Durrani, 659 F. Supp. 1183, 1185 (D.Conn.), *aff'd*, 835 F.2d 410 (2d Cir. 1987). For a criticism of this argument, see

801(d)(2)(D) contains no intimation of this bias towards the government. If, as *Huddleston* indicates, a neutral provision cannot be transformed in favor of the accused, courts certainly cannot make a neutral provision prefer the prosecution. Just as any judicial interpretation must cease that creates a biased rule out of a facially neutral one, so too must cease the doctrine that treats statements by government agents differently from all other agency admissions.

So far, however, courts have continued to interpret this admission provision in a biased manner, although *United States v. GAF Corp.*[39] comes close to recognizing that the biased interpretation of the agency admission rule cannot continue in criminal cases.[40] In *GAF Corp.* the defendants were convicted of federal securities violations. Before the trials began, the government filed a bill of particulars indicating that the relevant series of trades took place in October and November, 1986. At the second trial,[41]

Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 774-78 (1990). For an argument that equal protection makes admissible statements of government agents as vicarious admissions, see Imwinkelried, *supra* note 1.

39. 928 F.2d 1253 (2d Cir. 1991).

40. Some courts in civil cases have rejected the biased interpretation of the agency admission rule. *See* United States v. American Tel. & Tel. Co., 498 F. Supp. 353 (D.D.C. 1980). The court in *American Tel. & Tel.* rejected the government's claim, in a civil antitrust action, that statements made by government officials outside the Justice Department were not agency admissions. *Id.* at 357-58. "[T]he admissibility of an admission by a party-opponent is a consequence, not of trustworthiness or lack of burdensomeness, but of the adversary system of litigation. . . . The adversaries in this litigation . . . are the United States of America and the American Telephone and Telegraph Company." *Id.*; *see also* Corrigan v. United States, 609 F. Supp. 720 (E.D. Va. 1985), *rev'd*, 815 F.2d 954 (4th Cir. 1986), *cert. denied*, 484 U.S. 926 (1987). This case involved a suit against the United States under the Federal Tort Claims Act for negligently serving alcohol to a person the government should have known was underage and intoxicated. The court admitted the out-of-court statements of the bartender, a government employee at a military club, who had served the drinks. The court stated:

> The disputed statements were offered against the United States, and were made by an agent or servant of the United States, Mrs. Brown, concerning a matter within the scope of her employment. Mrs. Brown's statements were made while she was still an employee of the United States. Therefore, each element of Rule 801(d)(2)(D) has been met.

Id. at 727 n.3; *see also* Skaw v. United States, 740 F.2d 932, 937 (Fed. Cir. 1984) (in action against United States for alleged taking of mining claims, statements made by Forest Service employees against government could be considered on summary judgment motion); Burkey v. Ellis, 483 F. Supp. 897, 911 n.13 (N.D. Ala. 1979) (in action to enjoin government agencies, declarations made by government officials in environmental impact statement were admissible against government).

41. The first trial ended in a mistrial because of the late disclosure by the prose-

the defendants argued that a government witness was responsible for the November trades. They asserted that since the government contended in its bill of particulars that the October and November trades were all part of one series, a reasonable doubt existed as to whether the defendants, as opposed to the witness, were responsible for the October trades. A hung jury ensued.

Before the start of the next trial, the government amended its bill of particulars and included only the October trades in the charged series of transactions. The trial court denied the defendants' offer to admit the original bill stating that "there is no doctrine of admissions 'against the government the same as there would be against civil litigants or against defendants in a criminal case.'"[42]

On appeal, the Second Circuit first noted its previous holdings that defense counsel's statements made in an opening argument could be admitted as admissions,[43] and that inconsistent prior pleadings also were admissible.[44] The court then recognized that holding similar government statements inadmissible would lead to an unfair bias.

> We think that the same considerations of fairness and maintaining the integrity of the truth-seeking function of trials that led this Court to find that opening statements of counsel and prior pleadings constitute admissions also require that a prior inconsistent bill of particulars be considered an admission by the government in an appropriate situation.[45]

The court was correct in recognizing that an interpretation of a neutral evidence rule that produces bias in favor of the prosecution cannot stand. Courts, however, need to go even further. They must not only eliminate the bias in the limited circumstances considered in the *GAF* case, but reinterpret the general doctrine of agency admissions by the government to eliminate that doctrine's bias.[46]

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cution of an expert's report. *See GAF*, 928 F.2d at 1257.

42. *Id.* at 1258.

43. *See id.* at 1259 (citing United States v. McKeon, 738 F.2d 26 (2d Cir. 1984)).

44. *See id.* at 1260 (citing Andrews v. Metro North R.R., 882 F.2d 705 (2d Cir. 1989)).

45. *Id.*

46. *Cf.* United States v. Kattar, 840 F.2d 118 (1st Cir. 1988), where the defendant was convicted of extorting money from the Church of Scientology. A prosecution witness

IV. FACIALLY NEUTRAL RULES WITH A DISPARATE IMPACT

Facially neutral rules that are interpreted impartially by the courts can still be biased because their application predominantly helps or hinders one class of parties. An example is the ban on proof of subsequent remedial measures to establish negligence.[47] This doctrine, of course, tends to make it harder to prove negligence. Because plaintiffs have the burden of proof on negligence, the prohibition on subsequent remedial measures disproportionately aids defendants.

The facially neutral provision allowing substantive use of prior inconsistent statements is another rule with a similar

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stated that the Church had once had a "Fair Game policy" whereby "enemies" of the Church "[m]ay be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. [The enemy may] be tricked, sued or lied to or destroyed." *Id.* at 125. Although the witness testified that policy had ended long before the activities prompting the prosecution had occurred, the United States, in other cases, had maintained that the Fair Game policy had continued, *see id.* at 125-26, information that was kept from the jury. *See id.* at 127.

On appeal defendant contended that the assertions from the other cases were admissible as agency admissions. The First Circuit expressed concern about the fairness of the government's actions stating: "[I]t is disturbing to see the Justice Department change the color of its stripes to such a significant degree, portraying an organization, individual, or series of events variously as virtuous and honorable or as corrupt and perfidious, depending on the strategic necessities of the separate litigations." *Id.* at 127. The court, however, did not construe the statements as agency admissions:

> We need not deduce the scope of Rule 801(d)(2)(D) . . . because the statements here were admissible under Rule 801(d)(2)(B) as statements of which the party-opponent "has manifested an adoption or belief in its truth." The Justice Department here has, as clearly as possible, manifested its belief in the substance of the contested documents; it has submitted them to other federal courts to show the truth of the matter contained therein.

Id. at 131; *see also* United States v. Ramirez, 894 F.2d 565, 570 (2d Cir. 1990) (indicating that criminal defendant may introduce at trial statements made by government in search warrant application as adoptive admissions); United States v. Morgan, 581 F.2d 933, 937-38 (D.C. Cir. 1978) (informant's statements that government characterized as "reliable" in sworn affidavit were admissible against government at trial as adoptive admissions).

47. Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FED. R. EVID. 407.

disparate impact.[48] As other commentators have explained, this provision

> is asymmetric in that its benefits accrue almost entirely to the party having the burden of proof, that is, the prosecution in criminal cases and the plaintiff in most aspects of civil actions. The defending party is likely to be content with the traditional rule admitting prior inconsistent statements for impeachment only since if the jury disbelieves the testimony of crucial prosecutorial or plaintiff's witnesses, the defendant will prevail.[49]

Provisions such as these have a disparate impact on the parties, but courts should not attempt to change them. These rules are unlike the truly biased rules that either expressly or through judicial interpretation prohibit a class of parties from introducing evidence or impose special requirements on such a class. These provisions do not explicitly treat civil plaintiffs differently than civil defendants or prosecutors differently than criminal defendants. A defendant, as well as the party with the burden of proof, can seek to introduce a prior inconsistent statement for its substance. A plaintiff will not have to confront its subsequent remedial measure when its contributory or comparative negligence is at stake. Whenever such proof might be relevant, each group of parties confronts the same evidentiary requirements.[50] The disproportionate impact of such rules stems not from the evidence law, but from the substantive law. These are not truly biased evidentiary provisions and should not be changed by the courts.

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48. The Federal Rules of Evidence provide that a statement is not subject to the general ban on hearsay "[i]f the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . ." FED. R. EVID. 801(d)(1)(A).

49. R. LEMPERT & S. SALTZBURG, *supra* note 6, at 507.

50. *See, e.g.*, United States v. Reed, 726 F.2d 570, 579-80 (9th Cir.), *cert. denied* 469 U.S. 871 (1984) (criminal defendants attempt to have prior inconsistent statements of testifying witnesses admitted substantively failed because statements were not made under conditions required by Rule 801(d)).

V. THE BIAS IN ADMISSIONS

The final category of biased evidence rules, admissions, is different from all the other biased provisions.[51] Admissions seem to be facially neutral. The governing provision does not put restrictions on one particular party or grant a special license to another. The rule makes no overt distinctions between the prosecutor or the accused, as the character evidence or penal interest provisions do, or between civil parties, as the old impeachment rule did. Even if the courts neutrally and correctly interpret the agency admissions provisions to apply against the government in criminal cases,[52] the rule, produces asymmetrical results since both sides do not have the same power to introduce identical or comparable evidence.

Statements of the party, of course, can be introduced by the party's opponent, but the party himself cannot introduce his own words. A plaintiff can get into evidence the defendant's hearsay, "I ran the red light." The defendant, however, cannot use the same evidentiary provision to admit his comparable out-of-court statement, "I did not run the red light." Even if the same words are at stake, only one side determines whether the jury will hear them. For example, either party might want admitted the defendant's hearsay statement, "I pushed plaintiff because he made fun of my dog." Even so, only the plaintiff could introduce the statement as an admission.

This unbalanced result, however, is not unreasonable. Parties' objections that their own words should not be used against them

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51. Under the Federal Rules of Evidence,

> [a] statement is not hearsay if . . . The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

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

52. *See supra* text accompanying notes 34-46 (discussing biased construction of agency admissions rule).

ring hollow[53] because these parties are not truly penalized when they cannot introduce the statement they have previously made.[54] Parties can simply get on the stand and testify that they did not run the red light or tell the jury why they pushed the plaintiff. Parties will not be deprived of any meaningful evidence. This unbalanced result of admissions does not really matter when a party's personal words are at issue.

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53. As Professor Morgan stated:

> A litigant can scarcely complain if the court refuses to take seriously his allegation that his extra-judicial statements are so little worthy of credence that the trier of fact should not even consider them. He can hardly be heard to object that he was not under oath or that he had no opportunity to cross-examine himself. Accordingly, his relevant utterances are everywhere receivable as admissions against him for the truth of the matter asserted in them, and it makes no difference whether they were self-serving or against his interest when made. Their content may affect their weight; it cannot control their admissibility.

Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 461 (1929). Similarly, the drafters of the Federal Rules stated:

> Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

FED. R. EVID. 801(d)(2) advisory committee's note. At least one commentator has taken issue with the drafters' position:

> Taken at face value, though, the "adversary system" is a nonjustification justification [for party admissions]—the equivalent of urging "that's the way the system operates." A decision to admit any proof at trial is as readily explained, or not explained, as a product of the adversarial method of trying cases. Of course, here the purported authors of the hearsay proof are the adversaries themselves. But the connection between the declarants' status and the manner in which use of their declarations furthers the goals of the adversarial system is not self-evident.

Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing*, 12 HOFSTRA L. REV. 393, 419 (1984).

54. The drafters of the Federal Rules confronted

> the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. "The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence . . . ."

FED. R. EVID. 801(d)(1) advisory committee's note.

On the other hand, the bias can have a greater effect when vicarious admissions are at stake. The truck driver's statement, "I ran the red light," may be admitted against the truck owner as a vicarious admission. The comparable statement that the truck driver did not run the red light, however, cannot be admitted by the truck owner as an admission. Because of the greater difficulty of producing a non-party witness as compared to having a party testify, the truck owner will find it harder to have the favorable version presented than if personal statements and perceptions of the party were at stake.

Even so, however, these asymmetrical results do not produce a rule biased against a class of parties. Although the words and information of particular witnesses may be treated differently depending on which party is trying to utilize them, systemic bias that always, or generally, favors either the class of plaintiffs or defendants is not produced. Instead, one time a plaintiff may be aided by vicarious admissions in a civil case, and the next time a defendant. Either party may be hampered by not being able to produce the favorable words of the declarant agent, but neither plaintiffs nor defendants as a group should have the greater difficulty in producing the helpful information.[55]

A subset of vicarious admissions, coconspirator statements in criminal cases, however, is different and truly biased. First, the doctrine is biased because only one party, the prosecution, can

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55. Just because vicarious admissions are not generally biased against one class of parties does not mean that the rationale for the doctrine should be insulated from examination. Professor Morgan argued that, "[i]f *B* authorizes *A* to speak for him, he can take no valid exception to the reception of *A's* statements against him which he could not take to the reception of his own." Morgan, *supra* note 53, at 463. Professor Morgan also argued, however, that other statements of agents should not be admitted as admissions unless there are guarantees of reliability for the statements: "If such statements are to be received, their reception must be justified not on any ground of representation but because of the existence of some independent guaranty of trustworthiness." *Id.*

Other commentators have taken a similar position.

> Taken as an argument that evidence law ought not to unreasonably impede proof of employee's [sic] acts for which substantive law makes employers responsible, it is unobjectionable. Where there is reliability and need for such employee utterances, they should be as admissible as any others. However, taken as an argument that employee utterances should be treated as employers' own because there is a need for employers to bear an evidentiary risk coterminus with their substantive risks, the argument is specious.

Bein, *supra* note 53, at 436.

introduce this kind of evidence. Even if the agency admissions rule is correctly interpreted,[56] a criminal defendant still will not be able to introduce coconspirator admissions. The coconspirator rule allows admissibility for a statement that "is offered against a party and is . . . a statement by a coconspirator *of a party* during the course and in furtherance of the conspiracy."[57] While a declarant could, of course, be a coconspirator of those working for the government, those government agents are not the party-opponent of the accused. The government is the party, and the government itself, as distinguished from its employee, cannot be a conspirator.[58] Thus, the declarant cannot be a coconspirator of the party-opponent of the criminal defendant. As a result, the defendant cannot introduce coconspirator admissions in a criminal case.

This fact also makes coconspirator statements in criminal cases different from vicarious admissions in civil cases generally. The vicarious admissions doctrine means that the damaging hearsay of the agent can be introduced against a party without a guarantee that the party will be able to present that declarant's favorable information.[59] The risk of the presentation of adverse evidence without the introduction of the positive evidence falls equally on all civil parties.[60] In criminal cases, however, only the government can introduce coconspirator statements, and therefore, the risk is not equally distributed, but falls solely on the defendant. Furthermore, this bias is exacerbated in criminal cases because criminal defendants have enormous difficulties producing the favorable information from the coconspirator declarants whose damaging hearsay has already been admitted.

In the civil arena, if the truck owner against whom the truck driver's statements have been admitted wants to elicit additional information from the driver, the owner can just call the driver to

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56. *See supra* text accompanying notes 34-46 (discussing biased construction of agency admissions rule).

57. FED. R. EVID. 801(d)(2)(E) (emphasis added).

58. *Cf.* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.10(c), at 262 (2d. ed. 1986) (asserting "it is universally accepted [that] except where the law defining the offense specifically provides otherwise, the conduct giving rise to corporate liability must be 'performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment'") (quoting MODEL PENAL CODE § 2.07(1) (1962)).

59. *See supra* note 55 and accompanying text (discussing vicarious admissions in civil context).

60. *See id.*

testify. While there is no guarantee that this can be done, the owner should have no more difficulty doing this than producing any other witness with information about the litigated event. Indeed, if the driver remains employed by the owner, the owner should find it easier to get this testimony than testimony from other witnesses generally.

The same, of course, is not true for the criminal defendant who wants to solicit further information from the declarant whose coconspirator statement has been introduced. Since evidence will have been produced that indicates the declarant is a conspirator, he will be unlikely to testify willingly. Instead, in all likelihood, he will refuse to testify for the defense and claim a fifth amendment right instead.[61] Thus, the loss of favorable information is not only biased in the criminal area; it will also occur more frequently and have more significance than the loss of similar information in civil trials.

Rules regarding admission of coconspirator statements are biased, then, and this bias is of the most suspect sort since it favors the prosecution over criminal defendants. This bias should not continue.[62] Indeed, it cannot continue. Recent sixth amend-

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61. *Cf.* United States v. Inadi, 475 U.S. 387 (1986) (confrontation clause of Sixth Amendment did not require prosecution to produce declarant to have coconspirator statements admitted).

In *Inadi*, the court stated:

> The declarant and the defendant will have changed from partners in an illegal conspiracy to suspects or defendants in a criminal trial, each with information potentially damaging to the other. The declarant himself may be facing indictment or trial, in which case he has little incentive to aid the prosecution, and yet will be equally wary of coming to the aid of his former partners in crime.

Id. at 395. The Court stressed the practical difficulties the prosecution would have if it were required to produce these declarants. *See id.* at 399.

However, "[w]hatever difficulty a production burden might give the prosecution, the difficulty is even greater for a defendant. He has all the problems encountered by the prosecutor, and then some." Jonakait, *supra* note 2, at 616 (giving examples of special difficulties criminal defendants have in producing such declarants).

62. If courts correctly interpreted the vicarious admissions rule so that statements of government agents were regarded as admissions, the bias of the coconspirator doctrine would be ameliorated. Professor Imwinkelried contends that the refusal to classify the statements of government agents as vicarious admissions violates equal protection and concludes: "[a]s long as the government enjoys a marked superiority in investigative resources and views the coconspirator exception as an essential prosecution weapon, the only feasible cure for the unconstitutionality of the classification will be admitting the relevant evidence on both sides." Imwinkelried, *supra* note 1, at 315. Although admitting the statements of government agents as vicarious admissions would allow the accused

ment cases reveal that the accused has a compulsory process right to introduce statements made by coconspirators. These cases hold that for constitutional purposes statements made by coconspirators must be considered reliable when introduced by either prosecution or defense, and that the accused, therefore, has a sixth amendment right to introduce this trustworthy evidence.

Bourjaily v. United States[63] held that coconspirator statements are inherently reliable.[64] Earlier, the Supreme Court had concluded that the Sixth Amendment's Confrontation Clause[65] allows statements by an absent out-of-court declarant to be admitted against a criminal defendant "only if [the statement] bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[66]

This framework raised questions about the constitutionality of admissions made by coconspirators. On the one hand, coconspirator statements have long been regarded as admissible[67] and have been admitted often.[68] In other words, the coconspirator exception is firmly rooted in hearsay doctrine. Therefore, this type of hearsay is reliable according to the confrontation clause formulation.[69] On the other hand, the hearsay exception for coconspirator statements is not based on reliability. Instead,

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to introduce some evidence that also would be coconspirator declarations, many other coconspirator declarations would not be admissible as vicarious admissions of the government. *See, e.g.*, United States v. Mandel, 437 F. Supp. 262 (D. Md. 1977) (defendant unsuccessfully attempted to introduce declarations by coconspirator's wife), *aff'd on other grounds*, 602 F.2d 653 (4th Cir. 1979) (en banc).

63. 483 U.S. 171 (1987).

64. *See id.* at 183-84.

65. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . " U.S. CONST. amend. VI.

66. Ohio v. Roberts, 448 U.S. 56, 66 (1980); *see also* Idaho v. Wright, 110 S. Ct. 3139, 3146-47 (1990) (reaffirming *Roberts* reliability formulation).

67. The origins of the admissibility of coconspirator statements has been traced back to 17th-century English treason trials. *See* Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323, 325-31 (1984). The United States Supreme Court recognized a form of coconspirator statements as early as 1827. *See* United States v. Gooding, 25 U.S. (12 Wheat.) 460, 469-70 (1827).

68. *See* United States v. Inadi, 475 U.S. 387, 398 (1986) ("The co-conspirator rule apparently is the most frequently used exception to the hearsay rule.").

69. *Bourjaily*, 483 U.S. at 183-84.

> [t]he co-conspirator exception has usually been supported by a variety of theories unrelated to the trustworthiness of the evidence itself. . . . [There] has been . . . a seemingly random appeal to various of the following rationales: (1) a characterization of conspiracy as a relationship of mutual agency, with the admissions of one conspirator thereby being treated as vicarious admissions by the others; (2) a characterization of many of the statements of conspirators as "acts" of the conspiracy (elements, in themselves, of the crime); and (3) an allegation of special need for lax rules of evidence in prosecutions for such a traditionally secret and inchoate crime.[70]

Since coconspirator statements as a class are not in reality reliable, the confrontation clause formulation might indicate that even though these statements fall within a standard hearsay exception, they could be constitutionally admitted by a prosecutor only when accompanied with a showing of particularized guar-

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70. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384-85 (1972) (footnotes omitted); *see also* Note, FEDERAL RULE OF EVIDENCE 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay, 53 FORDHAM L. REV. 1291 (1985). Furthermore:

> [A] fictional criminal agency theory is frequently used to justify [the] admissibility of alleged coconspirator's statements. . . . A more candid explanation for the coconspirator exception is that coconspirator statements are necessary tools for prosecuting conspiracies, which are inherently covert and therefore difficult to prove. . . . Trustworthiness problems with coconspirator statements . . . remain manifold.

Id. at 1296-98 (footnotes omitted).

The coconspirator exception evolved differently from other exceptions to the hearsay rule.

> The *exceptions* to the hearsay rule evolved because of their inherent reliability. The coconspirator *exemption*, on the other hand, arose as a rule of conspiracy law, is supported by a series of legal fictions, and is based primarily upon policy notions that are completely unrelated to evidence considerations.

Note, *Reconciling the Conflict Between the Coconspirator Exemption From the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1300 (1985) (emphasis in original).

The drafters of the Federal Rules of Evidence also recognized that "the agency theory of conspiracy is at best a fiction . . . ." FED. R. EVID. 801(d)(2)(E) advisory committee's note. The advisory committee stated that the reliability of the evidence did not justify the admissibility of any admissions. "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission." FED. R. EVID. 801(d)(2) advisory committee's note.

antees of trustworthiness. *Bourjaily* resolved this conflict by rejecting the particularized guarantees approach and deeming all coconspirator statements falling within the exception constitutionally reliable.

> [C]o-conspirators' statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion. Accordingly, we hold that the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E).[71]

Although the reliability of coconspirator hearsay may truly be only a fiction, it now has constitutional reality. The prosecutor offers constitutionally reliable evidence when he presents coconspirator statements. The accused must, therefore, also be submitting reliable evidence when he seeks to introduce coconspirator hearsay evidence unless that trustworthiness depends on the identity of the evidence's proponent. *Idaho v. Wright*[72] and *United States v. Inadi*,[73] however, show that, under the Sixth Amendment, inherent reliability of coconspirator hearsay does not hinge on who offers it.

Wright held that certain hearsay statements admitted under Idaho's residual hearsay exception in a child sexual abuse case violated the Confrontation Clause.[74] In reaching that result, the Court first decided that Idaho's residual exception was not a firmly rooted one and, therefore, the evidence could satisfy the Confrontation Clause only if the hearsay had particularized guarantees of trustworthiness.[75] Such guarantees, the Court continued, had to produce evidence at least as reliable as that admitted under a firmly rooted hearsay exception and that those exceptions admitted statements "so trustworthy that adversarial testing would add little to [their] reliability."[76] Consequently, hearsay is

71. *Bourjaily*, 483 U.S. at 183-84.
72. 110 S. Ct. 3139 (1990).
73. 475 U.S. 387 (1986).
74. *See Wright*, 110 S. Ct. at 3152-53.
75. *See id.* at 3147-48.
76. *Id.* at 3149.

not constitutionally reliable because it is corroborated by other trial evidence.[77] Instead, it satisfies the Sixth Amendment only if it has the necessary guarantees of trustworthiness at the time it was uttered:

> Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the . . . out-of-court statement.
>
> . . . [The Court declines] to endorse a mechanical test for determining "particularized guarantees of trustworthiness" under the Clause. Rather, the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.[78]

Wright teaches that reliability is measured not by what happens at trial, but by what happened at the making of the out-of-court statement. The circumstances existing when the statement was uttered must indicate that adversarial testing would matter little. The identity of the offering party, then, cannot affect the constitutional reliability of the hearsay because that identity arises subsequent to the utterance of the statement.

Coconspirator statements must be reliable, then, because of the conditions surrounding their utterance. Indeed, in deciding that the prosecution could constitutionally introduce coconspirator statements without showing the unavailability of the declarant, the Supreme Court specifically indicated that this hearsay's chief value stems from the context of its making.

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77. As the Court in *Wright* explained:

> To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. . . .
>
> In short, the use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.

Id. at 3150.

78. *Id.*

> Because [the statements] are made while the conspiracy is in progress, [coconspirator] statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. When the Government—as here—offers the statement of one drug dealer to another in furtherance of an illegal conspiracy, the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. . . .
>
> . . . .
>
> [C]o-conspirator statements, derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence.[79]

Coconspirator statements are reliable for constitutional purposes because of the context in which they were made, not because of who offers them. This hearsay is trustworthy under the Sixth Amendment simply because it was made by a conspirator in furtherance of and during the conspiracy. The context existing at the time of the statement's utterance makes it reliable. Whenever a criminal defendant offers coconspirator statements made under these conditions, he is offering constitutionally reliable evidence. The happenstance of who the declarant was conspiring with, or who the parties are now, does not affect the statement's reliability. Therefore, *any* statements by a conspirator that aided the illegal enterprise while the conspiracy existed is trustworthy under the Sixth Amendment.[80]

Consequently, the criminal defendant has a right under the Compulsory Process Clause of the Sixth Amendment to introduce such evidence. While the plain language of that clause might be read only as a guarantee that a criminal defendant should be able to subpoena witnesses,[81] compulsory process also grants a right

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79. United States v. Inadi, 475 U.S. 387, 395-96 (1986).

80. In other words, as long as the statement could have been introduced into a criminal trial of the declarant's coconspirator, the statement must be constitutionally reliable when offered by a criminal defendant.

81. The Sixth Amendment provides in relevant part: "In all criminal prosecutions,

to have defense evidence heard by the jury. As the United States Supreme Court explained:

> The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words . . . .[82]

This guarantee of introducing evidence, however, is not absolute. "[T]he right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'"[83]

The biased nature of the restriction on defense evidence, while often important, is not the controlling factor in determining whether an accused's compulsory process guarantee has been violated.[84] Rules that place special burdens on the defendant do

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the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI.

82. Taylor v. Illinois, 484 U.S. 400, 409 (1988). The Court then quoted from its first modern compulsory process case:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

83. Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

84. As commentators have pointed out:

> Whenever a rule enables the government to produce witnesses that the accused cannot, that rule is, under the sixth amendment, suspect. It is but a small step from this realization to the position that rules that do not interfere with the defendant's subpoena power but prevent the witnesses a defendant calls from testifying are likely to offend the core principle of compulsory process unless the rule would have similarly barred the state from introducing the evidence in question.

R. LEMPERT & S. SALTZBURG, *supra* note 6, at 628; *see also* White, *Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence*, 80 J. CRIM. L. & CRIMINOLOGY 377, 393 (1990) ("Barring unusual circumstances, then, a privilege should not be invoked to exclude evidence offered by the defense unless it could also be invoked to exclude comparable evidence offered by the prosecution.").

not necessarily violate the Sixth Amendment,[85] and evenhanded rules do not necessarily pass constitutional muster.[86] Instead, arbitrariness is the touchstone.[87] As the Court stated in *Rock v.*

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85. In Taylor v. Illinois, the United States Supreme Court upheld, against a compulsory process claim, the preclusion of a defense witness whose identity had not been furnished in accordance with a pretrial discovery request. *See* 484 U.S. 400, 413 (1980). Although the discovery rules apparently were not biased in the prosecutor's favor, the opinion does not rely on that fact. The preclusion of the accused's witness because of the violation of a notice of alibi statute would apparently also be upheld, according to the logic of *Taylor*, even though an alibi notice requirement disproportionately affects the defense, since the accused's violation would prevent the presentation of a defense, while a prosecutorial violation would only prohibit rebuttal testimony.

Michigan v. Lucas, 111 S. Ct. 1743 (1991), indicates that evidentiary provisions biased in favor of the prosecution do not always violate the Compulsory Process Clause. The *Lucas* court noted that *Wright* held that defense evidence can be precluded for failure to comply with a rape shield statute. *See id.* at 1747-48. The rape shield statute is not neutral since it only prohibits defense evidence. The Court, relying heavily on Taylor v. Illinois, decided the case under general sixth amendment rights, without distinguishing between confrontation and compulsory process rights. *See id.* at 1748.

86. In Rock v. Arkansas, 483 U.S. 44 (1987), the Court found a compulsory process violation because Arkansas prohibited the criminal defendant from giving hypnotically refreshed testimony. *See id.* at 62. This was not a biased rule, because Arkansas forbade such testimony by all witnesses. *See* Rock v. State, 288 Ark. 566, 708 S.W.2d 78, 80 (1986), *vacated*, 484 U.S. 44 (1987).

87. This was indicated in the Court's first modern compulsory process case, Washington v. Texas, 388 U.S. 14 (1967). In *Washington* the Supreme Court struck down a Texas rule that prohibited an alleged accomplice from testifying on an accused's behalf while permitting the alleged accomplice to testify for the prosecution. *See id.* at 16-17. Although that bias was important to the outcome, the Court held the rule unconstitutional, not because of the bias, but because of the rule's arbitrariness:

> We hold that [Washington] was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.

Id. at 23.

The bias, however, was an important factor because it was evidence of the rule's arbitrariness.

> The absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant. Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large. Moreover, under the Texas statutes the accused accomplice is no longer disqualified if he is acquitted at his own trial. Presumably, he would then be free to testify on behalf of his comrade, secure in the knowledge that he could incriminate himself as freely as he liked in his testimony, since he could not again be prosecuted for the same offense. The

Arkansas,[88] which held unconstitutional a rule prohibiting the accused's hypnotically refreshed testimony, "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."[89]

Restrictions are not arbitrary if they reasonably help to assure an orderly trial and do not forbid the accused from presenting favorable evidence to the jury.[90] Discovery provisions

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> Texas law leaves him free to testify when he has a great incentive to perjury, and bars his testimony in situations where he has a lesser motive to lie.

Id. at 22-23. Justice Harlan, concurring in the result, found a due process violation, not a compulsory process one, precisely because of the bias: "[T]he State may not constitutionally forbid . . . a criminal defendant [] from introducing on his own behalf the important testimony of one indicted in connection with the same offense, who would not, however, be barred from testifying if called by the prosecution." *Id.* at 24 (Harlan, J., concurring).

Professor Westen summarizes *Washington v. Texas* as follows:

> *Washington* . . . construed the defendant's right to present witnesses in his favor without reference to the corresponding rights of the prosecution. Justice Harlan invited the Court to invalidate the Texas rule not because it was arbitrary, but because it discriminated against the accused. . . .
>
> The Court, while agreeing with Harlan that the rule was discriminatory, refused to rest on that narrow ground. It distinguished between the discriminatory effect of the rule and its "arbitrary" effect.

Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 73, 116 (1974) (footnote omitted). However, Professor White states that "[t]he principle of evenhandedness finds support in . . . *Washington v. Texas*. . . . In condemning a Texas rule of incompetency as arbitrary, the Court emphasized that the Texas rule did not apply to government evidence in the same way as it did to defense evidence." White, *supra* note 84, at 401 (footnote omitted).

The discriminatory use of evidence also can play an important role in determining due process violations. In Green v. Georgia, 442 U.S. 95 (1979), the Court found a due process violation when Green, the defendant, was not allowed to introduce a codefendant's confession into his capital sentencing trial. *See id.* at 97. The Court held that the confession should have been admitted because it was highly relevant and good reason existed to believe it reliable. *See id.* The Court noted, "Perhaps most important, the State considered the testimony sufficiently reliable to use it against [the codefendant], and to base a sentence of death upon it." *Id.*

88. 483 U.S. 44 (1987).

89. *Id.* at 55-56. This principle applies not only to rules that totally prevent a witness from testifying, but also to rules that prohibit part of a person's testimony. "Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Id.* at 55.

90. *See* United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). In *Valenzuela-*

provide an example. The state has a legitimate interest in an efficient discovery process.[91] Furthermore, such restrictive rules do not prevent the accused from presenting testimony, for as long as the defendant follows the prescribed procedures, he can introduce his favorable evidence to the jury. Consequently, sanctions for defense violations of discovery provisions are not unconstitutional.[92]

In contrast, restrictions placed on the defense are arbitrary if they prevent the accused from presenting evidence that could reasonably sway the jury. "Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."[93]

Evidentiary rules that forbid a criminal defendant from presenting unreliable evidence or evidence that cannot be accurately evaluated by the jury will not violate the Compulsory Process Clause. Such proof cannot properly influence the determination of guilt.[94] The Supreme Court has made clear, however, that this principle cannot justify the exclusion of a category of evidence, even though that category generally contains untrustworthy information, if it might be trustworthy some of the time or if it is possible for the jury still to evaluate it. As *Rock v. Arkansas* concluded:

> A State's legitimate interest in barring unreliable evidence

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Bernal, the court held that "more than the mere absence of testimony is necessary to establish a violation of the [compulsory process] right. . . . [The defendant] must at least make some plausible showing of how [the] testimony would have been both material and favorable to his defense." *Id.* at 867. While this may be a significant burden when potential defense witnesses have been deported, as they were in *Valenzuela-Bernal*, examining the content of the coconspirator hearsay should easily reveal whether the proffered information is material and favorable to the defense.

91. *See* Taylor v. Illinois, 484 U.S. 400, 411 (1988). In *Taylor*, the Court held that "[t]he State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence." *Id.*

92. *See id.* at 415-16; *see also* Michigan v. Lucas, 111 S. Ct. 1743 (1991) (upholding preclusion of evidence for defense violations of discovery provisions).

93. Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987).

94. *See* Westen, *Compulsory Process II*, 74 MICH. L. REV. 192, 213 (1975) (defense evidence can be excluded if it "is so inflammatory or prejudicial as to induce the fact-finder to disregard its instructions and decide the case on irrational grounds").

> does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections. . . . [The State] has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.[95]

This principle means that the per se rule preventing a criminal defendant from introducing coconspirator statements made during and in furtherance of the conspiracy violates the Compulsory Process Clause. Coconspirator hearsay offered by an accused is not so unreliable that it could not be reliable in an individual case. Indeed, the Supreme Court has held such evidence inherently reliable for sixth amendment purposes. Coconspirator statements can be evaluated by the jury, as its widespread admission against criminal defendants indicates. The rule preventing the defendant from introducing such evidence is arbitrary and violates the Sixth Amendment's Compulsory Process Clause.[96] While biased evidence rules may not invariably violate the Compulsory Process Clause, that clause does require that the

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95. 483 U.S. at 61; *cf.* Westen, *supra* note 87, at 133-36 (defendant has constitutional right to produce any witness whose ability to give reliable evidence is something about which reasonable people can differ).

96. It is difficult to tell at this point whether recognizing the defendant's right to introduce coconspirator statements will have much significance. Attorneys have not been seeking admission of evidence on this ground, and there is now no way to gauge the prevalence of such evidence that the defense would like to introduce. Such cases, however, do exist. *See* United States v. Mandel, 437 F. Supp. 262 (D. Md. 1977), *aff'd on other grounds*, 602 F.2d 653 (4th Cir. 1979) (en banc). In *Mandel* the prosecution claimed that Hess, the Rodgers brothers, and Governor Mandel were in cahoots in nefarious activities involving a racetrack. Mandel sought to introduce statements of Dorothy Rodgers, wife of one of the defendants, that she heard Hess and her husband state that Governor Mandel would be shocked by the activities of Hess and Rodgers. *See id.* at 263. Rodgers then instructed her to keep those activities secret from the Governor. *See id.* These statements certainly appear to be statements of conspirators made during and in furtherance of a conspiracy. Mandel, however, could not get Mrs. Rodgers testimony admitted under Rule 801(d)(1)(E). In fact, the trial court did not even discuss the coconspirator exemption and only analyzed whether the statements were admissible under Rule 803(3), the hearsay exception for statements of then existing mental, emotional, or physical condition. *See id.* at 264. Such testimony, however, should now be admitted because it is required by the Compulsory Process Clause.

accused be allowed to introduce coconspirator statements in his defense.

VI. CONCLUSION

Evidence rules that do not grant the parties equal mechanisms for admitting or excluding evidence can harm the adversary system. The judiciary, however, should not reform all such biased provisions. A court's course of action should depend on whether the rule is affecting civil or criminal actions, which party is favored by the rule, and how the bias was created. Any rule that makes distinctions between civil parties, tilts toward the prosecution, or was manufactured by a court's interpretation of a neutral provision should be changed.