PRIORITIZING PROOF OF INNOCENCE

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It is an honor to take part in a symposium with so many experts who are doing impressive work to prevent and remediate wrongful convictions. I am grateful for the opportunity to visit the Rutgers-Newark campus and see first-hand the significant academic and clinical infrastructure that this school has devoted to exonerating the innocent. Rutgers provides a model for the rest of the nation in many respects. I very much appreciate the hospitality extended to me by Professor Laura Cohen, who directs the Rutgers Criminal and Youth Justice Clinic, and by Editor-in-Chief Sarah Calderone of the *Rutgers University Law Review*.

My contribution to this symposium is to propose rule amendments that would help to avoid wrongful convictions in the first instance. Of course, there are many categories of rules that need reform, including rules of criminal procedure, rules governing police conduct, and internal

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disciplinary rules for prosecuting agencies. My focus here will be narrow, given the word limits for a symposium essay. I will offer amendments to improve the evidentiary rules and the rules of legal ethics. Those rules are more or less uniform throughout the United States, so the proposals offered here could potentially be of use in many jurisdictions.

Several aspects of the current evidentiary and ethical rules heighten the likelihood of wrongful convictions.[1] Space does not permit a comprehensive review of all such rules. Rather, this Essay will pay particular attention to rules relating to exculpatory evidence—including both evidence tending to negate the culpability of the accused, as well as evidence pointing to the culpability of an uncharged party.

A recent exoneration illustrates the risk that evidentiary and ethical rules can cause wrongful convictions. The "most high-profile killing in Oregon history" took place in 1989, when a murderer viciously stabbed the state's highest-ranking prison official.[2] Frank Gable was charged with the murder and convicted in 1991, even though the prosecution could not produce any physical evidence of Gable's involvement.[3] The trial court barred Gable from offering a confession by a third party who said he had committed the murder, and who provided details that only

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1. Some scholarship has addressed the role of the current evidence rules in causing wrongful convictions. *See, e.g.*, Jeffrey Bellin, *The Evidence Rules That Convict the Innocent*, 106 CORNELL L. REV. 305, 324–43 (2021) (arguing that some false convictions are attributable to evidence rules permitting the admission of mistaken identifications and unreliable confessions by the accused); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record – Lessons from the Wrongfully Convicted,* 5 J. EMPIRICAL LEGAL STUD. 477, 483 n.19 (2008) (finding that, among exonerated defendants, the most common reason given for their failure to testify at trial was their fear of impeachment with their prior convictions as permitted by the current language of Federal Rule of Evidence 609 and its state counterparts). Scholars have also faulted the rules of legal ethics for failing to protect against wrongful convictions. *See, e.g.*, Victor S. Johnson, *Prosecutorial Ethics and Wrongful Convictions*, 1 BELMONT CRIM. L.J. 37, 42 (2018) (arguing that under the current rules, prosecutors are prone to "tunnel vision" that leads to wrongful convictions); Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1452 (2018) (suggesting an "alternative ethical framework" to reduce wrongful convictions resulting from prosecutors' presentation of dubious testimony by experts or informants). I acknowledge that the cause of rooting out wrongful convictions necessitates reexamination of all evidentiary and ethical rules, not just the ones on which I focus in this Essay.

2. Jim Redden, *Federal Judge Berates Oregon Justice Department, Marion County DA over Gable Decision Delay*, PORTLAND TRIB. (May 3, 2023), https://www.portlandtribune.com/news/federal-judge-berates-oregon-justice-department-marion-county-da-over-gable-decision-delay/article_2d50fb04-e850-11ed-9ca4-5fd9e812a04e.html.

3. *Id.*

the actual murderer would know.[4] Gable spent nearly three decades in prison. Finally, in 2019, a U.S. magistrate judge overturned Gable's conviction after determining that his conviction was wrongful due to the "trial court's mechanistic application of the Oregon Rules of Evidence"[5]—rules that were identical, in pertinent part, to the rules currently used in federal court and in most states.[6] The Ninth Circuit affirmed in 2022, faulting the trial court's exclusion of the third-party confession.[7] The Oregon Attorney General petitioned for the U.S. Supreme Court to reinstate Gable's conviction,[8] and the Court denied review on April 24, 2023.[9] When the government's attorneys indicated in a rehearing that they might still try to recharge Gable for the killing, a federal district court finally dismissed the charges with prejudice on May 8, 2023.[10] The prosecution never acknowledged an ethical duty to drop the charges due to the mounting evidence of Gable's innocence.[11] If more appropriate evidentiary and ethical rules had been in place at the time of Gable's trial, there is a strong chance that he could have avoided conviction and three decades of incarceration.[12]

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4. Gable v. Williams, No. 3:07-cv-00413-AC, 2019 WL 1756468, at *16–22, *33–35 (D. Or. Apr. 18, 2019), *aff'd*, 49 F.4th 1315 (9th Cir. 2022).

5. *Id.* at *37.

6. The rules at issue in the exclusion of the third-party evidence in the Gable case—the general relevance rule, the general prejudice rule, and the hearsay exception for statements against interest—have been substantively identical in the Federal Rules of Evidence and the Oregon Evidence Code since the 1970s. Tom Lininger, *Should Oregon Adopt the New Federal Rules of Evidence?*, 89 OR. L. REV. 1407, 1408–17 (2011) (noting that most states copy the federal model for their evidence codes, and Oregon's few deviations have not related to the rules for relevancy, prejudice, or statements against interest).

7. *Gable*, 49 F.4th at 1330–31.

8. Petition for Writ of Certiorari, *Gable*, 49 F.4th 1315 (Nos. 19-35427, 19-35436), https://www.supremecourt.gov/DocketPDF/22/22-581/250541/20221220180240318_GABLE%20petition.pdf.

9. Steward v. Gable, 143 S. Ct. 1796 (2023).

10. *See* Redden, *supra* note 2; Maxine Bernstein, *Judge Grants Frank Gable Full Release, Bars Oregon from Retrying Him in 1989 Killing of State Prisons Chief*, OREGONLIVE (May 8, 2023, 5:32 PM), https://www.oregonlive.com/crime/2023/05/judge-grants-frank-gable-full-release-bars-oregon-from-retrying-him-in-killing-of-oregon-prisons-chief.html.

11. In 2008, the American Bar Association updated their Model Rules of Professional Conduct, including language requiring that when clear and convincing evidence indicates a conviction is wrongful, prosecutors must seek to undo the conviction. MODEL RULES OF PRO. CONDUCT r. 3.8(h) (AM. BAR ASS'N 2008). Many states, including Oregon, never adopted this amendment, however, and do not have similar language in their ethics codes.

12. For example, part of the reason why the trial judge in Gable's prosecution excluded the third-party confession was the inability of the defense to provide the corroboration required under Oregon's version of the statement-against-interest rule. Petition for Writ of Certiorari, *supra* note 8, at 5–6. One of this Essay's proposals is to do away with the corroboration requirement. *See infra* Section I.G.

In this Essay, I will offer twelve proposals for reform of the evidentiary and ethical rules to prioritize proof of innocence. In the following sections, the language of both the current rules and the proposed amendments will appear in italics. Strikethroughs will indicate deletions (e.g., ~~deletion~~), and underlining will indicate additions (e.g., addition). The explanations of the proposals will be brief due to space constraints, but will offer a starting point for discussion and future scholarship. After presenting the twelve proposals for rule amendments, I will list and reply to foreseeable objections.

I. PROPOSED AMENDMENTS TO EVIDENCE RULES

A. General Purposes

Federal Rule of Evidence 102 and its state counterparts should be amended to read as follows:

> **Purpose**
>
> *These rules should be construed so as to administer every proceeding fairly, to eliminate unjustifiable expense and delay, to maximize opportunities for proof that the accused is innocent, and to promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.*

Rule 102 functions as a preamble. Its general language gives way to more particular provisions in the rules that follow. In some instances, however, the statement of purposes in Rule 102 can guide judges' and parties' interpretation of more specific rules.[13] When the specific rules seem to be in conflict, or when rules are amenable to two different interpretation, a citation to an overarching purpose in the Rule 102 could be a tiebreaker.

Right now, the list of purposes in Rule 102 is underinclusive. It omits the paramount concern of protecting against wrongful convictions. If Blackstone was correct that freeing ten guilty people is preferable to convicting one innocent person,[14] then Rule 102 must elevate the exoneration of the innocent to at least the same tier as the efficiency and truth-seeking goals presently memorialized in Rule 102. The proposed amendment uses the phrase "maximizing opportunities of proof that the

13. Rule 102 "reads more like a hortatory declaration than a master switch that controls the rules." 21 FED. PRAC. & PROC. EVID. § 5021 (2d ed. 2023).

14. 15 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 ("[T]he law holds that it is better that ten guilty persons escape, than that one innocent suffer.").

accused is innocent" to guide judges in weighing various priorities that may be in conflict.[15]

B. Exclusion Due to Prejudice, Delay, or Confusion

The second paragraph of the notes following Federal Rule of Evidence 403 and its state counterparts should be amended to read as follows:

> *Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Evidence tending to show the innocence of the accused generally should not be excluded under Rule 403, as the harmful effect of admitting such evidence usually does not substantially outweigh its probative value.*

Rule 403 allows a judge to exclude relevant evidence if prejudice, confusion, or delay would substantially outweigh probative value. This balancing is highly discretionary,[16] and it provides opportunities for judges to express their impatience that evidence of third-party culpability is too distracting or time consuming.

The proposed revision to the commentary following Rule 403 would make clear that the game is worth the candle when the judge is considering whether to admit exculpatory evidence. Because such evidence has significant probative value on the most material issue in a criminal trial—the guilt or innocence of the accused—the judge must tolerate a commensurate amount of prejudice, complication, or delay. The U.S. Constitution sometimes requires admission of exculpatory evidence, including evidence pointing to third-party guilt, even if the evidence rules might seem to permit exclusion.[17] Only where such adverse effects substantially outweigh probative value would exclusion be appropriate. The proposed amendment indicates that exculpatory evidence "usually"

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15. In its current form, Rule 102 does not "provide any guidance as to how to weigh competing considerations when, for example, concerns for efficiency (expense? delay?) conflict with notions of fairness." FED. R. EVID. 102.

16. Aviva Orenstein, *Propensity or Stereotype?: A Misguided Experiment in Indian Country*, 19 CORNELL J.L. & PUB. POL'Y 173, 179 (2009) ("The application of Rule 403 is highly discretionary.").

17. *E.g.*, Chambers v. Mississippi, 410 U.S. 284, 298–302 (1973) (holding that, in criminal prosecution, exclusion of third-party confessions violated defendant's constitutional rights even if the evidentiary rules could abide this result; the rules "may not be applied mechanistically to defeat the ends of justice").

does not cause such disproportionate harm that the judge should decline to admit the evidence.

C. Extrinsic Uncharged Conduct

Federal Rule of Evidence 404(b) and its state counterparts should be amended to read as follows:

> **(b) Other Crimes, Wrongs, or Acts.**
>
> **(1) Prohibited Uses.** Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> **(2) Permitted Uses.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, ~~or~~ lack of accident, or, in a criminal case, another person's commission of an act that the government has charged the accused with committing.
>
> **(3) Notice in a Criminal Case.** In a criminal case, the prosecutor must:
>
> (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
> (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
> (C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Rule 404(b) applies more frequently to criminal trials than to civil trials.[18] The rule forbids a propensity inference based on uncharged

18. Gregg M. Jacobson, *The Usefulness of Rule 404(b) and the Doctrine of Chances in Civil Construction Cases*, ABA (Sept. 7, 2017), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2017/summer/usefulness-rule-404/#:~:text=Rule%20404(b)%20states%20that,knowledge%2C%20or%20absence%20of%20mistake.&text=This%20rule%20of%20evidence%20is,criminally%20underutilized%20in%20civil%20trials.

extrinsic acts.[19] In other words, a prosecutor could not point to past crimes outside the scope of the indictment and make a facile argument about a penchant for criminality: *once a criminal, always a criminal.*[20] While the exceptions in Rule 404(b)(2) limit the protection in Rule 404(b)(1), the rule against admitting uncharged extrinsic acts generally operates to the benefit of the accused—at least to the extent that the judge interprets Rule 404(b) to give the accused a "clean slate" at trial.

Some authority suggests that Rule 404(b) could bar the admission of evidence indicating that an uncharged person has committed criminal or wrongful acts.[21] When the accused seeks to inculpate that uncharged person as the one who committed the presently charged offense, a strict reading of Rule 404(b) could lead the judge to overrule this defense strategy unless the defendant has invoked one of the permissible purposes listed in Rule 404(b)(2).[22] This risk is the reason why the proposed amendment creates a new exception under Rule 404(b)(2). With the amendment in place, the accused should be in a stronger position to show that a third person committed the charged offense.[23] The new exception is much more general than the other existing exceptions, which is appropriate because the third person covered by the exception would

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19. Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 789 (2018) (discussing that "Rule 404(b) is designed to prevent convictions based upon a criminal defendant's propensity to behave in certain ways," although trial courts do not always interpret the rule in a way that is faithful to this purpose).

20. *Id.* at 776 ("Fundamental to the adversary system is the principle that a person should be convicted for what she has done and not for who she is.").

21. This application of 404(b) evidence is sometimes referred to as "reverse 404(b)." *See, e.g.*, Jessica Broderick, *Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U. COLO. L. REV. 587, 594–99 (2008) (explaining this application of Rule 404(b)).

22. Edward J. Imwinkelried, *Evidence of Third Party's Guilt of the Crime that the Accused Is Charged with: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0*, 47 LOY. U. CHI. L. J. 91, 101–02 (2015) (observing that when the defendants offer reverse 404(b) evidence in criminal trials, "most courts apply the character evidence prohibition as rigorously to such testimony as they do when the prosecution offers evidence of an accused's uncharged misconduct. They see no basis in the text of the rule for treating the misconduct of the accused and that of a third party differently"); Broderick, *supra* note 21, at 596 (indicating that while courts do not treat such evidence in a uniform way, one approach has been to apply Rule 404(b) and require that a defendant identify a purpose in Rule 404(b)(2) that could allow admission of the evidence).

23. *Cf.* Broderick, *supra* note 21, at 597 (observing that at the present time, "no decisions expressly hold that 404(b) does not apply to third parties when defendants offer reverse 404(b) evidence").

usually not be a party in the current trial, and therefore the risk of prejudice to that person would be much lower.[24]

One possible objection to this proposal is that the exceptions under Rule 404(b) are generally for proving an actor's mental state rather than for proving which actor committed the presently charged offense.[25] While that generalization is true for the most part, there is currently an exception for proof of identity, which is available when an actor has used a distinctive modus operandi in the past, and this history supports an inference that the actor is also responsible for the presently charged offense.[26] The amendment proposed in this Essay would be a logical extension of the longstanding exception for proof of identity, but would not require the proponent to show a pattern indicating the actor had continued to commit a "signature crime."

D. Expert Testimony on Mens Rea

Federal Rule of Evidence 704 and its state counterparts should be amended to read as follows:

> **Opinion on an Ultimate Issue**
>
> ~~(a) In General—Not Automatically Objectionable.~~ An opinion is not objectionable just because it reaches an ultimate issue.
>
> ~~(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.~~

In 1981, John Hinckley, Jr. attempted to assassinate President Ronald Reagan.[27] Hinckley won a verdict of not guilty by reason of insanity.[28] Congress reacted by passing the Insanity Defense Reform Act of 1984,

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24. If the third person were indeed a party to the present trial, the court could address the risk of prejudice by severing the defendants. *E.g.*, FED. R. CRIM. P. 14 (allowing severance of jointly charged defendants if evidence admissible in the trial of one defendant would cause undue prejudice to the second defendant in a joint trial).

25. Six of the nine permissible purposes listed in Rule 404(b)(2) seem to relate to state of mind: e.g., proof of motive, intent, knowledge, plan, absence of mistake, and lack of accident. FED. R. EVID. 404(b).

26. *Id.*

27. David Cohen, *Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)*, 40 U. FLA. L. REV. 541, 542 (1988).

28. *Id.*

which included a provision adding Federal Rule of Evidence 704(b).[29] That new rule prevented experts from giving opinions on the mens rea of the accused, even though experts could give opinions on all other offense elements.[30]

Rule 704(b) unduly hinders proof of innocence. A person who commits an act prohibited by a criminal statute, but who commits this act without the mental state specified in the statute, is not culpable in any meaningful sense. One example could be a street-level drug dealer who belies he is selling a particular substance but is actually selling a different substance subject to much higher penalties. Another example could be an unhoused person struggling with mental illness who enters a residence without permission but does not intend to commit a felony there. A third example might be a person who shoots a police officer during execution of a search warrant because the shooter mistakes the officer for a burglar. All of these people could face significant incarceration for crimes that depend on guilty mental states, and all of these people should be able to offer expert testimony demonstrating that their mental states were innocent. Public funding is available to pay for expert testimony when the accused is indigent,[31] so the only remaining impediment to the use of such testimony is Rule 704(b). The amendment proposed in this Essay would delete the "Hinckley rule" altogether and restore Rule 704 to its pre-1984 language.

E. Exclusions from Hearsay Definition

Federal Rule of Evidence 801(d) and its state counterparts should be amended to read as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > **(1) A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> >
> > > (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

29. *Id.* at 541–42, 545–47 (explaining the history of Rule 704(b)).
30. FED. R. EVID. 704(b).
31. FED. R. EVID. 706 (providing that court can cover expert fees for indigent parties).

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

(3) A Statement Constituting a Crime. The statement is offered by an accused who is not the declarant, and the statement constitutes a criminal violation or an overt act in furtherance of a criminal conspiracy, whether or not the declarant has been charged, is a party to the present action, or is available for testimony or cross-examination in the present action.

One of the most egregious asymmetries in evidence codes today is the government's ability to introduce "co-conspirator statements" as nonhearsay, while the accused has very limited ability to introduce a

statement evincing a criminal act by another person.[32] As currently written, Rule 801(d)(1)(E) extends the definition of an admission by a party-opponent to include a statement uttered by a co-conspirator of the defendant currently standing trial, even if the co-conspirator has not been charged, so long as the statement somehow furthered the conspiracy. The government can satisfy these predicates with a mere preponderance of the evidence,[33] and then the government can rely on the co-conspirator statement as part of the proof that the accused is guilty beyond a reasonable doubt. By contrast, the accused is not able to offer a third person's statement under Rule 801(d)(2), even if that utterance constitutes a criminal violation, because the accused cannot show the requisite relationship between the third person and the government (the party-opponent).[34] The limited utility of Rule 801(d) for the accused can hamper efforts to pin the blame for the charged offense on a third person.

A better approach would be the amendment proposed in this Essay. Under the amendment, an accused could offer another person's out-of-court statement constituting a crime, including, but not limited to, an overt act in furtherance of a conspiracy. The declarant would not need to have been charged with the offense, because no such requirement exists when the government offers a co-conspirator statement under Rule 801(d)(2)(E).[35] The declarant would not need to be available for cross-examination because such availability is not necessary for the court to admit a co-conspirator statement offered by the government.[36] The

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32. The accused presently cannot introduce a co-conspirator statement under Rule 801(d)(2)(E) because the declarant would have no affiliation with a party-opponent of the accused. FED. R. EVID. 801(d)(2) (requiring that evidence in this subsection only applies to statements by affiliates of opposing party); *see* Comments by Paul L. Shechtman, *Conference on Proposed Amendments: Experts, the Rule of Completeness, and Sequestration of Witnesses*, 87 FORDHAM L. REV. 1361, 1406–08 (2019) (noting the asymmetry whereby government can introduce co-conspirator statements but accused cannot introduce such statements, even when they are potentially exculpatory).

33. Bourjaily v. United States, 483 U.S. 171, 175–76 (1987) (holding that preponderance standard governs preliminary determination of whether government has shown all the predicates for admission of a co-conspirator statement under Rule 801(d)(2)(E); even statement itself can be part of government's preliminary proof to establish these predicates).

34. Shechtman, *supra* note 32, at 1406–08.

35. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE § 8:59, Westlaw (database updated Aug. 2023) ("The requirement that the party against whom a coconspirator statement is offered be a member of a conspiracy does not mean he must be charged with conspiring. As legislative history recognizes, the exception operates even if no conspiracy charges are brought.") (internal citations omitted).

36. *Compare* FED. R. EVID. 801(d)(1) (including a requirement that the declarant be available for cross-examination), *with* FED. R. EVID. 801(d)(2) (omitting this requirement); *see* Giles v. California, 554 U.S. 353, 374 n.6 (2008) (indicating that statements in furtherance of a conspiracy will generally not be "testimonial" for purposes of the Supreme

amendment would promote fairness by granting to the accused the same ability the government has to introduce relevant statements through which third persons undertake crimes.

Would the amendment proposed in this Essay be consistent with the theory underlying the hearsay rules? To be sure, the amendment would not rest on the same equitable notion that holds the accused accountable for statements by co-conspirators the accused voluntarily chose; the government does not have a similar connection to the statements of third persons committing crimes. But if equity is indeed a principle that animates hearsay law, there is a strong equitable case to create symmetrical rules whereby both the accused and the government can utilize relevant statements by third persons whose words constitute crimes. More fundamentally, it is important to bear in mind the longstanding theory that statements constituting crimes are "verbal acts" with legal significance transcending the mere substance of the words, and therefore such statements lie outside the definition of hearsay because they are not offered for the truth of the matter asserted.[37] In sum, the theories that allow prosecutors to introduce co-conspirator statements apply with equal force when the accused seeks to introduce statements through which third persons undertake crimes. Given the potential exculpatory value of such statements, it is perplexing that rules could have abided for so long the asymmetrical constraints on evidence offered by the accused.

F. Police Reports

Federal Rule of Evidence 803(8) and its state counterparts should be amended to read as follows:

> [This rule creates a hearsay exception for]
>
> A record or statement of a public office if:
>
> (A) it sets out:

Court's confrontation analysis pursuant to Crawford v. Washington, 541 U.S. 36 (2004), because the purpose of such statements is to further a conspiracy); *Bourjaily*, 483 U.S. at 183–84 (holding that if a co-conspirator statement meets all the requirements of Rule 801(d)(2)(E), the admission of that statement against the accused will comply with the Confrontation Clause). *Cf.* Ben Trachtenberg, *Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause*, 64 FLA. L. REV. 1669, 1684, 1696 (2012) (explaining that *Crawford* will generally not present a hurdle when prosecutors seek to introduce coventurers' statements against the accused).

37. Shechtman, *supra* note 32, at 1405–06.

> (i) the office's activities;
> (ii) a matter observed while under a legal duty to report, but not including, if offered by the government in a criminal case, a matter observed by law-enforcement personnel; or
> (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
>
> (B) the opponent does not show that the source of information or other circumstances indicate lack of trustworthiness.

Police reports can be a treasure trove of exculpatory evidence, especially evidence pointing to a third person's involvement in the offense for which the accused is presently on trial. Unfortunately, the current evidence rules provide little opportunity for the accused to introduce police reports. These reports generally do not meet the requirements to be agent admissions under Rule 801(d)(2), even though the authors of the reports are usually agents of the same governmental body (the United States or a state) opposing the accused in the caption for a criminal prosecution.[38] So too does Rule 803(8) exclude police reports in criminal cases, even though the rule generally admits reports by government employees regarding observations they make while performing their duties.[39] Many courts have excluded police reports under Rule 803(6), the exception for records of routinely conducted activities, because these courts do not want to undermine the ban on police reports in Rule 803(8).[40] Because these various rules erect a virtual stone wall against the substantive use of police reports in criminal cases,[41] the accused must forego a potentially valuable opportunity for proof of innocence.

This Essay's proposed amendment would allow police reports when offered by the accused in a criminal case but would continue to bar the prosecution from offering police reports. If the prosecution may freely

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38. Jared M. Kelson, *Government Admissions and Federal Rule of Evidence 801(D)(2)*, 103 VA. L. REV. 355, 356–68 (2017) (discussing difficulty faced by defendants in criminal cases when they try to introduce statements by law enforcement officers as agent admissions under Rule 801(d)(2)).

39. FED. R. EVID. 803(8).

40. *E.g.*, United States v. Oates, 560 F.2d 45, 66–67, 72 (2d Cir. 1977) (determining that "it was the clear intention of Congress to make evaluative and law enforcement reports absolutely inadmissible against defendants in criminal cases," either under Rule 803(6) or Rule 803(8)).

41. *Cf.* Kelson, *supra* note 38, at 369–70 (explaining generally that statements by government agents are admissible for the nonsubstantive purpose of impeaching trial testimony by these agents).

introduce statements by the "teammates" of the accused under Rule 801(d)(2), the accused should have the same latitude to offer reports by members of the government's "team." The original rationale for excluding police reports in Rule 803(8) seems to relate to the inability of defendants to confront accusers,[42] but when the Supreme Court strengthened constitutional confrontation after the adoption of Rule 803(8),[43] there was no need for Rule 803(8) to backstop those requirements. In any event, there is usually no confrontation issue when the accused offers a police report in a trial with no other defendants. The government's inability to rely on police reports will be of little concern, because the government can cause virtually all police officers to appear for live testimony.

G. Self-Inculpatory Statements by Third Parties

Federal Rule of Evidence 804(b)(3) and its state counterparts should be amended to read as follows:

> [This rule creates a hearsay exception for]
>
> A statement that~~:~~
>
> > ~~(A)~~ a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or expose the declarant to civil or criminal liability~~; and~~

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42. A review of legislative history indicated that confrontation concerns were the reason for the limits on the use of police reports in criminal cases under Rule 803(8)(A)(ii):

> The relevant language of Rule 803(8)(A)(ii), however, was specifically added by Congress to protect the confrontation rights of criminal defendants. Congress was concerned that the use of police reports by the government might circumvent the need to make an officer available at trial and subject to cross-examination. There is no indication that Congress meant to limit the admissibility of observations by law enforcement personnel when introduced against the government by a defendant, and courts have overwhelmingly accepted this interpretation.

Kelson, *supra* note 38, at 401–02 (internal citations omitted).

43. Crawford v. Washington, 541 U.S. 36, 61 (2004) (requiring that all testimony hearsay requires confrontation, even if the government has identified an applicable hearsay exception, because "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence").

~~(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability~~.

Sometimes a third person makes a post-arrest statement to law enforcement officials in which the declarant takes responsibility for a crime. If the government decides to prosecute a different defendant and allow the confessing declarant to walk free, the accused should be able to offer the declarant's self-inculpatory statement as one tending to exonerate the accused. Exclusion of this evidence would reduce the incentives for the government to charge carefully, because the government would be able to hide credible evidence of others' culpability. The person actually charged would be powerless to point out the admitted complicity of another.

The corroboration requirement in the present version of Rule 804(b)(3) is a significant hurdle to proof of innocence.[44] The rule requires that when an accused offers a third person's self-inculpatory statement, the accused must also show "corroborating circumstances that clearly indicate its trustworthiness." The prosecution does not have to contend with such a difficult requirement when the prosecution offers prior bad acts under Rule 404(b), co-conspirator statements under Rule 801(d)(2), or various categories of hearsay under Rule 803 and Rule 804, including Rule 804(b)(3) itself.[45] The Federal Rules Advisory Committee is now considering ways to clarify and circumscribe the corroboration requirement,[46] but a better approach would be this Essay's proposal to

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44. Richard D. Friedman, Comment letter on the Proposed Amendment to Federal Rule of Evidence 804(b)(3), at 4 (Feb. 17, 2009), https://www.uscourts.gov/sites/default/files/fr_import/08-EV-006-Comment-Friedman.pdf (arguing for elimination of the corroboration requirement in Rule 804(b)(3) for third-party statements against interest exonerating the accused).

45. *See, e.g.*, Huddleston v. United States, 485 U.S. 681, 682, 685 (1988) (holding that government has no burden to prove prior bad acts under Rule 404(b) by clear and convincing evidence, or even by a preponderance of evidence); Bourjaily v. United States, 483 U.S. 171, 175–76 (1987) (explaining that preponderance is sufficient to prove predicates for conspirator statements under Rule 801(d)(2)(E)); Friedman, *supra* note 44, at 4 (opining that Rule 804(b)(3)'s corroboration requirement "is tougher on evidence offered by an accused than it is on comparable evidence offered by a prosecutor has seemed very unfair and anomalous").

46. The Advisory Committee on Evidence Rules issued a report in 2022, indicating that it had approved a draft amendment to Rule 804(b)(3) clarifying the corroboration requirement for statements against interest that could exonerate the accused: "At its Spring, 2022 meeting, the Committee unanimously approved an amendment to Rule 804(b)(3) that would parallel the language in Rule 807, and require the court to consider the presence or absence of corroborating evidence in determining whether 'corroborating circumstances' exist." Patrick J. Schlitz, *Report of the Advisory Committee on Evidence*

eliminate the corroboration requirement altogether. Assuming that statements against interest bear some indicia of reliability—which is the premise that Rule 804(b)(3) accepts uncritically in other contexts—there is no reason to assume self-inculpatory statements exposing the declarant to criminal liability would be any less reliable. Indeed, the uniquely severe hardship borne by a convicted defendant would make such statements more reliable than statements merely risking financial liability. While it is possible that a declarant who already faces certain incarceration could "take the fall" for confederates, such a statement would not truly be against interest,[47] and in any event, the jury could consider the declarant's possibly disingenuous motives as the jury considers what weight to accord to the statement.

II. PROPOSED AMENDMENTS TO ETHICS RULES

A. Exceptions to Attorneys' Duty of Confidentiality

ABA Model Rule of Professional Conduct 1.6(b)[48] and its state counterparts should be amended to read as follows:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent reasonably certain death or substantial bodily harm;
> > (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> > (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably

Rules, at 13 (May 15, 2022), https://www.uscourts.gov/sites/default/files/evidence_rules_report_-_may_2022_0.pdf.

47. In an opinion issued after the adoption of Rule 804(b)(3), the Supreme Court insisted that a statement cannot meet the requirements of that rule except to the extent that it actually subjects the declarant to detriment, and any portions that do not subject the declarant to detriment must by excised. Williamson v. United States, 512 U.S. 594, 603–04 (1994) (indicating that Rule 804(b)(3) only admits statements to the extent that they could bring harm to the declarant). This ruling significantly reduced the risk that Rule 804(b)(3) could admit statements that do not have any practical consequence for the declarant.

48. MODEL RULES OF PRO. CONDUCT r. 1.6(b) (AM. BAR. ASS'N 1983).

> certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
> (6) to comply with other law or a court order; ~~or~~
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client; or
> (8) to exonerate another person in a pending prosecution, or a wrongfully convicted person, if the lawyer reasonably believes that disclosure could not harm the client.

ABA Model Rule of Professional Conduct 1.6(a) requires strict protection of confidential information gathered in the course of representing the client, whether that information comes from the client or from other sources. When the client expressly or impliedly directs the attorney to divulge that information, then the attorney has no choice but to do so. But when there is a risk of harm to third parties, Rule 1.6(b) sets forth permissive disclosure grounds (i.e., grounds that the attorney could invoke if the attorney wanted to do so).

Presently there is no exception in Rule 1.6(b) that allows disclosure of confidential information to prevent or remediate the wrongful incarceration of a third party. Rule 1.6(b)(1) allows disclosure "to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm." While some commentators have argued that wrongful incarceration entails substantial bodily harm, this interpretation has not gained wide acceptance, so Rule 1.6(b)(1) is generally not a vehicle for disclosing client information that would avert or remediate wrongful convictions.[49]

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49. One article published in 2020 indicated that few jurisdictions recognize the wrongful incarceration of a third party to be a disclosure ground under Model Rule 1.6.

> As of 2008, 26 states had adopted MRPC 1.6, however, the general interpretation of the rule had not recognized wrongful incarceration as

The Essay's proposed amendment would allow disclosure to prevent wrongful conviction or incarceration of a third party, whether or not bodily harm would result. The amendment would only apply to situations in which disclosure would not cause harm to the client. If, for example, an attorney were representing a defendant in a pending prosecution who admitted to committing a crime for which a third party has already been convicted, that attorney would not need to disclose the client's admission. A broader disclosure obligation would be inconsistent with the notion that attorneys are, first and foremost, zealous advocates for their clients.

B. Attorneys' Duty Not to Obstruct Access to Evidence

ABA Model Rule of Professional Conduct 3.4(f)[50] and its state counterparts should be amended to read as follows:

> [A lawyer shall not:]
>
> request a person other than a client to refrain from voluntarily giving relevant information to another party unless all three of the following conditions are met:
>
> > (1) the person is a relative or an employee or other agent of a client; ~~and~~
> > (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; and
> > (3) the lawyer is not representing the government in a criminal case.

As presently written, Rule 3.4(f) risks the possibility that government attorneys will instruct other government employees not to cooperate with defense investigators. Such stonewall tactics could limit access to exculpatory evidence. The current version of Rule 3.4(f) allows government attorneys to request that other government employees (i.e., employees of the same "client") refrain from voluntarily giving

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> substantial bodily harm. To date, only two states, Massachusetts and Alaska, have codified a wrongful incarceration exception into their versions of Rule 1.6. In the rest of the country, ethics committees responsible for attorney discipline have been reluctant to read a wrongful incarceration exception into the existing rule.

Vania M. Smith, *Wrongful Incarceration Causes Substantial Bodily Harm: Why Lawyers Should be Allowed to Breach Confidentiality to Help Exonerate the Innocent*, 69 CATH. U. L. REV. 769, 772 (2020) (internal citations omitted).

50. MODEL RULES OF PRO. CONDUCT r. 3.4(f) (AM. BAR. ASS'N 1983).

information to defense investigators, so long as the government attorneys can be sure that the people they exhort to withhold information will not suffer any harm because of this advice. In the federal government, there are millions of employees who could conceivably be discouraged from sharing information with defense investigators. In some of the larger states, such employees could number in the tens of thousands.

The best way to avoid such concerted obstruction would be to bar government attorneys from ever requesting that government employees decline to cooperate with the defense in a criminal case. This Essay's proposal disqualifies government attorneys from such obstructive tactics, even if the government attorneys could conceivably meet all the requirements in the present version of Rule 3.4(f). The disqualification makes sense because of the unique ability of government attorneys to harm information flow to the defense.[51] Moreover, government attorneys are supposed to serve the public interest and are generally subject to heightened rules of transparency,[52] so they should not expect to comport themselves in any other way when they prosecute criminal cases.

C. Prosecutors' Duty to Disclose Exculpatory Evidence

ABA Model Rule of Professional Conduct 3.8(d)[53] and its state counterparts should be amended to read as follows:

> [The prosecutor in a criminal case shall]
>
> ~~make timely disclosure~~ immediately disclose to the defense ~~of~~ all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, as well as all leads or investigative opportunities known to the prosecutor that appear reasonably likely to result in the discovery of such evidence or information, and, in connection with any plea hearing, sentencing hearing, grand jury proceeding, pretrial hearing in a criminal case, or application for arrest warrant or search warrant, immediately disclose to the defense

51. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963).

52. *See* Press Release, Merrick B. Garland, Att'y Gen., U.S. Dep't of Just., Attorney General Merrick Garland Issues New FOIA Guidelines to Favor Disclosure and Transparency (Mar. 15, 2022), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-issues-new-foia-guidelines-favor-disclosure-and ("'The Attorney General's new FOIA guidelines underscore the Justice Department's commitment to government that is open, transparent and accountable to the people we serve,' said Associate Attorney General Vanita Gupta . . . .").

53. MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR. ASS'N 1983).

> and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Many prosecutors may be reluctant to disclose exculpatory evidence, even though *Brady v. Maryland* and Rule 3.8(d) require such disclosure.[54] After all, to the extent that the prosecution provides the defense with proof of innocence, the prosecutor's job becomes incrementally harder. Given the conflicted motivation that some prosecutors may have, they may be tempted to resort to the "ostrich strategy" whereby they limit the government's exposure to exculpatory evidence.[55] Such a strategy would dictate that government investigators refrain from pursuing leads that are likely to yield exculpatory evidence.[56]

The ethics rules must expressly command prosecutors to direct an exhaustive search for all relevant evidence, including both inculpatory and exculpatory evidence.[57] This sweeping responsibility is fair because the government usually has resources that are vastly superior to those of the defense. Also, in a proactive investigation, the government usually gets an earlier start than the defense in pursuing leads. If the government learns of an investigative opportunity that is reasonably likely to result in the discovery of exculpatory evidence, the government should pursue the opportunity or at least promptly make it known to defense counsel. This Essay's proposed amendment sets forth that new requirement, and also clarifies that the government must "immediately"—not simply "timely"—disclose the exculpatory information.

The amendment extends the prosecutor's disclosure duty to settings in which the U.S. Constitution does not require disclosure, such as plea hearings.[58] While most of the Supreme Court authority interpreting constitutional disclosure obligations applies to criminal trials, not pretrial proceedings, ethical rules can address public policy concerns that

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54. *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR. ASS'N 1983).

55. Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. OF CRIM. L. & CRIMINOLOGY 191, 194 (1990).

56. *See id.*

57. *Cf.* Kyles v. Whitley, 514 U.S. 419, 421 (1995) (extending *Brady*'s disclosure obligations to information possessed by law enforcement agents, even if prosecutors are not aware of this information).

58. *Cf.* United States v. Ruiz, 536 U.S. 622, 625 (2002) (holding that when defendant agrees to plead guilty, a prosecutor has no constitutional obligation to disclose evidence relevant to impeachment of a government informant).

are not constitutional in nature. The need for defense access to exculpatory information is no less urgent in pretrial hearings, especially since the vast majority of criminal prosecutions never proceed to trial.[59]

D. Duty to Establish Conviction Integrity Units in Prosecuting Agencies

ABA Model Rule of Professional Conduct 3.8[60] and its state counterparts should be amended to add the following subpoint:

> (i) An attorney who supervises a prosecuting agency shall assign at least one attorney to be responsible for receiving information regarding the reliability of past convictions obtained by the agency. When substantial evidence indicates that a past conviction may be unreliable, the attorney will undertake a review to determine what, if any, remedial action may be necessary under subpoints (g) and (h) above.

Several speakers at the Rutgers symposium on March 31, 2023, including Bryce Benjet, Jill Friedman, Cynthia Garza, Carolyn Murray, Ronald Sullivan, Jr., and Sean Washington explained the importance of "conviction integrity units" at prosecutors' offices.[61] The establishment of such a unit makes ongoing review more likely and also sets up a repository for information about the possible frailty of past convictions. The University of Pennsylvania's Quattrone Center for the Fair Adminstration of Justice has posted extensive resources on its website showing the value of conviction integrity units in prosecuting agencies of all sizes.[62]

The ethical obligation in this Essay's proposed Rule 3.8(i) would parallel the obligations that Rule 5.1 imposes on managing attorneys and supervisors at private firms.[63] This Essay's proposal makes sense

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59. THEA JOHNSON, A.B.A. CRIM. JUST. SECTION, 2023 PLEA BARGAIN TASK FORCE REPORT 36 n.2 (2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf (indicating that only two percent of federal prosecutions go to trial and the corresponding number in many states is approximately three percent).

60. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR. ASS'N 1983).

61. Bryce Benjet et al., Conviction Review Units Panel at the Rutgers University Law Review Symposium: Barriers to Innocence (Mar. 31, 2023).

62. *Conviction Review/Integrity Units Resource Center*, UNIV. OF PA.'S QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUST., https://www.law.upenn.edu/institutes/quattronecenter/resources.php (last visited on Oct. 20, 2023).

63. ABA Model Rule 5.1(a) imposes proactive duties of firm supervisors: "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure

alongside Rules 3.8(g) and 3.8(h), which impose ethical obligations on prosecutors who come to discover evidence that a prior conviction was unjust.[64] The discovery of such information is more likely when a prosecuting agency has a conviction integrity unit.

E. Judges' Duty to Prioritize Proof of Innocence

Canon 2 in the ABA Model Code of Judicial Conduct[65] and its state counterparts should be amended to include the following new rule:

> **Ruling on Admissibility of Exculpatory Evidence.**
>
> When a judge is called upon to determine the admissibility of evidence that tends to negate the guilt of the accused or mitigate the offense, and the prosecutor objects to the evidence, the judge shall prioritize admission of the evidence and shall only exclude the evidence as a last resort. In appropriate circumstances, the judge shall consider safeguards that address the prosecutor's objection while still admitting the evidence. Such safeguards could include redaction of documents, limitations on the scope of testimony, or cautionary instructions to the jury.

Judges have an important role to play in facilitating proof of innocence. If judges do not admit exculpatory evidence, juries will not be able to consider that evidence. Moreover, through consistent admission of exculpatory evidence, judges set expectations for prosecutors and their law enforcement partners. When judges take exculpatory evidence

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that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR. ASS'N 1983). ABA Model Rule 5.1(c)(2) also indicates that a supervisor could have responsibility under the ethical rules for misconduct by another attorney, even if the supervisor did not direct or ratify that misconduct, if the supervisor "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." *Id.*

64. ABA Model Rule 3.8(g) provides that when "a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted," that prosecutor may have obligations to disclose the information to the defense and the court, and the prosecutor may also have obligations to undertake further investigation. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR. ASS'N 1983). ABA Model Rule 3.8(h) provides that a prosecutor must try to undo a wrongful conviction in certain circumstances: "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction." *Id.*

65. MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR. ASS'N 1997).

seriously, all participants in the criminal justice system are more likely to take this evidence seriously.

The ethical rules for judges talk generally about the need for judges to promote fairness and the just resolution of disputes, but the rules do not direct judges to err on the side of admitting exculpatory evidence. The natural inclination of some judges may be to avoid the "distraction" that such evidence would entail, especially evidence foisting blame to third persons not charged in the present prosecution. Judges in the state system are usually elected to their positions, so they might face political pressure to help rather than encumber the prosecution. In short, judges need more specific guidance about their ethical responsibilities with respect to exculpatory evidence.

One potentially salutary reform would be to add a new rule at the end of Canon 2 in the Model Code of Judicial Ethics. This new rule would expressly prioritize the admission of exculpatory evidence.[66] When prosecutors raise objections to such evidence, judges should try to redress the objections without excluding the evidence. Solutions such as redaction or cautionary jury instructions would not be ideal from the defense perspective, but they would be preferable to an order barring admission of the evidence altogether.

III. FORESEEABLE OBJECTIONS

Several objections to this Essay's proposals are possible. To be sure, heightened duties to attend to exculpatory evidence would bring burdens and disadvantages. While a thorough response to those objections must await further scholarship, a brief discussion is appropriate here.

Objection #1: This article's proposals would be unduly time-consuming. In the near term, duties to review, disclose, and admit exculpatory evidence will create burdens on both lawyers and judges. The imperative of avoiding wrongful convictions must trump any competing notions of efficiency. Even if efficiency were a top-tier priority, prosecutors and judges must consider how much time is wasted when post-conviction investigation and litigation are necessary to remediate a wrongful conviction that this Essay's safeguards could have prevented.

Objection #2: Appeals and collateral post-conviction remedies are the best approach because they focus narrowly on the problematic cases, whereas this Essay's reforms would apply to every case at the trial stage.

66. This new rule of judicial ethics would be an appropriate complement to this Essay's proposed amendment to Federal Rule of Evidence 102 and its state counterparts, which would direct judges to interpret the evidentiary rules "to maximize opportunities for proof that the accused is innocent." *See supra* Section I.A.

Some critics might prefer post-hoc review of alleged errors by prosecutors or judges because such review would not be necessary in all cases and would situate the alleged errors in an overall record that would allow reviewing courts to consider whether the errors were "harmless." This critique is mistaken for several reasons. First, the "harmless error" used for appellate and post-conviction review is unduly restrictive and it tolerates even blatant errors if the overall evidence against the defendant seems to be overwhelming.[67] Second, the logistical challenges faced by incarcerated people seeking post-conviction relief—including the lack of counsel and the procedural limits imposed by the Antiterrorism and Effective Death Penalty Act of 1996—make it very unlikely that even a meritorious claim will succeed.[68] Third, and most important, exoneration after a lengthy appeal will not restore the lost months or years that an innocent person has spent in wrongful incarceration.

Objection #3: The criminal justice system works best when the prosecutor and the defense attorney advocate zealously for their separate partisan interests. Some critics of this Essay's proposals might believe that strict adherence to the adversarial paradigm is preferable because that competition would be most likely to "average out" to the truth, or at least to outcomes acceptable by both sides. This view is unduly sanguine. Zealous advocacy by criminal defense should indeed be celebrated and that is part of the reason why this Essay has avoided suggesting any reforms that might reduce the client-centered partisanship by criminal defense counsel.[69] But justice does not demand—and cannot abide—unrestrained partisanship by prosecutors. The power imbalance that leads to plea bargains in virtually all cases belies any characterization of the competition between prosecutors and defense attorneys as a fair fight.[70] Finally, it is important to bear in mind that prosecutors have an obligation to do more than advance the government's partisan interest: prosecutors must do justice.[71]

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67. *See* A. LEON HIGGENBOTHAM, SHADES OF FREEDOM, RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS, 130–31 (Oxford Univ. Press 1996) (indicating that harmless error standard is insufficient to solve problem of racism in the courtroom).

68. Gregory J. O'Meara, *"You Can't Get There From Here?": Ineffective Assistance Claims in Federal Circuit Courts After AEDPA*, 93 MARQ. L. REV. 545, 546–47 (2009) (noting that, due in part to "roadblocks [that] AEDPA erected," post-conviction review for state prisoners "is currently seen as an exercise in futility").

69. *See supra* Section II.A (proposing an exception to confidentiality when client information could exonerate a third party but declining to apply the exception when it would hurt the client).

70. *See* JOHNSON, *supra* note 59, at 36 n.2.

71. Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose

CONCLUSION

This Essay has proposed several new evidentiary and ethical rules that would prioritize and facilitate proof of innocence. The reforms certainly would not end wrongful incarceration, but they would improve the odds that prosecutors would produce a wider range of exculpatory evidence, that defense counsel would be able to offer this evidence in trials, and that judges would be receptive to this evidence. Significant barriers to proving innocence would still remain even if legislatures and state bars were to adopt all of this Essay's proposals, but given the urgent imperative of exonerating the innocent, policymakers must strive to optimize every variable that could affect the fairness of criminal trials.

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obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").