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Why Would You Say That? Addressing Systemic Injustice in the Evidentiary Standard for Opposing Party Statements, 53 UIC J. Marshall L. Rev. 773 (2021)

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WHY WOULD YOU SAY THAT? ADDRESSING SYSTEMIC INJUSTICE IN THE EVIDENTIARY STANDARD FOR OPPOSING PARTY STATEMENTS

HUGH M. MUNDY* AND L. ALEXANDRA McDONALD**

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"Privilege is embedded in the question 'Why would you say that?' There's a lack of understanding about the relationship between people of color and the police. It's scary to be black and brown and face a police officer."

-Ava DuVernay¹

I. INTRODUCTION

In April 1989, New York Police Department officers arrested five boys for the rape of a jogger in Central Park.² The victim was white.³ The accused were Black and Latino.⁴ Detectives interrogated the five separately, all of whom made incriminating

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** Staff Attorney, Superior Court of California, County of San Diego County, and former Public Defender for the County of San Diego and Federal Defenders of San Diego, Inc. The author thanks the attorneys at Federal Defenders of San Diego, Inc. for their persistence in fighting systemic injustice and inspiring the author in her contributions to this article.

1. See Kate Storey, *'When They See Us' Shows the Disturbing Truth About How False Confessions Happen*, ESQUIRE (June 1, 2019), www.esquire.com/entertainment/a27574472/when-they-see-us-central-park-5-false-confessions/ [perma.cc/9QJ5-HPM5]. Ava DuVernay is the director of *When They See Us*, a television mini-series about the Central Park Five.

2. Jim Dwyer, *The True Story of How a City in Fear Brutalized the Central Park Five*, N.Y. TIMES, June 2, 2019, at AR1.

3. *Id.*

4. *Id.*

statements over some thirty hours of continuous questioning.⁵ The boys later recanted their statements, arguing that the detectives coerced the confessions.⁶ Nonetheless, the court ruled that the statements were voluntary and admissible.⁷ At trial, a jury heard the boys' statements and – based largely on that evidence – returned a guilty verdict against each one.⁸ The boys, who became known as the Central Park Five, spent between six and thirteen years in prison before exculpatory DNA proved their innocence.⁹ They ultimately reached a financial settlement with New York City.¹⁰

Though the trial captivated New Yorkers more than thirty years ago, a 2012 documentary (*The Central Park Five*) and a 2019 television mini-series (*When They See Us*) sparked new interest in the case from broader audiences.¹¹ In most corners, the attention was rightly coupled with a sense of outrage over the litany of injustices that corrupted the case from its beginnings.¹² The boys' false confessions and the tactics used by police to extract them generated particular anger and incredulity.¹³ Exonerations based on DNA and other categorical evidence of innocence have exposed dangerous flaws in police interrogation techniques and strategies. Still, the evidence rules governing the admissibility of statements obtained from those flawed processes have remained largely intact since the prosecution of the Central Park Five.¹⁴ Further, systemic racism continues to infect the whole of the criminal justice system.¹⁵

5. Evan Nestarak, *Coerced to Confess: The Psychology of False Confessions*, BEHAV. SCIENTIST (Oct. 21, 2014), www.behavioralscientist.org/coerced-to-confess-the-psychology-of-false-confessions/ [perma.cc/VSZ7-XZUW].

6. *Id.*

7. Dwyer, *supra* note 2.

8. See Carl Suddler, *How the Central Park Five Expose the Fundamental Injustice in Our Court System*, WASH. POST (July 12, 2019), www.washingtonpost.com/outlook/2019/06/12/how-central-park-five-expose-fundamental-injustice-our-legal-system/ [perma.cc/RST7-SQ42] (“Forced confessions were enough to land four of the five in the juvenile system [and the fifth] who was sixteen at the time of his arrest landed in the adult system because, up until 2018, New York prosecuted 16- and 17-year-olds as adults.”).

9. Dwyer, *supra* note 2.

10. Aisha Harris, *The Central Park Five: 'We Were Just Baby Boys'*, N.Y. TIMES, June 2, 2019, at AR 12.

11. THE CENTRAL PARK FIVE (Sundance Selects 2012); WHEN THEY SEE US (Netflix 2019).

12. Suddler, *supra* note 8.

13. Storey, *supra* note 1 (“The [interrogation] scenes are painful to watch as the young actors portray the pain and desperation of hour after hour of deceptive interrogation.”).

14. Compare FED. R. EVID. 801(d)(2)(A) (“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”), with FED. R. EVID. 801(d)(2)(A) (1975) (amended 2014); *id.* (“Admission by party-opponent.—The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity.”).

15. For a broader discussion of systemic racism in the criminal justice

These critiques hold true in both state and federal prosecutions.¹⁶ Today, if the government offered a defendant's self-inculpatory statements in a prosecution akin to the Central Park Five, the rules of evidence would almost certainly allow for their admission at trial.¹⁷

This Article endeavors to show how Federal Rule of Evidence 801(d)(2)(A), which controls the admissibility of statements by criminal defendants, perpetuates privilege and fosters injustice. To do so, we will examine the rule's history. We will then consider how the risk of false statements undermines the rule's rationale for the admissibility of statements by criminal defendants. Further, we will explore the ways in which the rule functions to disadvantage disproportionately criminal defendants of color. Finally, we will propose a change to the rule to improve fairness in its use and application against all criminal defendants at trial.

II. THE ADMISSIBILITY OF A CRIMINAL DEFENDANT'S STATEMENTS UNDER THE EVIDENCE RULES

The Federal Rules of Evidence include a generic restriction on the admissibility of hearsay, *i.e.*, a declarant's out-of-court statement offered for the truth of the matter asserted.¹⁸ The prohibition is rooted in concerns that the declarant "might have been lying" or "might have misperceived the events which he relates" to the listener.¹⁹ In turn, the listener "might [have] misunderstood or taken out of context" the declarant's words.²⁰ To mitigate these hazards and to "encourage a witness to do his best,"

system, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2d ed. 2020). Alexander writes that crime control practices over the last thirty years created a "racial caste system" in which "it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans, [including] employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service[.]" *Id.* at 2.

16. Federal courts and all fifty states allow for the trial admissibility of opposing party statements as non-hearsay.

17. Our Article does not consider the potential pre-trial due process challenge associated with statements made by criminal defendants during police interrogations. Rather, the Article assumes a pre-trial judicial determination that a statement was voluntary. For a broader discussion of due process and police interrogations, see Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 904 (2004).

18. FED. R. EVID. 802.

19. *Williamson v. United States*, 512 U.S. 594, 598 (1994); FED. R. EVID. 801, Advisory Committee Introductory Note to Article VIII ("The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration.").

20. *Williamson*, 512 U.S. at 598.

“the Anglo-American tradition” requires that a witness’s testimony is given “under oath,” “in the personal presence” of the judge and jury, and “subject to cross-examination.”²¹ Still, there are myriad exceptions to the hearsay prohibition.²² Rule 801(d)(2)(A), governing opposing party statements made by an individual, cuts a particularly broad swath through the ban on hearsay.²³

As evidentiary rules go, Rule 801(d)(2)(A) is simple and straightforward.²⁴ In a civil or criminal case, an out-of-court statement is admissible for its truth if “made by the party in an individual or representative capacity,” and offered into evidence by the party’s adversary.²⁵ Perhaps for that reason, the rule has not been the topic of significant interpretive debate.²⁶ In civil cases, either party may take advantage of the benefits conferred by the rule.²⁷ In criminal cases, the government may offer statements attributed to defendants.²⁸ The rule, however, does not necessarily function in reverse fashion.²⁹ At common law, the government was considered “an objective representative of the public” not an “opposing party.”³⁰ Under the Federal Rules of Evidence, the circuits are split as to whether the government can ever fall within the rule’s ambit.³¹

21. FED. R. EVID. 801, Advisory Committee Introductory Note to Article VIII.

22. See FED. R. EVID. 801, 803, 804.

23. FED. R. EVID. 801(d)(2)(A). Technically speaking, opposing party statements are “excluded” from the hearsay ban and not considered “exceptions” to the ban. However, the effect at trial is the same – the statement is admitted for the truth of the matter asserted. Prior to the adoption of the Federal Rules of Evidence, an opposing party statement was generally considered an “exception” to the hearsay rule. See, e.g., *Dutton v. Evans*, 400 U.S. 74 (1970); see also Edmund M. Morgan, *Admission as an Exception to the Hearsay Rule*, 30 YALE L.J. 355, 361 (1921) (“[U]pon both principle and authority, extrajudicial verbal admissions by a party to an action are receivable in evidence under an exception to the rule against hearsay.”).

24. JACK B. WEINSTEIN & MARGARET BERGER, *WEINSTEIN’S EVIDENCE MANUAL STUDENT EDITION 13-15* (9th ed. 2011) (“All that is required is that a statement made by a party is offered into evidence by an adverse party.”).

25. *Id.*

26. FED. R. EVID. 801, Advisory Committee Note to Rule 801(d)(2)(A) (referring to “party’s own statement [as] the classic example of an admission”); see also *United States v. Matlock*, 415 U.S. 164, 175 (1974) (stating that in criminal cases, statements made by an accused prior to arrest are admissible against him admissions).

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

28. Jared M. Kelson, *Government Admissions and Federal Rule of Evidence 801(d)(2)(A)*, 103 VA. L. REV. 355, 356-57 (2017); Anne Bowen Poulin, *Party Admission in Criminal Cases: Should the Government Have to Eat its Words?*, 87 MINN. L. REV. 401, 404 (2002) (“Party admissions do not bind the government, but they are powerful evidence.”).

29. Kelson, *supra* note 28, at 356-57.

30. *Id.*

31. *Id.*; Poulin, *supra* note 28, at 415 (noting that Rule 801(d)(2)(A) “provides no support for the argument that party admissions operate differently against the government [but] some courts continue to resist admitting party admissions

In its initial form, the rule covered an “opposing party’s admissions.”³² In 2011, the Advisory Committee on the Rules of Evidence replaced the term “admissions” with “statements.”³³ The replacement is essentially semantic.³⁴ The purpose and function of the rule remains unchanged.³⁵ Otherwise, the Advisory Committee’s Notes state plainly that an opposing party’s statements are admissible based “on the theory that their admissibility is the result of the adversary system rather than the satisfaction of the conditions of the hearsay rule.”³⁶ Importantly, the hallmark condition for the admissibility of an out-of-court statement is its “guarantee of trustworthiness.”³⁷ Therefore, no guarantee of trustworthiness is required for the admission of an opposing party statement.³⁸ The Advisory Committee views the rule’s lack of reliability safeguards through a lens of liberation, describing “the freedom which admissions have enjoyed from the technical demands of searching for an assurance of trustworthiness.”³⁹ In turn, the absence of “restrictive influences . . . calls for generous treatment of this avenue to admissibility.”⁴⁰

The rule’s origins support the Advisory Committee’s interpretation.⁴¹ In 1921, Edmund Morgan, the primary author of the Model Code of Evidence, explained the rationale of the “adversary system” as grounds for admission of opposing party statements.⁴² The witness, Morgan observed, “must confront the very person whose statements he is reporting” and “is subject to

against the government, particularly in criminal cases”).

32. Advisory Committee Note, *supra* note 26.

33. *Id.*

34. GLEN WEISSENBERGER & JAMES J. DUNNE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY 550 (7th ed. 2011) (“[N]ot all statements covered by the exclusion are admissions in the colloquial sense – a statement can be within the exclusion even if it ‘admitted’ nothing[.]”).

35. Advisory Committee Note, *supra* note 26.

36. *Id.*

37. Stephen A. Saltzburg, *Rethinking the Rationale(s) for the Hearsay Exceptions*, 84 *FORDHAM L. REV.* 1485, 1486 (2016).

38. *Id.* (“Rule 801(d)(2) is different from the true hearsay ‘exceptions’ because those require a guarantee of trustworthiness.”).

39. Advisory Committee Note, *supra* note 26.

40. *Id.*; see also Zachary Bolitho, *The Hearsay and Confrontation Clause Problems Caused by Admitting What a Non-Testifying Interpreter Said the Criminal Defendant Said*, 49 *N.M. L. REV.* 193, 199 (2019) (noting that statements admitted under Rule 801(d)(2) are “one of the most common reasons why out-of-court statements are admitted during trials”).

41. See Morgan, *supra* note 23, at 361 (“[I]t is too obvious for comment that the party whose declarations are offered against him is in no position to object on the score of lack of confrontation or of lack of opportunity for cross-examination. It seems quite as clear that he ought not to be heard to complain that he was not under oath.”).

42. *Id.* The Model Code of Evidence, a predecessor to the Federal Rules of Evidence, was adopted by the American Law Institute in May 1942.

cross-examination by counsel who has at his elbow the person who knows all the facts and circumstances of the alleged statements.”⁴³ Further, “the [opposing party]-declarant may himself go upon the stand and deny, qualify or explain the alleged admissions.”⁴⁴ Notably, Morgan reasoned that – like excited utterances and other spontaneous declarations – an opposing party’s out-of-court statements are *more* likely to be “trustworthy and free from bias” than the party’s subsequent trial testimony.⁴⁵ Quoting nineteenth-century common law, he concluded, “What a party himself admits to be true may reasonably be presumed to be so.”⁴⁶

III. OPPOSING PARTY STATEMENTS AND THE RISK OF FALSE CONFESSIONS

The uncontroversial history of Rule 801(d)(2)(A) belies its troubling connection to wrongful convictions. In his 1923 evidence treatise – a text that still holds considerable sway today – John Henry Wigmore declared that false confessions were “scarcely conceivable” and “of the rarest occurrence.”⁴⁷ The emergence of exculpatory DNA as a central basis for exonerations, however, has proved Wigmore wrong.⁴⁸ Indeed, false statements by defendants are a leading cause of wrongful convictions.⁴⁹ The National Registry of Exonerations reports that 13-percent of DNA-based exonerations involved false statements by defendants used at trial.⁵⁰ Moreover,

43. *Id.*; WEISSENBARGER & DUNNE, *supra* note 34, at 551 (“In essence, this doctrine is predicated on an estoppel theory.”).

44. Morgan, *supra* note 23, at 361 (noting that an opposing party “is given every opportunity to qualify and explain” a statement).

45. *Id.* (comparing the trustworthiness of an opposing party statement to a statement regarding “presently existing mental or subjective bodily condition, or a spontaneous exclamation”).

46. *Id.* (citing *Slatterie v. Pooley*, 151 Eng. Rep. 579 (Exch. 1840)). Interestingly, the Advisory Committee Note to FED. R. EVID. 1007 (“Testimony or Statement to Prove Content”) challenges *Slatterie*’s logic in the context of document production. The Committee writes, “While [*Slatterie*] allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for non-production of the original, the risk of inaccuracy is substantial[.]” Advisory Committee Note to Rule 1007. Therefore, Rule 1007 “[limits] this use of admissions to those made in the course of giving testimony or in writing.” *Id.*

47. BRANDON L. GARRETT, *CONVICTING THE INNOCENT* 18 (2011).

48. Drizin & Leo, *supra* note 17 (commenting that “[t]he most significant development in wrongful conviction scholarship in the 1990s was the advent of increasingly sophisticated forms of DNA testing and the application of this new technology to criminal investigation” and citing an early study in which 18-percent of exonerations involved false confessions”).

49. *Id.* at 906-07 (reporting false confessions in fourteen to twenty-five percent of the total miscarriages of justices studied, “thus establishing the problem of false confessions as a leading cause of the wrongful convictions of the innocent in America”).

50. Samuel Gross & Maurice Possley, *For Fifty Years, You’ve Had “The Right*

that figure “deeply understates” the ubiquity of the problem as many cases involving false statements by defendants do not have DNA or other categorical evidence of innocence “to rescue them.”⁵¹ Further, even exculpatory DNA may be insufficient for a case to overcome a defendant’s false statement and end in exoneration.⁵² Finally, a defendant’s false statement may never reach the ears of the jury if suppressed by the judge before trial.⁵³

Writer and filmmaker Ava DuVernay describes the circumstances giving rise to the Central Park Five’s false confessions as a “petri dish of injustice.”⁵⁴ To DuVernay’s point, police custodial interrogations are an especially dangerous source for statements attributed to defendants at trial.⁵⁵ Arrestees are isolated in windowless rooms, usually without access to counsel.⁵⁶ They often waive their *Miranda* rights, tilting the balance of power heavily toward law enforcement interrogators.⁵⁷ Interrogations may persist for hours on end, increasing the arrestee’s stress, fatigue,

to *Remain Silent*,” MARSHALL PROJECT (June 12, 2016), www.themarshallproject.org/2016/06/12/for-50-years-you-ve-had-the-right-to-remain-silent [perma.cc/CTP4-CCAW]; see also ADAM BENFORADO, UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE 30 (2015) (citing false confessions as “a factor in about 25 percent of all post-conviction exonerations”).

51. Gross & Possley, *supra* note 50; see also GARRETT, *supra* note 47, at 18 (“[W]e do not know how often false confessions occur[.]”).

52. Gross & Possley, *supra* note 50 (discussing a Lake County, Illinois case involving a defendant’s false confession, the subsequent discovery of exculpatory DNA, and his re-conviction after a subsequent trial).

53. Drizin & Leo, *supra* note 17, at 956-57.

54. Storey, *supra* note 1.

55. One of the authors has previously written about an initiative by the Advisory Committee on the Federal Rules of Evidence to expand Rule 801(d)(1)(A) to allow for admissibility of all prior inconsistent statements for their truth, including statements made during police interrogations. The expansion has not been adopted and, currently, Rule 801(d)(1)(A) covers only prior inconsistent statements given under penalty of perjury at trial, deposition, or other qualifying proceedings. See Hugh Mundy, *Forward Progress: A New Pattern Criminal Jury Instruction for Impeachment with Prior Inconsistent Statements Will Ease the Court’s Burden by Emphasizing the Prosecutor’s*, 84 FORDHAM L. REV. 1455 (2016).

56. See Bryan L. Sykes, Eliza Solowiej & Evelyn J. Patterson, *The Fiscal Savings of Accessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013*, 5 U.C. IRVINE L. REV. 813, 816, 819 (2015) (documenting that only 0.2 percent of men arrested in Cook County, Illinois, had a defense lawyer at the police station; about eighty percent of arrestees waived their *Miranda* rights).

57. *Miranda v. Arizona*, 384 U.S. 436 (1966); BENFORADO, *supra* note 50, at 31 (“Indeed, it is innocent people who are more likely to waive their rights to remain silent and to have a lawyer present[.]”); see also Saul M. Cassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 L. & HUM. BEHAV. 211, 212-13, 216 (2004) (discussing the various reasons for *Miranda* waivers, including police officers strategically establishing rapport to induce waivers, suspects waving rights due to their lack of criminal justice “experience,” or suspects who wish to protect their innocence believing “apparently, in the power of truth to prevail”).

and fear.⁵⁸ Not surprisingly, the inherently coercive interrogation environment invites false statements — especially as to arrestees who are threatened with harsher treatment or additional charges without confessing or naming the true culprit.⁵⁹

Further, police are trained to elicit incriminating statements from arrestees using “a range of psychologically coercive and deceptive tactics” — including lies that forensic evidence has proved the suspect’s guilt, promises of leniency in return for a confession, and feigned empathy for the suspect’s plight.⁶⁰ These strategies — all associated with the so-called “Reid Technique” of interrogation — not only fail to guard against false statements “but actually appear to encourage them.”⁶¹ More problematically, the law enforcement officer who interrogated the defendant generally testifies at trial as to the defendant’s statements.⁶² The officer’s motivation to secure a conviction, however, often comes at the cost of truthful testimony.⁶³

58. BENFORADO, *supra* note 50, at 31; *see also* Lisa Black & Steve Mills, *What Causes People to Give False Confessions?*, CHI. TRIB. (July 11, 2010), www.chicagotribune.com/news/ct-xpm-2010-07-11-ct-met-forced-confessions-20100711-story.html [perma.cc/3YPF-6KJB]. (“Trauma, lack of sleep, and highly manipulative interrogation techniques are a few factors that can cause the most level-headed people to confess to a crime[.]”).

59. Saul M. Kassir et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 36 L. & HUM. BEHAV. 3, 6 (2010) (noting that the “single-minded purpose” of interrogation is “not to discern the truth” but “to elicit incriminating statements . . . in an effort to secure the conviction of offenders”).

60. GARRETT, *supra* note 47, at 22-23.

61. BENFORADO, *supra* note 50, at 30. Custodial interrogations aside, the “Reid Technique” has produced false statements in *non-custodial* investigative interviews. In a 2008 study of the influence of police interviewing techniques, researchers asked college students a series of questions about the instigator of a computer crash. After a “relatively low-pressure” interview, forty-five percent of the participants falsely implicated a peer. *See* Kirk A. B. Newring & William O’Donohue, *False Confessions and Influenced Witnesses*, 4 APPLIED PSYCHOL. CRIM. JUST. 81, 87–90, 98 (2008). The Reid Technique begins with a Behavioral Analysis Interview during which the officer “determine[s] whether the suspect is lying” based on the suspect’s verbal responses and non-verbal cues. Douglas Star, *The Interview*, NEW YORKER (Dec. 2, 2013), www.newyorker.com/magazine/2013/12/09/the-interview-7 [perma.cc/2JBV-X9MA]. If the officer believes the suspect is dishonest, the officer leaves the interrogation setting briefly and returns “with an official-looking folder” purportedly containing incriminating evidence. *Id.* The officer then begins an interrogation designed to “[prod] the suspect toward confession.” *Id.*

62. Federal law enforcement agencies must record interrogations. Half of the states in the country and the District of Columbia have similar policies. While the practice reduces the risk of officer perjury, testimony is nonetheless required to authenticate a recording and provide additional details about the interrogation. *See False Confessions and Recording of Custodial Interrogations*, INNOCENCE PROJECT, www.innocenceproject.org/false-confessions-recording-interrogations/ [perma.cc/ZXL3-S9XZ] (last visited Aug. 6, 2020).

63. *See* Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013), www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html [perma.cc/J2LX-2U3F] (“In the War on Drugs, federal grant programs like the Edward Byrne Memorial Justice Assistance Grant Program

Concerns over trustworthiness notwithstanding, a defendant's inculpatory statement remains "the most probative and damaging evidence" that can be offered by the prosecution at trial.⁶⁴

IV. RULE 801(D)(2)(A) DISPROPORTIONATELY DISADVANTAGES CRIMINAL DEFENDANTS OF COLOR

In *Pena-Rodriguez v. Colorado*, the United States Supreme Court reaffirmed the longstanding principle that race-based discrimination "is odious in all aspects, [but] especially pernicious in the administration of justice."⁶⁵ Still, the race-based disparities among those prosecuted in criminal court are manifest. Black men are more likely than Caucasian men to be arrested, to be convicted, and to receive long prison sentences.⁶⁶ Black men are incarcerated at nearly six times the rate of Caucasian men.⁶⁷ Hispanic men are almost three times as likely as Caucasian men to be imprisoned⁶⁸ One in every three Black boys born in 2001 could expect to go to prison in his lifetime, as could one of every six Hispanic boys—compared to one of every seventeen Caucasian boys.⁶⁹ In the Southern District of New York, the nation's most populous, Black and Hispanic men comprise about one-third of the general population but roughly seventy percent of criminal defendants.⁷⁰ Nationally, only one-quarter of federal criminal defendants are non-Hispanic whites.⁷¹

Based on a quantitative analysis alone, Rule 801(d)(2)(A)

have encouraged state and local law enforcement agencies to boost drug arrests in order to compete for millions of dollars in funding. Law enforcement has increasingly become a numbers game."); Mark Joseph Stern, *The Police Lie. All the Time. Is There Anything We Can Do to Stop Them?*, SLATE (Aug. 4, 2020), www.slate.com/news-and-politics/2020/08/police-testilying.html [perma.cc/T37N-EVXE] (citing police incentives to lie, including concerns that illegally obtained evidence will be suppressed and fears about disciplinary actions).

64. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968)).

65. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 859 (2017) (quoting *Rose v. Mitchell*, 443 U. S. 545, 555 (1979)).

66. The Sentencing Project, Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Regarding Racial Disparities in the United States Criminal Justice System 1 (2018) www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf [perma.cc/KT4Y-AWPX].

67. U.S. Bureau of Justice Statistics, *Prisoners in 2018* at 9 T6 (Apr. 2020) (In 2018, incarceration rates were 1,501 per 100,000 Black men, 797 per 100,000 Hispanic men, and 268 per 100,000 Caucasian men).

68. *Id.*

69. The Sentencing Project, *supra* note 66, at 1.

70. David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2590 (2013).

71. *Id.* at 2587.

disproportionately impacts Black and Hispanic criminal defendants.⁷² Worse still, race and ethnicity play a significant role in the increased likelihood of false statements during questioning by law enforcement.⁷³ A comprehensive 2015 study of interrogations revealed that, while Black and Caucasian suspects cooperated “at similar rates,” police officers “were significantly more likely to misjudge innocent Black suspects than innocent [Caucasian] suspects.”⁷⁴ Officers also found Black suspects “to be less cooperative and less forthcoming” than Caucasian suspects, notwithstanding contrary data.⁷⁵ Further, an officer’s assessment of a Black suspect’s “elevated stress level” – a sign the “Reid Technique” calls a “cue to deception” – was often due to “the [suspect’s] fear of being mistakenly judged as guilty.”⁷⁶ In fact, the dynamic resulted in “a self-fulfilling prophecy.” The Black suspect’s awareness of the risk of being judged as guilty caused anxiety that the police, in turn, interpreted as a sign of guilt.⁷⁷ The same police biases hold true for Hispanic people who are called in for questioning.⁷⁸ Popular perception, exacerbated by baseless politically-motivated attacks, links Hispanic communities to “a predisposition to violence, criminality, and membership in street gangs.”⁷⁹ Law enforcement views follow suit.⁸⁰ Moreover, Hispanic individuals are especially vulnerable to fall prey to police coercion due to language barriers and fear of potential immigration consequences.⁸¹

72. See James E. Johnson et al., BRENNAN CTR. FOR JUST., N.Y. UNIV. SCH. OF L., RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 2 (2010), www.brennancenter.org/sites/default/files/legacy/Justice/ProsecutorialDiscretion_report.pdf [perma.cc/P7RH-BE2S].

73. Sara C. Appleby, *Guilty Stereotypes: The Social Psychology of Race and Suspicion in Police Interviews and Interrogations in Police Interviews and Interrogations*, CUNY ACAD. WORKS (2015), www.academicworks.cuny.edu/cgi/viewcontent.cgi?article=1518&context=gc_etds [perma.cc/5F5E-9GVE].

74. *Id.* at iii.

75. *Id.* at iii-iv.

76. *Id.* at 3 (“The research on stereotype threat, concern about being negatively evaluated based on one’s membership in a group, shows that being stereotyped is an anxiety provoking process.”).

77. *Id.* at 3-4; see also J. Guillermo Villalobos & Deborah Davis, *Interrogation and the Minority suspect: Pathways to True and False Confession*, in 1 *ADVANCES IN PSYCHOL. & L.* (Monica K. Miller & Brian H. Bornstein eds., 2016).

78. Villalobos & Davis, *supra* note 77, at 4.

79. *Id.* at 23; *Trump Goes on Offensive, Starting with an Attack on Harris*, N.Y. TIMES (Aug. 20, 2020), www.nytimes.com/2020/08/20/us/politics/trump-harris-biden-pennsylvania.html [perma.cc/VNX5-A3RC] (describing President Trump’s efforts to “stoke fear of immigrants” at a Pennsylvania campaign rally).

80. Villalobos & Davis, *supra* note 77, at 23; Julia Arce, *It’s Long Past Time We Recognized All the Latinos Killed at the Hands of Police*, TIME (July 21, 2020), www.time.com/5869568/latinos-police-violence/ [perma.cc/36T4-V7Z3] (“The names of Latinos killed by police go on and on, as is painfully clear at Black Lives Matter protests.”).

81. Villalobos & Davis, *supra* note 77, at 25 (noting “widespread

Of course, Rule 801(d)(2)(A) offers no safeguard against false statements borne of coercion or compliance. The prosecution of immigration crimes epitomizes the rule's especially insidious impact on defendants of color.⁸² In 2019, the most commonly prosecuted federal offenses were immigration offenses, including illegal entry and reentry.⁸³ Between 2011 and 2016, the number of immigration cases steadily declined—a trend which ended in 2017.⁸⁴ Since 2017, immigration related prosecutions have steadily increased, and, in 2019, 29,354 immigration cases were prosecuted federally; a 22.9 percent increase from 2018. These cases share a glaring commonality: Hispanic men accounted for 96.4 percent of federal immigration cases in 2019.⁸⁵

To secure a conviction for illegal reentry, the government must prove the following elements:

misunderstanding of *Miranda* rights” caused by language barriers).

82. The disproportionate prosecution of Hispanic men under 8 U.S.C. §§ 1325 and 1326 is not the result of historical accident. Federal laws criminalizing immigration went into effect in 1929 and were drafted by Senator Coleman Livingston Blease. See Ian McDougall, *Behind the Criminal Immigration Law: Eugenics and White Supremacy*, PROPUBLICA (June 19, 2018), www.propublica.org/article/behind-the-criminal-immigration-law-eugenics-and-white-supremacy [perma.cc/6GH5-ZWWK]; Kelly Lytle Hernandez, *How Crossing the US-Mexico Border Became a Crime*, CONVERSATION (Apr 30, 2017), www.theconversation.com/how-crossing-the-us-mexico-border-became-a-crime-74604 [perma.cc/DNH2-CET4]; Libby Watson, *How Crossing the Border Became a Crime*, SPLINTER NEWS (June 29, 2018), www.splinternews.com/how-crossing-the-border-became-a-crime-1827160001 [perma.cc/ZYG4-8W7A]. Blease frequently defended violence against non-white people, claiming, “the morals and the mode of living between colored people are not up to the standard adopted and lived up to by the white people.” Isaac Stanley-Becker, *Who's Behind the Law Making Undocumented Immigrants Criminals? An Unrepentant White Supremacist*, WASH. POST (June 27, 2019), www.washingtonpost.com/nation/2019/06/27/julian-castro-beto-orourke-section-immigration-illegal-coleman-livingstone-blease/ [perma.cc/3YDN-SNZS]. The bills were championed by Secretary of Labor, James Davis, who was a devout eugenicist and believed that those with “tainted blood, weak mentality or physical fault, threaten the whole physical, mental, and moral level of the American people.” James Davis, *America and Her Immigrants*, in 2 CONGRESSIONAL DIGEST 291 (Alice Gram ed., 1923).

83. Immigration related offenses include felony prosecutions for illegal reentry under 8 U.S.C. § 1326 and misdemeanor prosecutions for illegal entry under 8 U.S.C. § 1325; UNITED STATES SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2019 (2020), www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/FY19_Overview_Federal_Criminal_Cases.pdf [perma.cc/8AE9-H3NZ].

84. UNITED STATES SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2018 (2017), www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf [perma.cc/4N7R-HDRE].

85. UNITED STATES SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2019, *supra* note 83.

“(1) [the] Defendant was, at the time of the offense, an alien; (2) [the] Defendant had been lawfully deported or removed from the United States; (3) subsequent to this deportation or removal, [the] Defendant was found in the United States after knowingly and voluntarily reentering and thereafter remaining in the United States; and (4) no representative of the Attorney General or the Secretary of the Department of Homeland Security consented to [the] Defendant's reentry or presence in the United States.”⁸⁶

To prove the alienage element, the government may not simply rely upon the existence of the defendant's prior deportation or removal orders.⁸⁷ As a result, the government routinely moves to admit statements made by defendants during immigration proceedings as corroborating evidence to prove the element.⁸⁸

To introduce statements made during immigration proceedings, federal prosecutors often rely on Rule 801(d)(2)(A).⁸⁹ In 2018, expedited removals — a form of immigration removal proceeding — accounted for 43-percent of all immigration removals from the United States.⁹⁰ An expedited removal entails an administrative process through which a Department of Homeland Security agent processes an individual for removal from the United States.⁹¹ The individual does not appear before an immigration judge at any point in the process.⁹² The expedited removal process includes the taking of a sworn statement by the detained individual, which may be later admitted as an opposing party statement in a

86. *United States v. Castro-Cabrera*, 534 F. Supp. 2d 1156, 1157 (C.D. Cal. 2008).

87. *United States v. Sotelo*, 109 F.3d 1446, 1449 (9th Cir. 1997) (holding that a removal order, by itself, is insufficient evidence of illegal reentry due to the differing standards of proof between criminal and immigration proceedings).

88. *Id.* (“The prosecution presented Sotelo's admissions to Agent Hess that he is a Mexican citizen and his admissions during the deportation proceedings that he is not a United States citizen.”); *United States v. Gonzalez-Corn*, 807 F.3d 989, 996 (9th Cir. 2015) (“[N]either a deportation order, nor the defendant's own admissions, standing alone, is sufficient to prove alienage.” (alteration in original) (quoting *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1158 (9th Cir. 2000))); *United States v. Ruiz-Lopez*, 749 F.3d 1138, 1141 (9th Cir. 2014). “It is true a deportation order, on its own, is insufficient to establish alienage.” *Gonzalez-Corn*, 807 F.3d at 996.

89. See *United States v. Orellana-Blanco*, 294 F.3d 1143, 1148 (9th Cir. 2002), in which the government argues that statements contained within a record of sworn statement taken during an immigration proceeding are a party admission. See also *United States v. Hermoso-Garcia*, 475 F. App'x. 124, 126 (9th Cir. 2012) (holding that statements within the record of sworn statement taken during the immigration proceedings fell within the hearsay exception for “party admissions”).

90. MIKE GUO AND RYNA BAUGH, ANNUAL FLOW REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2018 (Oct. 2019), www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/enforcement_actions_2018.pdf [perma.cc/VB8S-P5W4].

91. *Id.*

92. *Id.*

criminal immigration-related prosecution against the defendant.⁹³

The statements made in expedited removal proceedings are, at their best, of dubious reliability. In a congressionally-commissioned study, observers routinely witnessed Department of Homeland Security agents failing to follow the minimum mandated procedures during the proceedings.⁹⁴ This study includes the most recent data on expedited removal proceedings and was commissioned under the International Religious Freedom Act of 1998. While the primary focus of the study was on asylum seekers, during the course of the study, experts observed more than 400 inspections by U.S. Customs and Border Protection agents at seven ports of entry and reviewed over 900 case files.⁹⁵ The Commission found widespread inconsistencies in compliance with mandated procedures.⁹⁶ In expedited removal proceedings, 72-percent of the men subject to removal failed to read – or have read to them – their sworn statements, as required.⁹⁷ Nonetheless, 100-percent signed and attested to the accuracy of their statements.⁹⁸ Agents failed to tell 15-percent of the men why they were signing the forms at all.⁹⁹ In other cases, sworn statements failed to include complete or relevant information communicated by the individual.¹⁰⁰ At the conclusion of the study, the Commission issued a report with recommendations designed to improve the integrity of the interview process.¹⁰¹ Two years later, at the request of Congress, the Commission prepared a follow-up report describing how agencies fared in implementing the recommendations in the report.¹⁰² U.S. Customs and Border Protection failed to implement a single recommendation and received a failing grade.¹⁰³

Accordingly, a disturbing trend in the use of statements under Rule 801(d)(2)(A) in the prosecution of illegal entry and reentry offenses emerges. Immigration-related offenses are the most

93. *Id.*

94. 1 United States Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal (2005), www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf [perma.cc/TQ76-KRKD] [hereinafter Asylum Seekers: Volume I].

95. *Id.* at 3, 37. The methodology of the study was carefully developed, requiring two specially trained observers to code their experience of their observations of the expedited removal proceedings.

96. *Id.* at 4.

97. 2 United States Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal 18-19 (2005), www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/ERS_RptVolII.pdf [perma.cc/3YJP-YDGR].

98. *Id.*

99. *Id.*

100. ASYLUM SEEKERS: VOLUME I, *supra* note 94, at 57.

101. *Id.*

102. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, EXPEDITED REMOVAL STUDY REPORT CARD: 2 YEARS LATER, at 3, 4 (2007).

103. *Id.*

commonly prosecuted federal offenses, and the targets of such prosecutions are largely Hispanic men.¹⁰⁴ To convict an individual of a violation of such an immigration-related offense, the prosecution must prove alienage, which is commonly accomplished through the introduction of an individual's statements obtained during their immigration proceedings.¹⁰⁵ Studies establish that these immigration proceedings are rife with inconsistency and unreliability, and yet statements obtained during the course of expedited removal proceedings may result in a criminal conviction with the possibility of a twenty-year prison sentence.¹⁰⁶ The use of such problematic evidence under Rule 801(d)(2)(A) should be subject to the evidentiary standard discussed below.

V. AMENDING RULE 801(D)(2)(A) TO REQUIRE A "GUARANTEE OF TRUSTWORTHINESS"

Allowing for admissibility of a criminal defendant's statement solely as a byproduct of "the adversary system" is a relic of the "Anglo-American [legal] tradition."¹⁰⁷ As a starting point, the assumptions undergirding the rule are imbued with privilege. Rule 801(d)(2)(A) presupposes that a criminal defendant who wishes to contradict an out-of-court statement at trial will have "every opportunity" to do so.¹⁰⁸ In fact, other evidence rules conspire to diminish a defendant's likelihood to testify at trial, especially defendants of color. As one example, a defendant's otherwise-excludable prior criminal conviction is admissible as proof of "character for truthfulness" if the defendant testifies.¹⁰⁹ As Black and Hispanic men are arrested, prosecuted, and convicted at a rate that far exceeds Caucasians, the rule is especially prejudicial to those defendants.¹¹⁰ Additionally, an emerging understanding of how coercive police interrogation strategies engender false confessions, primarily as to suspects of color, exposes the threadbare reliability of opposing party statements.¹¹¹ Therefore, an amendment to ensure a criminal defendant's statement possesses a "guarantee of trustworthiness" is long overdue. To achieve this safeguard, the government would be required to prove by a preponderance of the evidence prior to trial that a statement is reliable. Limited judicial review would benefit both parties. For the

104. See *supra* note 85.

105. See *supra* note 88; see also Bolitho, *supra* note 40, 199 (Statements admitted under Rule 801(d)(2) are "one of the most common reasons why out-of-court statements are admitted during trials.")

106. 8 U.S.C. § 1326 (2018).

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

108. See Morgan, *supra* note 23, at 361.

109. FED. R. EVID. 404(b) (1), 609.

110. See The Sentencing Project, *supra* note 66, at 1.

111. See *supra* notes 60-64, 70-76 and accompanying text.

government, a pre-trial determination that a defendant's statement bears indicia of reliability would solidify its proof at trial and protect testifying officers against cross-examination about the statement's veracity. For defendants, the review would provide much-needed scrutiny of nefarious interrogation tactics that too-often elicit false confessions.

The Supreme Court's interpretation of Rule 801(d)(2)(E), governing statements by alleged co-conspirators, imposes a similar requirement.¹¹² In applying this rule, a trial court must ascertain, as a preliminary matter, the existence of a conspiracy, its pendency, whether the party against who it was offered was a member, and whether the statement was made in furtherance of the alleged conspiracy.¹¹³ The standard of proof to be applied by the court is preponderance of the evidence, *i.e.*, "more likely than not."¹¹⁴ While a court may consider the contents of the statement itself, its contents "are not alone sufficient to establish" the preliminary facts.¹¹⁵ Federal appellate courts uniformly require some independent evidence, including "the corroboration of facts contained in the statements of the [alleged] co-conspirators."¹¹⁶ A comparable pre-trial process must be applied to opposing party statements attributed to defendants and offered by the prosecution under Rule 801(d)(2)(A). As part of this process, courts should allow defense experts to opine about the correlation between coercive police interrogation techniques and false statements.¹¹⁷

Rule 804(b)(3), controlling "statements against interest" by a now-unavailable witness-declarant, incorporates comparable protections.¹¹⁸ According to the Advisory Committee Notes and judicial interpretation, the rule "is founded upon the commonsense notion that reasonable people, even [those] who are not especially

112. *Bourjaily v. United States*, 483 U.S. 171, 180 (1987) (holding that admissibility of a co-conspirator's statement against the defendant requires that the government prove by a preponderance of the evidence "the existence of a conspiracy and the participation therein of the declarant [and the defendant]"). An amendment to the rule codified the holding. See 1997 Amendment Committee Note on Amendment to Rule 801(d)(2).

113. *Bourjaily*, 483 U.S. at 175-176 (citing FED. R. EVID. 104(a)).

114. *Id.*

115. Advisory Committee Note, *supra* note 26.

116. See, *e.g.*, *United States v. Petty*, 132 F.3d 373, 380 (7th Cir. 1997).

117. In a similar vein, Professors Richard Leo and Steven Drizin propose that, on the defendant's motion, courts should hold "pretrial reliability hearings" to determine the veracity of a defendant's confession. See Richard A. Leo et al., *Bring Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 484 (2006); see also Mark Costanzo, Netta Shaked-Schroer & Katherine Vinson, *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J. EMPIRICAL LEGAL STUD. 231, 234 (2010) (describing a 2010 study of prospective jurors that revealed that "a large majority reported that it would be helpful to hear expert testimony about interrogation techniques and reasons why a defendant might falsely confess to a crime").

118. FED. R. EVID. 804(b)(3)(B).

honest, tend not to make self-inculpatory statements unless they believe them to be true.”¹¹⁹ In 2010, amidst exoneration-driven revelations about false statements made during coercive police interrogations, the rule was amended to require “corroborating circumstances that clearly indicate [the statement’s] trustworthiness, if it is offered in a criminal case[.]”¹²⁰ Those circumstances may include whether the declarant voluntarily relinquished his or her *Miranda* rights, whether the statement was made “to curry favor with authorities,” or whether the statement bore “indicia of trustworthiness of the specific, ‘essential’ assertions, not merely of other facts contained [therein].”¹²¹ While Rule 804(b)(3) requires a declarant’s unavailability at trial, its logic holds true to statements made by criminal defendants: the significant risk of police coercion coupled with the outsize evidentiary value of inculpatory statements demands the government’s corroboration of trustworthiness.

VI. CONCLUSION

In the framers’ vision, the Federal Rules of Evidence “should be construed so as to administer every proceeding fairly . . . to the end of ascertaining the truth and securing a just determination.”¹²² To hold the framers to that laudatory goal, an amended Rule 801(d)(2)(A) must consider two realities. First, law enforcement officers are trained to pursue interrogation strategies that value confessions and convictions at the expense of a “just determination” of actual guilt. Further, the rule disproportionately impacts defendants of color and endangers wrongful convictions. The changes we propose to Rule 801(d)(2)(A) are modest, especially when measured against the incalculable harm suffered by the Central Park Five and other defendants of color over its unjust application.

119. *Williamson v. United States*, 512 U.S. 594, 599 (1994); FED. R. EVID. 804(b)(3), Advisory Committee Note (citing *Hillman v. Northwest Engineering Co.*, 346 F.2d. 668 (6th Cir. 1965)) (“The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true”).

120. FED. R. EVID. 804(b)(3)(B).

121. *United States v. Jackson*, 540 F.3d 578, 589 (7th Cir. 2008); *United States v. Mackey*, 117 F.3d 24, 29 (1st Cir. 1997), *cert. denied*, 522 U.S. 975 (1997)

122. FED. R. EVID. 102.