

# FAILED SNITCHES AND SENTENCING STITCHES: SUBSTANTIAL ASSISTANCE AND THE COOPERATOR’S DILEMMA\*

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*The “substantial assistance” provisions of the U.S. Sentencing Guidelines dominate the practice of modern federal criminal law. This primary mechanism by which criminal defendants who provide valuable information to federal prosecutors are compensated for their cooperation—namely, in the form of a sentence either below the calculated Guidelines sentencing range or, more significantly, below any mandatory minimum—has created a system where defendants are incentivized to incriminate themselves and as many others as possible, all without any guarantee that their cooperation will actually result in a lesser sentence. This Note explores the operation of this provision; the consequent “cooperator’s dilemma” it creates for defendants considering cooperation; and the unreliable, unfair, and unethical results it generates. It offers a novel incremental solution: an intermediate departure provision called “good faith cooperation,” whereby defendants who have attempted to cooperate but do not obtain substantial assistance motions can move to receive sentences below guidelines ranges and mandatory minimums on the basis of their attempted assistance. This provision provides a politically feasible option for legislators and commissioners that addresses multiple concerns regarding the current system without entirely upending the practice of federal criminal law as it exists.*

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INTRODUCTION

Anyone familiar with modern federal criminal defense can attest to the significance of “substantial assistance.”<sup>1</sup> This term refers to the primary mechanism by which criminal defendants who provide valuable information to federal prosecutors are compensated for their cooperation. This compensation occurs when a United States Attorney makes a motion on behalf of a defendant pursuant to particular statutory provisions, thereby giving the sentencing judge explicit authority to impose a sentence either below the calculated United

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<sup>1</sup> See, e.g., *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003) (“We conclude that the profound effect a substantial assistance motion can have on a defendant’s sentence qualifies the cooperation period as a ‘critical stage’ of the criminal process.”); ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 51 (2009) (“Because [the substantial assistance] provisions make cooperation central to a defendant’s ability to get a lower sentence, they turned cooperation into a dominant feature of federal plea bargaining and sentencing, ensuring that a large percentage of federal defendants become informants of one kind or another.”); Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor’s Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 205 (1997) (“Today, substantial assistance departures constitute an increasing percentage of all guideline departures . . . prompting one judge to call section 5K1.1 the ‘King of the departure mountain.’” (quoting Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combating Ultra-Uniformity*, 35 B.C. L. REV. 799, 807 (1994))). For purposes of this Note, I will use the generic term “substantial assistance motions” to refer to both § 5K1.1 and § 3553(e) motions, unless specified otherwise.

States Sentencing Guidelines sentencing range<sup>2</sup> or—more significantly—below any statutorily imposed mandatory minimum sentence.<sup>3</sup> It is thus no surprise that the institution of cooperation has become pervasive in the practice of federal criminal law.<sup>4</sup> Although this provision of the sentencing guidelines ultimately authorizes the judge to determine the “appropriate reduction” based on the details of a defendant’s cooperation, the prosecutor acts as the sole gatekeeper for defendants wishing to take advantage of this beneficial policy.<sup>5</sup> Prosecutors essentially have unilateral bargaining power to obtain any and all inculpatory information possessed by a defendant—regardless of whether providing that information will actually result in a lesser sentence.<sup>6</sup> As such, defendants are incentivized not only to give up their rights, but to take down as many other people as possible in the process. This creates a system rife with reliability and fairness concerns.<sup>7</sup>

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<sup>2</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004) (“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”). This policy statement lists five factors the court may consider, but is not limited to, in determining the “appropriate reduction”: (1) “the significance and usefulness of the defendant’s assistance,” (2) “the truthfulness, completeness, and reliability of any information or testimony provided by the defendant,” (3) “the nature and extent of the defendant’s assistance,” (4) “any injury suffered [or risk thereof] . . . resulting from his assistance,” and (5) “the timeliness of the defendant’s assistance.” *Id.*

<sup>3</sup> 18 U.S.C. § 3553(e) (2012) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”). The government may also move for a reduction in the sentence of a defendant who has already been sentenced, including with respect to a sentence imposed as a result of a mandatory minimum. FED. R. CRIM. P. 35(b).

<sup>4</sup> In 2012, approximately 11.5% of defendants received a § 5K1.1 substantial assistance departure. U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.30 (2012), <http://www.uscourts.gov/research-and-publications/annual-reports-sourcebooks/2012/sourcebook-2012> [hereinafter SOURCEBOOK]. Additionally, 5K1.1 motions constituted 16.5% of all sentences below the Guidelines range and 27.1% of those below-range sentences sponsored by the government and imposed pursuant to a plea agreement. *Id.* at tbl.28A.

<sup>5</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004) (requiring a government motion in order for the court to depart from the guidelines); 18 U.S.C. § 3553(e) (requiring a government motion in order for the court to depart from the statutory minimum sentence); *Wade v. United States*, 504 U.S. 181, 185 (1992) (“[I]n both § 3553(e) and § 5K1.1 the condition limiting the court’s authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted.”).

<sup>6</sup> See *United States v. Mezzanatto*, 513 U.S. 196, 200–01 (1995) (holding that a defendant’s waiver, as part of a cooperation agreement, of federal rules of evidence and criminal procedure that exclude for purposes of impeachment any statement made by the defendant during plea negotiations was constitutionally valid).

<sup>7</sup> See *infra* Part III (detailing these concerns).

Under the Sentencing Guidelines, a defendant must provide “substantial assistance in the investigation or prosecution of another person who has committed an offense” in order to receive the cooperation benefit.<sup>8</sup> The term “substantial assistance” is neither defined by the United States Sentencing Commission (the “Commission”)<sup>9</sup> nor clarified by controlling precedent.<sup>10</sup> At a minimum, the provision requires a defendant to plead guilty to the instant offense and, in some districts, to “any other serious criminal conduct” that is revealed during the course of cooperation.<sup>11</sup> Moreover, it is generally agreed that the additional information necessary to receive a substantial assistance motion must be inculpatory as to crimes for which the government does not yet have sufficient evidence.<sup>12</sup> In other words, the government only pays for what it does not already have. Furthermore, a prosecutor’s ultimate decision of whether to make a coveted 5K1.1 motion on behalf of a particular defendant is judicially reviewable only if it is “based on an unconstitutional motive”<sup>13</sup> or is “not rationally related to any legitimate Government end.”<sup>14</sup>

The Sentencing Guidelines’ intersection with the substantive law of conspiracy, “one of the most commonly charged federal crimes,”<sup>15</sup>

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<sup>8</sup> 18 U.S.C. § 3553(e).

<sup>9</sup> *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1503, 1507 (2001) (“[T]he Sentencing Commission did not define ‘substantial assistance,’ leaving that determination to the government.”); see also Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 37 (1992) (“To receive the lightest possible sentence [defendants] must do something more, which is not precisely defined but which consists of impressing the government very much with the value of their testimony.”).

<sup>10</sup> Compare *United States v. Knights*, 968 F.2d 1483, 1488–89 (2d Cir. 1992) (suggesting that if the defendant did all that the plea agreement requires, he has kept his half of the agreement, and the government could not in good faith refuse to move for a downward departure), and *United States v. Melton*, 930 F.2d 1096, 1098–99 (5th Cir. 1991) (holding that a defendant’s “read[iness] to perform” may be enough to constitute substantial assistance), with *United States v. Donatui*, 922 F.2d 1331, 1335 (7th Cir. 1991) (finding that substantial assistance requires actual assistance in the prosecution of another defendant so the government’s decision not to move for departure was reasonable when the defendant’s information was not new or helpful).

<sup>11</sup> Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 17 (2003).

<sup>12</sup> See *id.* at 16 (“In evaluating the ultimate utility of the defendant’s cooperation, the prosecutor will look to several factors, [including] the number of other people who can be prosecuted based on the defendant’s information, . . . and whether the defendant’s information is cumulative of other evidence that the prosecution already has or can obtain.”).

<sup>13</sup> *Wade v. United States*, 504 U.S. 181, 185–86 (1992).

<sup>14</sup> *Id.* at 186.

<sup>15</sup> Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777, 778 (2001).

compounds the systemic increase in reliance on cooperation.<sup>16</sup> In the world of large-scale criminal enterprises, individuals who are higher on the conspiracy chain tend to be those with more information.<sup>17</sup> Conversely, defendants peripherally involved in such conspiracies are not likely to hold the sort of novel evidence that could be considered “substantial.”<sup>18</sup> These low-level defendants are unlikely to qualify for substantial assistance, yet can still be liable for acts that they have no information about based on a conspiracy charge, and are thus sentenced just as harshly.<sup>19</sup> This phenomenon leads to a specific problem known as “inverted sentencing”<sup>20</sup> or the “cooperation paradox,”<sup>21</sup> which describes how lower-level defendants can receive harsher penalties than their higher-up cooperating counterparts. Moreover, even defendants who possess information that might warrant substantial assistance motions are faced with the undeniable possibility that their attempts to cooperate ultimately will not result in the government motion.<sup>22</sup> If these defendants offer the government self-incriminating information but are not rewarded for their cooperation in the form of

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<sup>16</sup> See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1340 (2003) (arguing that charging conspiracy gives prosecutors the “leverage necessary” to induce a defendant to “flip[ ]” against his fellow conspirators by cooperating with the prosecution).

<sup>17</sup> See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993) (“Defendants who are most in the know, and thus have the most ‘substantial assistance’ to offer, are often those who are most centrally involved in conspiratorial crimes.”).

<sup>18</sup> See *id.* (“Minor players, peripherally involved and with little knowledge or responsibility, have little to offer . . .”).

<sup>19</sup> See, e.g., CHARLES DOYLE, CONG. RESEARCH SERV., RL32040, FEDERAL MANDATORY MINIMUM SENTENCING STATUTES 9 (2013), available at <https://www.fas.org/sgp/crs/misc/RL32040.pdf> (describing how the substantial assistance exception may also lead to “inverted sentencing,” where “the more serious the defendant’s crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he had to offer to a prosecutor; while in contrast the exception is of no avail to the peripheral offender who can provide no substantial assistance” (internal quotations omitted)); Schulhofer, *supra* note 17, at 212 (“Defendants who are most in the know . . . may be the best placed to negotiate a big sentencing break.”).

<sup>20</sup> E.g., DOYLE, *supra* note 19, at 9.

<sup>21</sup> E.g., Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1863–64 (1995) (“Inverted sentencing, or the cooperation paradox, allows knowledgeable and, therefore, highly culpable offenders to escape the mandatory sentences, while less culpable actors receive the harsh penalties.”).

<sup>22</sup> A 1998 study by the Sentencing Commission found that while over two-thirds of defendants provided some form of assistance to the government, only 38.6% of those defendants received 5K1.1 motions. LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 9–10 (1998), available at [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Publications/1998/199801\\_5K\\_Report.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Publications/1998/199801_5K_Report.pdf).

a 5K1.1 motion, they are left in an even worse position than before.<sup>23</sup> These factors combine to form what I call the “cooperator’s dilemma.”<sup>24</sup>

This Note attempts to address the problematic incentive structure created by substantial assistance, as well as several larger structural criticisms of the federal criminal cooperation system, by offering a novel, incremental solution—an intermediate departure provision I call “good faith cooperation.” Under such a provision, defendants who have attempted to cooperate but do not obtain substantial assistance motions can move to receive sentences below the Sentencing Guidelines ranges and mandatory minimums on the basis of their attempted assistance. Although other commentators have addressed the cooperation paradox and the attendant concerns surrounding cooperation under the Sentencing Guidelines,<sup>25</sup> the possibility of an explicit, intermediate cooperation departure has yet to be explored.

Part I gives a brief overview of the Sentencing Guidelines, mandatory minimum statutes, and the structure of cooperation within the federal criminal system. Part II provides an analytical framework for the subsequent analysis and proposed solution. Using concepts drawn from traditional contract law principles and rational choice theory, this Part creates a more holistic picture of the incentive effects underlying the substantial assistance model and the “cooperator’s dilemma” it creates. Part III provides an overview of scholarly critiques of the federal cooperation system, the suggested solutions that have yet to be adopted, and the current state of sentencing policy. Part IV introduces the operational features of the proposed “good faith cooperation” provision, examines the expected effects of the provision, and responds to potential criticisms.

Ultimately, this solution is one that could address multiple concerns regarding the current system without entirely upending the cur-

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<sup>23</sup> See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869, 900 (2008) (“Even if a defendant provides substantial assistance, there is a risk that a biased prosecutor might withhold the motions so that a defendant receives a longer sentence . . .”).

<sup>24</sup> See *infra* Part II.C (illustrating this concept). This phrase has been used in a broader context to describe the phenomenon of individuals “attempt[ing] to acquire a benefit which is only attainable through collective action but which enables some beneficiaries to opt out of the group effort.” Raymond Hogler & Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado’s Labor Peace Act and Its Implications for Public Policy*, 70 *U. COLO. L. REV.* 871, 911 (1999) (citing MARK IRVING LICHBACH, *THE COOPERATOR’S DILEMMA* (1996)). However, for the purposes of this Note, the term will refer to the set of choices and incentives facing criminal defendants who must decide whether to formally cooperate with federal prosecutors. See *infra* Part II.C (illustrating this concept).

<sup>25</sup> See *infra* Part III.A (detailing these critiques).

rent practice of federal criminal law. In a system that has seen its prison population increase by almost 900% since 1980,<sup>26</sup> this option provides a potential pathway to reduce harsh sentences,<sup>27</sup> better address law enforcement objectives,<sup>28</sup> and increase fairness for everyone involved.<sup>29</sup> As a result, my proposal provides a politically feasible option for legislators and commissioners wishing to deal with these issues, and fills the gaps that prior statutory amendments and executive enforcement policies have left unresolved.

## I

### OVERVIEW: INFORMANTS, MANDATORY MINIMUMS, AND THE FEDERAL SENTENCING GUIDELINES

#### A. *The Sentencing Guidelines*

Federal criminal sentences are primarily determined using a comprehensive set of policies and practices promulgated by the Commission, collectively known as the Federal Sentencing Guidelines (the “Guidelines”).<sup>30</sup> The purpose of the Guidelines is to “provide certainty and fairness,” to “avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct,”<sup>31</sup> and to advance “the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”<sup>32</sup>

The process for determining a defendant’s sentence under the Guidelines is mathematical in nature. The statute under which a defendant is convicted is matched with the Guidelines provisions to establish a “base offense level,”<sup>33</sup> which is then adjusted based on cer-

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<sup>26</sup> See NATHAN JAMES, CONG. RESEARCH SERV., R42937, *THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 1* (2014), available at <http://www.fas.org/sgp/crs/misc/R42937.pdf> (“The number of inmates under the [Bureau of Prison]’s jurisdiction has increased from approximately 25,000 in FY1980 to over 219,000 in FY2013.”).

<sup>27</sup> See *infra* Part IV.B (describing the potential for more defendants to receive lesser sentences under the proposed provision).

<sup>28</sup> See *id.* (explaining how this provision could increase reliability and promote the principles of criminal punishment).

<sup>29</sup> See *id.* (addressing fairness concerns).

<sup>30</sup> See Pub. L. No. 98-473, 98 Stat. 1989–90 (1984) (requiring that courts consider the Guidelines in sentencing decisions).

<sup>31</sup> 28 U.S.C. § 991 (2012); see also Jonathan D. Lupkin, *5K1.1 and Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guidelines*, 91 COLUM. L. REV. 1519, 1520–22 (1991) (describing the historical shift from indeterminate sentencing to the Guidelines).

<sup>32</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subsec. 1 (2004).

<sup>33</sup> *Id.* ch. 2, at 47.

tain characteristics of the instant offense.<sup>34</sup> In addition, the defendant's criminal record is analyzed to establish a "criminal history category."<sup>35</sup> These calculations are then matched using the Guidelines' Sentencing Table, which produces a sentencing range in months of imprisonment.<sup>36</sup> While the Guidelines' calculations have been deemed "advisory" for judges rather than mandatory,<sup>37</sup> a majority of cases are still sentenced using the Guidelines ranges.<sup>38</sup>

In theory, this process should comport with the goals of equality and predictability. The reality of present-day federal criminal law, however, is that the same conduct can fall under a remarkably wide array of criminal statutes.<sup>39</sup> The decision of which charges to bring against a defendant lies solely in the hands of the prosecutor.<sup>40</sup> This fact, combined with the significance of the applicable offense level in determining the Guidelines sentencing range, makes the exercise of prosecutorial discretion at the charging stage the single most important factor in a defendant's ultimate sentence.<sup>41</sup> In other words, by cabining the discretion of sentencing judges, the Guidelines effectively

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* ch. 4, at 368.

<sup>36</sup> *Id.* ch. 5, pt. A, at 393–95. See generally U.S. SENTENCING COMM'N, SENTENCING TABLE (2012) [hereinafter SENTENCING TABLE], available at [http://www.ussc.gov/Guidelines/2012\\_Guidelines/Manual\\_PDF/Sentencing\\_Table.pdf](http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Sentencing_Table.pdf).

<sup>37</sup> *United States v. Booker*, 543 U.S. 220, 246 (2005) (finding two provisions of the Guidelines to be in violation of the Sixth Amendment, and severing those provisions to make the Guidelines sentencing system advisory rather than mandatory).

<sup>38</sup> In 2012, 54.4% of all sentences were within or above the Guidelines range. SOURCEBOOK, *supra* note 4, at tbl.N (displaying national comparison of sentences imposed and position relative to the guideline range).

<sup>39</sup> See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 645–48 (1997) (describing the increase in substantive federal criminal statutes and the resulting "disparate treatment of similarly situated offenders").

<sup>40</sup> See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 150 (1994) ("The prosecutor has traditionally exercised a certain degree of control over a defendant's ultimate sentence by determining what charges to bring or, indeed, whether to prefer [sic] charges at all." (quoting *United States v. LaGuardia*, 902 F.2d 1010, 1015 (1st Cir. 1990))).

<sup>41</sup> See, e.g., William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (describing substantive criminal laws not as "rules in the shadow of which litigants must bargain," but as "items on a menu from which the prosecutor may order as she wishes" such that "[t]he law-on-the-street—the law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges").

shifted the vast majority of sentencing power to the initial charging decisions of federal prosecutors.<sup>42</sup>

### B. Cooperation Under the Guidelines

The Guidelines contain two primary mechanisms dealing with defendants who cooperate in a general sense by conceding to the charges against them, though they operate in dramatically different ways. First, the “Acceptance of Responsibility” provision acts to adjust a defendant’s offense level downward by either two or three points.<sup>43</sup> A two-level reduction is applied to any defendant who “clearly demonstrates acceptance of responsibility for his offense.”<sup>44</sup> An additional one-level reduction is reserved for crimes whose original offense level is sixteen or greater, and requires a motion by government as to the timeliness of the defendant’s intention to plead guilty.<sup>45</sup> The actual reduction in a defendant’s sentence based on the two- or three-level mitigation credit varies depending on their criminal history. However, a two-level reduction can reduce the floor of the range by anywhere from three months (constituting a 75% sentence reduction from an original floor of four months) to sixty-eight months (constituting an 18.9% reduction from an original floor of 360 months).<sup>46</sup> Though the award of an additional point reduction under § 3E1.1(b) is within the discretion of the prosecutor, the initial two-point reduction under § 3E1.1(a) is generally available to all defendants who plead guilty in a timely fashion.<sup>47</sup>

On the other hand, the “Substantial Assistance” provision of the Guidelines is classified as a departure and explicitly allows a judge to sentence a defendant below the calculated sentencing range.<sup>48</sup> Because mandatory minimum sentences are dictated by federal statute rather than the agency-created Guidelines, there is a statutory analogue to § 5K1.1 that gives judges authority to impose a sentence

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<sup>42</sup> See Lee, *supra* note 40, at 109 (“[G]iving the prosecutor broad discretion to decide whether the defendant may receive a downward departure for his cooperation has the possibly unintended effect of shifting sentencing discretion previously held by the judge to the prosecutor, and may undermine the goals of uniformity and certainty in sentencing.”).

<sup>43</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2004).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See SENTENCING TABLE, *supra* note 36.

<sup>47</sup> See Laura Waters, *A Power and a Duty: Prosecutorial Discretion and Obligation in United States Sentencing Guideline § 3E1.1(B)*, 34 CARDOZO L. REV. 813, 819 (2012) (describing these provisions and the circuit split regarding “whether subsection (b) confers onto the defendant an entitlement to the reduction or merely provides the prosecutor with a means of rewarding a cooperative defendant, should he so choose”).

<sup>48</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004).

below a statutorily imposed mandatory minimum.<sup>49</sup> These sentencing reductions are much more difficult to obtain because both the Guidelines and the statute require a government motion attesting to the defendant's assistance.<sup>50</sup> Once the government moves for the departure, the Guidelines direct the judge to consider the "nature and extent" as well as the "significance and usefulness" of the assistance, the "truthfulness, completeness, and reliability" of the information or testimony provided, whether the defendant was put in danger or suffered injury to himself or family as a result of the cooperation, and the timeliness of the assistance.<sup>51</sup> Unsurprisingly, the sentencing reduction can vary immensely depending on the facts of an individual defendant's offense(s) and cooperation with prosecutors.<sup>52</sup> While the government's sentencing recommendation as to a cooperating defendant is taken into account, this determination is ultimately within the court's judgment and therefore is somewhat unpredictable.<sup>53</sup> Despite the relatively uncertain reward for obtaining a substantial assistance motion, the incentive to receive one is remarkably high.<sup>54</sup>

Perhaps the most unforeseeable aspect of the cooperation process is not the potential sentence reduction, but rather the government's decision whether or not to grant the motion to begin with. Indeed, the government motion requirement of Section 5K1.1 is arguably the greatest source of scholarly interest in the federal coop-

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<sup>49</sup> 18 U.S.C. § 3553(e) (2012). The Supreme Court has held that this authority is dependent on a motion from the government authorizing such a sentencing reduction pursuant to this statute explicitly (as opposed to § 5K1.1 alone). *Melendez v. United States*, 518 U.S. 120, 129–30 (1996).

<sup>50</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004).

<sup>51</sup> *Id.* These factors have been held to apply to mandatory minimum cases as well. *See, e.g., United States v. Gabbard*, 586 F.3d 1046, 1051 (6th Cir. 2009) (citing *United States v. Richardson*, 521 F.3d 149, 159 (2d Cir. 2008)) (“[C]onsidering U.S.S.G. § 5K1.1’s factors is appropriate in determining the extent of a departure below the statutory minimum pursuant to 18 U.S.C. § 3553(e).”).

<sup>52</sup> In 2012, the median decreases in months from Guideline minimums as a result of 5K1.1 motions ranged from six (prison offenses) to seventy-two (kidnapping/hostage taking), with the total median decrease equaling thirty months. SOURCEBOOK, *supra* note 4, at tbl. 30. The median percent decrease ranged from twenty-five (murder) to one hundred (several white collar crimes including embezzlement and tax offenses), with the total median decrease at 49.6%. *Id.*

<sup>53</sup> *See* I. India Geronimo, Comment, “Reasonably Predictable”: The Reluctance to Embrace Judicial Discretion for Substantial Assistance Departures, 33 *FORDHAM URB. L.J.* 1321, 1331–32 (2006) (describing the expanded judicial discretion post-*Booker* “to reduce a defendant’s sentence when reasonableness so requires” regardless of the government’s recommendation).

<sup>54</sup> *See supra* note 52 (describing the median sentence decreases resulting from substantial assistance departures); *infra* Part II (examining the incentive effects of substantial assistance).

eration system.<sup>55</sup> There is no definition of “substantial assistance” to guide prosecutors in their decisionmaking and, indeed, individual United States Attorneys’ offices vary widely with respect to 5K1.1 motions.<sup>56</sup> In *Wade v. United States*,<sup>57</sup> the Supreme Court held that the government’s decision to withhold a 5K1.1 motion on behalf of a cooperating defendant may only be reviewed for unconstitutional motive.<sup>58</sup> As long as the government’s decision not to grant a substantial assistance motion is rationally related to a legitimate government purpose, is not arbitrary, and is not made in bad faith, that decision is constitutionally valid.<sup>59</sup>

The Acceptance of Responsibility adjustment is a formalized, quasi-automatic function of pleading guilty, while the Substantial Assistance departure provides an entirely discretionary but highly valuable reward system for cooperators. In cases with no mandatory minimum sentence, there exists no mechanism aside from these provisions for individuals to benefit from cooperation with the government.

### C. Mandatory Minimums and the Safety Valve

As mentioned above, one of the most valuable aspects of substantial assistance is its applicability in cases with statutorily imposed mandatory minimum sentences, where a government motion pursuant to 18 U.S.C. § 3553(e) is generally the only way to receive a lower sentence.<sup>60</sup> Unlike the Sentencing Guidelines ranges, federal

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<sup>55</sup> See, e.g., Lisa Egitto, *Substantial Assistance Departures: Threat to Sentencing Goals or Necessary Evil?*, 17 ST. JOHN’S J. LEG. COMMENT. 585, 588 (2003) (“Commentators have criticized the motion requirement for granting prosecutors too much discretion in deciding whether a substantial assistance departure is warranted in a specific instance.”); Adriano Hrvatin, *Unconstitutional Exploitation of Delegated Authority: How to Deter Prosecutors from Using “Substantial Assistance” to Defeat the Intent of Federal Sentencing Laws*, 32 GOLDEN GATE U. L. REV. 117, 147–51 (2002) (describing separation-of-powers arguments against the government motion requirement); Lee, *supra* note 1, at 203 (1997) (claiming that the government motion requirement “results in an undesirable transfer of discretion from judges to prosecutors”).

<sup>56</sup> See MAXFIELD & KRAMER, *supra* note 22, at 10 (“These exploratory findings suggest that . . . there was a lack of uniformly applied criteria as to what merits a substantial assistance departure.”); Simons, *supra* note 11, at 19 (“Whether assistance will be considered ‘substantial’ varies from district to district and even from prosecutor to prosecutor.”). For a detailed examination of these variances, see Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 602–08 (1999).

<sup>57</sup> 504 U.S. 181 (1992).

<sup>58</sup> *Id.* at 186 (“Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant’s race or religion.”).

<sup>59</sup> *Id.*

<sup>60</sup> *Supra* note 49 and accompanying text. As discussed below, the one exception to this is the “safety valve” provision of § 3553, which limits the applicability of statutory minimum sentences for a small class of low-level defendants convicted of certain drug crimes. See 18 U.S.C. § 3553(f) (2012) (setting forth the safety valve requirements); *infra*

mandatory minimum sentencing statutes have never been judicially struck down.<sup>61</sup> Absent a § 3553(e) substantial assistance motion from the government, the sentencing judge has no discretion whatsoever to consider the individual characteristics of the defendant, the actual severity of his criminal conduct, or any unsuccessful attempts he may have made to cooperate with the government.<sup>62</sup>

The Federal Sentencing Guidelines are historically tied to mandatory minimums.<sup>63</sup> The current statutory framework for drug trafficking offenses applies mandatory minimums to all individuals engaged in a “continuing criminal enterprise.”<sup>64</sup> As long as an enterprise as a whole is responsible for the statutorily requisite quantity of drugs, each individual defendant can be held liable at sentencing for that entire amount. As such, a defendant’s actual level of individual participation in a drug conspiracy has become less relevant to the sentence he will face.<sup>65</sup>

In response to concerns about the effects of mandatory minimum sentencing laws on “the least culpable offenders,” for whom “mitigating factors that [were] recognized in the guidelines and generally [were] considered in drug cases [did] not apply . . . except in rare instances,”<sup>66</sup> Congress amended § 3553 by enacting the “safety valve”

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Part I.C (describing the statutory provision, the history behind its adoption, and its limited applicability).

<sup>61</sup> *Cf.*, e.g., *United States v. Angelos*, 433 F.3d 738, 742, 750–53 (10th Cir. 2006) (holding that a fifty-five-year minimum federal sentence pursuant to 18 U.S.C. § 924(c) for possession of a firearm during two controlled sales of eight ounces of marijuana did not violate the Eighth Amendment’s prohibition on cruel and unusual punishment or Equal Protection), *cert. denied* 549 U.S. 1077 (2006); *Harmelin v. Michigan*, 501 U.S. 957, 1001–05 (1991) (holding that a sentence of mandatory life imprisonment without possibility of parole for possession of more than 650 grams of cocaine did not violate the Eighth Amendment’s prohibition on cruel and unusual punishment).

<sup>62</sup> See 18 U.S.C. § 3553(e) (2012).

<sup>63</sup> The same statute that created the Sentencing Guidelines in 1984 also contained new mandatory minimum sentences for certain drug and firearm offenses. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 503(a), 1005(a), 98 Stat. 2069, 2138 (1984) (amending 21 U.S.C. § 860 (formerly § 845a) and 18 U.S.C. § 924(c)).

<sup>64</sup> 21 U.S.C. § 848(a) (2012) (“Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years . . .”).

<sup>65</sup> See 21 U.S.C. § 846 (2012) (“Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”); Natasha Bronn, “*Unlucky Enough to Be Innocent*”: *Burden-Shifting and the Fate of the Modern Drug Mule Under the 18 U.S.C. § 3553(f) Statutory Safety Valve*, 46 COLUM. J.L. & SOC. PROBS. 469, 476 (2013) (“The Act’s focus on drug enterprises began to blur the lines between upper-level organizers, mid-level dealers, and low-level dealers by applying mandatory minimums to all players involved and determining sentences based upon quantities of drugs trafficked rather than rank in a trafficking organization.”).

<sup>66</sup> H.R. REP. NO. 103-460, at 3 (1994).

provision,<sup>67</sup> which provides an exception to particular mandatory minimum statutes for “a certain class of nonviolent, low-level drug offenders.”<sup>68</sup> In order to qualify for this valuable exclusion from mandatory minimum sentencing laws, a defendant has the burden<sup>69</sup> of establishing that: (1) the defendant “does not have more than 1 criminal history point, as determined under the [S]entencing [G]uidelines”; (2) the defendant “did not use violence or credible threats of violence”; (3) the offense “did not result in death or serious bodily injury to any person”; (4) “the defendant was not an organizer, leader, manager, or supervisor of others in the offense . . . and was not engaged in a continuing criminal enterprise as defined in 21 U.S.C. § 848”; and (5) the defendant has, by the time of sentencing, “truthfully provided to the Government all information and evidence the defendant has concerning the [instant] offense.”<sup>70</sup> Unlike the substantial assistance provision, the judge is the ultimate gatekeeper for sentencing reductions under the safety valve provision.<sup>71</sup> Still, these requirements do not apply as widely as many would hope.<sup>72</sup> Over three-fifths of drug offenders facing mandatory minimums in 2013 did not receive the safety valve exception.<sup>73</sup>

Interestingly, the fifth factor of the safety valve provision acts as a cooperation requirement for those who wish to take advantage of the provision’s benefit—a source of significant scholarly commentary.<sup>74</sup>

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<sup>67</sup> Pub. L. No. 103-322, § 80001, 108 Stat. 1985 (1994) (amending 18 U.S.C. § 3553). Federal Sentencing Guidelines § 5C1.2 was added to reflect this exception to mandatory minimum sentences for certain drug-related offenses. See, e.g., Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. REV. 1471, 1472 n.7 (2000). Congress codified this exception at 18 U.S.C. § 3553(f) (1994). *Id.* These statutory enactments are collectively known as the “safety valve” provision. *Id.*

<sup>68</sup> Froyd, *supra* note 67, at 1496.

<sup>69</sup> See Bronn, *supra* note 65, at 473 (“All circuits agree that the initial burden of proof to demonstrate safety-valve eligibility is on the defendant.”).

<sup>70</sup> U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(1)–(5) (2004).

<sup>71</sup> See Bronn, *supra* note 65, at 497 (“[In contrast to substantial assistance.] when drafting the safety-valve provision, Congress made a calculated decision to take this discretion away from the prosecutor and place the eligibility determination in the hands of the judge.”).

<sup>72</sup> See, e.g., Froyd, *supra* note 67, at 1498 (“The safety valve, however, falls short of Congress’s goal of relieving this disparity in sentencing [between high- and low-level drug offenders] because it is too restrictive with respect to the class of defendants to which it applies.”).

<sup>73</sup> See SOURCEBOOK, *supra* note 4, at tbl.44 (showing that for cases where a mandatory minimum sentence applied, only 24.5% of offenders received the safety valve exception).

<sup>74</sup> See, e.g., Froyd, *supra* note 67, at 1499–500 (recommending a non-exclusive list of factors for a judge to consider about the offender and the offense, rather than the cooperation requirement, which has “no bearing on the defendant’s status as a low-level offender or on traditional factors that have been considered in assessing a defendant’s threat to society”); Jeffrey J. Shebesta, *The “Safety Valve” Provision: Should the*

Those who attempt to attain the safety valve benefit but are unable to for any reason—but especially the cooperation requirement—would be particularly well suited to take advantage of an intermediate cooperation provision.<sup>75</sup>

## II

### ANALYTICAL FRAMEWORK: THE INCENTIVE EFFECTS OF COOPERATION

This Part explores the relevant institutional factors influencing a defendant's decision whether to cooperate with federal prosecutors. As I demonstrate below, the manner in which the cooperation provisions are currently implemented creates a real-life Prisoner's Dilemma<sup>76</sup> for would-be cooperators: what I call the "cooperator's dilemma."<sup>77</sup>

#### A. Plea Bargaining

Since cooperation agreements are a form of plea bargaining, the incentive effects of plea bargaining generally are crucial to a full understanding of the cooperation process. In both state and federal courts, the reality of plea bargaining as the primary mode of disposition in criminal cases is well documented.<sup>78</sup> In 2012, ninety-seven per-

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*Government Get an Automatic Shut-Off Valve?*, 2002 U. ILL. L. REV. 529, 553 (arguing that courts should read § 5C1.2 to allow defendants to qualify for the benefit as to the fifth element as long as they ultimately make a "complete and truthful statement"); Virginia G. Villa, *Retooling Mandatory Minimum Sentencing: Fixing the Federal "Statutory Safety Valve" to Act as an Effective Mechanism for Clemency in Appropriate Cases*, 21 *HAMLIN L. REV.* 109, 125 (1997) (advocating replacing the fifth element's language with language more akin to the "acceptance of responsibility" provision).

<sup>75</sup> See *infra* Part IV.B (describing the applicability of the proposed alternative cooperation provision to those who do not qualify for the safety valve).

<sup>76</sup> This term refers to the classic illustration of the problem of collective choice, wherein two prisoners must decide individually whether to confess. The rational choice calculus drives them to do so, even though they would be best off "if they could coordinate their efforts and remain silent." Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 *HARV. L. REV.* 4, 20 n.38 (1988). This thought experiment is in essence a reductive version of the issues facing real criminal defendants considering cooperation. See Miriam Hechler Baer, *Cooperation's Cost*, 88 *WASH. U. L. REV.* 903, 922–23 (2011) (describing cooperation as an exacerbated prisoner's dilemma).

<sup>77</sup> See *supra* note 24 (defining this term in the context of this Note); *infra* notes 141–49 and accompanying text (describing this concept in operation).

<sup>78</sup> See, e.g., George Fisher, *Plea Bargaining's Triumph*, 109 *YALE L.J.* 857, 859 (2000) ("[P]lea bargaining has triumphed. Bloodlessly and clandestinely, it has swept across the penal landscape and driven our vanquished jury into small pockets of resistance."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992) ("[Plea bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system.").

cent of all federal offenders pled guilty.<sup>79</sup> While some commentators claim that the ubiquity of plea bargaining could, with some minor changes, allow for efficient and value-maximizing resolution on behalf of criminal defendants,<sup>80</sup> many scholars and practitioners view the current process as falling anywhere on the scale between a “necessary evil”<sup>81</sup> to an unmitigated disaster for the American adversarial system of justice.<sup>82</sup> Despite the critiques, the Supreme Court has upheld the constitutionality of the plea bargaining process,<sup>83</sup> even in the most extreme, seemingly inequitable cases.<sup>84</sup> Moreover, the Court has applied regular contract law principles to plea bargains,<sup>85</sup> relying on the notion that “[a] plea bargain, after all, is a bargain—a contract.”<sup>86</sup>

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<sup>79</sup> U.S. SENTENCING COMM’N, ANN. REP. 2012, at 42, available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/2012\\_Annual\\_Report\\_Chap5.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/2012_Annual_Report_Chap5.pdf).

<sup>80</sup> See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 289 (1983) (arguing that plea bargaining is an element “of a well-functioning market system”); Scott & Stuntz, *supra* note 78, at 1967 (“Given the range of areas where our legal system tolerates (indeed, subsidizes) consensual allocation, it is hard to argue that contract is impermissible here.”).

<sup>81</sup> See, e.g., Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 220 (1983) (“Many actors in the legal system who espouse due process values have begrudgingly accepted plea bargaining as a ‘necessary evil.’ . . . [arguing] that our system must rely on plea bargaining to resolve most disputes because we cannot afford to provide criminal trials to all defendants who wish to contest their culpability.”).

<sup>82</sup> See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992) (“Plea bargaining is a disaster. It can be, and should be, abolished.”). For a brief description of the various arguments made against the plea bargaining system, see Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 705–06 (2001).

<sup>83</sup> See *Brady v. United States*, 397 U.S. 742, 751–52 (1970) (upholding a plea as a voluntary, knowing, and intelligent waiver of defendant’s constitutional right to trial based on the “mutuality of advantage” provided to the State and defendant through plea bargaining). The Court has gone on to regulate the plea bargaining process as part of a defendant’s right to adequate and effective assistance of counsel under the Sixth Amendment. See *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (holding that a defense attorney’s failure to warn a non-citizen defendant of the deportation consequence of his plea violated the defendant’s Sixth Amendment rights); *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2011) (holding that counsel’s faulty advice to reject a lenient plea offer constituted ineffective assistance); *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012) (holding that counsel’s failure to inform client of plea offers was ineffective assistance).

<sup>84</sup> E.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (holding that a mandatory life sentence imposed post-trial under a habitual offender statute for forging an \$88.30 check did not constitute an unconstitutional punishment of, or retaliation for, defendant’s “reliance on his legal rights”).

<sup>85</sup> See *Santobello v. New York*, 404 U.S. 257, 262 (1971) (invoking the contractual concepts of bargain and negotiation to hold that “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled”).

<sup>86</sup> Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners’ (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 738 (2009) (explaining the view that because plea bargains are contracts entered freely, they necessarily improve the positions of both parties involved).

Under this notion of “mutuality of advantage,”<sup>87</sup> the Court has affirmed the practice’s pervasiveness within our system—pronouncing that “[i]t is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>88</sup>

Through an economic lens of decisionmaking, “a defendant will accept a plea offer only if the utility (or value) of the known consequences of such an acceptance outweighs the risk (or cost) associated with going to trial.”<sup>89</sup> This decision is severely impacted by the possible maximum sentence in conjunction with the potential discount for not going to trial—that is, the knowledge that a defendant will likely face significantly higher sentences by going to trial and losing than if they had pled guilty.<sup>90</sup> This feature of criminal sentencing is also known as the “trial penalty,” since it greatly disincentivizes defendants from exercising their rights to trial, all in exchange for more lenient charging and a potentially reduced sentence.<sup>91</sup> The trial penalty in the federal system is immense,<sup>92</sup> particularly in cases prose-

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<sup>87</sup> *Brady*, 397 U.S. at 752.

<sup>88</sup> *Frye*, 132 S. Ct. at 1407 (2012) (holding that plea negotiations represent a critical stage during which a defendant is entitled to effective assistance of counsel) (quoting Scott & Stuntz, *supra* note 78, at 1912).

<sup>89</sup> H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 *CATH. U. L. REV.* 63, 69 (2011).

<sup>90</sup> In the federal system, this calculation will certainly focus on the Guidelines sentence recommendation with and without the Acceptance of Responsibility discount. *See supra* note 46 and accompanying text (quantifying the average Guidelines sentence reduction for acceptance of responsibility). However, even beyond the sentence a defendant would receive by being found guilty at trial for the same crime(s), prosecutors routinely overcharge defendants initially and subsequently offer lesser charges in exchange for pleas. This can be done either “horizontally,” whereby a prosecutor “multipl[ies] ‘unreasonably’ the number of accusations against a single defendant,” or “vertically,” by “charging a single offense at a higher level than the circumstances of the case seem to warrant.” Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 *U. CHI. L. REV.* 50, 85–86 (1968).

<sup>91</sup> *See, e.g.*, Doug Lieb, Note, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 *YALE L.J.* 1014, 1051 (2014) (defining the “trial penalty” as the “disparity between the charge and sentence offered for a plea and those sought at trial” that arises “[r]egardless of whether a prosecutor bargains by charging a higher crime first and offering to drop, or by charging a lesser crime first and threatening to add”). In *Bordenkircher* and its progeny, the Supreme Court has expressly authorized this phenomenon. *E.g.*, *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982) (“A charging decision does not levy an improper ‘penalty’ unless it results solely from the defendant’s exercise of a protected legal right, rather than the prosecutor’s normal assessment of the societal interest in prosecution.”).

<sup>92</sup> *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 *U. PA. L. REV.* 79, 112 (2005) (“Sentence severity in the federal system today carries a built-in risk that the plea discount will become too large and distort hypothetical trial outcomes.”).

cuted under mandatory minimum statutes.<sup>93</sup> The trial penalty, especially the threat of mandatory minimums, is the primary bargaining chip by which federal prosecutors induce guilty pleas from defendants.<sup>94</sup> Specifically, prosecutors often do so by aggregating charges against multiple defendants, “alleging a massive conspiracy with criminal conduct far greater than anything engaged in by many of the individuals.”<sup>95</sup> This sort of aggregation makes higher mandatory minimums apply to each individual defendant and increases the stakes of the plea bargaining process dramatically.<sup>96</sup>

One major factor that exacerbates the plea-bargaining process is the asymmetrical access to information between the prosecution and the defense. Specifically, the prosecutor will have almost exclusive access to the information necessary to determine the likelihood of conviction at trial, which skews a defendant’s decision.<sup>97</sup> It is therefore in the prosecutor’s interest to overstate the evidence against a defendant, causing a defendant to believe in the inevitability of his conviction at trial.

In addition, the defendant obviously bears much greater personal risks.<sup>98</sup> These risks create a tremendously skewed bargaining process

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<sup>93</sup> See *id.* at 153 (“Mandatory minimum sentence laws exert a powerful pull on plea negotiations, because a prosecutor’s promise not to file (or to dismiss) charges that carry a mandatory minimum penalty can create enormous gaps in the sentence imposed and enormous incentives to plead guilty.”); AM. BAR ASS’N JUSTICE KENNEDY COMM’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 27 (2004), [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_kennedy\\_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf) (“Although prosecutors have discretion throughout the criminal justice system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward.”).

<sup>94</sup> Schulhofer, *supra* note 17, at 202 (1993) (“Mandatory then become little more than a bargaining chip, a ‘hammer’ which the prosecutor can invoke at her option, to obtain more guilty pleas under more favorable terms.”).

<sup>95</sup> Norman L. Reimer & Lisa M. Wayne, *From the Practitioners’ Perch: How Mandatory Minimum Sentences and the Prosecution’s Unfettered Control over Sentence Reductions for Cooperation Subvert Justice and Exacerbate Racial Disparity*, 160 U. PA. L. REV. PENUMBRA 159, 165 (2011).

<sup>96</sup> *Id.*

<sup>97</sup> See Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 987–88 (2008) (describing plea bargains as “a process of prediction” as to potential trial outcomes and noting that inadequate discovery results in parties bargaining “blindfolded” such that “[t]hey bargain in whatever shadow of trial they can discern, but . . . can easily go astray based on bluffing, puffery, fear, and doubt” (quoting Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2495 (2004))). For a discussion of the major structural distortions of the plea bargaining process, see Bibas, *supra*, at 2469–96.

<sup>98</sup> See, e.g., Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1132 (1998) (“The prosecutor is charged with achieving a result that satisfies society’s

where, arguably, a “defendant[’s] choice is not free but rather a response to powerful constraints and threats from prosecutors.”<sup>99</sup> Stated in contractual terms, “many of the bargains are unconscionable; defendants accept prosecutors’ offers under duress; the poor and ignorant suffer disproportionately; [and] the bargains are the product of irrationality and mistake.”<sup>100</sup> Despite objections to such bargaining conditions as unconstitutional or unethical,<sup>101</sup> prosecutors continue to have largely unfettered discretion in bargaining with defendants to obtain guilty pleas.<sup>102</sup>

Ultimately, plea bargaining incentivizes defendants to plead guilty in order to take full advantage of the discounts offered by prosecutors (and thereby avoid the potential sentences facing them if they go to trial and lose). However, the benefit obtained by a guilty plea alone is often *de minimis* in comparison to that provided to official cooperators.<sup>103</sup> So, defendants are further incentivized to consider “flipping” or “turning” against their co-conspirators, also known as “signing up” as a cooperator.<sup>104</sup>

### B. Cooperation Agreements, “Queen[s] for a Day,” and Substantial Assistance

A major procedural aspect of formal cooperation with federal prosecutors is the cooperation agreement. This formal document is a contractual agreement between the defendant and the United States government that details the bargained-for promises and obligations between both parties—primarily, “immunity and lenient plea bargaining in return for cooperation.”<sup>105</sup> More precisely, a defendant is “selling” the information he possesses, which may or may not be exclusively in his control, in exchange for a “commodity that is largely,

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sometimes conflicting desires for vengeance, deterrence, and fairness. The defendant seeks to minimize incarceration, loss of reputation, and damage to his personal affairs.”)

<sup>99</sup> Bar-Gill & Ben-Shahar, *supra* note 86, at 738. For a thorough discussion of the cognitive distortions on defendants caused by the plea bargaining process, see Bibas, *supra* note 97, at 2498–519.

<sup>100</sup> Scott & Stuntz, *supra* note 78, at 1918 (citing Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981)).

<sup>101</sup> See *supra* note 82 (providing examples of commentators who have made such objections).

<sup>102</sup> See, e.g., Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 276 (2007) (“Prosecutors are the most powerful officials in the criminal justice system. They exercise vast, almost limitless discretion, and the Supreme Court consistently has protected that discretion and shielded them from meaningful scrutiny.”).

<sup>103</sup> See *supra* notes 43–54 and accompanying text (illustrating this point).

<sup>104</sup> R. Michael Cassidy, “Soft Words of Hope:” Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1135 (2004).

<sup>105</sup> Hughes, *supra* note 9, at 2.

if not exclusively, within the prosecutor's control—leniency.”<sup>106</sup> Unlike plea agreements, which can be analogized to contracts of adhesion,<sup>107</sup> a cooperation agreement is often much more detailed, complex, and individualized.<sup>108</sup> One common thread between plea and cooperation agreements is the waiver of constitutional rights by a defendant.<sup>109</sup> Beyond merely agreeing to save the government resources in trying the defendant's case, cooperators “assume[ ] potentially onerous and protracted obligations[.] . . . includ[ing] interviews and debriefings and [perhaps] undercover action or observation and reporting back.”<sup>110</sup> These commitments made at signing can extend far into the future and may include testifying before grand juries, at trials, and even at retrials.<sup>111</sup>

Before a defendant can officially “sign up” as a cooperator, however, he must show the prosecutors what he has to offer them. This disclosure occurs in “proffer sessions,” which are informal meetings between a defendant, defense counsel, law enforcement officials, and prosecutors.<sup>112</sup> In these sessions, a prosecutor may attempt to convince a defendant to cooperate by “persuad[ing] the defendant that the evidence against him is overwhelming and that cooperating is his only option.”<sup>113</sup> More frequently, however, it is the defendant who must convince the prosecutor that he has valuable information and can provide “substantial assistance.”<sup>114</sup> To do so, he will certainly

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<sup>106</sup> Cassidy, *supra* note 104, at 1135 (2004).

<sup>107</sup> This term refers to “a standardized form of offer about which one party, usually a consumer, has no liberty to negotiate and simply must take or leave the offered terms.” Hughes, *supra* note 9, at 4 n.7.

<sup>108</sup> See *id.* at 2 n.4 (“The complexity may arise from the need to define in detail and with precision: (1) the nature of the cooperation promised by the cooperator, and (2) the scope of the immunity or nature of the plea bargain that is extended.”).

<sup>109</sup> See, e.g., Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV. 1253, 1267 (1994) (“Defendants incur risks and surrender rights when entering into a cooperation agreement with the government. . . . [In addition to the other] [p]otential hazards of cooperating . . . a defendant gives up constitutional rights by entering a guilty plea.”).

<sup>110</sup> Hughes, *supra* note 9, at 3.

<sup>111</sup> See *id.* (“The cooperator's obligations will probably continue into more formal stages with grand jury and trial testimony and, perhaps, testimony at retrials years later.”).

<sup>112</sup> See *United States v. Chaparro*, 181 F. Supp. 2d 323, 326 n.2 (S.D.N.Y. 2002) (describing proffer sessions as “those interviews in which a defendant submits to questioning by prosecutors in the hope of receiving a benefit from the government, such as a decision to offer a defendant a cooperation agreement”). Proffer sessions also apply to sessions in which a defendant provides information in order to receive “a representation from the Government that a defendant qualifies for the safety valve provision of the law by having provided truthful information to the Government.” *Id.* at 326 n.2.

<sup>113</sup> Simons, *supra* note 11, at 15.

<sup>114</sup> *Id.*

inform the government of whatever incriminating information he has against others.<sup>115</sup> In addition, a defendant must fully admit to his role in the instant offense(s) and must often describe any and all other criminal activity in which he has ever participated.<sup>116</sup>

This process is done in the hopes that the prosecutors will be satisfied with what the defendant has to offer, and will provide the cooperation agreement the defendant seeks. In most cases, however, “[u]nless the proffering target has something to offer that will provide significant assistance in the prosecution of another target defendant, there will be no deal.”<sup>117</sup> In crimes involving multiple defendants, it is in each defendant’s interest to cooperate as quickly as possible, since “[t]he longer a defendant waits to cooperate, the less likely he is to have information that is still useful to the government.”<sup>118</sup> This results in a “race to the station house” among co-conspirators, each wanting to provide the most beneficial (new) information.<sup>119</sup>

Of course, when a defendant makes the decision to participate in such a proffer session, he has no guarantee that it will be successful. In other words, defendants must blindly take the extreme step of fully incriminating themselves, contrary to their otherwise available constitutional rights. Their only protection is a proffer agreement, also known as a “Queen for a Day” agreement, which sets the rules under which the government and a criminal defendant conduct the interview.<sup>120</sup> Although the colloquial title of these documents seems to assure defendants that their information will not be used against them later,<sup>121</sup> this promise is limited.

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<sup>115</sup> See, e.g., George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 50 (2000) (“Every defendant or target of an investigation knows that her only possibility of making a deal with the government for lenient treatment is a proffer of testimony helpful in convicting another defendant or target.”); Ross Galin, Note, *Above the Law: The Prosecutor’s Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245, 1252 (2000) (“Defendants facing the possibility of a stern sentence under the guidelines will frequently offer prosecutors information about another criminal . . .”).

<sup>116</sup> See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 928 (1999) (“[I]n certain districts . . . potential cooperators are expected to tell the government about all of their criminal conduct throughout their lifetime as a precondition to a cooperation agreement. If they are ‘signed up’ . . . cooperators will be required . . . to plead guilty to serious conduct that they reveal . . .”).

<sup>117</sup> Harris, *supra* note 115, at 17.

<sup>118</sup> Yaroshefsky, *supra* note 116, at 929.

<sup>119</sup> *Id.*

<sup>120</sup> Benjamin A. Naftalis, Note, “*Queen for a Day*” Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules, 37 COLUM. J.L. & SOC. PROBS. 1, 1 (2003).

<sup>121</sup> See *Queen for a Day*, URBAN DICTIONARY (Sept. 2, 2012), <http://www.urbandictionary.com/define.php?term=queen+for+a+day> (providing a common

Under Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f) (“the plea statement rules”), statements made by a defendant during plea negotiations are not admissible into evidence.<sup>122</sup> However, following the Supreme Court’s decision in *United States v. Mezzanatto*,<sup>123</sup> the typical terms of proffer agreements have expanded for many U.S. Attorneys’ offices, “markedly weakening the already limited immunity previously reserved to the defendant.”<sup>124</sup> Namely, United States Attorneys are permitted to require the defendant to sign away these immunity rights, allowing the government to “use statements made by Client at the meeting to rebut any evidence or arguments offered by or on behalf of the Client (including arguments or issues raised sua sponte by the District Court) at any stage of the criminal prosecution,”<sup>125</sup> even if the defendant does not testify. Although the Supreme Court has not explicitly sanctioned this expansion,<sup>126</sup> every Circuit to rule on the issue has permitted the use of such broad waivers.<sup>127</sup> In practice, this means that

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understanding of the term, which includes “implied assurance that said knowledge will not be used against them in later proceedings”).

<sup>122</sup> FED. R. CRIM. P. 11(f); FED. R. EVID. 410(a)(4).

<sup>123</sup> 513 U.S. 196, 197, 210–11 (1995) (holding that a criminal defendant could, through a proffer agreement, waive the otherwise applicable plea statement rules, thus allowing the government to use a defendant’s proffer statements for impeachment when he testified contrary to them).

<sup>124</sup> Naftalis, *supra* note 120, at 7.

<sup>125</sup> *Id.* at 7–8 (quoting U.S. ATTORNEY’S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, STANDARD PROFFER AGREEMENT, ¶¶ 2–3 (2001) (emphasis omitted) (on file with the *Columbia Journal of Law and Social Problems*)).

<sup>126</sup> Notably, the 7-2 *Mezzanatto* decision included a 3-justice concurrence that expressly limited the holding to waivers allowing the government to impeach a defendant with his plea statements—not one allowing it to use such statements in its case-in-chief. *Mezzanatto*, 513 U.S. at 211 (Ginsburg, J., concurring).

<sup>127</sup> See *United States v. Stevens*, 455 F. App’x 343, 345–46 (4th Cir. 2011) (upholding agreements to waive Rule 410 protections as valid and enforceable absent fraud, coercion, or an indication that the agreement was entered into unknowingly or involuntarily); *United States v. Mitchell*, 633 F.3d 997, 998 (10th Cir. 2011) (upholding the defendant’s voluntary waiver of his Rule 410 protections); *United States v. Sylvester*, 583 F.3d 285, 294 (5th Cir. 2009) (upholding a defendant’s waiver permitting the use of defendant’s proffer statements in the case-in-chief); *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008) (upholding the waiver clause in a defendant’s proffer agreement, permitting government to use proffer statements in its case-in-chief, as enforceable); *United States v. Bloate*, 534 F.3d 893, 902 (8th Cir. 2008), *rev’d on other grounds*, 559 U.S. 196 (2010) (upholding a defendant’s waiver allowing defendant’s proffer statements to be admitted at trial); *United States v. Johnson*, 174 F. App’x 511, 514 (11th Cir. 2006) (upholding the use of a defendant’s proffer statements given defendant’s waiver); *United States v. Velez*, 354 F.3d 190, 195 (2d Cir. 2004) (holding that such a broad waiver did not violate the defendant’s “fundamental rights to present a defense and to the effective assistance of counsel”); *United States v. Rebbe*, 314 F.3d 402, 407 (9th Cir. 2002) (upholding admission of proffer statements in rebuttal); *United States v. Krilich*, 159 F.3d 1020, 1025–26 (7th Cir. 1998) (upholding a defendant’s waiver, which allowed the prosecution to use proffer

for federal prosecutors, proffer sessions have become more than “tools for collecting information”<sup>128</sup>—they are now used “to hem in the defense and foreclose the full panoply of defense theories.”<sup>129</sup> Once a defendant makes the decision to proffer inculpatory evidence against himself, there is no going back.

If a defendant successfully convinces the prosecutor to “sign [him] up”<sup>130</sup> as a cooperator based on the information he has provided during the proffer sessions, this is not the end of the game. In fact, it is only the beginning. Cooperation agreements are premised on the defendant’s continuing obligations towards the prosecution—often a “lengthy process that starts with numerous debriefing sessions, extends to intensive witness preparation, and culminates in public testimony,”<sup>131</sup> which may include testimony years after the agreement is entered into.<sup>132</sup> Many defendants fail at this aspect of substantial assistance: namely, in order to receive any benefit from cooperation, they must be willing to do anything and everything asked of them by prosecutors.

In order to avoid the “hazard[s]” that would result from providing the cooperator the sentencing benefit before the cooperator has discharged its duties, the government contracts with the cooperator so that it can “keep the immunity grant or plea bargain contingent on the cooperator’s substantial performance of the promised obligations”<sup>133</sup>—often in the form of having a cooperator plead guilty to any number of offenses<sup>134</sup>—but waiting until after they are done testifying against all those implicated before proceeding to sentencing.<sup>135</sup> Prosecutors use this delay for a dual purpose: to maintain

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evidence if defendant testified or presented a position inconsistent with it, as voluntary in the absence of coercion and knowing if made with awareness of the right being waived and the consequences of such); *United States v. Burch*, 156 F.3d 1315, 1321–22 (D.C. Cir. 1998) (extending the majority opinion in *Mezzanatto* to allow the admission of plea statements in the case-in-chief).

<sup>128</sup> Naftalis, *supra* note 120, at 8.

<sup>129</sup> *Id.*

<sup>130</sup> Baer, *supra* note 76, at 917.

<sup>131</sup> Simons, *supra* note 11, at 18.

<sup>132</sup> See Hughes, *supra* note 9, at 3 (“The cooperator’s obligations will probably continue into more formal stages with grand jury and trial testimony and, perhaps, testimony at retrials years later.”).

<sup>133</sup> *Id.*

<sup>134</sup> See Simons, *supra* note 11, at 17 (describing how, in some districts, a cooperator must plead guilty “not only to the criminal conduct for which he was arrested,” but also to “any other serious criminal conduct that is revealed during the proffer sessions, even conduct completely unrelated to the crimes that led to the cooperator’s arrest and even conduct for which the government’s only proof is the cooperator’s proffer”).

<sup>135</sup> See Cassidy, *supra* note 104, at 1146 (“In the [cooperation] model [typically used in federal prosecutions], the accomplice pleads guilty to the charges against him (or to

“maximum leverage” over the cooperator,<sup>136</sup> and to limit the quality of defense counsel’s cross-examination of the testifying cooperator aimed at exposing the substantial benefit likely to be bestowed upon him by the government.<sup>137</sup>

This exchange of obligations is designed to allow prosecutors to determine *ex post* the “value” of a cooperator’s assistance with respect to the benefit the government might confer—ideally (for a cooperator) a substantial assistance motion.<sup>138</sup> These contracts are often written so that the cooperator’s “obligation is very clear (i.e., to tell the truth), but the prosecutor’s obligation is open-ended (e.g., the prosecutor will consider whether to file a substantial assistance motion and/or will make the witness’s level of cooperation known to the sentencing judge).”<sup>139</sup> It is almost impossible for prosecutors to breach their obligations because they have the sole discretion to decide what exactly “substantial assistance” means.<sup>140</sup>

### C. *The Cooperator’s Dilemma*

These processes and incentives all combine to form the “cooperator’s dilemma” facing defendants accused of conspiratorial crimes, who must decide whether to “flip” or not. In contrast to the classic game theory model, the potential outcomes and resulting incentives facing federal criminal defendants do not point towards staying silent. Rather, it is explicitly in each defendant’s interest to cooperate first and provide the most information when doing so.<sup>141</sup> The cognitive distortions connected to the plea bargaining system, mandatory minimums, and the Guidelines skew all of these factors,<sup>142</sup> and therefore warp a decisionmaking process that can never be truly rational in the

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reduced charges if that is part of the bargain), and the prosecutor delays sentencing until after the accomplice has testified against his confederate.”).

<sup>136</sup> Simons, *supra* note 11, at 18–19.

<sup>137</sup> See *id.* (explaining that a cooperator “who has not yet received his sentencing benefit may make a more compelling witness” because then the cooperator “can truthfully testify that he does not know whether his sentence will be reduced or how much it will be reduced; he just knows that he has to ‘tell the truth’ and the rest is up to the judge”).

<sup>138</sup> See *infra* notes 48–59 and accompanying text (describing substantial assistance motions and their statutory and agency-created policy sources).

<sup>139</sup> Cassidy, *supra* note 104, at 1146.

<sup>140</sup> See *supra* notes 56–59 and accompanying text (discussing prosecutors’ discretion in this context).

<sup>141</sup> See *supra*, note 12, and accompanying text; U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004) (listing “the timeliness of the defendant’s assistance” and “the nature and extent of the defendant’s assistance” as primary factors for the court to consider in determining the “appropriate reduction”).

<sup>142</sup> See *supra* Part II.A–B (discussing the relevant institutional factors influencing a defendant’s decision whether to cooperate in the context of plea bargaining and cooperation agreements).

first place.<sup>143</sup> Further, all of these competing incentives are compounded by yet another force—the cultural, moral, and social stigma of “snitching.”<sup>144</sup>

Most importantly, the original prisoner’s dilemma hypothetical hinges on the prisoners knowing the exact payout of each potential scenario, thus allowing them to make a rational decision. In reality, a defendant has no idea what the benefit will be if he cooperates. The best-case scenario is that he receives a substantial assistance motion. However, there is a very real possibility that his cooperation will not be successful (for whatever reason)—in which case, he may end up in a much worse position than had he not said anything at all.<sup>145</sup>

The resulting morass of stimuli precludes the possibility of a truly rational decision on the part of a defendant. At the same time, the very validity of the contractual process by which cooperation occurs depends on the defendant’s actions being “knowing,” “voluntary,” and “intelligent.”<sup>146</sup> Although the Supreme Court has deemed this standard to be met as far as a constitutional floor, the reality of the “substantial assistance” policy produces outcomes that are often unreliable,<sup>147</sup> unfair,<sup>148</sup> and contrary to broader ethical norms.<sup>149</sup>

### III

#### OVERVIEW OF CRITIQUES OF SUBSTANTIAL ASSISTANCE AND FEDERAL COOPERATION AND OFFERED SOLUTIONS

Despite (or perhaps as a result of) the ubiquity of cooperation in the federal criminal justice system under the Sentencing Guidelines, there has been much critical response to the system. This Part categorizes these critiques and lists the suggested solutions to address these problems.

##### *A. Critiques to Cooperation*

Scholarly critiques regarding cooperation in the federal criminal system can be categorized under three larger thematic umbrellas: (1) reliability, (2) fairness, and (3) normative ethical concerns. The first

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<sup>143</sup> See *supra* note 97 and accompanying text (describing the informational asymmetry and attendant system distortions of the plea bargaining process).

<sup>144</sup> See *infra* notes 187–88 and accompanying text (describing this force).

<sup>145</sup> See *supra* note 23 and accompanying text.

<sup>146</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970) (stating that a guilty plea is a waiver of the constitutional right to trial by jury and that waivers of constitutional rights “not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences”).

<sup>147</sup> See *infra* notes 150–79 and accompanying text (addressing reliability concerns).

<sup>148</sup> See *infra* notes 180–86 and accompanying text (addressing fairness concerns).

<sup>149</sup> See *infra* notes 187–91 and accompanying text (addressing normative concerns).

classification focuses on the truth-finding function of the criminal adjudication process; critics attack systemic reliance on cooperators on the basis of both actual and potential factual inaccuracy. The second category of critics examine the system's negative effects on individual defendants—either those who choose to cooperate or those against whom cooperators' testimony is used. The third category addresses larger normative questions about cooperation's place in the criminal legal system, from both an institutional and an individual perspective.

### 1. *Unreliability*

One of the primary critiques of snitching in the criminal justice system is the endemic problem of cooperators providing false information.<sup>150</sup> As an empirical matter, informants who provide false information are a leading source of wrongful convictions in the United States.<sup>151</sup> They contribute to almost half of all wrongful death penalty convictions.<sup>152</sup> Perhaps not surprisingly given the incentives of the substantial assistance model,<sup>153</sup> this proportion may be even higher when examining wrongful federal convictions in particular.<sup>154</sup>

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<sup>150</sup> See, e.g., Natapoff, *supra* note 97, at 998 (“The most infamous and best documented hallmark of snitching is its unreliability. Both in theory and practice, information obtained from criminal informants who are compensated for their information is often wrong.”).

<sup>151</sup> The Innocence Project, which assists prisoners who can be proven innocent through DNA testing, estimates that “[i]n 15% of wrongful conviction cases overturned through DNA testing, statements from people with incentives to testify—particularly incentives that are not disclosed to the jury—were critical evidence used to convict an innocent person.” *The Causes—Informants*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/informants> (last visited Sept. 28, 2015).

<sup>152</sup> ROB WARDEN, NW. U. SCH. L. CTR. ON WRONGFUL CONVICTIONS, *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 14* (2004), <http://www.innocenceproject.org/causes-wrongful-conviction/SnitchSystemBooklet.pdf>.

<sup>153</sup> See *supra* Part II (describing the incentive effects of the federal cooperation system).

<sup>154</sup> According to The National Registry of Exonerations, a project of the University of Michigan Law School that “provides detailed information about every known exoneration in the United States since 1989,” among the eighty-three federal criminal prosecutions that have resulted in exonerations since 1989, forty-eight involved perjury or false accusation (“P/FA”)—defined as “[a] person other than the exoneree falsely accus[ing] the exoneree of committing the crime for which the exoneree was later exonerated, either in sworn testimony or otherwise.” Fourteen of these specifically involved “[a] codefendant of the exoneree, or a person who might have been charged as a codefendant, g[iving] a confession that also implicated the exoneree.” Although the National Registry of Exonerations does not possess definitive data regarding whether those who testified falsely were formally signed up as cooperators pursuant to the substantial assistance sentencing provisions, the qualitative information provided for the individual cases suggests that in the vast majority of P/FA exonerations, the lying witness was receiving a substantial benefit in exchange for their testimony. See *Exoneration Detail List*, THE NATIONAL REGISTRY OF

The issue of informants who lie has been a concern for as long as law enforcement has relied on them.<sup>155</sup> Certainly, this concern is compounded by the potential for, and reality of, government abuse—namely, law enforcement officials and prosecutors knowingly using false evidence to obtain convictions.<sup>156</sup> However, unreliability is not limited to cases of affirmative prosecutorial misconduct. Rather, for a number of reasons, well-meaning prosecutors may simply be unable to sort out the truth from the lies told by informants.<sup>157</sup>

When Professor Yaroshefsky interviewed twenty-five former Assistant United States Attorneys from the Southern District of New York regarding their experiences with the federal cooperation system, the primary mechanism by which prosecutors maintained they could determine cooperators' truthfulness was corroboration of informants' facts.<sup>158</sup> However, further inquiry regarding instances in which prosecutors later learned that cooperators had lied revealed major concerns "as to whether the corroboration rationale [wa]s sufficient assurance that convictions [we]re based on truthful information . . . ."<sup>159</sup> Other

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EXONERATIONS, (2015), <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (click on "Tags"; then select "FED" as a filter).

<sup>155</sup> See, e.g., *Hoffa v. United States*, 385 U.S. 293, 320 (1966) (Warren, C.J., dissenting) (arguing that the use of an imprisoned informer to conduct a criminal investigation "evidence[s] a serious potential for undermining the integrity of the truth-finding process in the federal courts").

<sup>156</sup> See Natapoff, *supra* note 97, at 998 ("Numerous cases and media stories reveal the extent to which informants lie in exchange for lenience, and the extent to which police and prosecutors rely on their information knowing it to be problematic or outright false." (citing *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007) (holding that defendant stated a claim against District Attorney for maintaining office procedures that permitted unreliable informant information to be used); *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (finding that the prosecutor violated due process by knowingly presenting the false testimony of an informant); *United States v. Connolly*, 341 F.3d 16, 20–25 (1st Cir. 2003) (documenting FBI agents' complicity in and cover up of their mafia informants' criminal activities))).

<sup>157</sup> See Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT. R. 292, 293 (1996) ("[T]here is the perhaps greater risk that a cooperator will independently try to be 'helpful' to a prosecutor, in hopes of greater leniency, and that the prosecutor will not be able to separate the truth from the 'icing.'"). As one former Assistant U.S. Attorney (AUSA) put it, "You never really know if a person has told the truth. Maybe there's a lot more lying than one suspects. You really do not know the extent of a lie until you start preparing for trial." Yaroshefsky, *supra* note 116, at 931 (1999) (quoting an anonymous interview).

<sup>158</sup> Yaroshefsky, *supra* note 116, at 932 ("Virtually all former AUSAs emphasized corroboration as the key factor in assuring cooperator truthfulness.").

<sup>159</sup> *Id.* Yaroshefsky identifies nine factors contributing to false beliefs in cooperator truthfulness: (1) insufficient corroboration, (2) lack of proper investigation, (3) insufficient evidence of guilt, (4) misplaced trust in cooperators, (5) rigid theory of the case, (6) cultural barriers, (7) attitudes of individual AUSAs, (8) lack of experience of the AUSA, and (9) the nature and structure of the proffer process as well as "psychological factors attendant to the relationship with cooperators." *Id.* at 932–33, 934–62.

commentators echo these problematic features, which can be broadly categorized as unreliability resulting from (i) the amount of extrinsic evidence in the government's possession, (ii) cognitive factors on the part of both the cooperator and the Assistant U.S. Attorney (AUSA), and (iii) dynamic processes attendant to the operation of the proffer system.

a. Due to a Lack of Extrinsic Evidence

At bottom, the cooperation process is an exchange of information. Certain classes of cases—such as drug conspiracies, antitrust, corporate fraud, and terrorism—are almost impossible to successfully prosecute without some inside information.<sup>160</sup> Thus, the government's desire to sign up cooperators in such cases is extremely high.

Those same types of cases, however, make it extremely difficult for the government to find objective extrinsic evidence with which to corroborate informant testimony.<sup>161</sup> Moreover, even with seemingly objective evidence such as a wiretap or undercover recording, the informant is needed to “decipher the code” of potentially ambiguous underlying interactions<sup>162</sup> and “provide the full narrative,”<sup>163</sup> thereby preempting the ability of other defendants to “fill in the empty spaces with doubts and exculpatory theories.”<sup>164</sup> Although many prosecutors would argue that corroboration in the form of documentary evidence, tapes, wiretaps, surveillance, and fruits of the crime would be enough to determine whether a cooperator was truthful, there are “many open areas in which cooperators could shade or embellish the truth.”<sup>165</sup>

b. Due to Cognitive Factors

Under the substantial assistance model, the cooperator's sole obligation—to provide “full cooperation,” including “truthful” testimony—is naturally filtered by the knowledge that the “truth” that is most often rewarded is information that is “consistent with the coop-

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<sup>160</sup> See Natapoff, *supra* note 97, at 993 (describing the increased need in such cases for co-conspirator cooperation since the information needed to prosecute them is “only possessed by participants”).

<sup>161</sup> See *id.* (describing the difficulty of obtaining incriminating extrinsic information in such cases).

<sup>162</sup> Yaroshefsky, *supra* note 116, at 935 (“There is often ambiguity to tape recorded conversations. The wiretaps are like a table of contents of a book. Even if it's good, it's coded and you need people to decipher the code.”).

<sup>163</sup> Weinstein, *supra* note 56, at 597.

<sup>164</sup> *Id.*

<sup>165</sup> Yaroshefsky, *supra* note 116, at 935.

erator's proffer, and helpful in the conviction of another target."<sup>166</sup> A defendant whose only option for a below-mandatory minimum sentence is substantial assistance is incentivized to provide as much inculpatory information as possible, as soon as possible, and to maintain the same story. If the information provided about others is not true (or at least not fully true), but prosecutors believe it, the cooperator is never incentivized to come clean—nor is his information ever tested.

Simultaneously, prosecutors' cognitive biases affect their ability to determine the truthfulness of lying cooperators.<sup>167</sup> Although prosecutors are charged with the public duty to "do justice" (not merely to obtain convictions), the function of the prosecutor as a zealous adversary can often conflict with her function as a public servant.<sup>168</sup> This dual role can result in active prosecutorial misconduct, which is certainly a source of unreliability in the criminal justice system.<sup>169</sup> A presumption of good faith on the part of prosecutors does not eliminate reliability concerns.

First, prosecutors may rely on their "gut reaction[s]" in cases in which they are heavily dependent upon informant testimony, which is obviously problematic.<sup>170</sup> Another major factor affecting prosecutors' ability to sort lies from the truth is a developed sense of trust, or even "affection," between the prosecutor and her cooperator.<sup>171</sup> Perhaps the most significant psychological process that prosecutors may expe-

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<sup>166</sup> Harris, *supra* note 115, at 17.

<sup>167</sup> See Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 195–96 (2007) ("Even when a prosecutor relinquishes her advocacy role and attempts to negotiate a resolution, her passion may induce or exaggerate cognitive biases that can skew plea bargaining outcomes.").

<sup>168</sup> See Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1006–07 (2009) ("A prosecutor's duty to litigate zealously can therefore be difficult to reconcile with the general exhortation to proceed fairly, and few formal rules exist to guide that process.").

<sup>169</sup> See *id.* at 1007–08 ("Prosecutorial misconduct can occur in many forms, [including] . . . inappropriate opening statements or inflammatory closing arguments at trial . . . [as well as] coercing witnesses, knowingly or recklessly offering perjured testimony, overcharging defendants to extract a guilty plea, and failing to disclose exculpatory information to the defense.").

<sup>170</sup> See Sam Roberts, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257, 275 (2005) ("As former prosecutors have recognized, that 'gut reaction' is often wrong, and, indeed, prosecutors are often 'horrible at assessing the credibility of their cooperators.'" (quoting Yaroshefsky, *supra* note 116, at 953)).

<sup>171</sup> See *id.* ("Prosecutors commonly develop affection for their informants."); Yaroshefsky, *supra* note 116, at 944 (describing the phenomenon of prosecutors becoming "chummy" with their cooperators).

rience and that contributes to unreliability is “confirmation bias,”<sup>172</sup> or the unconscious desire to believe the cooperator whose version of events fits the prosecutor’s preconceived notions of the truth. As former prosecutor Joel Cohen puts it:

Simply put, it is far too easy to take the accounts given by cooperators at face value when, for a variety of reasons, they neatly fit into the prosecutor’s preconceived view of the evidence, or are precisely what the prosecutor wants to hear—even discounting any shortcomings in the prosecutor’s mode of building a case or his tunnel vision in the construction process.<sup>173</sup>

Ultimately, these biases can create situations where prosecutors not only rely upon false evidence, but fail to adequately examine the potential holes in the facts provided by their cooperating witnesses. This is wrong not only because of reliability issues—it can have a domino effect, infecting a prosecutor’s approach to any number of decisions as to that criminal conspiracy, and raising fairness concerns as well.

### c. Due to Dynamic Processes of the Proffer and Plea System

The covert structure of the cooperation process in the modern federal criminal enforcement apparatus informs many of the reliability concerns articulated against it. For example, “[p]rosecutors rarely take notes during their initial sessions with cooperators,”<sup>174</sup> which makes the possibility of impeaching a testifying witness almost impossible.<sup>175</sup> As Professor Natapoff notes, the use of informants is “one of the most secretive aspects of the criminal justice system.”<sup>176</sup>

The entire American system of justice is premised on the adversarial system’s superiority in the truth-finding process. The assumption is that by attacking evidence from both sides, and ensuring the government is held to their proof, the truth will be revealed and jus-

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<sup>172</sup> See O’Brien, *supra* note 168, at 1011 (“[Unlike] the deliberate case building that any attorney must do to prepare for trial,” when someone exhibits confirmation bias, they “might be oblivious to the preference for evidence that favors a particular hypothesis. Even when they initially approached the evidence with objectivity, once people take a position their priority is to defend it.”).

<sup>173</sup> Joel Cohen, *When Prosecutors Prepare Cooperators*, 23 *CARDOZO L. REV.* 865, 869 (2002).

<sup>174</sup> Yaroshesky, *supra* note 116, at 961.

<sup>175</sup> Prosecutors intentionally refrain from taking notes in order to prevent the required disclosure that would come with it. *See id.* (“[T]he office lore is don’t take too many notes or figure out how to take notes so that they are meaningful to you and no one else. You do not want a complete set of materials that you have to disclose.” (quoting an interview with a former AUSA)).

<sup>176</sup> Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 *U. CIN. L. REV.* 645, 654 (2004).

tice will prevail.<sup>177</sup> However, the information culture of the federal cooperation process prevents this fundamental dialogue. Namely, “[t]he traditional adversarial mechanisms for checking unreliability such as discovery, trial, and public disclosure are unavailable in the investigative and plea bargaining context.”<sup>178</sup> Evidence that might otherwise be tested through defense investigation based on disclosed discovery, pre-trial hearings, or cross-examination at trial, simply does not get that opportunity when a client pleads guilty very early on in the process, or when a defense attorney is unable to present evidence contradicting her client’s plea statements. This systemic limitation can result in unreliable outcomes.<sup>179</sup>

## 2. *Unfairness*

The secrecy of the cooperation process also implicates fairness to the defendants against whom a cooperator eventually testifies, as defense counsel’s ability to cross-examine such a cooperator is naturally compromised. Further, as mentioned previously, the substantial assistance model is unfair to low-level defendants in the event of the “cooperation paradox.”<sup>180</sup> Although there is evidence that prosecutors have general policies of signing up “small fish” in order to catch “big fish,” rather than vice versa, the classic example of “inverse sentencing” does occur.<sup>181</sup>

The other major fairness concern that underlies the federal cooperation system is the unpredictability of the prosecutor’s decision to make a substantial assistance motion.<sup>182</sup> Professor Cynthia K.Y. Lee claims that the government motion requirement in practice “gives the prosecutor unbridled discretion to make the substantial assistance determination,”<sup>183</sup> resulting in differing treatment of similarly situated

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<sup>177</sup> See Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714–15 (1983) (identifying the values that the adversary system is intended to serve).

<sup>178</sup> Natapoff, *supra* note 97, at 998.

<sup>179</sup> See *id.* (“[A]s liability is resolved earlier in the process, the more likely it is that informant information will generate wrongful guilt determinations.”).

<sup>180</sup> See *supra* notes 17–21 and accompanying text (describing this concept).

<sup>181</sup> Compare Baer, *supra* note 76, at 917 (2011) (“In sum, the paradigmatic image of the prosecutor using ‘little fish’ to swallow ‘bigger fish’ simply may not hold.”), with Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing “First Drafts,” Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 556 (2009) (stating that although the “typical goal” is to gather evidence against larger players through the smaller players, the converse occurs, “reveal[ing] that the process has been subverted”).

<sup>182</sup> See Lee, *supra* note 1, at 251 (“Virtually unreviewable discretion is problematic because it may reproduce the unwarranted sentencing disparity that the Guidelines seek to correct.”).

<sup>183</sup> Lee, *supra* note 40, at 174.

defendants between prosecutors' offices. Second, it "plac[es] ultimate authority over the substantial assistance determination in the hands of . . . one of the parties to the litigation,"<sup>184</sup> which precludes the necessary "neutral and detached evaluation of the assistance provided"<sup>185</sup>—a function that the court, not the prosecutor, is best equipped to handle. As Ross Galin argues, the unfairness facing a defendant who does not receive a substantial assistance departure motion despite his good faith attempts to assist the government is contrary to the fundamental fairness that "has become the touchstone of due process."<sup>186</sup>

### 3. Normative Ethical Concerns

One normative question inherent in examining criminal cooperators is the morality of the government's reliance on criminals who benefit purely from being disloyal to others. The question of loyalty surrounds much of the popular discourse on cooperating with law enforcement, also known as "snitching" or "ratting."<sup>187</sup> In Alexandra Natapoff's view, the "stop snitching" campaign of inner-city, crime-ridden neighborhoods can be traced to a fundamental issue of trust: "Interpersonal trust is a crucial ingredient for community survival, and studies show that poor urban neighborhoods are particularly dependent on social trust networks . . . for jobs, income, shelter, child care, and other vital resources," and that such networks "also play a vital role in preventing crime in the first place."<sup>188</sup>

Beyond the more abstract moral principles implicated by the government's reliance on disloyal criminal informants, another set of normative concerns arises with respect to the appropriate function of criminal law. This includes both the function and purposes underlying criminal punishment as well as the idealized adversarial system that is central to the American system of justice. In particular, while "[t]he use of cooperators does increase the likelihood that their accomplices

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 171.

<sup>186</sup> Galin, *supra* note 115, at 1270 (quoting Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298, 1300 (1988)). Specifically, Galin claims that the only instances where a substantial assistance motion should not be made pursuant to a cooperation agreement are "where the defendant materially breaches the agreement by intentionally providing false information, perjures himself on the stand in such a way that conviction of the other defendant is jeopardized, misrepresents the extent of his knowledge, or refuses to answer questions." *Id.* at 1282–83.

<sup>187</sup> See Michael L. Rich, *Lessons of Disloyalty in the World of Criminal Informants*, 49 AM. CRIM. L. REV. 1493, 1493 (2012) ("[I]dentifying disloyalty as the reason for society's disdain raises more questions than it answers.").

<sup>188</sup> NATAPOFF, *supra* note 1, at 117.

will be convicted”<sup>189</sup> and “may even destabilize a criminal conspiracy before the government initiates a formal prosecution,”<sup>190</sup> it might also damage the external legitimacy of our system of law when there is a perception that “murderers ‘walk’ because they were fortunate enough to have others to ‘rat’ on.”<sup>191</sup>

### B. *Suggested Reforms*

For each criticism discussed above, several solutions have been suggested. For the substantial assistance government motion requirement, proposed reforms include eliminating the motion requirement altogether as a violation of separation of powers,<sup>192</sup> requiring that a “good faith” contractual standard of review be applied to prosecutorial decisions to withhold such motions,<sup>193</sup> and creating national prosecutorial guidelines on substantial assistance.<sup>194</sup>

For the cooperation process generally, proposals include requiring prosecutors to record early interviews with potential cooperators,<sup>195</sup> holding *Daubert*-style pre-trial reliability hearings for testifying cooperators,<sup>196</sup> verifying informant veracity with a polygraph,<sup>197</sup> and imposing a numerical limit on the number of defendants that can be rewarded with sentencing reductions in order to impose a cost on prosecutors and thus encourage them to use fewer cooperators.<sup>198</sup>

None of these suggestions have been adopted. The most promising changes that have been made to the federal guidelines system have been attempts from within the Department of Justice<sup>199</sup> as well

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<sup>189</sup> Richman, *supra* note 157, at 293 (1996).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Michael Buescher, Note, *Rebuilding the Safety Mechanism: Does 18 U.S.C. § 3553(e) Violate the Separation of Powers?*, 76 *FORDHAM L. REV.* 1065, 1107 (2007).

<sup>193</sup> Justin H. Dion, Note, *Prosecutorial Discretion or Contract Theory Restrictions?—The Implications of Allowing Judicial Review of Prosecutorial Discretion Founded on Underlying Contract Principles*, 22 *W. NEW ENG. L. REV.* 149, 200–01 (2000).

<sup>194</sup> Lee, *supra* note 1, at 245–51.

<sup>195</sup> Roberts, *supra* note 170, at 288.

<sup>196</sup> Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 *GOLDEN GATE U. L. REV.* 107, 109 (2006).

<sup>197</sup> Aaron M. Clemens, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 *QUINNIAC L. REV.* 151, 234–42 (2004).

<sup>198</sup> Weinstein, *supra* note 56, at 568.

<sup>199</sup> In August 2013, in response to the Supreme Court’s decision in *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013), which held that any fact that increases the mandatory minimum “is an element” and therefore “must . . . be submitted to the jury and found beyond a reasonable doubt,” Attorney General Eric Holder circulated a memorandum to all United States Attorney’s Offices detailing changes in official Department policy on charging mandatory minimum sentences and recidivist enhancements in certain drug cases. Memorandum from Eric Holder, Attorney Gen. of the U.S., to the U.S. Attorneys and Assistant Attorney Gen. for the Gen. Div. (Aug. 12, 2013), available at <http://www.justice.gov>.

as certain members of Congress<sup>200</sup> to change the enforcement of mandatory minimum sentences. Furthermore, the first Federal Conviction Integrity Unit (designed to identify past wrongful convictions) was established in 2014 by the United States Attorney's Office in Washington D.C.<sup>201</sup> These changes, however, are not specifically related to cooperation or substantial assistance.

One commentator suggests that judges should “consider those efforts where the cooperation does not amount to substantial assistance,” as part of the post-*Booker* advisory Guidelines and the goals of § 3553(a) in imposing an individualized sentence.<sup>202</sup> Another similar ad hoc proposal is for judges to consider codefendant sentencing disparity under § 3553(a)(6),<sup>203</sup> which lists “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” as a valid factor to be considered in imposing a sentence.<sup>204</sup> These proposals, however, merely reframe pre-existing sentencing considerations, which is a bit like trying to tinker with old machinery, rather than building something new.

#### IV

#### ALTERNATIVE SOLUTION: “GOOD FAITH” COOPERATION

The incremental solution I propose to address the shortfalls of the existing cooperation structure is a new departure provision and mandatory minimum exception called “good faith cooperation.” Although this provision is certainly not a cure-all for the ills plaguing the federal criminal justice system, it addresses many of the concerns

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gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf. In particular, the directive established standards under which prosecutors should refrain from charging drug quantities that would trigger mandatory minimum sentences (requiring each to be met). These criteria mirror those of the safety valve provision, except allowing a criminal history score of up to two, and do not include a cooperation provision. *Id.* at 2.

<sup>200</sup> On January 30, 2014, the Senate Judiciary Committee approved the Smarter Sentencing Act (SSA), S. 1410, 113th Cong. (2014), a bipartisan bill which would modify mandatory minimum sentences for drug offenses from five, ten, and twenty years to two, five, and ten years, respectively, and broaden the eligibility criteria of the existing “safety valve” provision.

<sup>201</sup> See Ian Simpson, *Washington U.S. Attorney Sets Up First Unit to ID Wrongful Convictions*, REUTERS, Sept. 12, 2014, <http://www.reuters.com/article/2014/09/12/us-usa-justice-districtofcolumbia-idUSKBN0H71X320140912>.

<sup>202</sup> Geronimo, *supra* note 53, at 1324. Specifically, Geronimo argues that judges should consider cooperation “under” § 5K1.1, even where there is no motion.

<sup>203</sup> Ryan Scott Reynolds, Note, *Equal Justice Under Law: Post-Booker, Should Federal Judges Be Able to Depart from the Federal Sentencing Guidelines to Remedy Disparity Between Codefendants' Sentences?*, 109 COLUM. L. REV. 538, 539 (2009).

<sup>204</sup> 18 U.S.C. § 3553 (2012).

articulated by scholars and practitioners and could adjust incentives surrounding cooperation under the Guidelines in a positive way.

### A. *Features*

The proposed provision would allow defendants to move on their own behalf for a reduced sentence by virtue of their “good faith cooperation.” The text of the provision might read as follows:

Notwithstanding any other provision of law, the court shall have the authority, upon motion from the defendant, to depart from the Guidelines or impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s good faith cooperation with the Government, if the defendant:

- (a) qualifies for a decrease under Section 3E1.1(a) for acceptance of responsibility, and
- (b) demonstrates having engaged in cooperation with the Government in good faith, in order to provide assistance in the investigation or prosecution of a person who has committed an offense.

The level of the sentencing reduction (beyond the significant step of escaping mandatory minimums) would be determined by the judge, but would be less than the discount provided for 5K1.1 cooperators. By incorporating by reference the Acceptance of Responsibility provision and the language of Substantial Assistance, the new provision fits squarely within Congress’s goals in adopting those previous enactments. The provision also encourages pleas and cooperation under the scope of conserving institutional resources.

As envisioned here, Congress must enact the new provision by statute since it includes the possibility of escaping mandatory minimum sentences set by various federal criminal laws.<sup>205</sup> An additional provision, however, might be included in the Sentencing Guidelines themselves, which would only require action by the United States Sentencing Commission. Such an enactment would be appropriate for cases prosecuted under criminal statutes without mandatory minimum sentences.

The actual operation of the provision would begin with the defendant filing a motion for a reduced sentence based on good faith cooperation, presumably after the defendant pled guilty. A defendant could file this motion without prior notice to or approval from the government. In order to give prior notice and obtain approval from

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<sup>205</sup> It is for this reason that under the current sentencing regime, prosecutors must specifically make motions under 18 U.S.C. § 3553(e) in order for a judge to sentence below a mandatory minimum, rather than motions pursuant to § 5K1.1 of the Sentencing Guidelines. *See Melendez v. United States*, 518 U.S. 120, 124 (1996) (holding that a motion under § 5K1.1 does not “authorize a departure below a lower statutory minimum”).

the government, defendants could indicate during proffer sessions their intent to cooperate and potentially seek a departure based on good faith assistance, thus initiating a *real* bargain between the defendant and the prosecutor over what level of cooperation would warrant an unopposed good faith motion. Similar to the standard cooperation trajectory, a cooperation agreement could memorialize any specific obligations agreed upon by the government and a defendant. Instead of the illusory promise of a substantial assistance motion,<sup>206</sup> the government would indicate that it would not oppose a defendant's motion for a good faith cooperation benefit in exchange for the level of assistance provided. In this scenario, the good faith cooperation provision acts as a middle-tier level of cooperation that benefits both the government and the defendant. From a contractual perspective, this would alleviate the issue of uneven bargaining power, since a defendant could rationally decide what level of assistance to provide in exchange for a particular level of sentencing benefit, rather than the all-or-nothing deal required under the current scheme. For situations in which the defendant's motion remains unopposed by the government, the judge might simply ask for more information from both parties, potentially *in camera*, as to the details of the defendant's cooperation in order to fashion a sentence.

There could also be situations in which the government does not concede to a defendant's good faith cooperation motion. This may occur in a number of situations, even before a cooperation agreement has been entered into. For example, it could be that the defendant lacks sufficient information regarding criminal acts of others because of his minor position in a scheme, which would give the government legitimate grounds to refuse to agree to an "exchange." The government may also refuse a defendant's good faith cooperation motion if he is too late to attempt cooperation, such that all the information he has to offer is already available to the government through other cooperators. It could be that a defendant's proffered version of events differs from the information the government has at that time, leading the government to deem his version untruthful. Similarly, a defendant's version of events may contain internal inconsistencies so the government does not believe he would make a good witness. The government might also contest a good faith cooperation motion after a defendant has signed up via a cooperation agreement pursuant to § 5K1.1. For example, a defendant might have fulfilled what he believes to be every obligation required of him, but ultimately is not

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<sup>206</sup> See *supra* notes 138–40 and accompanying text (describing a prosecutor's obligation to make such a motion as "open-ended").

offered a substantial assistance motion by the prosecutor. Regardless of the reason, if the government opposes the defendant's motion, an adversarial hearing would be appropriate to test whether the defendant's cooperation was, in fact, in good faith.<sup>207</sup>

This process would hand discretion back to the sentencing judge to consider evidence presented by the defendant regarding his attempted cooperation, particularly since it would provide a mechanism to escape mandatory minimums. The proposed statute purposefully does not define "cooperation in good faith," just as the government's standard for "substantial assistance" is not defined. This lack of a definition would leave it up to district courts to establish the contours of evidentiary standards required to satisfy the provision, thus counteracting the high level of sentencing power allotted to prosecutors under the Guidelines. Just as Congress placed discretion in the hands of judges to determine defendants' qualification for the safety valve departure,<sup>208</sup> the discretion to evaluate evidence regarding a defendant's attempted good faith cooperation also should be in judges' hands.<sup>209</sup>

### *B. Expected Effects*

By filling the gap between Acceptance of Responsibility (§ 3E1.1), Substantial Assistance (§ 5K1.1), and the general factors to be considered in imposing a sentence (§ 3553(a)), the "good faith cooperation" provision has the potential to address many of the scholarly criticisms of the current cooperation system. First and foremost, the provision directly addresses the unfairness attached to the longer sentences handed down to those who attempt to receive cooperation agreements and/or substantial assistance motions but are not successful. Under the current regime, these individuals are completely stuck in the event their attempted cooperation does not result in a 5K1.1 motion by the government.

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<sup>207</sup> Such evidentiary hearings occur for numerous other purposes. *See generally* FED. R. CRIM. P. 12 (setting forth the procedures for pretrial motions); 1A CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, *FEDERAL PRACTICE AND PROCEDURE* § 194 (4th ed. 2008) (describing the procedures for hearings and rulings on a motion). Good faith cooperation hearings would presumably take a similar format.

<sup>208</sup> *See Lee, supra* note 1, at 216 ("Section 5C1.2 provides sufficient guidance to courts to ensure that judicial discretion is not unfettered while giving judges, rather than prosecutors, the power to decide whether a departure based on full and truthful cooperation is appropriate.").

<sup>209</sup> The 1987 language of § 5K1.1 of the Sentencing Guidelines provided for government motions on behalf of individuals who had "made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense." Geronimo, *supra* note 53, at 1326 n.32 (quoting Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,103 (May 13, 1987)).

The suggested provision is also a potential solution to the “cooperation paradox,” because it allows those who may not qualify for the “safety valve” provision,<sup>210</sup> but who also do not have sufficient information to provide assistance in the prosecution of others, to present such claims to the judge, who may be more sympathetic than a prosecutor. Namely, a low-level defendant may be able to explain the limits of his knowledge to the judge, such that his good faith attempt to cooperate is acknowledged. Conversely, it would also allow prosecutors to agree to good faith sentencing benefits *ex ante*, thus prompting greater cooperation from defendants who do not have to worry about incriminating themselves and others without being rewarded for providing information.

By reducing the potential costs for those who attempt to cooperate and accept responsibility, the information deficits caused by prosecutors’ reliance on one cooperator will be diminished. Claims of actual innocence may serve more of a signaling function to prosecutors to reevaluate the evidence against a particular defendant (from the front end, rather than through post-conviction review programs, or CIUs). Competing narratives of events from more potential cooperating defendants might prevent some confirmation bias on the part of prosecutors. Additionally, defendants will not have as much of an incentive to tell prosecutors only what they think the government wants to hear because their ability to obtain sentencing benefits will no longer depend exclusively on the prosecution’s illusory promise. Ultimately, more defendants would potentially be induced to cooperate at some level, which would give the government more than one person’s narrative to help understand complex criminal conspiracies. Although *more* information does not necessarily mean *better* information, the ability of more actors to participate (and expose faulty information) would make it more difficult for false accusations to survive. By introducing an adversarial testing mechanism, and, thus, more transparency and accountability to the cooperation process, “good faith cooperation” would increase reliability and fairness.

Further, the provision adjusts the incentive effects of substantial assistance and creates the possibility of more rational decisions by defendants considering cooperation. Namely, the provision changes the nature of the “cooperator’s dilemma” so the options available are not as dramatically opposed to one another. Instead of the binary choice between not cooperating (carrying what is likely to be a severe penalty) and attempting to cooperate (potentially receiving a large benefit, but also risking failure that results in an even worse outcome),

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<sup>210</sup> See *supra* notes 66–75 and accompanying text (introducing this provision).

defendants can consider cooperation with a potential third outcome: a “partial credit” of sorts.<sup>211</sup> Although the informal proposals by Geronimo<sup>212</sup> and Reynolds<sup>213</sup> advocate for judges to consider this sort of cooperation, a formalized departure provides a stronger signaling function and would be more likely to affect defendants’ reasoning. Moreover, the “good faith cooperation” provision would not require co-defendant sentencing disparity<sup>214</sup> or a reading of § 5K1.1 and § 3553(a) that construes good faith attempts at cooperation as “reveal[ing] important characteristics, such as likelihood of recidivism.”<sup>215</sup>

### C. *Potential Criticisms and Responses*

One major criticism this proposal might face is that the provision provides a way for any opportunistic defendant to claim good faith cooperation, which could burden the system with frivolous motions and hearings. This “floodgates” concern fails to consider the fact that the adversarial process could easily weed out defendants who have no colorable claim of good faith assistance. Specifically, judges could require defendants, as a predicate for a full blown hearing, to present their claims of good faith cooperation *in camera*. The judge could additionally inquire as to the prosecution’s reasons for opposing the defendant’s motion. If no genuine dispute exists as to the nature of the defendant’s cooperation, no hearing would be required. Additionally, this criticism does not consider the resources saved by those defendants for whom the prosecution agrees to good faith cooperation. Even if courts may need to spend some extra time dealing with good faith cooperation motions, the potential benefits to the existing system in the form of reliability and fairness would make such a tradeoff fair and even desirable.

Another critique may be that creating a mid-level cooperation provision will unduly affect the government’s ability to obtain valuable information because defendants will have less incentive to provide all the information they have against others. The first response to this is that prosecutors’ interests may be aligned with defendants seeking a good faith cooperation benefit. Rather than being limited to

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<sup>211</sup> Miriam Hechler Baer contemplates the possibility of “partial credit” for attempted cooperation, concluding that it might increase the “Sanction Effect,” or a change in “the punishment that the defendant reasonably expects in the event he is apprehended.” Baer, *supra* note 76, at 944, 961 n.220.

<sup>212</sup> Geronimo, *supra* note 53.

<sup>213</sup> Reynolds, *supra* note 203.

<sup>214</sup> See *id.* at 557–58 (arguing that district court judges can and should “consider co-defendant sentencing disparity”).

<sup>215</sup> Geronimo, *supra* note 53, at 1344.

those defendants who can provide “substantial” information and assistance, prosecutors can incentivize all levels of defendants to provide some level of information, especially if the government agrees to consent to the defendant’s good faith cooperation motion at sentencing. Defendants who otherwise would not, or could not, cooperate (either because of limitations in their knowledge or unwillingness to do anything and everything asked of them by prosecutors) could now be induced to provide some level of helpful information, while not reaching the level of substantial assistance. Moreover, substantial assistance motions will still offer a much higher sentencing reward than good faith cooperation, which will continue to provide incentives for full cooperation and assistance, particularly for the defendants with the most to lose in sentencing, and thus the most to gain by cooperating.

#### CONCLUSION

Substantial assistance is an institution that has come to define modern federal criminal justice. By assigning all the force it carries to the exclusive discretion of federal prosecutors, the Sentencing Guidelines have created a culture of back door, bargained-for justice that often creates results that do not reflect the realities of those who have become caught in the system. I have attempted to present the various incentives—both rational and irrational—affecting criminal defendants in the untenable position of deciding what to do when under federal indictment in these conditions. By providing a way to potentially change that calculus, I hope to increase the capacity of all parties involved—prosecutors, defense attorneys, and especially defendants—to make decisions that are more informed by all the relevant considerations.