

# Cooperating Clients

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## INTRODUCTION

Indicted on serious narcotics charges, Jose Lopez retained Barry Tarlow to “vigorously defend and try the case.”<sup>1</sup> Tarlow was up to the task but warned Lopez that it was “his general policy not to represent clients in negotiations with the government concerning cooperation,” and that he did not plan to make any exception for Lopez.<sup>2</sup> As Tarlow later explained, he found such negotiations “personally[,] morally and ethically offensive.”<sup>3</sup> This arrangement suited Lopez just fine, until he wavered in his resolution. Encouraged by a co-defendant, worried about his children, and hoping to obtain an early release from prison in order to be with them, Lopez asked his co-defendant’s lawyer to initiate discussions with the government. He told his own lawyer nothing about this overture, calculating that Tarlow would serve him well if negotiations broke down and the case ended up going to trial. Sensitive to the constitutional and ethical issues raised by a defendant’s efforts to go behind his lawyer’s back but relying on a memorandum from Attorney General Thornburgh authorizing pre-indictment contacts with represented defendants,<sup>4</sup> the prosecutor had Lopez

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From 1987 until 1992, I was an Assistant United States Attorney in the Southern District of New York. Although I hope that the insights I gained during this period are not colored by the biases of advocacy, I’m sure they are and therefore make this disclosure.

<sup>1</sup> *United States v. Lopez*, 765 F. Supp. 1433, 1438 (N.D. Cal. 1991) (quoting an affidavit submitted by Barry Tarlow, Esq.), *rev’d*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993). Although the factual recitation here draws upon the facts and allegations in *Lopez*, certain additional facts have been omitted in the interest of clarity.

<sup>2</sup> *Id.* at 1438–39.

<sup>3</sup> *Id.* at 1440 n.12 (quoting Tarlow affidavit). Among the clients that Tarlow has said he “will not represent out of moral repugnance” are “snitches, Nazis and an Argentine general said to be responsible for 10,000 ‘disappearances.’” Gail D. Cox, *Fighting and Flaunting It*, 15 NAT’L L.J., Apr. 19, 1993, at 28.

<sup>4</sup> *Lopez*, 765 F. Supp. at 1445 nn.20–21. See UNITED STATES DEP’T OF JUSTICE, DEP’T. OF JUSTICE MANUAL, tit. 9, ch. 2, 9-2.010A. The “Thornburgh Memorandum” was

brought before a magistrate, who advised Lopez of the dangers of proceeding without the assistance of counsel. Undeterred, Lopez signed a written waiver avowing his belief that Tarlow did not represent his best interests in the matter. He then met with the prosecutor and revealed the names of several alleged drug traffickers.

Upon learning of Lopez's meetings with the prosecutor, Tarlow withdrew from the case. Not long thereafter, Lopez, now with new counsel and evidently dissatisfied with the progress of his plea negotiations, moved to dismiss the indictment, alleging that the government had violated his Sixth Amendment right to counsel and DR 7-104(A)(1) of the American Bar Association's *Model Code of Professional Responsibility*, which bars an attorney from communicating with a represented party without the knowledge and consent of opposing counsel.<sup>5</sup> The district court found no Sixth Amendment violation,<sup>6</sup> but it concluded that the "prosecutor's actions constituted an intentional violation of the long-standing ethical prohibition" expressed in DR 7-104<sup>7</sup> and that dismissal of the indictment was the appropriate sanction for the government's "flagrant and egregious misconduct."<sup>8</sup> Although the Ninth Circuit later vacated the district court's order, it found fault only with that court's choice of remedy and agreed with the court's condemnation of the prosecutor's decision to deal with Lopez behind the back, and without the

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essentially reiterated in regulations published in the *Federal Register*, Communications with Represented Persons, 57 Fed. Reg. 54,737 (1992) (to be codified at 28 C.F.R. § 77) (proposed Nov. 20, 1992), but on January 22, 1993, these regulations were withdrawn, pending a review by the Clinton Administration. *Justice Department Withdraws Regulation*, 52 Crim. L. Rep. (BNA) 1385 (Feb. 3, 1993). They were thereafter repropounded by Attorney General Reno on March 3, 1994. Communications with Represented Persons, 59 Fed. Reg. 10,086 (1994) (to be codified at 28 C.F.R. § 77) (proposed Mar. 3, 1994).

<sup>5</sup> *Lopez*, 765 F. Supp. at 1444. DR 7-104(A)(1) states:

During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so . . . .

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1983). The *California Rules of Professional Conduct* incorporate this rule as Rule 2-100. *Lopez*, 765 F. Supp. at 1450. The American Bar Association's *Model Rules of Professional Conduct* contain a similar provision, Rule 4.2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1994).

<sup>6</sup> *Lopez*, 765 F. Supp. at 1456 & n.43.

<sup>7</sup> *Id.* at 1460.

<sup>8</sup> *Id.* at 1461, 1463.

knowledge, of his lawyer.<sup>9</sup>

*Lopez* has added new fire to the already heated debate about the extent to which the conduct of prosecutors can or should be regulated through generally applicable ethics rules, and more particularly, the extent to which DR 7-104(A)(1) should be read to bar prosecutors from communicating with represented defendants.<sup>10</sup> But the case also highlights a very different issue—one that has received all too little attention. How well does our adversarial system serve defendants like *Lopez* who, having been arrested and formally charged, have the option of “cooperating” with the government against other defendants? Put differently, what danger is there that the choices of defendants like *Lopez* will be skewed by the personal interests or ideologies of their defense lawyers?

The starting point for any such inquiry must be cooperation itself. Part I addresses its benefits and liabilities. A simple plea of guilty rarely carries any stigma or risk, beyond that flowing from the conviction itself.<sup>11</sup> Indeed, most

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<sup>9</sup> *United States v. Lopez*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993).

<sup>10</sup> See COMMITTEE ON CRIMINAL LAW, *Regulating the Conduct of United States Department of Justice Employees Who Communicate with Persons Represented by Counsel*, 45 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 834 (1990); Bruce A. Green, *A Prosecutor's Communications with Defendants: What Are the Limits*, 24 CRIM. L. BULL. 283 (1988); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 471-75 (1993); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 700-03 (1992); Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515 (1992); F. Dennis Saylor, IV & J. Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459 (1992); William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903 (1993); H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1176-83 (1987); Marc A. Schwartz, Note, *Prosecutorial Investigations and DR 7-104(A)*, 89 COLUM. L. REV. 940 (1989).

<sup>11</sup> Although entry of a guilty plea conditioned on receipt of a sentencing discount is hardly an indication of true atonement, those who do plead guilty are often said to have “accepted responsibility” for their actions. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.3 (1992) [hereinafter U.S.S.G.] (“Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility for purposes of this section.”).

Even Mafiosi do not look askance at those who simply plead guilty. See *United States v. Gotti*, No. CR 90-1051 (E.D.N.Y.), Tr. 4303 (Mar. 4, 1992) (testimony of Salvatore

defendants take this course, usually in exchange for a sentencing discount.<sup>12</sup> "Snitching"<sup>13</sup> is a very different matter, and those who do it often face economic or physical retaliation and social ostracism. But with these disincentives come extraordinary opportunities, because the snitch can expect a far more lenient sentence than he would have received had he merely pleaded guilty.<sup>14</sup>

The decision faced by one with information to trade is far more complex than that faced by the defendant with the stark choice of pleading guilty or going to trial. Why this is so can best be explained by the analogy to commercial contract theory developed in Part II. The defendant deciding whether to plead guilty contemplates entry into a traditional executory agreement.<sup>15</sup> The prosecutor will offer a sentencing discount—or, more often, the promise to recommend such a discount to the sentencing judge—to induce a guilty plea.<sup>16</sup> With rare exceptions, "future contingencies are not only known

Gravano) (members of Mafia family free to plead guilty to criminal charges, so long as they did not admit membership in or existence of "La Cosa Nostra"). This is also true for those in political movements. See Kathy Boudin et al., *The Bust Book*, in *RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS* 99, 100–01 (Jonathan Black ed., 1971) ("[U]sually it will be of far greater political value for you to cop a plea and be immediately free to organize, than for you to be politically honest in the courtroom where you will have no influence.").

<sup>12</sup> During the year ending June 30, 1990, of the 46,725 defendants convicted and sentenced in United States district courts, 39,734 (85%) had entered guilty pleas, and 718 (1.5%), pleas of nolo contendere. U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 530 tbl. 5.37 (Timothy J. Flanagan & Kathleen Maguire eds., 1991). The proportion of guilty pleas in state cases may be even greater. In 300 representative counties, 91% of the felony convictions in 1988 came from guilty pleas. *Id.* at 545 tbl. 5.48.

<sup>13</sup> See Craig M. Carver, *Word Histories: "Snitch"*, *ATLANTIC MONTHLY*, Jan. 1994, at 128 ("Snitch . . . was originally seventeenth-century cant for 'a fillip on the nose,'" and, like "nose" itself, came to mean "to inform on.").

<sup>14</sup> A defendant deemed by the prosecution to have valuable information and minimal culpability may escape having to plead to any charges. See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 *VAND. L. REV.* 1, 3 (1992). Because such nonprosecution arrangements are simply an extreme variant of the sentencing concessions in plea agreements, I do not address them separately.

<sup>15</sup> Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1921 (1992) ("Typically, a plea bargain involves a simple promissory exchange: the defendant trades his promise to plead guilty (and waives his right to trial) for the prosecutor's promise to recommend a specific sentence.").

<sup>16</sup> Because in most jurisdictions the sentencing judge is generally not bound to accept the prosecutor's recommendation, "[t]he typical plea bargain is in fact an agreement by both sides to present the case to the sentencing judge in a particular way—from the defendant's

and understood at the time the bargain is struck, but can also be addressed by efficacious contractual responses.”<sup>17</sup> Any breach by the government<sup>18</sup> will likely be clear at sentencing, and the consequence (at least in theory) will either be specific performance or a return to square one, with the defendant getting his plea back.<sup>19</sup> In contrast, a cooperation agreement is usually a leap into the unknown, resembling more a “relational contract” than an executory agreement.<sup>20</sup> The defendant’s obligations under the agreement will be defined vaguely: He must cooperate and testify fully and truthfully. He can expect some sentencing break in exchange for his cooperation, but the extent of that break will often be unknown until sentencing, which typically will not occur until after he has rendered his assistance to the government. Because the sentencing judge will likely defer to the government when deciding whether the defendant has kept his part of the bargain, the defendant who cooperated in good faith may find himself robbed of his valuable information and branded as a snitch, with nothing to show for his pains but a long prison sentence.

To recognize the one-sidedness of enforcement mechanisms in cooperation agreements is to appreciate the critical role of defense lawyers in the decision to cooperate. A zealous defense attorney cannot give the defendant contemplating

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side, an agreement to plead guilty to specified offenses; from the government’s side, a promise to say (or to avoid saying) particular things at sentencing.” *Id.* at 1954.

<sup>17</sup> Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1090 (1981). This is not to say that there are no issues as to the fairness of such executory agreements. Compare Scott & Stuntz, *supra* note 15 with Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992) and Albert W. Alschuler, *The Changing Plea Bargain Debate*, 69 CAL. L. REV. 652 (1981).

<sup>18</sup> The term “government” is meant to refer to the prosecution in a general sense, because the issues raised in this Article arise in both state and federal prosecutions. I do admit, though, that the cases and studies on which I rely, and my own personal experience, have given this Article a decidedly federal focus.

<sup>19</sup> See *Santobello v. New York*, 404 U.S. 257 (1971); Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471 (1978).

<sup>20</sup> Ian R. McNeil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691, 694 (1974); see also Ian R. McNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483. Goetz and Scott explain:

In a complex society . . . many contractual arrangements diverge so markedly from the classical model that they require separate treatment. Parties frequently enter into continuing, highly interactive contractual arrangements. For these parties, a complete contingent contract may not be a feasible contracting mechanism. Where the future contingencies are peculiarly intricate or uncertain, practical difficulties arise that impede the contracting parties’ efforts to allocate optimally all risks at the time of contracting.

Goetz & Scott, *supra* note 17, at 1090.

cooperation the certainty of a simple plea bargain, but she can vastly reduce the risk. Her legal knowledge and experience will help the defendant assess the likely outcome of a trial, the value of his information, the nature of both parties' obligations under a cooperation agreement, the likelihood and extent of a sentencing discount, and other such factors. Even more importantly, as a repeat player in the market where the government buys information,<sup>21</sup> the defense lawyer helps guarantee that the government will meet its obligations in good faith.<sup>22</sup>

In Part III, we move from theory to practice, and inquire into the likelihood that a defense attorney will perform her role properly, and give her client the fair assessment of the advantages and disadvantages of cooperation that will allow him to make an informed decision at this critical juncture. She certainly is under an ethical obligation to do so<sup>23</sup> and ordinarily will be presumed to have lived up to this duty.<sup>24</sup> The issue, however, is whether this confidence is justified by reality or simply by necessity.

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<sup>21</sup> See Bruce H. Kobayashi, *Deterrence with Multiple Defendants: An Explanation for "Unfair" Plea Bargains*, 23 RAND J. ECON. 507, 508 (1992) (addressing "plea bargaining system's role as a device through which a prosecutor 'buys information'").

<sup>22</sup> William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 832-33 (1989) ("Many defense lawyers are repeat players with whom the government must deal often. If prosecutors renege on their bargains, counsel will learn not to trust them, and future bargains simply will not be made."). This is not to say that defense lawyers' status as repeat players plays no role in policing the government's conduct in ordinary plea bargains as well. See Scott & Stuntz, *supra* note 15, at 1923. As will be shown in this Article, however, the need for such guarantors is far greater where a defendant cooperates with the government.

<sup>23</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1983) ("A lawyer should exercise independent professional judgment on behalf of a client."); *id.* Canon 7 ("A lawyer should represent a client zealously within the bounds of the law."); *id.* DR 7-101 (lawyer to seek the lawful objectives of his client through "reasonably available means"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1994) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *id.* Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests . . ."); see STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION Standard 4-5.1 (1979) ("After informing . . . herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome. . . . It is unprofessional conduct for the lawyer intentionally to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his . . . plea.").

<sup>24</sup> See *Fiumara v. United States*, 727 F.2d 209, 212 (2d Cir.), *cert. denied*, 466 U.S. 951 (1984).

One aspect of the problem has received considerable attention. Many have documented how indigent defendants with appointed counsel, or defendants of limited means, are all too frequently coaxed, cajoled, or coerced into pleading guilty by attorneys who place wealth maximization—or effort minimization, which is just another aspect of wealth maximization—over professional duty.<sup>25</sup> An attorney of this ilk, pushing her client to plead guilty, might well press him to cooperate as well—if cooperation is an option<sup>26</sup>—because the lower sentences that cooperating usually brings will doubtless make the prospect of a guilty plea more palatable to the defendant. Advice biased toward cooperation may also come, to a far lesser extent, from defense attorneys who seek to aid the government either out of a misplaced sense of public spirit or for personal gain—perhaps so that they can market themselves as “deal makers.” There is no evidence that this is a particularly large group, but its existence has been vociferously noted by some of the more adversarial members of the defense bar.<sup>27</sup>

The prevailing picture of a defense bar systemically biased toward plea bargaining and, by extension, cooperation is not complete. There are also pressures on attorneys to avoid cooperation. The risk that a defense lawyer with ties to an identified third party will deter her client from rendering

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<sup>25</sup> See, e.g., ROBERT HERMAN ET AL., *COUNSEL FOR THE POOR* 158 (1977) (After studying indigent representation in three cities, “[i]t became clear that the criminal defense bar includes in its ranks far too many lawyers who know little law, who are indifferent to or even contemptuous of their clients’ circumstances, who do not work thoroughly and diligently to prepare the best defense, who are temperamentally incapable of giving vigorous adversarial representation when that is warranted, and whose style of practice is dictated largely by economic or institutional considerations that are inconsistent with high-quality representation.”); Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 *YALE L.J.* 1179 (1975); Richard Klein, *The Emperor Gideon Has No Clothes*, 13 *HASTINGS CONST. L.Q.* 625, 672 (1986) (plea bargaining as “mechanism for relieving the defender of the need to prepare that case”); Schulhofer, *supra* note 17, at 1988–90; *Poor Man’s Justice*, *AM. LAW.*, Jan.-Feb. 1993, at 45–87. A defender’s aversion to trying cases may be based as much on fear of personal embarrassment as on economic self-interest.

<sup>26</sup> Cooperation might not be an option for a large number of indigent defendants. The lone defendant charged with a street crime might have no accomplices to cooperate against and insufficient knowledge about unrelated criminal activity to make him of interest to the government.

<sup>27</sup> See ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 400–02 (Vintage Books 1983) (describing “prosecutor[s] in defense attorney’s clothing” whose “hearts are not in defending criminals” and “who hope, someday, to return to the prosecutorial establishment in senior positions.”); Barry Tarlow, *Life After Caplin & Drysdale*, 14 *THE CHAMPION*, Jan.-Feb. 1990, at 40.

cooperation harmful to that third party is well known.<sup>28</sup> Yet little thought has been given to the ideological and economic considerations, cutting across cases, that may similarly lead defense lawyers to dissuade or deter clients from cooperating, regardless of the clients' best interests. I would like to begin to fill this gap in this Article.

The irony of this bias against cooperation is that its roots may lie in the very motivations that can lead defense lawyers to render the highest quality, most zealous representation to their clients. A personal commitment to checking the government's law enforcement powers or a concern for professional reputation in the market for legal services might easily conquer any reasons a lawyer might have for doing less than her best for a client. This is the stuff of which vigorous advocates are made. These motivations, however, may skew a lawyer's advice on the issue of cooperation. The vigorous battler against the overweening government in one case might well refuse to countenance the prospect of her next client helping that same government prosecute another defendant. And the lawyer seeking to attract future clients may find herself cut out of a significant segment of the market if she becomes known as someone who will cooperate her clients. The point here is not that cooperation is necessarily in a defendant's best interest; this certainly is not true. Nor is it that zealous defense attorneys will invariably seek to discourage cooperation. I merely argue that there are considerable pressures on a broad range of attorneys to deter their clients from cooperating and that there is reason to believe that these pressures affect the advice that many defendants receive.

If this is a problem, is there a solution to it? Part IV canvasses the ways in which defendants whose attorneys would deter them from cooperation might be given fairer advice about that option. But its conclusion is far from satisfying. Courts cannot provide, or even guarantee, such counseling. And even though the incentives of private defense lawyers as repeat players in the market for legal services can pose a threat to their impartiality, the monitoring role they play as repeat players in criminal litigation argues strongly against allowing the government to circumvent them to deal directly with potential cooperators.<sup>29</sup> In the end, this is a piece about the adversary system, its virtues, and its limitations. A vigorous defense bar has properly been hailed as the best protection for individual defendants, and society as a whole, against the power of the state. But the sources of this vigor have their own pitfalls. And at a time when a defendant is most in need of disinterested and informative legal advice, he may not get it.

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<sup>28</sup> See *infra* note 183.

<sup>29</sup> This general rule must give way where a defendant has reason to avoid alerting his lawyer to his interest in cooperating. See *infra* text accompanying notes 265–72.



## I. SNITCHING: ITS RISKS AND ITS REWARDS

The defendant facing serious criminal charges<sup>30</sup> who has first-hand information about the wrongdoing of others is generally in a better position than he would be without such a bargaining chip. Should he choose not to cooperate with the government, he can either take the case to trial or avail himself of the sentencing discount generally available to defendants who simply plead guilty.<sup>31</sup> Indeed, there may be irresistible pressures on him to remain

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<sup>30</sup> Because this Article focuses on the effect of the adversary system on the advice that defendants are given about cooperation, I do not address cases in which a putative defendant has the option of cooperating before formal charges have been brought against him. Because such an individual may not have access to a lawyer at all, those cases raise very different issues. See *United States v. Gouveia*, 467 U.S. 180, 188 (1984) (holding that the Sixth Amendment right to counsel does not attach until after formal charges have been brought); see also George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207 (discussing voluntariness issues raised by station house confessions where suspects told that cooperation would bring leniency); Robert L. Misner & John H. Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713, 714 (1977) (discussing police practice of "diverting arrestees as informants by giving them the option of bypassing the criminal justice system in return for their agreement to do undercover work for the police"); Jay Zitter, Annotation, *Enforceability of Agreement by Law Enforcement Officials Not to Prosecute if Accused Would Help in Criminal Investigation or Would Become Witness Against Others*, 32 A.L.R. 4TH 990 (1984) (collecting and analyzing state and federal cases in which courts discussed when various cooperative agreements are binding on the prosecution).

<sup>31</sup> A qualification is needed here. In *Roberts v. United States*, 445 U.S. 552 (1980), the Court held that a sentencing judge could properly consider a defendant's "refusal to cooperate with officials investigating a criminal conspiracy in which he was a confessed participant." *Id.* at 553; see *United States v. Bell*, 905 F.2d 458, 462 (D.C. Cir. 1990) ("*Roberts* . . . clearly establishes the constitutional propriety of the statutorily recognized practice of allowing a person's sentence to vary depending on whether he has cooperated."); cf. Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669 (1980) (defending position later adopted in *Roberts* but arguing for procedural limitations). Thereafter, some courts drew a distinction between "increasing the severity of a sentence for a defendant's failure to cooperate and refusing to grant leniency," barring the former, but permitting the latter. *United States v. Stratton*, 820 F.2d 562, 564 (2d Cir. 1987); see also *United States v. Bradford*, 645 F.2d 115, 117 (2d Cir. 1981). Consistent with this approach, the *Federal Sentencing Guidelines* provide that "[a] defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor." U.S.S.G. § 5K1.2. The possibility remains, however, that a sentencing judge's readiness to grant leniency on other grounds, or the positions taken by a prosecutor in plea negotiations, will be influenced by knowledge that the defendant is withholding valuable information. See *United States v. Klotz*, 943 F.2d 707, 710 (7th Cir. 1991) (holding that § 5K1.2 does not preclude consideration of defendant's refusal to cooperate

silent about the affairs of his associates or acquaintances. Loyalty, or fear of retaliation, may be his foremost consideration, and even the most unreflective defendant will likely look beyond the direct consequences of his actions to others and consider what it means to be a "snitch" in our society.<sup>32</sup> Yet partly because of the common disdain for snitches (and partly in spite of it) governments have long rewarded cooperators with special leniency. Such rewards seem particularly great in these days of lengthy sentences,<sup>33</sup> and they continue to give defendants extraordinary incentives to cooperate.

### A. *The Tug of Loyalty, the Fear of Retaliation, and the Shame of Snitching*

Because those who commit crimes would prefer that information about their illegal activities not be in the hands of people over whom they exercise no persuasion or control, the defendant with personal knowledge of the misdeeds of someone else will generally—though not invariably—have obtained it by virtue of having a relationship of trust with that person. Perhaps the defendant himself participated in those crimes; perhaps he did not but was trusted with the information by those who did. Either way, he can be expected to have some loyalty to the "target" against whom he can cooperate.<sup>34</sup> The loyalty can stem from a group ethic of secrecy that the defendant has explicitly avowed, *e.g.*, the Mafia oath.<sup>35</sup> It can be the allegiance a corporate employee feels to his

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when choosing what sentence he should receive within presumptive guidelines range.). There obviously will be no penalty where the authorities are unaware that the defendant has such information.

<sup>32</sup> See GEORGE FLETCHER, *LOYALTY* 8 (1993) ("Some of the strongest moral epithets in the English language are reserved for the weak who cannot meet the threshold of loyalty: They commit adultery, betrayal, treason."); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 130 (1966) ("[I]n our culture, as is evidenced by the children's terms 'tattletale' and 'snitch' as well as by the underworld's 'fink' and 'stoolie,' informants are objects of contempt and derision.").

<sup>33</sup> See U.S. SENTENCING COMM'N, *ANNUAL REPORT* 148 (1991) (federal statistics show "significant increases both in the use of incarcerative sentences and in the average length of prison sentences" between 1984 and 1990) [hereinafter *ANNUAL REPORT*]; see also *infra* note 72.

<sup>34</sup> Of course, the defendant who has obtained his information by being a victim or just an innocent bystander is not likely to feel any loyalty to his putative targets.

<sup>35</sup> See *United States v. Gotti*, No. CR 90-1051 (E.D.N.Y.), Tr. 3975-76 (Mar. 4, 1992) (testimony of Salvatore Gravano) (telling of secrecy oath taken upon initiation into Mafia family); Francis A.J. Ianni, *The Lupollo Family and Their Rules of Conduct*, in 1 SIR LEON RADZINOWICZ & MARVIN E. WOLFGANG, *CRIME & JUSTICE: THE CRIMINAL IN SOCIETY* 218, 252 (2d ed. 1977) (Organized crime family's rule of secrecy extends to "all

company and supervisors.<sup>36</sup> It can be a loyalty based on a blood relationship, ethnic ties, or close friendship.<sup>37</sup> Or it can be the camaraderie of the loosely-knit gang that “hangs out” together.<sup>38</sup> In their many forms, such loyalties can be powerful arguments against cooperation.

Considerations of loyalty can carry even more weight if a defendant fears that his act of betrayal will be punished. For some, the threat of physical retaliation by former associates is very real,<sup>39</sup> and reprisals against a cooperator’s friends or family can be as much a possibility as they are against those who actually cooperate.<sup>40</sup> Other defendants can fear the loss of their jobs<sup>41</sup> or “the sanctions of the marketplace that often follow a person’s providing incriminating information against business associates.”<sup>42</sup>

Neither should one minimize the social cost of cooperating, the “aversion and nauseous disdain” with which the snitch will be regarded,<sup>43</sup> not just by his

areas of the family operations” legal and illegal, and reflects “the strength of the bond among family members which defines all others as ‘outsiders.’”).

<sup>36</sup> See Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection than the Model Rules Provide?*, 23 IND. L. REV. 1, 11–12 (1990).

<sup>37</sup> See *United States v. Baker*, 4 F.3d 622 (8th Cir. 1993) (defendant claims that her cooperation against a close relative exposed her to “‘ostracism’ and ‘suspicion’” within her extended family).

<sup>38</sup> See Walter B. Miller, *American Youth Gangs: A Reassessment*, in RADZINOWICZ & WOLFGANG, *supra* note 35, at 188, 194–95.

<sup>39</sup> *United States v. Roberts*, 726 F. Supp. 1359, 1376 n.76 (D.D.C. 1989), 925 F.2d 455 (1991) (“Whenever a defendant cooperates with law enforcement by identifying confederates, his safety in the correctional system and elsewhere is in serious jeopardy.”), *rev’d on other grounds*, *United States v. Mills*, 925 F.2d 455 (D.C. Cir. 1991); *see, e.g.*, *United States v. Amuso*, 21 F.3d 1251, 1254–57 (2d Cir.), *cert. denied*, 115 S. Ct. 326 (1994) (mafia boss orders murders of numerous associates suspected of cooperating).

<sup>40</sup> See MICHAEL H. GRAHAM, WITNESS INTIMIDATION 3–7 (1985) (discussing cases of physical retaliation against witnesses and their families); Nemerson, *supra* note 31, at 734 (“[M]ost often the explanation for noncooperation is fear of reprisal against self, family, or friends, or a misplaced sense of loyalty to past associates.”).

<sup>41</sup> Tate, *supra* note 36, at 11–12.

<sup>42</sup> KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 172 (1985); *see* Stanley S. Arkin, *Moral Issues and the Cooperating Witness*, N.Y. L.J., June 9, 1994, at 3, 7 (“[A]ny businessman/informer must consider whether he will be able to continue to pursue his trade once he fulfills his role as an informant.”).

<sup>43</sup> Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1093 (1951).

Donnelly’s title suggests the need for a definitional aside. Terms like: “snitch,” “rat,” “informer” and “informant” are all used to denote individuals who tell the police about the wrongdoing of other people, but specific definitions vary. Donnelly says that an “informant” is the type of “informer” who has participated in the offense he reports. *Id.* at

former associates, but by all those around him, including the law enforcement authorities who benefit most from his cooperation.<sup>44</sup> Sanford Levinson tells how John Ford's movie *The Informer* captures this popular response:

A British police officer disdainfully pushes with his walking stick the thirty-pound reward—itsself so obviously reminiscent of the thirty pieces of silver given to the arch-betrayer Judas—toward Gypo Nolan, who has just conveyed the whereabouts of his friend and political comrade to the British enemy. It is as if the police officer were unwilling to risk the contamination that might arise from even an accidental touching of flesh by physically handing over the money.<sup>45</sup>

Where does this disdain for snitches come from? After all, while we ordinarily condemn someone for betraying his associates for personal gain—or mitigated hardship—the associates the cooperator betrays are, by assumption, people involved in antisocial activity.<sup>46</sup> A utilitarian calculus would applaud, or

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1092. Victor Navasky follows what he considers “popular usage” and defines “an informer as someone who betrays a comrade, i.e., a fellow member of a movement, a colleague, or a friend, to the authorities.” VICTOR S. NAVASKY, *NAMING NAMES* xviii (1980). It seems fair to say that a criminal defendant who agrees to give the government information about his associates in exchange for leniency can safely be called a “snitch” or “informer” without fear of terminological inexactitude.

<sup>44</sup> See SKOLNICK, *supra* note 32, at 130 (officers in one police department would officially call “informants” “special employees,” but privately speak of “snitches”); MALACHI L. HARNEY & JOHN C. CROSS, *THE INFORMER IN LAW ENFORCEMENT* 64 (2d ed. 1968) (former federal agents condemn “the police’s acceptance of the underworld attitude and vocabulary toward the informer”).

The disdain police officers have for “snitches” may reflect their antipathy for cooperators from within their own ranks. See ABRAHAM S. BLUMBERG, *CRIMINAL JUSTICE: ISSUES AND IRONIES* 82 (2d ed. 1979) (discussing “blue coat ‘code of omerta,’ a blanket of silence that must be maintained among the police ‘brotherhood’ in the face of official inquiry or review to shield one’s colleagues”); Stan K. Shernock, *The Effects of Patrol Officers’ Defensiveness Toward the Outside World on Their Ethical Orientations*, 9 *CRIM. JUST. ETHICS*, Summer/Fall 1990, at 24, 25 (“[B]lowing the whistle,’ ‘finking,’ and ‘squealing’ are breaches of the ‘code of silence’ that represent the most heinous offense in the police world.”).

<sup>45</sup> Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 *DUKE L.J.* 631, 635; see NAVASKY, *supra* note 43, at x–xi. Cinematic condemnations of snitching are legion, with *Scent of a Woman* the most recent example. *SCENT OF A WOMAN* (Universal Pictures 1992).

<sup>46</sup> See William J. Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System*, 67 *J. CRIM. L. & CRIMINOLOGY* 143, 143 (1976) (“[T]he informer, spy, or accomplice witness is to be detested and hated only if one is willing to accept the fact that the men ‘betrayed’ are not engaged in an act or acts that are socially destructive.”); Gordon

at least encourage, the snitch, regardless of his motivations or personal allegiances. With the control of crime his paramount goal, Jeremy Bentham went so far as to condemn, as “negative falsehood,” the “concealment of any fact of which, for the protection of their rights, individuals or the public have a right to be informed.”<sup>47</sup>

Maybe the popular reaction to snitching reflects utilitarian concerns that cooperators may not tell the truth or that the light sentences given to cooperators undermine deterrence.<sup>48</sup> Such considerations might explain the notoriety of the defendant who, although far more culpable than his co-conspirators, gets a far lighter sentence by testifying against them.<sup>49</sup> But the

Tulloch, *The Prisoner's Dilemma and Mutual Trust*, 77 ETHICS 229 (1967) (society as a whole benefits when one prisoner, caught in “prisoner’s dilemma” squeals on a fellow prisoner).

In *Roberts v. United States*, the Court blithely proclaimed that “[c]oncealment of crime has been condemned throughout our history,” and found that “the criminal defendant no less than any other citizen is obliged to assist the authorities.” 445 U.S. 552, 557–58 (1980); see *United States v. Bell*, 905 F.2d 458, 462 (D.C. Cir. 1990) (in rejecting plea for leniency by defendant who found cooperation dishonorable, sentencing judge noted, “How it is not ‘honorable’ to aid the Government in detection and prosecution of serious crimes . . . is beyond the Court.”) (quoting *United States v. Bell*, Crim. No. 83-320-12 (D.D.C. Jan. 27, 1989), Memorandum Opinion at 6–7). But see *Roberts*, 445 U.S. at 570 (Marshall, J., dissenting) (“If the Court’s view of social mores were accurate, it would be hard to understand how terms such as ‘stool pigeon,’ ‘snitch,’ ‘squealer,’ and ‘tattletale’ have come to be the common description of those who engage in such behavior.”).

<sup>47</sup> 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 339–40 (1827). Bentham also extolled the social utility of forcing wives to testify against their husbands: “[I]f a man could not carry on schemes of injustice, without being in danger, every moment, of being disturbed in them,—and (if that were not . . . enough) betrayed and exposed to punishment,—by his wife; injustice in all its shapes . . . would, in comparison of what it is at present, be rare.” *Id.*; see Nemerson, *supra* note 31, at 678–79, 684–85 (setting out utilitarian justification for leniency to cooperators, but noting inadequacy of utilitarian perspective as sentencing principle).

<sup>48</sup> See Hughes, *supra* note 14, at 14–15 (addressing the utilitarian calculations that a prosecutor should make before seeking a defendant’s cooperation).

<sup>49</sup> A consequence of the current scheme’s rewards for cooperation is what one court has called “inverted sentencing”: “The more serious the defendant’s crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he has to offer to a prosecutor.” *United States v. Brigham*, 977 F.2d 317, 318 (7th Cir. 1992); see also *United States v. Griffin*, 17 F.3d 269, 274 (8th Cir. 1994) (Bright, J., dissenting) (“What kind of a criminal justice system rewards the drug kingpin or near-kingpin who informs on all the criminal colleagues he or she has recruited, but sends to prison for years and years the least knowledgeable or culpable conspirator, one who knows very little about the conspiracy and is without information for the prosecutors?”); Steven J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993) (“Minor

depth of sentiment against snitches seems to go well beyond such calculations and to be more consistent with a Kantian condemnation of a betrayal motivated by personal gain. Even those wholly unfamiliar with the Categorical Imperative can feel antipathy for those who profit by incriminating others.<sup>50</sup>

The assumption that defendants' reasons for cooperating are exclusively selfish seems reasonable enough<sup>51</sup> and alone can explain the public's disdain.

players, peripherally involved and with little knowledge or responsibility, have little to offer and thus can wind up with far more severe sentences than the boss."); Antoinette M. Tease, *Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendants*, 53 MONT. L. REV. 75, 88 (1992). *But see* Kobayashi, *supra* note 21, at 508 (arguing that cooperation agreement leaving the most culpable defendant with lowest sentence can maximize deterrence because increase in penalties placed on subordinates will more than outweigh any decrease in the penalty placed on the ringleader).

<sup>50</sup> Immanuel Kant, *Metaphysical Foundations of Morals*, in THE PHILOSOPHY OF KANT 140, 178 (Carl J. Friedrich ed., 1949) (A categorical imperative is to: "Act so as to treat man, in your own person as well as in that of anyone else, always as an end, never merely as a means."). Kant's theory of retributive punishment also would preclude the use of sentencing incentives for cooperators. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (J. Ladd trans., 1965) ("The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it . . ."); *see* Nemerson, *supra* note 31, at 688-89.

<sup>51</sup> *See* JAMES Q. WILSON, THE INVESTIGATORS: MANAGING F.B.I. AND NARCOTICS AGENTS 65 (1978) ("A major motive—most investigators believe *the* major motive—of an informant is to obtain leniency on a criminal charge in exchange for information about accomplices involved in that charge or persons involved in other criminal offenses."). Other motives may of course be present—or even dominate—in particular cases. *See* HARNEY & CROSS, *supra* note 44, at 41-59 (informing can be product of fear, revenge, ego, greed, and even repentance, among other motivations). A recent newspaper article suggests a hierarchy of values:

Tommy Burns has done some nasty deeds in his 32 years but he is no rat. He wants everyone to be clear on that score. He knows how to keep his mouth shut.

And he wants everyone to be crystal clear about one more thing: The only reason he is cooperating with Federal agents investigating deadly acts of cruelty and fraud in the glittering showhorse business is that those rich skunks he worked for turned their backs on him the second he got busted doing their dirty work.

....

Spilling his guts is his bittersweet revenge. It is also his only shot at shaving time off a prison term.

Don Terry, *On Killing Horses for Money: A Craftsman's Dirty Secrets*, N.Y. TIMES, Sept.

After all, rare is the criminal associate who cooperates *before* he faces serious charges; the snitch typically forces the government to “buy” information that the “concerned citizen” would have freely given. But suspicion of the snitch’s motives may be only part of the story. What of the defendant who suddenly rues his past ways and, in Kantian terms, proclaims, “I can no longer remain true to someone or some group that acts with so much contempt for humanity”?<sup>52</sup> During the McCarthy witch hunts, the alleged treason of a witness’s former associates was thought by many to justify, even glorify, his act of betrayal. Richard Donnelly reported:

Curiously enough, the political informant, spy, or agent provocateur is not now regarded with the same opprobrium as his brother who participates in other types of crime. Public opinion being what it is, his credibility is at a premium . . . . He may admit to all kinds of past knavery and mendacity but the greater his self-debasement the greater his claim to belief. That he now acts from patriotic motives is conclusively presumed.<sup>53</sup>

Those who so glorified McCarthy-era cooperators, however, as Victor Navasky has insightfully explained, could do so only in the context of what they perceived to be a national emergency, “an extreme situation where . . . survival alone may count and moral considerations be obliterated.”<sup>54</sup> Where customary moral judgments are not suspended, the snitch will be condemned as much for his act of betrayal as for his presumably selfish motivation.

As Deborah Rhode has observed, “The public’s distaste for tattling reflects deeply rooted convictions about the value of trust and candor in human relationships.”<sup>55</sup> Perhaps the roots of these convictions lie in the ethic of the schoolyard or the large family where those who break solidarity to report others to authority figures will almost certainly face peer condemnation. But the lessons of history are equally evocative. Nearly everyone has been touched by a worthy cause that, at one time or another, has suffered at the hands of snitches and carries the scars of such betrayals. Judas is seen as the patron saint

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5, 1993, at 1.

<sup>52</sup> FLETCHER, *supra* note 32, at 171.

<sup>53</sup> Donnelly, *supra* note 43, at 1126.

<sup>54</sup> NAVASKY, *supra* note 43, at 424. *But see* HARNEY & CROSS, *supra* note 44, at 17–20 (former federal agents allege that “Communist conspiracy [had] launched an all-out attack on the informer as an institution” and quoting other law enforcement authorities, including J. Edgar Hoover, making similar allegations).

<sup>55</sup> Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 613 (1985).

of all informers,<sup>56</sup> and, as Navasky notes, “[t]he informer fares worse, if anything, in the Jewish tradition.”<sup>57</sup> Since the First Century, observant Jews have thrice daily prayed that for “slanderers”—meaning informers—“let there be no hope.”<sup>58</sup> The treatment of Gypo Nolan in *The Informer* only begins to convey the hatred that those of Irish ancestry have for his ilk.<sup>59</sup> The causes whose betrayal is recalled in these traditions have little in common with the racketeering enterprises, insider-trading rings, and drug conspiracies betrayed by the cooperating defendant. But the images remain, suggesting a valuation of loyalty for its own sake, and creating a moral backdrop that every defendant considering cooperation will face.<sup>60</sup>

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<sup>56</sup> Sanford Levinson suggests that Judas’s betrayal of Jesus was made of a “wholly different magnitude” by Judas’s willingness to return to Jesus’s side and participate in the Last Supper as a disciple even after having betrayed Jesus to the Roman authorities. Levinson finds “an all-important distinction between the informer as ‘snitch’ and the undercover agent.” Sanford Levinson, *Under Cover: The Hidden Costs of Infiltration, in ABCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* 43, 48–49 (Gerald Caplan ed., 1983). Although I see the difference, I suspect that Judas’s status in the Christian tradition would be secure had he fingered Jesus but skipped the Supper.

<sup>57</sup> NAVASKY, *supra* note 43, at xii.

<sup>58</sup> Joel Cohen, *Informers: Does American Law Violate the Talmud’s Precepts?*, N.Y. L.J., Nov. 29, 1991, at 1, 4. Jewish witnesses refusing to testify in criminal proceedings have unsuccessfully tried to avoid contempt citations by pointing, with considerable support, to a Talmudic prohibition against testifying against another Jew. *Id.* at 32; *see, e.g.*, *United States v. Martin*, 525 F.2d 703, 710 n.11 (2d Cir.), *cert denied*, 423 U.S. 1035 (1975); *United States v. Huss*, 482 F.2d 38, 51 (2d Cir. 1973); *Smilow v. United States*, 465 F.2d 802, 804–05 (2d Cir. 1972); *see also* *United States v. Teicher*, 987 F.2d 112, 119 (2d Cir.) (witness notes reluctance to testify against defendants because “one of the cardinal rules is . . . Jews aren’t supposed to turn other Jews over”), *cert. denied*, 114 S. Ct. 467 (1993).

<sup>59</sup> *See* HARNEY & CROSS, *supra* note 44, at 4 (“Special antagonism to informers may be attributed . . . to the fact that the forebears of many of our citizens came to this country one jump ahead of the process of the law. Many Americans of today have a sort of atavistic hatred of the informer derived from a grandfather who evaded the ‘Black and Tans’ in Ireland or the Kaiser’s conscriptors in Germany.”).

<sup>60</sup> *See, e.g.*, *United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993) (“Unfortunately—or indeed fortunately for the public in many cases—all co-defendants who turn state’s evidence and cooperate with the government, ‘trade on,’ or have traded on, their fellow co-defendant’s ‘trust.’”); *United States v. Bell*, 905 F.2d 458, 459 (D.C. Cir. 1990) (defendant, arguing for leniency despite having refused to cooperate with government, notes his reluctance to “buy my freedom with somebody else’s days”).

In the midst of a bitter alimony dispute with her husband, Seema Boesky noted that, while her first reaction to news of Ivan Boesky’s crimes was to “reach out to him,” “the most painful thing for me of all [was Boesky’s] turning in friends.” *The Secrets of Ivan Boesky* (ABC television broadcast, May 15, 1992).



## B. *The Rewards*

Even as the defendant with first-hand information about the criminal activities of others may face personal shame, physical or economic retaliation, and social ostracism should he choose to cooperate, he can also look to a substantial reward, in the form of a far lighter sentence than he otherwise would have received.

The idea is not new, of course. Under the ancient English common law practice of “*approvement*,” an accused felon could implicate an accomplice and win a pardon upon the accomplice’s conviction.<sup>61</sup> Although this practice had “fallen into disuse . . . by at least the mid-seventeenth century,” it “remained ‘a part of the common law’” to the extent that “whenever a felon was permitted to testify against his accomplices, he gained ‘an equitable title’ to a pardon.”<sup>62</sup> By 1878, this informal immunity arrangement—which allowed prosecutors to control whether a defendant could obtain leniency, but not the extent of that leniency—had become quite prevalent in the United States.<sup>63</sup> In more recent times, while prosecutorial control over charging decisions and judicial deference to prosecutorial recommendations have given prosecutors far more flexibility in their negotiations with potential cooperators, the incentives offered to such defendants have remained considerable.<sup>64</sup> Even when federal

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<sup>61</sup> See *United States v. Ford*, 99 U.S. 594, 599 (1878) [hereinafter *The Whiskey Cases*]; 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*330; 2 MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN*, 226–35 (S. Emlyn ed., 1736); see also Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 14 (1979); Hughes, *supra* note 14, at 7.

<sup>62</sup> Alschuler, *supra* note 61, at 14 (quoting *Rex v. Rudd*, 1 Cowp. 331, 334–35, 98 Eng. Rep. 114, 116 (K.B. 1775) (Mansfield, J.)).

<sup>63</sup> *The Whiskey Cases*, 99 U.S. at 599. “Courts of justice everywhere agree that the established usage is that an accomplice duly admitted as a witness in a criminal prosecution against his associates in guilt, if he testifies fully and fairly, will not be prosecuted for the same offense . . . .” *Id.* “When . . . [the accomplice] fulfills those conditions, he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.” *Id.* at 604.

<sup>64</sup> See ROBERT O. DAWSON, *SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE* 184 (1969) (discussing extent of inducements given to informants and testifying cooperators); HARNEY & CROSS, *supra* note 44, at 41 (same); DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 187 (1966) (“The typical state’s witness . . . is . . . only too happy to settle for charge and sentencing leniency which, without such cooperation, would be inappropriate in view of his past record and present involvement. The most common and sought-after reward for a state’s witness is probation on the current charge. This may be accomplished by a sentencing promise alone or by charge reduction with a promise of probation.”).

sentencing law gave judges nearly complete discretion within very large statutory ranges, they regularly, if not invariably, rewarded cooperators with substantial sentencing discounts.<sup>65</sup>

These discounts have become far more dramatic with the advent of the *Federal Sentencing Guidelines*—applicable to all offenses committed after November 1, 1987.<sup>66</sup> The stick is far heavier: Vastly curtailing judicial sentencing discretion, the *Guidelines*, in a great many cases, have required the imposition of longer sentences than before and, in all cases, have increased the amount of prison time a sentenced defendant must actually serve. The *Guidelines* operate against a statutory background of mandatory minimum provisions, which for certain drug and weapons offenses require sentences even higher than those set by the *Guidelines*.<sup>67</sup> And the carrot is larger: A judge can

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<sup>65</sup> STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 118–120 (1988); see also *Roberts v. United States*, 445 U.S. 552, 570–71 & n.9 (1980) (Marshall, J., dissenting).

<sup>66</sup> 18 U.S.C. § 3553 (1988).

<sup>67</sup> Although as of 1991 there were approximately 100 separate federal mandatory minimum penalty provisions located in 60 different criminal statutes, four statutes accounted for approximately 94% of the 59,780 defendants sentenced under such provisions during the period 1984–90. These four—21 U.S.C. § 841 (1988 & Supp. V 1993), 21 U.S.C. § 844 (1988 & Supp. V 1993), 21 U.S.C. § 960 (1988 & Supp. V 1993), and 18 U.S.C. § 924(c) (1988 & Supp. V 1993)—all involve drugs and weapons offenses. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 10 (1991) [hereinafter MANDATORY MINIMUM PENALTIES]. A defendant can be subject to more than one mandatory minimum: the distribution of 50 grams of crack cocaine by someone who uses or carries a firearm in the course of that crime can, for example, mean a 15-year minimum sentence—10 years for the drug offense, 21 U.S.C. § 841(b)(1)(A) (1988), and 5 years for the weapons offense, 18 U.S.C. § 924(c) (1988 & Supp. V 1993).

Because of changes in enforcement patterns—like the targeting of more serious drug offenders—and the interplay between the *Guidelines* and statutory mandatory minimums, it is difficult to separate the effects of the *Guidelines* from those of the statutory provisions. However, mean sentence lengths across all offenses increased from 24 months in July 1984 to 46 months in June 1990, with the proportion of defendants sentenced to prison increasing from 52% to 65%. Mean prison terms for drug offenders increased from 27 months to 67 months, with the proportion of defendants sentenced to prison increasing from 72% to 87%. The mean sentences for economic offenses remained about the same, but the rate of imprisonment changed from 39% to 51%. U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 56–63 (1991) [hereinafter REPORT ON THE OPERATION OF THE GUIDELINE SYSTEM]; see Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. CAL. L. REV. 367 (1992).

“depart” below the normal *Guidelines* sentence whenever the government has certified that a defendant “provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”<sup>68</sup> Congress has also provided that such a government motion will allow a defendant to escape being sentenced under otherwise applicable mandatory minimum provisions.<sup>69</sup> Although they merely authorize leniency for cooperators, and do not require it, the provisions release judges from the constraints of a sentencing scheme that a great many think is far too harsh.<sup>70</sup> As a result, the cooperator who before the *Guidelines* and mandatory minimums would have received a substantial sentencing discount can now expect an even greater one.<sup>71</sup> And the defendant

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<sup>68</sup> U.S.S.G. § 5K1.1.

<sup>69</sup> 18 U.S.C. § 3553(e) (1988). The Supreme Court has yet to resolve a split in the circuits as to whether the government can say that a defendant has rendered “substantial assistance” within the meaning of U.S.S.G. § 5K1.1, but not of 18 U.S.C. § 3553(e)—and thereby allow him to be sentenced below the *Guideline* level but not the mandatory minimum. *Wade v. United States*, 112 S. Ct. 1840, 1843 (1992); *see United States v. Hernandez*, 17 F.3d 78, 83 (5th Cir. 1994) (court joins “majority of circuits which hold that the district court may depart below a mandatory minimum irrespective of whether the departure motion is made under either § 5K1.1 or § 3553(e)”). *Compare United States v. Ah-Kai*, 951 F.2d 490, 493–94 (2d Cir. 1991) (holding that the court is free to treat § 5K1.1 motion as one also under § 3553(e), even over government’s objection) and *United States v. Keene*, 933 F.2d 711, 713–14 (9th Cir. 1991) (same) with *United States v. Rodriguez-Morales*, 958 F.2d 1441, 1443 (8th Cir.) (holding separate motions by government needed), *cert. denied*, 113 S. Ct. 375 (1992).

<sup>70</sup> *See* Jack B. Weinstein, *A Trial Judge’s Reflections on Departures from the Federal Sentencing Guidelines*, FED. SENT. REP., July-Aug. 1992, at 6, 7 (Section 5K1.1 is “[t]he most important avenue” for judge seeking a basis for departing below a *Guidelines* sentence.). Of 49 district judges and one magistrate judge surveyed, six complained that the *Guidelines* were too harsh. REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM, *supra* note 67, at 16. A different survey of 48 judges found 18 complaining that mandatory minimums were too harsh. MANDATORY MINIMUM PENALTIES, *supra* note 67, at 93–94. Many judges have criticized the severity of the *Guidelines* as a general matter. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1685–86 n.10 (1992) (collecting citations); Deborah Pines, *Judges Cite Rules’ Harshness, Rigidity; Esoteric Wrangles Extend the Process*, N.Y. L.J., Nov. 4, 1992, at 1 (reporting complaints of New York area judges about harshness of *Sentencing Guidelines*). Far more have spoken out against particular results in specific cases.

<sup>71</sup> *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1506 n.111 (1993) (*Sentencing Guidelines*, and § 5K1.1 in particular, “do not explicitly add to the discretion of prosecutors but instead render the prosecutor’s traditional exercises of discretion more influential in the final disposition of the case.”).

who refuses to cooperate effectively pays a far greater price for his silence.<sup>72</sup>

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<sup>72</sup> See John D.B. Lewis, *Cooperation Under the Guidelines*, N.Y. L.J., Apr. 30, 1993, at 2 (defense attorney assails a “pernicious component of the federal sentencing scheme: the emphasis on informing . . . as the only avenue of escape available to those confronted with the guidelines’ Draconian sentences”); Schulhofer, *supra* note 49, at 211–12 (“[M]andatories coupled with an exception for cooperation provide powerful inducements for assistance that might not otherwise be forthcoming.”). In 1991, substantial assistance motions by the government was a reason cited in 68.7% of all downward departures in country; ANNUAL REPORT, *supra* note 33, at 137.

The Violent Crime and Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong., 2d Sess., 108 Stat. 1796 (1994), has made it possible for certain narcotics defendants to avoid statutory mandatory minimums without cooperating against other individuals. Title VIII of that Act provides that a defendant charged with drug trafficking crimes “shall” be sentenced “without regard to any statutory mandatory minimum sentence,” if the court finds, after hearing from the government, that (1) the defendant “does not have more than 1 criminal history point . . .,” i.e., if convicted once before, has never served more than sixty days in prison, *see* U.S.S.G. § 4A1.1; (2) the defendant did not use [or threaten] violence . . . or possess a firearm . . . in connection with the offense;” (3) he was not “an organizer, leader, manager, or supervisor of others in the offense”; and

(4) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Violent Crime and Control and Law Enforcement Act of 1994, tit. VIII, sec. 80001, H.R. 3355, 103rd Cong., 2d sess., 108 Stat. 1796 (1994) (amending 18 U.S.C. § 3553 (1988)).

This provision will permit a defendant with little or no information to “sell” to the government to avoid the mandatory minimums (but not the *Sentencing Guidelines*). What remains to be seen, however, is whether it will reduce the government’s leverage over defendants who *can* cooperate. I suspect that any such reduction will not be substantial. The readiness of many, if not most, judges to defer, for sentencing purposes, to the government’s assessment of a defendant’s truthfulness, *see infra* note 124, will make it difficult for a potential cooperator who falsely tells the government that he has little or no information about others to avoid the mandatory minimums. Moreover, even if he can fool the prosecutor, or at least persuade the judge to ignore the government’s recommendation, he will still face a *Guideline* sentence that will likely (although perhaps not always) be much higher than the sentence he could expect as a cooperator. This last reason will also make it unlikely that a potential cooperator ready to tell the truth about others would opt to rely on the new provision, instead of a cooperation agreement. Given that, after this defendant has proffered useful information about others, the government might immunize him and force

## II. COOPERATION AND THE ROLE OF THE DEFENSE ATTORNEY

Were he to have the simple option of selling out his criminal associates in exchange for a substantial and specified sentencing discount, a defendant would face a difficult enough moral dilemma. But his choice is unlikely to be so stark, or the consequences so clear. Not even the classic model of the “prisoner’s dilemma”—which factors the actions of co-conspirators into the problem—captures the complexities of the defendant’s decisional matrix. The defendant may know that the government is interested in his cooperation, but he may not know exactly how much the government is willing to “pay” for it in sentencing discounts. And even when he knows the “price,” he will typically have to perform, *i.e.*, testify, before he ever gets paid and will have inadequate legal remedies against governmental bad faith. In short, even for the most knowledgeable defendant, the decision to cooperate will be a leap into the unknown. In this situation, the advice of a defense attorney will be critical, perhaps dispositive. As a repeat player in the market where the government “buys” information, she can provide not merely expert guidance, but a high degree of certainty.

### A. *The Real Prisoner’s Dilemma*

One dimension of the potential cooperator’s calculus that has been missing from our discussion so far is the potential for reciprocal betrayal: The associates against whom the defendant can cooperate probably can themselves implicate the defendant in exchange for leniency. This additional element is dramatically portrayed in that most famous of cooperation quandaries, the prisoner’s dilemma:

Two members of a criminal gang are arrested and imprisoned. Each prisoner is in solitary confinement with no means of speaking to or exchanging messages with the other. The police admit they don’t have enough evidence to convict the pair on the principal charge. They plan to sentence both to a year in prison on the lesser charge. Simultaneously, the police offer each prisoner a Faustian bargain. If he testifies against his partner, he will go free while the partner will get three years in prison on the main charge. . . . If *both* prisoners testify against each other, both will be sentenced to two years in jail.<sup>73</sup>

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him to testify against those others, such a course would seem to have all the liabilities of cooperation, without the benefits.

<sup>73</sup> WILLIAM POUNDSTONE, PRISONER’S DILEMMA 118 (1992); *see also* ANATOL RAPOPORT & ALBERT CHAMMAH, PRISONER’S DILEMMA 24–25 (1965).

If the two prisoners act rationally, each will cooperate, reasoning “[t]estifying takes a year off my sentence, no matter what the other guy does.”<sup>74</sup> But consider the model’s assumptions: (1) the defendant cannot communicate with his co-defendant; (2) the police have given him a reasonably precise indication of the strength of the evidence against him, and (3) he knows the exact payout for each of his options, with each payout quantifiable solely in length of sentence. This is not the world that the real defendant faces.

Dropping the first assumption—and positing that the defendants can communicate directly or through lawyers—may make the least difference, as long as each defendant is represented by a different lawyer.<sup>75</sup> If each attorney is loyal only to her client,<sup>76</sup> the prisoner’s dilemma, as Pam Karlan has pointed out, “may simply be played out at a different level. Each attorney will advise her client to cooperate with the prosecutor, because none can be sure that the other defendants’ lawyers are not agreeing to stonewall while secretly planning to claim the prosecutor’s offer for their clients.”<sup>77</sup> In the absence of complete trust—at a time when the bonds of loyalty will be severely tested—altering the model to allow for communication between defendants likely will change little.

Where the classic game-theory model diverges most from reality is in its second two assumptions—that the government will announce the strength of its case and that the defendant will know the precise payouts of his options. Relaxing these assumptions renders the hypothetical prisoner’s decisional matrix infinitely more complex. Perhaps the government’s case is so weak that the defendant might take the case to trial, obtain an acquittal and face no punishment. Or the government is soliciting his cooperation only to make an overwhelming case even stronger (perhaps to avoid a trial); should both he and his co-defendant refuse to cooperate, *both* might face the harshest sentence. The government might refuse to set a precise payout for cooperation, conditioning unspecified leniency upon the extent to which the defendant gives “truthful” information. Or there might be a real risk that, having imposed such a condition—with or without a specified payout—the government will later act in bad faith to deprive the defendant of the promised leniency. Moreover, even were a defendant to know precisely what his sentence would be were he to cooperate, fear of the condemnation or retaliation often faced by snitches could

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<sup>74</sup> POUNDSTONE, *supra* note 73, at 118 (emphasis omitted).

<sup>75</sup> Should the two prisoners share the same lawyer, she can coordinate a strategy of solidarity, or, at the very least, ensure that each prisoner knows exactly what the other is doing. In the absence of ignorance on this score, the dilemma disappears. See Stuntz, *supra* note 22, at 799 (“If all the conspirators have the same lawyer, the government is, in effect, able to deal with one defendant only by dealing with all.”).

<sup>76</sup> I will completely abandon this assumption of loyalty later. See *infra* part III.

<sup>77</sup> Karlan, *supra* note 10, at 694.

introduce an element of uncertainty into the effective payout.<sup>78</sup>

To put aside the simple matrix of the hypothetical is to recognize the critical role that a defense attorney must play in the cooperation decision, not simply as an experienced technical adviser, but as a monitor, even a guarantor, of the government's performance.

### B. *The Ordinary Plea Decision: The Minimization of Uncertainty*

The extent of uncertainty that the potential cooperator faces—and the critical role his lawyer must play—can best be appreciated by comparing his position with that of a defendant who lacks the ability to cooperate against anyone.

Soon after the defendant with no information to trade has been formally charged, he will probably be able to exchange his valuable right to a jury trial for some sort of sentencing concession. Should he choose not to cut a deal, he will risk a guilty verdict and a higher sentence.<sup>79</sup> Although under the discovery rules prevalent in the federal system and in most states, the government may not have to reveal much about its case,<sup>80</sup> and statutory sentencing ranges are generally quite wide, the defendant will be able to rely on his defense attorney, who, having seen many such cases, “is likely to have a good sense of the ‘market price’ for any particular case.”<sup>81</sup> With this expertise, she can negotiate with the government and obtain its best offer. Thereafter, she can give the defendant a reasonably good idea of the available payouts and of his chances of obtaining them.

A plea agreement with the government will vastly reduce, if not eliminate, any uncertainty the defendant faces. To be sure, given that plea agreements often do not bind judges to specific sentences, the defendant may be in

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<sup>78</sup> The standard model of the prisoner's dilemma assumes that “neither player has moral qualms about, or fear of, squealing.” ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 125 (1984). If the two prisoners “belonged to an organized crime gang, they could anticipate being punished for squealing. This might lower the payoffs for double-crossing their partner so much that neither would confess . . .” *Id.* at 133.

<sup>79</sup> A far more interesting and detailed discussion of risk allocation by the defendant considering a guilty plea can be found in Scott & Stuntz, *supra* note 15.

<sup>80</sup> WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 846–57 (2d ed. 1992); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 751–60 (4th ed. 1992); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 588–91 (3d ed. 1993); Susan Fleming, Note, *Defendant Access to Prosecution Witness Statements in Federal and State Criminal Cases*, 61 WASH. U. L.Q. 471 (1983).

<sup>81</sup> Scott & Stuntz, *supra* note 15, at 1923; see MILTON HUEMANN, *PLEA BARGAINING* 90 (1978).

jeopardy until he actually has been sentenced.<sup>82</sup> But, having resolved the case without trial, bound the government to a particular sentencing position, and consulted with his lawyer about the judge's track record in such cases, the defendant should have a good idea of what to expect.<sup>83</sup> This is especially true in those jurisdictions, like the federal system, with mandatory sentencing guidelines that substantially reduce the judge's discretion.

Much of the comfort that a defendant can take from a plea bargain stems from the similarity of that arrangement to a classic executory contract.<sup>84</sup> The parties agree on the way that the case will be presented to the sentencing judge; this may entail charge reduction, joint presentation of facts that will be relevant to sentencing, or other signals that a sentencing discount is appropriate. The defendant will enter his guilty plea. Then he will be sentenced. There is generally no particular need to trust in the government's good faith. Either the plea agreement itself or standard legal rules will likely address all contingencies that might arise in the relatively short period between the defendant's plea and his sentencing.<sup>85</sup> Moreover, should the government renege on the agreement, by urging a sentencing position that it has bargained away, the defendant will likely find out about the violation<sup>86</sup> and will be able to seek the withdrawal of

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<sup>82</sup> In the federal system, the court is prohibited from participating in plea negotiations. FED. R. CRIM. P. 11(e)(1). Even when the parties agree on a specific sentence, the court is still free to reject the agreement and give the defendant a chance to withdraw his plea. FED. R. CRIM. P. 11(e)(1)(C), 11(e)(2). Practices vary among local jurisdictions. See JAMES S. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?": THE MAKING OF A CRIMINAL LAWYER 169 (1983) ("In Washington you can bargain for the prosecutor to support, or at least not oppose, a particular sentence, but ultimately you roll the dice not knowing what the judge will impose. In New York City the judge makes a promise about sentencing before the defendant has to decide whether to plead."); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1092-95 (1976) (finding that majority of judges observed in state systems refused to commit themselves to specific sentences before accepting pleas, even though they made clear that there was an advantage to pleading).

<sup>83</sup> See Alschuler, *supra* note 82, *passim* (discussing extents to which judges in 10 major urban jurisdictions conveyed information before a plea concerning a defendant's likely sentence).

<sup>84</sup> Scott & Stuntz, *supra* note 15, at 1922 ("[T]he typical plea bargain is strikingly similar to the simple dickered bargain—my car for \$500—that is the staple example of enforceable exchange in contract law.").

<sup>85</sup> See Goetz & Scott, *supra* note 17, at 1090 (In classic executory contracts, "[a]ll relevant risks . . . can be assigned optimally—either by legal rule or through individualized agreement—because future contingencies are not only known and understood at the time the bargain is struck, but can also be addressed by efficacious contractual response.").

<sup>86</sup> Sealed *ex parte* sentencing presentations by the government present special difficulties because the defendant will not be able to monitor their content. See United States



his plea or the enforcement of the agreement.<sup>87</sup>

As a result of the executory nature of the typical plea bargain, the main job of the defense attorney in the process is to serve as an educated purchasing agent: finding out the “prices” being offered for pleas, ensuring that the offer is for the best possible price under the circumstances, and arranging the deal according to settled “market” conventions. The fact that defense attorneys are, as Bill Stuntz has noted, “repeat players with whom the government must deal often,”<sup>88</sup> certainly gives the government an added reason to abide by its plea agreements.<sup>89</sup> But the simple terms of the typical plea bargain and the availability of remedies that will either give the defendant the benefit of his bargain or return him to his original position<sup>90</sup> make the issue of trust a

v. Alverado, 909 F.2d 1443, 1446 (10th Cir. 1990) (holding that a court must provide defendant with summary of confidential information heard *in camera* sufficient for defendant to evaluate truthfulness).

<sup>87</sup> See *Santobello v. New York*, 404 U.S. 257 (1971). As a constitutional matter, and within the federal system, if the defendant shows that the government has breached the plea agreement, choice of the appropriate remedy lies with the court, which can allow withdrawal of the plea, alteration of the sentence, or specific performance of the agreement. See, e.g., *United States v. Hayes*, 946 F.2d 230 (3d Cir. 1991); *United States v. Jeffries*, 908 F.2d 1520, 1527 (11th Cir. 1990); *United States v. Parker*, 895 F.2d 908, 914 (2d Cir.), *cert. denied*, 495 U.S. 958 (1990); see also *Westen & Westin*, *supra* note 19, at 512–28 (arguing for rule that allows defendant to select specific performance).

I have doubtless presented an overly rosy picture of the likelihood that an actually aggrieved defendant can obtain satisfaction. Where the government makes the promised sentencing recommendation, but undercuts it by presenting or highlighting facts that lead the judge to impose a harsher sentence, courts will frequently not find a breach. Neither is the government obliged to be “enthusiastic” when making the promised recommendation. See *United States v. Benchimol*, 471 U.S. 453 (1985) (*per curiam*) (government not required to “enthusiastically” defend its sentencing recommendation where it did not specifically promise to do so); *Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1991–1992*, 81 GEO. L.J. 853, 1185 n.1323 (1993) (collecting cases). My point is simply that standards for enforcement are far clearer for plea agreements than for cooperation agreements.

<sup>88</sup> Stuntz, *supra* note 22, at 832–33.

<sup>89</sup> SEYMOUR WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* 53 (1981) (One defense lawyer regards lying by a prosecutor “as a personal betrayal to be dealt with personally—we’ll get the lying son of a bitch ourselves, if not in this particular case, then in some subsequent one. And in the meantime, we quickly passed the word to watch out for the deceitful bastard.”).

<sup>90</sup> The defendant given his plea back may find himself in an even better position than he started, because the government’s case may have deteriorated in the intervening time. See Bruce A. Green, “*Hare and Hounds*”: *The Fugitive Defendant’s Constitutional Right to be Pursued*, 56 BROOK. L. REV. 439, 507 n.290 (1990) (“[T]he passage of time is more

secondary one.

### C. Cooperation: A Leap into Uncertainty

In contrast to the defendant choosing simply between plea and trial, the defendant who has testimony or information to "sell" must consider a leap into uncertainty. Everyone knows that, as a class, cooperators get big sentencing breaks.<sup>91</sup> However, at the time he is contemplating whether to cooperate, a defendant typically will not know how large a discount he can expect, nor can he be sure that, were he to satisfy his part of the bargain, he would get a discount at all.

Nothing about cooperation inherently compels this state of affairs. One can imagine a scheme in which a defendant interested in cooperating would give the government a summary of the information he has to sell, protected by a side agreement that would bar the government from using the information against him if negotiations break down.<sup>92</sup> Alternatively, the defendant's lawyer could make a proffer of this information. Were the government willing to deal, an agreement could be struck obliging the defendant to plead guilty to certain charges and to testify or give information truthfully at the government's request; in exchange, the government would agree to make a sentencing presentation designed to give the defendant a precise discount commensurate with the value of his information. The defendant could then be sentenced before he actually testified in a single trial. If, thereafter, he reneged on his obligations, he could be prosecuted anew, for perjury in his trial testimony, for any charge dropped in consideration of his promise to cooperate, or for both.<sup>93</sup>

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likely to hurt the prosecution than the defense which, after all, has no obligation to call witnesses or present evidence but need only, and in many cases does only, put the government to its proof.").

<sup>91</sup> See Hughes, *supra* note 14.

<sup>92</sup> Such proffer agreements are routinely used during cooperation negotiations. See *id.* at 41; L. Felipe Restrepo, *To Be or Not to Be a Cooperating Defendant*, 7 CRIM. JUSTICE 22, 23-24 (Winter 1993). For an example of one such agreement, see Hughes, *supra* note 14, at 42 n.150. These agreements augment the protection already provided by the *Federal Rules of Evidence* and *Criminal Procedure*. See *United States v. Mezzanatto*, 56 Crim. L. Rep. (BNA) 2113 (U.S. Jan. 18, 1995) (FED. R. CRIM. P. 11(e)(6) and FED. RULE EVID. 410(4), barring admission against defendant of statements made during plea discussions, "permit the plea bargainer to maximize what he has "to sell" by preserving "the ability to withdraw from the bargain proposed by the prosecutor without being harmed by any of his statements made in the course of an aborted plea bargaining session.") (quoting *United States v. Mezzanatto*, 998 F.2d 1452, 1455 (9th Cir. 1993)).

<sup>93</sup> In *Mezzanatto*, 56 Crim. L. Rep. (BNA) 2113 (U.S. Jan. 18, 1995), the Supreme Court recently addressed the extent which to the government can condition its readiness to

Such arrangements, allowing the defendant about as much certainty as in ordinary plea agreements, are rarely available, because they do not serve the government's interests—and may not even serve most defendants' interests. Above all, the government's fear is that a defendant who has received his reward up front will perjure himself—give an account at odds with the “true” account that led the government to enter the cooperation agreement—when it comes time to testify against his former criminal associates. To deter defendants from “recanting,” the government needs a mechanism in place that promises swift and certain punishment for such conduct. An agreement that requires the government to pursue a defector in a separate criminal trial<sup>94</sup>—and, for those charges dismissed pursuant to the agreement, to prove breach of the agreement before even getting before a jury<sup>95</sup>—does not fit this bill.<sup>96</sup> The

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hear a putative cooperator's proffer on that defendant's waiver of the protections of FED. R. CRIM. P. 11(e)(6) and FED. R. EVID. 410. Notwithstanding defendant's claim that these protections were nonwaivable, the Court upheld an agreement permitting the government to use his proffer statements to “impeach any contradictory testimony he might give at trial if the case proceeded that far.” *Mezzanatto*, 56 Crim. L. Rep. (BNA) at 2114. Such agreements, the dissent noted, are quite common. *Id.* at 2120 (Souter, J., dissenting). The rules already allow the use of proffer statements “in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.” FED. R. EVID. 410; FED. R. CRIM. P. 11(e)(6). An issue remains as to whether the government could demand a waiver that would allow the use of proffer statements in its case-in-chief in a trial on charges besides perjury and false statement. Three of the seven Justices in the *Mezzanatto* majority noted that such a waiver “would more severely undermine a defendant's incentive to negotiate, and thereby undermine plea bargaining.” *Id.* at 2118 (Ginsberg, J., concurring). Even assuming that some limits are placed on the sort of waivers that the government can demand from a putative cooperator, *Mezzanatto* thus upholds the government's power to place renegeing cooperators at a severe evidentiary disadvantage in any subsequent prosecution.

<sup>94</sup> Where the defendant is given a lower sentence based on his promise to cooperate and reneges on that promise, the government—in the federal system, at least—will not be able to get him resentenced to a harsher term without either trying him or getting him to plead guilty again. Even if a cooperation agreement were drafted either to deny the defendant any legitimate expectation in his sentence's finality, *see* *United States v. DiFrancesco*, 449 U.S. 117 (1980), or simply to constitute a waiver of the defendant's double jeopardy rights, no provision in the *Federal Rules of Criminal Procedure* authorizes resentencing in such circumstances. *See* FED. R. CRIM. P. 35; *United States v. Lopez*, 26 F.3d 512 (5th Cir. 1994).

<sup>95</sup> Before proceeding on charges otherwise barred by a plea agreement, the government must prove the defendant's breach by a preponderance of the evidence. *See* *United States v. Verrusio*, 803 F.2d 885, 894 (7th Cir. 1986); *see also* *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 578 (1st Cir.) (“adequate evidence” standard), *cert. denied*, 484 U.S. 989 (1987); *United States v. Simmons*, 537 F.2d 1260, 1261 (4th Cir.

most efficient way for the government to keep some hold over the defendant is to postpone sentencing until after his cooperation.<sup>97</sup>

A similar concern that a defendant have an incentive to testify "at his best" also leads the government to prefer an agreement that does not specify how much leniency a defendant can expect for his cooperation. Such vagueness allows the ultimate sentencing discount to be commensurate with the degree of cooperation the defendant has actually rendered and allows the government to

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1976) (same).

<sup>96</sup> Perjury prosecutions can be particularly difficult. If the government had easily presented independent proof that the defendant's original account was true, it probably would not have entered a cooperation agreement with the defendant in the first place. The desire to avoid separate enforcement proceedings explains why the government so much prefers cooperation agreements to statutory grants of immunity.

This is not to say that the prosecution will never decide to incur the expenses of a trial against a cooperator who has breached his agreement. In *Ricketts v. Adamson*, 483 U.S. 1 (1987), Adamson's cooperation agreement provided that he would be sentenced "at the conclusion of his testimony in all of the cases referred to in the agreement." *Id.* at 14. He testified against two co-conspirators, and was thereafter sentenced. But the co-conspirators' convictions were overturned on appeal. When Adamson refused to testify at the retrials without additional consideration, the state declared him in breach of his agreement, moved to vacate his guilty plea, and indicted him on capital murder charges. *Id.* at 4-7. The Supreme Court upheld his death sentence. *Id.*

<sup>97</sup> Although a handful of state courts "have tried to curb the dangers of perjured testimony by requiring that the State execute its promises to the witness before he testifies, . . . the great weight of modern authority, particularly in the federal courts, is that, in guilty-plea cases, the postponement of plea and sentence is unobjectionable." Hughes, *supra* note 14, at 24-25; see *State v. DeWitt*, 286 N.W.2d 379, 384 (Iowa 1979) ("The cases are legion which recognize that the State may withhold its *quid* until the accomplice produces his or her *quo*."), *cert. denied*, 449 U.S. 844 (1980).

In *Sheriff, Humboldt County v. Acuna*, the Nevada Supreme Court overruled *Franklin v. State*, where it had barred the withholding of the benefits of cooperation until after a witness had testified. The court now observed:

If the State is required to provide the benefit of the bargain prior to the time the promisee testifies at trial, the State's expectations may be frustrated by an uncooperative or "forgetful" witness. Although it is true, as observed by the court in *Franklin*, that withholding the benefit of the bargain until after the promisee testifies may create pressure to testify in a particular manner, it would be neither realistic nor fair to expect the State to enter into a bargain without assurances that the promisee's trial testimony would be consistent with the information he or she provided the prosecutors as a basis for leniency.

*Sheriff, Humboldt County v. Acuna*, 819 P.2d 197, 199 (Nev. 1991), *overruling* *Franklin v. State*, 577 P.2d 860 (Nev. 1978).

avoid a stark choice between rewarding the defendant whose cooperation has been grudging and ripping up his agreement.<sup>98</sup> Moreover, the government might not be able to assess a cooperator's "value" with any precision *ex ante*. A defendant might, for example, be averse to disclosing valuable information for which his testimony might not be needed—like a bank account number—during a pre-agreement proffer,<sup>99</sup> or the government might not know enough about its case at that stage to ask the right questions.

The uncertainty that the government prefers in its cooperation agreements also reflects the fact that the document is designed to be seen not just by its parties but by the jury considering the cooperator's testimony. A vague agreement permits a witness who has admitted his involvement in heinous crimes to say, "I honestly don't know what sentence I will receive. I hope for leniency, but it's up to the judge." While defense counsel will try to educate the jury about the likelihood that the witness will receive exceptional leniency—and that the government will have considerable control over the extent of that leniency—the expectation is that jurors will be less likely to be put off by the "deal" than if the agreement set out a precise discount.<sup>100</sup>

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<sup>98</sup> Of course, the incentives for the defendant to give "truthful" testimony may also lead him to give a false account that he believes—correctly or not—the government would prefer to hear. A discussion of such dangers, and how they should be addressed—e.g., jury instructions and corroboration requirements—is beyond the scope of this Article. See Hughes, *supra* note 14, at 29–40; Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785 (1990); Sheldon R. Shapiro, Annotation, *Necessity of, and Prejudicial Effect of Omitting, Cautionary Instructions to Jury as to Accomplice's Testimony Against Defendant in Federal Criminal Trial*, 17 A.L.R. FED. 249 (1973). Agreements that appear to condition leniency on a particular result, like a conviction or the return of an indictment, can be particularly dangerous. See Yvette A. Berman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 809–12 (1987); Neil B. Eisenstadt, Note, *Let's Make a Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749 (1987).

<sup>99</sup> See JAMES B. STEWART, DEN OF THIEVES 282 (1991) (The pre-plea written proffer that Ivan Boesky's attorney gave the government identified the targets of his cooperation only as "investment banker A," "investment bank B," and so on. When the government appeared reluctant to enter into an agreement, Boesky's lawyer "offered to reveal orally the identities of everyone mentioned in the proffer, though he wouldn't put the names in writing.").

<sup>100</sup> See Hughes, *supra* note 14, at 22 n.74 ("A prosecutor may prefer not to have a written agreement that makes precise promises because its absence may strengthen the position of the witness before the jury."); see also *United States v. French*, 12 F.3d 114, 116–17 (8th Cir. 1993) (Expert testimony "that witnesses who testify after signing plea agreements that contain substantial-assistance provisions are more likely to incriminate the defendant falsely in order to receive the reduction" is not appropriate because such a

The government's interest in a vague and delayed payout will not always dictate the form that an agreement takes. Special circumstances or the demands of a particular defendant with substantial bargaining power may lead to a different arrangement.<sup>101</sup> Michael Milken's agreement, for example, first had him sentenced and then allowed him to seek a reduction in his sentence once he had cooperated.<sup>102</sup> Payouts may also need to be made up front in those jurisdictions where a cooperator's sentence, by statute or custom, will primarily be determined by the nature of the charges he has pleaded to, irrespective of his cooperation.<sup>103</sup> Alternatively, prosecutors may also find themselves obliged to use a combination of immediate and delayed payouts: A defendant can immediately plead to lesser charges that reduce his sentencing exposure but carry a sentencing range wide enough to give the defendant an incentive to

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proposition is a "matter of common sense.").

<sup>101</sup> The extent of a defendant's bargaining power will depend on (1) the perceived likelihood that the defendant will take the case to trial if a cooperation agreement is not reached, and (2) the value of his testimony or information, measured in terms of government resources that would have to be expended to obtain a similar result (like the conviction of a co-defendant) in the absence of his cooperation, or the cost (economic, political, etc.) of a prosecution that will have to be foregone.

<sup>102</sup> Letter Agreement (Apr. 22, 1990), *United States v. Milken*, No. 89 Cr. 41 (KMW) (copy of Letter Agreement on file with author). Milken's sentence was governed by the version of FED. R. CRIM. P. 35(b) that allowed a court substantial flexibility in reducing a sentence after its imposition. The agreement also allowed the government to seek civil or criminal contempt sanctions against Milken if he failed to comply with its provisions. For an account suggesting that the terms of Milken's agreement, and the parties' interpretation of them, allowed Milken to obtain a substantial reduction in his sentence with minimal cooperation, see James B. Stewart, *Michael Milken's Biggest Deal*, *NEW YORKER*, Mar. 8, 1993, at 58.

Although Rule 35(b) has since been amended, it still permits sentencing reductions for defendants who have rendered "substantial assistance in the investigation or prosecution of another person who has committed an offense," which is the same standard of U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) (1988). The rule thus permits an initial sentencing that does not take a defendant's cooperation into account, to be followed by a resentencing—after the defendant has actually cooperated—in which his sentence can be cut. Because, from a defendant's perspective, agreements relying on this scheme raise essentially the same enforcement issues as those in which sentencing is delayed, I do not discuss them separately.

<sup>103</sup> Agreements can delay cooperation payouts even in systems where sentencing ranges are closely limited by the charges of conviction. See *People v. Alzate*, 598 N.Y.S.2d 564 (N.Y. App. Div. 1993) (defendant initially pled guilty to greater charge on understanding that the prosecution would allow him to replead to a less serious charge if it deemed his cooperation satisfactory).

perform his part of the bargain.<sup>104</sup> The point is simply that the government will seek to keep the payout as uncertain as it can. Indeed, the government's risk aversion may lead defendants to prefer uncertainty as well, because if forced to commit himself to a precise payout and/or immediate sentencing, a prosecutor would be less likely to be lenient, for fear that a defendant would renege or that the agreement would play badly before a jury.<sup>105</sup>

The consequence of this convergence of interests is that cooperation agreements will typically<sup>106</sup> be quite clear in setting out the charges a defendant will have to plead to and the scope of his immunity, but will often be quite vague as to what leniency the defendant can expect in exchange for his cooperation. This is generally the practice under the *Federal Sentencing Guidelines*.<sup>107</sup> The government will simply covenant to inform the sentencing

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<sup>104</sup> See, e.g., *United States v. Justice*, 877 F.2d 664, 669 (8th Cir.), cert. denied, 493 U.S. 958 (1989); *United States v. Gotti*, No. CR 90-1051 (E.D.N.Y.), Tr. 4481-82 (Mar. 5, 1992) (testimony of Salvatore Gravano) (Gravano, the main witness against John Gotti, was promised a sentence capped at 20 years, instead of the life imprisonment that he might have faced had he not cooperated.).

<sup>105</sup> See KUNEN, *supra* note 82, at 69 (recounting case in which prosecutor's agreement to dismiss charges against witness "would render her testimony practically worthless"; by "agree[ing] not to reach an agreement" and relying on "'an understanding' that if [the witness] . . . testified, [the prosecutor] . . . would 'take into account' the fact that she had cooperated," defense counsel was able to get more favorable treatment for client); Hughes, *supra* note 14, at 22 n.74 ("If the prosecutor has a trustworthy and generous track record in this area, the cooperating witness's counsel may advise him that it is safe and even advantageous to proceed without a written agreement, since, if he does his best for the government, the prosecutor ultimately may give him a greater reward than the prosecutor would have promised in a written agreement at an early stage.").

Although the defendant who intends to act in bad faith would obviously prefer his rewards up front, I assume throughout that, although the government may not know it, the defendant is proceeding in good faith and intends to give truthful cooperation. One defense lawyer has suggested, however, that "open-ended" agreements can serve the interests of grudging cooperators by encouraging them "to bring in as much as possible," thereby making leniency more likely. Jerald W. Cloyd, *Prosecution's Power, Procedural Rights, and Pleading Guilty: The Problem of Coercion in Plea Bargaining Drug Cases*, 26 SOC. PROBS. 452, 461 (1979).

<sup>106</sup> I do not pretend to have conducted systematic research into the terms of cooperation agreements in use. The description here is largely based on anecdotal evidence from cases, articles, a randomly assembled collection of agreements from various jurisdictions, and my own experience in one federal district. The similarities of provisions alluded to in caselaw, however, do suggest some patterns.

<sup>107</sup> One practitioner advises:

Defense attorneys must make it clear to their client(s) that because of the guidelines'

judge of the extent of the defendant's cooperation, and leave the matter in her hands.<sup>108</sup>

Even where a cooperation agreement sets a precise payout,<sup>109</sup> a defendant will face considerable uncertainty so long as his sentencing is delayed. Typically, the defendant will broadly promise to testify truthfully, and to truthfully disclose all information concerning matters covered by the

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structure, neither the defense nor the prosecution is in a position to promise a specific result at sentencing. This particular aspect of cooperation is perhaps the most difficult for defendants to understand. They usually ask for a guarantee of a lesser sentence up front, prior to their proffer of the evidence. It may sometimes be possible to negotiate a [plea under FED. R. CRIM. P. 11(e)(1)(C)], which includes a negotiated sentence or a cap on the client's exposure in exchange for cooperation, although prosecutors are generally reluctant to agree to such a plea.

Restrepo, *supra* note 92, at 25. *But see* Stephen J. Schulhofer & Ilene Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. J. CRIM. L. 231, 269-70 (1989) (noting that some prosecutors seek greater certainty than available under § 5K1.1 of the *Federal Sentencing Guidelines* by restructuring charges).

<sup>108</sup> The standard agreement recently used in the U.S. Attorney's Office for the Eastern District of New York provides, "[i]f the Office determines that [the cooperator] has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion with the sentencing court setting forth the nature and extent of [his] cooperation." Hughes, *supra* note 14, at 38 n.143; *see, e.g.*, *United States v. Atwood*, 963 F.2d 476, 477 (1st Cir. 1992) (government promises to make defendant's cooperation known to any individual or entity, at defendant's request; both parties "reserve[] the right to petition the district court 'for the imposition of any lawful sentence'"); Letter Agreement at ¶¶ 9-10 (July 3, 1991), *United States v. Wright*, No. CR 91-376 (D.D.C.) (copy of Letter Agreement on file with author) (government promises defendant no specific sentence, and reserves right to recommend maximum allowable term of imprisonment); Letter Agreement at ¶ 7 (Oct. 29, 1990), *United States v. Profeta*, No. CR 90-449 (D.D.C.) (copy of Letter Agreement on file with author) (similar provision in case where maximum allowable term was life imprisonment without parole).

<sup>109</sup> Surveying three federal districts, Nagel and Schulhofer report that, in one, the reward for substantial assistance "is structured as a section 5K1.1 motion coupled with an agreement for a specific sentence below the guideline range." Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 532 (1992). Sentences were not specified in the other two districts. *But see, e.g.*, *United States v. Roberts*, 5 F.3d 365, 367 (9th Cir. 1993) (agreement obliges government to recommend that defendant's sentence be cut in half); *United States v. Jimenez*, 992 F.2d 131, 133 (7th Cir. 1993) (agreement calls for 25% downward departure from presumptive *Guidelines* range).



government's inquiries.<sup>110</sup> Any effort to bind a cooperator to a particular "story" would be unseemly, and probably illegal.<sup>111</sup> The government will reserve for itself the right to determine, prior to sentencing, whether the defendant has in fact cooperated fully and told the truth.<sup>112</sup> Ordinarily, this reservation might simply mean that the government would retain control over what it tells the sentencing judge about the defendant's cooperation. Given that a judge would be likely to rely heavily on a prosecutor's assessment of such matters, this would be a substantial enforcement mechanism. The *Federal Sentencing Guidelines* have strengthened the government's hand even more, however, by providing that cooperation generally cannot be a basis for a departure below the *Guidelines* range or a statutory minimum *except* when the government makes an explicit motion certifying that the defendant has indeed rendered "substantial assistance."<sup>113</sup> Harnessing this power, the government

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<sup>110</sup> See Letter Agreement at ¶ 3 (Oct. 29, 1990), *United States v. Profeta*, No. CR 90-449 (D.D.C.) (copy of Letter Agreement on file with author); Berman, *supra* note 98, at 801; Eisenstadt, *supra* note 98, at 750-51 & n.6; Hughes, *supra* note 14, at 38.

<sup>111</sup> Efforts by prosecutors to bind a defendant to a particular version of events have often been condemned or struck down as contrary to public policy. See *State v. Fisher*, 859 P.2d 179, 183 (Ariz. 1993) (By conditioning cooperator's plea on her agreement that her testimony at her husband's trial "would not vary substantially in relevant areas" from statements she had previously given to investigators, prosecution "may have overstepped the bounds of the law and its ethical responsibility to 'scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammelled conduct when appearing at trial or on the witness stand.')" (quoting A.B.A. CANONS OF PROFESSIONAL ETHICS 39 (1969)); *State v. DeWitt*, 286 N.W.2d 379, 384 (Iowa 1979), *cert. denied*, 449 U.S. 844 (1980); *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197, 201 (Nev. 1991) ("The testimony condemned by the courts generally, and now this court in particular, is that which must be played according to a predetermined script and irrespective of its truthfulness."); *People v. Medina*, 116 Cal. Rptr. 133, 145 (Cal. App. 1974) ("[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion."). *But see People v. Fields*, 673 P.2d 680, 700 (Cal. 1983) (holding *Medina* rule not applicable where agreement simply bound cooperator to testify truthfully), *cert. denied*, 469 U.S. 892 (1984).

<sup>112</sup> One standard agreement provides: "[I]t is understood that the Office's determination of whether [the cooperator] has cooperated fully and provided substantial assistance, and the Office's assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon [him]." *United States v. Gotti*, No. CR 90-1015 (E.D.N.Y.), Tr. 4490 (Mar. 5, 1992) (testimony of Salvatore Gravano); see also *United States v. Knights*, 968 F.2d 1483, 1485 (2d Cir. 1992); Hughes, *supra* note 14, at 38 n.143.

<sup>113</sup> U.S.S.G. § 5K1.1; see Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105

will typically reserve to itself complete discretion over whether or not it will file such a motion.<sup>114</sup> If the government determines that a cooperator has not lived up to his obligations, it will thus generally be able to prevent the sentencing judge from showing the defendant any significant leniency based on his cooperation.<sup>115</sup>

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(1994) (criticizing extent of discretion allowed to prosecutors by § 5K1.1).

An amendment proposed by the American Bar Association's guidelines committee that would have allowed a court to depart for "substantial assistance" even in the absence of a motion from the government, *see* Notice of Proposed Amendment to the Sentencing Guidelines, 57 Fed. Reg. 90,112 (1992), was "[c]onspicuously missing" from the package of amendments sent to Congress by the Sentencing Commission during the summer of 1993. 53 Crim. L. Rep. (BNA) 1136 (May 12, 1993); *see Lee, supra* at 145-49 (discussing failed amendment attempt). The 1994 Crime Bill has given courts some new latitude in this area, but not much. *See supra* note 72.

<sup>114</sup> *See, e.g., Sullivan v. United States*, 11 F.3d 573, 576 (6th Cir. 1993); *United States v. Massey*, 997 F.2d 823, 824-25 (10th Cir. 1993); *United States v. Knights*, 968 F.2d 1483, 1485 (2d Cir. 1992); *United States v. Urbani*, 967 F.2d 106, 107 (5th Cir. 1992); Letter Agreement at ¶ 9(d) (July 3, 1991), *United States v. Wright*, No. CR 91-376 (D.D.C.) (copy of Letter Agreement on file with author) ("Your client understands that the determination of whether he has provided 'substantial assistance' is within the sole discretion of the United States Attorney for the District of Columbia and is not reviewable by the Court."); *see also* Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing the Good Faith Standard*, 78 MINN. L. REV. 1253, 1275 (1994). In *United States v. Watson*, 988 F.2d 544 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 698 (1994), the court noted that the plea agreement was "unusual for its lack of language giving the government the unfettered discretion to determine whether it would submit a § 5K1.1 motion in the defendant's behalf." *Id.* at 552 n.3. *But see United States v. Hernandez*, 17 F.3d 78, 82-83 (5th Cir. 1994) (remanding to determine whether agreement stating that government "may" make motion if defendant rendered substantial assistance was intended to leave government with "unbridled discretion"); *United States v. Spiropoulos*, 976 F.2d 155, 161 (3d Cir. 1992) (agreement provides that if defendant "makes a good-faith effort prior to his sentencing to provide substantial assistance . . . the United States will" make substantial assistance motion at sentencing).

In state jurisdictions, the prosecution can create a similar enforcement mechanism through agreements that offer a defendant the chance to plead to a lesser charge, with a favorable sentencing recommendation, so long as the prosecution "in [its] . . . sole discretion" deems his cooperation satisfactory. *People v. Tobler*, 397 N.Y.S.2d 325, 328 (N.Y. Sup. Ct. 1977) (emphasis omitted).

<sup>115</sup> *See United States v. Gonzalez*, 970 F.2d 1095, 1102-03 (2d Cir. 1992); *United States v. Bruno*, 897 F.2d 691, 695 (3d Cir. 1990). Even where the absence of a § 5K1.1 motion bars the sentencing judge from departing below the presumptive guideline range on the ground of a defendant's cooperation, she may still take that cooperation into account when setting a sentence within that range. *See, e.g., United States v. La Guardia*, 902 F.2d

Where an agreement allows the government this discretion, there are still limits on a prosecutor's ability to deprive a deserving cooperator of his sentencing discount, but they are scant. As would be true even in the absence of any agreement, the government's refusal to file a section 5K1.1<sup>116</sup> or section 3553(e)<sup>117</sup> motion cannot be based on unconstitutional considerations, such as race or religion.<sup>118</sup> Finding a contractual obligation created by the existence of a cooperation agreement, some courts have also bound the government to act in "good faith."<sup>119</sup> This requirement is not entirely without teeth,<sup>120</sup> but it leaves

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1010, 1013 n.4 (1st Cir. 1990); *United States v. Alamin*, 895 F.2d 1335, 1337 (11th Cir.), *cert. denied*, 498 U.S. 873 (1990); *United States v. Huerta*, 878 F.2d 89, 93 (2d Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990). A judge may also depart below the range if she finds that the defendant's cooperation has aided the judicial system by breaking a "log jam" in a multidendant case. *See United States v. Garcia*, 926 F.2d 125, 127-28 (2d Cir. 1991) (allowing departure under U.S.S.G. § 5K2.0).

<sup>116</sup> U.S.S.G. § 5K1.1.

<sup>117</sup> 18 U.S.C. § 3553(e) (1988).

<sup>118</sup> *Wade v. United States*, 112 S. Ct. 1840, 1843-44 (1992); *see United States v. Paramo*, 998 F.2d 1212, 1219-20 (3d Cir. 1993) (government's refusal to file § 5K1.1 motion cannot constitutionally be based on fact that defendant exercised his right to trial), *cert. denied*, 114 S. Ct. 1076 (1994); David Fisher, Comment, *Fifth Amendment—Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions*, 83 J. CRIM. L. & CRIMINOLOGY 744, 770-71 (1993) (criticizing *Wade* for failing to give lower courts sufficient guidance).

<sup>119</sup> *See United States v. Kelly*, 18 F.3d 612, 617-18 (8th Cir. 1994) (If the government reserves discretion to make substantial assistance motion, relief is available only upon a showing "that the government's refusal . . . was based on an unconstitutional motive, that the refusal was irrational, or that the motion was withheld in bad faith."); *United States v. Profeta*, No. 91-3224 (D.C. Cir. June 20, 1993) (upholding district court's finding of no bad faith; no suggestion that district court's inquiry was inappropriate); *United States v. Robinson*, 978 F.2d 1554, 1569 (10th Cir. 1992) ("When a plea agreement leaves discretion to the prosecutor, the court's role is limited to deciding whether the prosecutor has made its determination in good faith.") (quoting *United States v. Vargas*, 925 F.2d 1260, 1266 (10th Cir. 1991)), *cert. denied*, 113 S. Ct. 1855 (1993); *United States v. Knights*, 968 F.2d 1483, 1485, 1488 (2d Cir. 1992) (ordering hearing to determine whether government acted in "bad faith" when it refused to file § 5K1.1 motion, even though cooperation agreement left government with "sole and unfettered discretion" to determine whether defendant had rendered substantial assistance); *see also Gyurci*, *supra* note 114 (arguing for objective good faith standard).

<sup>120</sup> *See, e.g., United States v. Yee-Chau*, 17 F.3d 21, 25-26 (2d Cir. 1994) (finding no bad faith in government's repudiation of agreement after cooperator balked while testifying); *United States v. Ganz*, 806 F. Supp. 1567 (S.D. Fla. 1992) (applying contract principles and finds that government acted in bad faith by refusing to make a § 5K1.1 motion after defendant complied fully with the terms of the plea agreement; granting the sentence reduction called for in the agreement); *cf. United States v. Dixon*, 998 F.2d 228

the government considerable room to rationalize a dubious, or even a bad faith, refusal to file.<sup>121</sup> In any event, only a minority of circuits has recognized this obligation.<sup>122</sup>

Even when the government finds itself bound to file a motion permitting a defendant to receive leniency as a cooperator, it can still make clear to the sentencing judge that the defendant does not deserve much of a discount.<sup>123</sup>

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(4th Cir. 1993) (holding defendant entitled to specific performance of government's promise to move for § 5K1.1 departure where government conceded that defendant had already rendered substantial assistance in investigation of crimes; prosecutor admitted having withheld § 5K1.1 motion to maintain pressure on the defendant when he testified at an upcoming trial).

<sup>121</sup> See Gyrucci, *supra* note 114, at 1276–77 (noting that those courts reviewing prosecution refusal for bad faith employ subjective standard that prevents “meaningful review”).

The discretionary control the government maintains over § 5K1.1 departures makes it the rare cooperator who takes a confrontational attitude toward his prosecutors. In *United States v. Mozer*, 828 F. Supp. 208 (S.D.N.Y. 1993), a defendant implicated in a scheme to violate the rules governing the auction of Treasury securities disputed the government's interpretation of certain provisions in his cooperation agreement before entering his plea. The government thereafter claimed that he had repudiated his agreement. Rejecting the government's claims and ordering specific performance of the agreement, the district court noted:

Ordinarily, defendants who have cooperation agreements with the Government are submissive; they cannot afford to alienate the prosecutor because the sentencing court's ability to depart from a mandatory minimum sentence or a Sentencing Guideline depends on the Government's willingness to make a motion for departure under 18 U.S.C. § 3553(e) or § 5K1.1 of the Guidelines. This defendant, for whatever reason, was apparently worrying less about pleasing the prosecutor and more about protecting his flank from exposure to further prosecution by the Antitrust Division and potential civil liabilities.

*Id.* at 213–14.

<sup>122</sup> See *United States v. Wallace*, 22 F.3d 84, 87 (4th Cir.) (holding that plea agreement leaving government with “sole discretion” to seek § 5K1.1 departure creates “no enforceable obligation”; relief only if defendant can show unconstitutional motivation), *cert. denied*, 115 S. Ct. 281 (1994); *United States v. Garcia-Bonilla*, 11 F.3d 45, 47 (5th Cir. 1993); *United States v. Forney*, 9 F.3d 1492, 1495, 1501–02 (11th Cir. 1993) (holding that where agreement gives government sole discretion to determine whether defendant gave “substantial assistance” within meaning of § 5K1.1, court will not review decision for arbitrariness or bad faith; will consider only claims of unconstitutional motivation); *United States v. Bagnoli*, 7 F.3d 90, 92 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 95 (1994); *United States v. Burrell*, 963 F.2d 976, 984–85 (7th Cir.), *cert. denied*, 113 S. Ct. 357 (1992).

<sup>123</sup> After the defendant had cooperated in *United States v. Jimenez*, 992 F.2d 131 (7th

Given the likelihood that the court will defer to the government's assessment of such a factual issue, a defendant's successful effort to compel a government motion may be pyrrhic.<sup>124</sup> This deference gives the government substantial de facto control over the extent of leniency even where judges have the power to grant sentencing reductions on their own.

It can thus be seen how different a typical agreement to cooperate is from the classic executory contract of those who simply plead guilty. Both kinds of agreements rely on the sentencing judge's receptivity to signals from the

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Cir. 1993), pursuant to an agreement in which the government promised to recommend a 25% § 5K1.1 departure, defendant's new counsel suggested that defendant's guilty plea may have been coerced. Thereafter, the government made the agreed-upon recommendation at sentencing, but noted that a larger departure was unwarranted because the defendant's cooperation had been of limited value. The sentencing judge refused to depart at all, questioning whether defendant's cooperation had been substantial enough. *Id.* at 133-34; *see also* United States v. Gonzalez-Perdomo, 980 F.2d 13, 15 (1st Cir. 1992) (Although an agent testifying at a sentencing hearing urged that defendant should receive downward departure because of her cooperation, he noted: "I believe that she had more to offer to the Government, and that her cooperation in this particular case was good, but she was able to contribute more if she wished to due to her involvement in the trafficking of narcotics and with the people that she was involved while trafficking in drugs." The defendant unsuccessfully appealed the extent of the district court's departure.); *cf.* United States v. Benchimol, 471 U.S. 453, 455-56 (1985) (per curiam) (holding that where government did not specifically commit to making sentencing recommendation "enthusiastically," not obliged to do so). *But see* United States v. Fisch, 863 F.2d 690, 690 (9th Cir. 1988) (per curiam) (holding that prosecutor's bare statement that defendant had cooperated did not fulfill obligation to inform sentencing judge of all cooperation; more details were needed).

<sup>124</sup> The commentary to § 5K1.1 notes that "substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain." U.S.S.G. § 5K1.1, cmt. n.3; *see* United States v. Thomas, 930 F.2d 526, 529-31 (7th Cir.) (vacating sentence where district court rejected government's recommendation of six-year sentence and departed downward to give defendant probation, based not merely on her cooperation but on her family responsibilities), *cert. denied*, 112 S. Ct. 171 (1991). In United States v. Watson, 988 F.2d 544 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 698 (1994), although it held that the government was obliged by its agreement to file a § 5K1.1 motion, the court noted that the government "remain[ed] free to inform the district court of the extent and usefulness of the defendant's cooperation. . . . Moreover, the district court may or may not conclude that the defendant's cooperation warrants a downward departure from the defendant's guideline range." *Id.* at 553 (citation omitted); *see also* United States v. Spiropoulos, 976 F.2d 155, 161-62 (3d Cir. 1992).

A district court has complete discretion as to how much of a downward departure a defendant should receive, and its decision will not be reviewed on appeal. *See* United States v. Doe, 996 F.2d 606, 607 (2d Cir. 1993); United States v. Gonzalez-Perdomo, 980 F.2d 13, 15 (1st Cir. 1992).

government;<sup>125</sup> if such reliance is ill-founded, the agreements can be meaningless.<sup>126</sup> But the typical cooperation agreement seems far more like the “relational contracts” that develop, according to Goetz and Scott, when “parties are incapable of reducing important terms of the arrangement to well-defined obligations. Such definitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance.”<sup>127</sup> With cooperation agreements, the absence of precise performance standards may be better attributed to government’s desire to hold a “hammer” over the defendant, and the impropriety or unseemliness of a contract for specified testimony<sup>128</sup> than to the

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<sup>125</sup> See *United States v. Johnson*, 33 F.3d 8, 9–10 (5th Cir. 1994) (reversing sentence where district court judge may have accepted government’s limited departure recommendation without exercising his independent judgment and discretion); *United States v. Johnson*, 997 F.2d 248, 252–53 (7th Cir. 1993) (upholding sentence where district court judge rejected government recommendation of ten-level downward departure because “he disagreed with the presentence report’s recommendation concerning the defendant’s truthfulness and the risk of danger presented by his cooperation”); *United States v. Mariano*, 983 F.2d 1150, 1155 (1st Cir. 1993) (“Put bluntly, while a government motion is a necessary precondition to a downward departure based on a defendant’s substantial assistance, the docketing of such a motion does not bind a sentencing court to abdicate its responsibility, stifle its independent judgment, or comply blindly with the prosecutor’s wishes.”); see also Stanley Marcus, *Substantial Assistance Motions: What Is Really Happening?*, 6 FED. SENTENCING REP. 6–8 (1993) (district court judge suggests that no consistent policy appears to underly government sentencing recommendations in substantial assistance cases); Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combatting Ultra-Uniformity*, 35 B.C. L. REV. 799, 832–35 (1994) (highlighting discretion of sentencing judge); Gyrucci, *supra* note 114, at 1261–62 n.44.

Although the possibility that a sentencing judge will dash the expectations of both parties should never be underestimated, it introduces an element of uncertainty into both plea agreements and cooperation agreements. The focus here is on the government’s performance only.

<sup>126</sup> Even though a judge’s hands will not be bound at sentencing, she may have a reputation as a lenient or harsh sentencer. To the extent that parties have some control over who will be the sentencing judge, these reputations may play a part in cooperation negotiations. See STEWART, *supra* note 99, at 304 (defense lawyer seeks assurance from government that defendant could plead and be sentenced by a “lenient sentencing judge”). In a number of federal districts, assignment systems that permit such “judge shopping” have been replaced by random selection. DAVID WEISBUND ET AL., *CRIMES OF THE MIDDLE CLASSES* 110 & n.14 (1991).

<sup>127</sup> Goetz & Scott, *supra* note 17, at 1091.

<sup>128</sup> See *supra* note 111.

unforeseeability of future conditions.<sup>129</sup> But the response of the contracting parties is the same: an open-ended covenant in which undefined truthful cooperation is traded for the government's help in obtaining undefined—or, where there has been charge bargaining, partially defined<sup>130</sup>—sentencing leniency.

Goetz and Scott note that:

In contracts containing such vague performance obligations, there are inevitable costs in ensuring that any particular level of performance is achieved. Parties will bear this cost in various ways. For example, they may grant the principal the right to monitor the agent's efforts. Performance can thus be controlled by direct supervision or by indirect incentive systems designed to encourage the agent to consider fully the principal's interests. Alternatively, in cases where monitoring is relatively costly, the agent may seek to reassure the principal with a "bonding" agreement. Liquidated damage provisions, covenants not to compete, and unilateral termination clauses are common examples of agent bonding.<sup>131</sup>

Cooperation agreements do contain such monitoring and bonding provisions, but most are for the government's benefit. Certainly, the cooperator will be directly supervised; the government will debrief him, prepare his testimony, and watch him testify. The prospect of a sentence largely dependent on the government's signals will be a powerful "direct incentive system."<sup>132</sup> And the

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<sup>129</sup> Flexibility in the face of future contingencies may play a part, however, especially where a cooperator has promised to "make cases" against specified or unspecified targets.

<sup>130</sup> See *supra* text accompanying note 103.

<sup>131</sup> Goetz & Scott, *supra* note 17, at 1093.

<sup>132</sup> The government may be able to offer additional incentives as well. The cooperator whose criminal activities expose him to liability in several jurisdictions (state or federal) will often not seek protection from prosecution from officials in each jurisdiction, perhaps for fear that each office might extract its own concession from him—in the form of testimony, pleas to charges, etc. He will typically enter into an agreement that formally binds only one prosecuting authority, even where cooperation given pursuant to the agreement may reveal criminal acts committed in other districts. See *United States v. Fuzer*, 18 F.3d 517, 520 (7th Cir. 1994) ("state prosecutors cannot bind federal prosecutors without the latter's knowledge and consent"); *United States v. Phibbs*, 999 F.2d 1053, 1080–82 (6th Cir. 1993) (circumstances of defendant's plea agreement with one U.S. Attorney do not indicate any intention of parties to bind other federal districts), *cert. denied*, 114 S. Ct. 1071 (1994); *United States v. Ingram*, 979 F.2d 1179 (7th Cir. 1992) (plea agreement with one U.S. Attorney's Office does not preclude prosecution in another district), *cert. denied*, 113 S. Ct. 1616 (1993); *United States v. Turner*, 936 F.2d 221, 225–26 (6th Cir. 1991); *Staten v. Neal*, 880 F.2d 962, 966 (7th Cir. 1989) (plea agreement with state's attorney from one county not binding on state's attorney for another county); *United States v. Russo*, 801 F.2d

government's minimally constrained power to refuse to certify at sentencing that the defendant has rendered "substantial assistance" can be likened to a termination clause, adding a final sanction to an already impressive array of guarantees.

How can a defendant guarantee that the government will reward his cooperation if he performs his part of the bargain?<sup>133</sup> In one sense, a cooperator holds hostage whatever government proceedings he participates in. If, while cooperating, he surmises that the government intends to renege, he can refuse to testify at a trial where his testimony is needed, his memory can "fail," or he can otherwise affect the content of his testimony. The government's ability to affect the cooperator's sentencing or to bring additional charges against him, however, make such tactics—or threats of them—unsatisfactory enforcement measures. Nor will a cooperation agreement likely give the defendant a satisfactory "bonding" provision; if the government

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624, 626 (2d Cir. 1986) (plea agreement need not expressly recite that it binds other federal districts, but that promise must be implied by negotiations); *United States v. Annabi*, 771 F.2d 670, 672 (2d Cir. 1985) ("A plea agreement binds only the office of the United States Attorney for the district in which the plea is entered unless it affirmatively appears that the agreement contemplates a broader restriction."). *But see* *United States v. Harvey*, 791 F.2d 294, 302–03 (4th Cir. 1986) (promise by federal prosecutor to bring no further charges binding on all federal districts). For protection against prosecution by these other districts, he will rely on the good offices of the jurisdiction with which he did contract and will have a special need to keep his prosecutor satisfied, in hopes that the prosecutor will informally intercede with other districts if necessary. *Cf.* *United States v. Nyhuis*, 8 F.3d 731, 741 (11th Cir. 1993) (A prosecutor in one federal district asserted that he intentionally did not want to give a cooperative defendant immunity against prosecution by other districts because he believed that the defendant "would be more cooperative if under the threat of other prosecutions."), *cert. denied*, 115 S. Ct. 56 (1994).

One drug defendant entered into cooperation agreements with three federal districts and was sentenced in the Eastern District of Virginia. Thereafter, prosecutors in the Eastern District of Michigan, not a party to these agreements and therefore claiming not to be bound by them, instituted civil forfeiture proceedings against the defendant and said that a criminal indictment was imminent. Even as defense lawyers claimed that the Michigan prosecutors were legally barred from proceeding, Virginia prosecutors noted that they were willing to "go to bat" for the defendant and the Justice Department said that it was reviewing the case. Eva Rodriguez, *Is One Prosecutor's Grant of Immunity Binding on Another?: Defendant Who Made a Deal with the Feds Now Says She Was Double-Crossed*, LEGAL TIMES, Nov. 22, 1993, at 1, 6.

<sup>133</sup> Although a defendant must face the possibility that the government will refuse in bad faith to reward his cooperation, it should also be noted that prosecutors have been known to certify "substantial assistance" where none was given, simply to allow a sympathetic defendant to avoid a harsh *Guidelines* sentence. *See* Nagel & Schulhofer, *supra* note 109, at 531; Schulhofer & Nagel, *supra* note 107, at 270–71.



improperly seeks to prevent him from being “paid” for his cooperation, sentencing judges may be unable to show him the leniency he otherwise would have received.

So what protection does the snitch have? The answer lies in the discipline of the marketplace: The prosecutor who mistreats snitches risks not being able to attract such assets in the future.<sup>134</sup> Here is where the repeat player status of defense lawyers is critical, for while aggrieved cooperators generally go directly to prison,<sup>135</sup> their attorneys remain to advise future defendants that the government—or an individual prosecutor—cannot be trusted.<sup>136</sup> This advice need not be limited to an attorney’s future clients. One lawyer recently took out a large advertisement in a national legal publication to castigate a United States Attorney in an open letter that, after describing his client’s extensive cooperation, announced:

Despite this, your office broke two written promises to make a 5K1 motion. The reasons given by your office were pure bovine do-do. Even the district judge was appalled.

During the sentence proceedings I stated that I was going to tell every defense lawyer in our nation not to enter any plea agreement with your office. Your office cannot be trusted. Your office cares nothing about promises and

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<sup>134</sup> In upholding U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) (1988) against constitutional challenges, several courts noted the government’s institutional incentive for dealing fairly with cooperators. *See, e.g.*, *United States v. Doe*, 934 F.2d 353, 358 (D.C. Cir.) (“The government’s strong institutional interest in ensuring the continued assistance of future defendants affords protection against prosecutorial parsimony in applying section 5K1.1.”), *cert. denied*, 112 S. Ct. 268 (1991); *United States v. La Guardia*, 902 F.2d 1010, 1016 (1st Cir. 1990) (“[A] government which is overly grudging in moving for departures to reward valuable cooperation will likely discover a drying up of its sources of information.”); *United States v. Huerta*, 878 F.2d 89, 93 (2d Cir. 1989) (“The reasonable use of substantial assistance motions for those who cooperate will make others more likely to do so in the future.”), *cert. denied*, 493 U.S. 1046 (1990); *see also* *United States v. Forney*, 9 F.3d 1492, 1502 n.4 (11th Cir. 1993) (using same argument in course of holding that even where there is a plea agreement, government’s failure to file § 5K1.1 motion will not be reviewed for bad faith).

<sup>135</sup> Perhaps there are networks of criminals that pool information, but there are no significant networks of snitches—certainly no such networks that can educate potential cooperators. And the imprisoned snitch is not likely to bemoan his plight to the general prison population.

<sup>136</sup> Acquiring a reputation within the private bar for untrustworthiness can also affect a prosecutor’s chances for success when he later joins that bar. *See* JAMES EISENSTEIN, *COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS* 174 (1978) (“Assistants recognize their reputation’s significance for their prospects in private practice and they shape their behavior accordingly.”).

agreements. I am surprised that the eagle in the Great Seal of the United States didn't fly from the wall in horror.

. . . Regardless of how the Eleventh Circuit rules, I wish to reiterate my intention to alert every criminal defense lawyer in this nation that your office should not be trusted. Like some sleazy insurance company who refuses to pay the widow because it wants the premiums but doesn't want to honor its obligations, your office will go to any length to renege on its solemn promises.<sup>137</sup>

Although information pooling usually is done less publicly, it can significantly constrain the government's behavior,<sup>138</sup> even as to clients of lawyers who do not pool,<sup>139</sup> because the government will not likely know enough to discriminate among defendants on this basis.

There are many issues relating to a defendant's cooperation decision on which his lawyer's knowledge and experience can shed light: How strong is the government's case?<sup>140</sup> How valuable is the defendant's testimony or information likely to be to the government?<sup>141</sup> What advantages can be gained

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<sup>137</sup> Michael H. Metzger, Advertisement, NAT'L. L.J., May 24, 1993, at 26 (letter dated April 20, 1993, from Michael H. Metzger, to Roberto Martinez, United States Attorney for the Southern District of Florida); see also Advertisement, N.Y. L.J., May 17, 1993, at 5 (same letter). In an obituary filed after his recent suicide, Metzger was described as "one of Northern California's most aggressive and outspoken defense lawyers." *Michael Metzger, 57, Hard-Hitting Lawyer*, N.Y. TIMES, Mar. 3, 1994, at D22. The case that sparked Metzger's remonstrance, *United States v. Block*, No. 92-115-CR-Kehoe (S.D. Fla.), is still on appeal, and I have no idea whether his complaints have any merit.

<sup>138</sup> See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 142 (1974) (Establishing a clearinghouse that allows one-shot players to share information "gives [opposing repeat players] a stake in the effect that [one shots] could have on their reputation.").

In a federal district where the defense bar felt aggrieved by some prosecutors' refusals to submit § 5K1.1 motions, the government was forced to rely much more heavily on charge reductions, thus giving defendants more of a reward "up front" for their cooperation. See Nagel & Schulhofer, *supra* note 109, at 541.

<sup>139</sup> Alschuler notes that "[m]ost private defense lawyers are solo practitioners or members of small firms with little opportunity and sometimes little inclination to share 'trade secrets.'" Alschuler, *supra* note 25, at 1230.

<sup>140</sup> Estimating the strength of the government's case may be particularly difficult for the lawyer whose client seeks advice about cooperation because such decisions often need to be made before the government's discovery materials are available. See Restrespo, *supra* note 92, at 24. The task will be much easier in less sophisticated prosecutions, where the strength of the government's case is clear from the outset.

<sup>141</sup> See Cloyd, *supra* note 105, at 459 (describing how an attorney, understanding government's needs, can maximize value of information client proffers to government).

by joining with co-defendants to present a united front to the government?<sup>142</sup> What sentence will likely be imposed should the defendant simply plead guilty or stand trial? The lawyer can also use her negotiating expertise to obtain the best offer from the government.<sup>143</sup> But for the defendant contemplating cooperation, an assessment of the extent to which the government can be trusted will perhaps be the most important contribution the attorney can make. Without this information, the decision to cooperate—whatever its potential advantages<sup>144</sup>—will remain a risky leap into the unknown.

### III. PRESSURES ON DEFENSE ATTORNEYS TO DETER COOPERATION

We have seen how a defense attorney's advice, particularly on the extent to which the government should be trusted, can and should play a decisive role in the calculus of the defendant contemplating cooperation. By assuring and helping to ensure that the government will perform on its promise of leniency, she can make cooperation a far more attractive option. Alternatively, she can make the rewards of cooperation seem quite illusory. Ideally, her advice will turn on the facts and circumstances of each case, with her client's best interests

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<sup>142</sup> The defendant may also need to know the likelihood that his co-defendants will cooperate against him, an assessment of which may in part turn on the reputations of their lawyers. See *infra* text accompanying notes 175–77.

<sup>143</sup> One prominent white-collar defense lawyer warns:

A lawyer representing a cooperator must be especially vigilant to protect his interests. The lawyer needs to be careful that firm limits are set on what is expected of the client by the government. . . . Lawyers also have to fight for what their client deserves. No one has much sympathy for a cooperator, so getting the benefits at sentencing may be hard if the government decides to pressure a client for more information.

Arkin, *supra* note 42, at 9.

<sup>144</sup> These advantages, in addition to sentencing discounts, may include promises of future support or protection. See *Witness Protection Program: Hearings Before the Subcomm. on Admin. Practice & Proc. of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 356–59, 362–63 (1978) (collecting complaints by several protected witnesses about promises made before their testimony but later broken); Stuart Mass, Note, *The Dilemma of the Intimidated Witness in Federal Organized Crime Prosecutions: Choosing Among the Fear of Reprisals, the Contempt Powers of the Court, and the Witness Protection Program*, 50 *FORD. L. REV.* 582, 587–88 (1982) (discussing grievances against Witness Protection Program). Information about the extent to which he can be protected against retaliation can further reduce the uncertainty a defendant faces concerning the effective payout for cooperation.

as her sole guide.

But can we have confidence that the lawyer's advice will be untainted by her own ideological or economic interests? The prevailing pathologies of the criminal justice system suggest that defense attorneys, whether retained or appointed, have strong incentives to push clients into plea bargains, with little thought to the clients' interests. It stands to reason that the same attorney who manipulates her clients into pleading guilty because she lacks the ability or inclination to defend their interests zealously would give little thought to advising a defendant to make the surrender complete by cooperating.<sup>145</sup> However, what of the lawyer who has not fallen victim to the widely noted conflicts of interests that dampen adversarial representation? What likelihood is there that her advice about cooperation will be uninfected by personal interest? Herein lies a paradox. For many of the same motivations that ordinarily lead an attorney to do the best she can for an individual client may, at the same time, create a different sort of agency problem, leading her to give advice skewed against cooperation, regardless of her client's interests.

#### A. *From Where Comes an Advocate's Motivation?*

Most criminal defendants are represented by appointed counsel whom they neither select nor pay.<sup>146</sup> Where counsel has been appointed from the private bar, she will be paid—if paid at all—either a flat fee<sup>147</sup> or, as in the federal system, a fee based on an hourly compensation rate.<sup>148</sup> Alternatively,

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<sup>145</sup> See Cloyd, *supra* note 105, at 463–64 (discussing “significant emotional pressure” placed on defendant when “the member of court who is supposed to be most supportive of the defendant’s interests throws his weight in support of the state’s definition of the situation” by urging that cooperation is defendant’s only way to escape long prison term and felony conviction).

<sup>146</sup> Andy Court, *Poor Man’s Justice: Is There a Crisis*, AM. LAW., Jan.-Feb. 1993, at 46 (approximately 80% of all felony defendants are indigent).

<sup>147</sup> See Andy Court, *Rush to Justice*, AM. LAW., Jan.-Feb. 1993, at 57 (describing Detroit Recorder’s Court indigent representation scheme in which court-appointed counsel paid set fee based on seriousness of charge, regardless of time spent on case); D.M. Osborne, *Contracting for Trouble*, AM. LAW., Jan.-Feb. 1993, at 75 (describing Harlan County, Kentucky system in which contracts given to lawyers to take on all indigent cases in district, regardless of volume, in exchange for set fee).

<sup>148</sup> See *Report of the Committee to Review the Criminal Justice Act*, 52 Crim. L. Rep. (BNA) 2265, 2275 (Jan. 29, 1993) (attorneys appointed to represent indigent defendants under Criminal Justice Act of 1964, 18 U.S.C. § 3006A, currently paid \$40 for out-of-court time, and \$60 for in-court time—rates found to be “significantly below those otherwise available to private attorneys and . . . insufficient in many districts to cover even basic overhead costs”). Schulhofer notes:

appointed counsel will come from the ranks of a public defender agency or like organization, whose attorneys are salaried employees. If a defendant is able to retain his own lawyer, she will likely charge him a flat fee, to be paid in advance,<sup>149</sup> which will not be refunded if she pushes him into a quick plea.<sup>150</sup> In short, few defense attorneys have an immediate financial incentive to represent a particular client zealously. To make matters worse, few defendants will have the knowledge or wherewithal to monitor their lawyers' performance,<sup>151</sup> and monitoring by appointing authorities can be inadequate.<sup>152</sup>

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[F]lat fees per case are a common method of compensation [for state indigent representation systems], so that incentives to settle are powerful. Where hourly rates exist, nearly all states impose a ceiling on total compensation that is independent of the plea tendered. For the appointed attorney who chooses to go to trial, the financial compensation in many states is totally derisory.

Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 55 (1988) (footnote omitted).

<sup>149</sup> AMERICAN BAR ASSOCIATION, EXPLORING THE LABRYNTH OF FEE SETTING, HOW TO SET AND COLLECT ATTORNEY FEES IN CRIMINAL CASES 13, 14 (1985) [hereinafter EXPLORING THE LABRYNTH OF FEE SETTING]; BLUMBERG, *supra* note 44, at 244; Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 599 (1993) ("The prevailing fee arrangements in criminal defense representation today involve either entirely prepaid fees . . . or the payment up front of a substantial retainer against which the attorney's hourly rate will be offset, often with an agreement for the prepayment of further lump sums if the retainer is exhausted."); Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, 514 (1991); Schulhofer, *supra* note 17, at 1988 ("Only a minority of criminal defense attorneys (as few as twenty percent in many urban jurisdictions) are retained by paying clients, and nearly all of those attorneys work for a flat fee paid in advance.").

<sup>150</sup> See *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting) (discussing that a flat fee encourages quick disposition); Alschuler, *supra* note 25, at 1200 (suggesting that once fee is collected, personal interest of attorney lies in disposing of case as quickly as possible); Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983) ("Defendants' lawyers, who have a conflict of interest if working for a fixed fee, may use plea bargaining to hide sloth or even fraud.").

<sup>151</sup> BLUMBERG, *supra* note 44, at 244-45 (describing ability of defense lawyers to "con" defendants into accepting plea bargains, and readiness of courts and prosecutors to cooperate with defense lawyers in this "confidence game"); Schulhofer, *supra* note 17, at 1991 ("On the defense side, the attorney-client relationship is not the voluntary contractual arrangement postulated by economic theory, but a partly or wholly involuntary relationship infected by pervasive conflicts of interest and the virtual nonexistence of effective means to monitor counsel's loyalty and performance in the low-visibility plea negotiation setting."); Schulhofer, *supra* note 148, at 59 ("[f]ew defendants are in a position to appraise the preparation and tactics of their counsel").

<sup>152</sup> See *Report of the Committee to Review the Criminal Justice Act*, *supra* note 148, at

Add to these obstacles the belief by criminal lawyers that the vast majority of their clients are in fact guilty of some wrongdoing,<sup>153</sup> and it seems that you have a recipe for disaster.

Why is it, then, that lawyers do not routinely sell out their clients? As Charles Ogletree has recently noted, this is a question less of theoretical “justifications” than of actual “motivations.”<sup>154</sup> For many lawyers, a sense of professional duty, inspired by a client’s trust and strengthened by the obligations of the code of ethics, might provide sufficient sustenance.<sup>155</sup> This might merely be a matter of personal pride. Yet some may find this professional commitment to a client’s interests confirmed or enhanced by what Ogletree calls “empathy,” a readiness to “see[] the client as more than a criminal defendant” and to “understand[] the adverse conditions he endures and the bleak future he may well face.”<sup>156</sup> For the lawyer driven by such client-

2283 (noting failure of most federal districts to monitor activities of counsel appointed under Criminal Justice Act); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 95 (1993) (“Judges and court officials who select counsel have the ability to acquire good information about attorney effectiveness, but they have little incentive to acquire such information and even less reason to act upon it. Their own interests are best served by assigning an attorney known to be cooperative rather than aggressively adversarial.”).

<sup>153</sup> Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1269 n.121 (1993) (“While it is difficult to determine how many defendants are guilty, there is evidence that public defenders and criminal defense lawyers themselves believe that the vast majority of their clients are guilty of some wrongdoing.”); see David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1757 (1993) (“Along with . . . [the] low pay scale [for court-appointed counsel] goes the natural human tendency to cut corners, especially when doing unpleasant things on behalf of unappetizing strangers whom one will probably never see again.”).

<sup>154</sup> Ogletree, *supra* note 153, at 1242.

<sup>155</sup> See *supra* note 23; Ogletree, *supra* note 153, at 1246–47; cf. *State v. Rush*, 217 A.2d 441, 444 (1966) (no need to pay court-appointed attorneys more because a “lawyer needs no motivation beyond his sense of duty and his pride”); *Grayson v. State*, 479 So. 2d 69, 73 (Ala. Crim. App. 1984) (same), *aff’d*, 479 So.2d 76 (Ala.), *cert. denied*, 474 U.S. 865 (1985).

<sup>156</sup> Ogletree, *supra* note 153, at 1243; see Randy Bellows, *Notes of a Public Defender*, in PHILIP HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS* 69, 79 (1988) (“To represent a client properly, you have to be able to develop an enormous amount of empathy.”); LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 143 (1987) (“[E]mpathy with the client’s situation permits lawyers to feel justified when defending someone whom they know is factually guilty.”). Related to these feelings of “empathy” is what Barbara Babcock has called the “social worker’s reason” for criminal defense work: “Those accused of crime, as the most visible

centered motivations, Lord Brougham's rhetorical flourish might indeed be a living truth: "[A]n advocate, in the discharge of his duties, knows but one person in all the world, and that person is his client."<sup>157</sup>

The lawyer for whom such client-centered motivations are not enough can still be spectacularly zealous. She might be driven by a sense of what Ogletree calls "heroism," "a desire to take on 'the system' and prevail, even in the face of overwhelming odds."<sup>158</sup> Ogletree has the public defender in mind when he speaks of the "glory in the 'David versus Goliath' challenge of fighting the state,"<sup>159</sup> but the lawyer defending a corporate executive against the lawyers and agents of the SEC, IRS and the Justice Department can feel equally outgunned and see "glory" in her job as well. She can also see herself as "fighting for all of us," because the ideology of criminal advocacy allows her to view her client, whatever his misdeeds, as a surrogate for the more "worthy" people who would ultimately suffer if she did not work to keep the government in check.<sup>160</sup> The lawyers who adopt this stance may share a special esprit that itself inspires zeal. The interests of particular clients differ, but a commitment to opposing state power is a banner around which many may rally.

Even the defense attorney, unmoved by professional or ideological commitment, who places economic self-interest above all else, may still have good reason to do her utmost for her client so long as she seeks to participate in a market for legal services populated by "buyers" with some knowledge of her past performances. In the absence of adequate monitoring by the public authorities responsible for their appointments, lawyers for the indigent—who rely on court appointment—may have little economic incentive to be zealous

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representatives of the disadvantaged underclass in America, will actually be helped by having a defender, notwithstanding the outcome of their cases. Being treated as a real person in our society . . . and accorded the full panoply of rights and measure of concern afforded by a lawyer can promote rehabilitation." "To this," Babcock adds, "might be added the humanitarian's reason: the criminally accused are men and woman in great need, and it is part of one's duty to one's fellow creatures to come to their aid." Barbara A. Babcock, Commentary, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178 (1983-84).

<sup>157</sup> Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976) (quoting from Lord Brougham's speech at the trial of Queen Caroline, in 1821).

<sup>158</sup> Ogletree, *supra* note 153, at 1243.

<sup>159</sup> *Id.* at 1276.

<sup>160</sup> DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 58-63 (1988). *But see* Luban, *supra* note 153, at 1765 (conceding that arguments justifying aggressive defense tactics may not fully extend to "the high-priced hired guns"); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) (challenging Luban's vision of the ideology supporting aggressive criminal defense tactics).

advocates, and the lawyer who earns her living by representing paying clients who lack opportunities to learn about her past performances will—if purely venal—worry less about the quality of her advocacy than about advertising her name.<sup>161</sup> But the lawyer seeking future business<sup>162</sup> from the educated customers who typically populate the higher end of the market—better-off clients and the lawyers on whom those clients rely for referrals—will have a powerful incentive<sup>163</sup> to ensure that positive information about her performances is available in this market.<sup>164</sup>

### B. *Effects of Motivation on Attitudes Toward Cooperation*

To the extent that a lawyer is driven by a sense of professionalism or some other commitment to the individualized interests of her client, she will feel no personal stake in whether her client chooses to cooperate—at least so long as no *other* client's interest would be threatened by cooperation.<sup>165</sup> Although the

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<sup>161</sup> For a graphic discussion of the way members of the “cop out bar” find their clients, see Alschuler, *supra* note 25, at 1182–91; see also Schulhofer, *supra* note 148, at 59 (noting few defendants in a position to “acquire reliable comparative reports about the plea-negotiation skills of various attorneys”).

<sup>162</sup> Because most attorneys in public defender organizations stay for relatively brief terms, see MCINTYRE, *supra* note 156, at 80–83, such lawyers may have an economic incentive to develop reputations on which they can “cash in” later, when they enter private practice.

<sup>163</sup> The market does not have to be composed exclusively of such buyers for them to create this incentive. See Easterbrook, *supra* note 150, at 309 (“Particular defendants may lack the information necessary to search intelligently, but in legal markets as in others search by even a few buyers may be sufficient for efficiency.”).

<sup>164</sup> Paul B. Wice, *Private Criminal Lawyers: A Beleaguered but Crucial Profession*, in EXPLORING THE LABRYINTH OF FEE SETTING, *supra* note 149, at 29, 31; see Paul D. Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291, 1292 (“[C]lients who select and compensate their lawyers generally retain enough control to assure that matters are handled satisfactorily. At least this is true for those clients who are part of the return trade, or who are likely to share their reactions with other prospective clients.”).

No discussion of defender motivations that are not client-centered could be complete without mention of “egotism,” see EVAN THOMAS, *THE MAN TO SEE: EDWARD BENNETT WILLIAMS: ULTIMATE INSIDER: LEGENDARY TRIAL LAWYER* 121 (1991); Babcock, *supra* note 156, at 178, but the focus here is only on those motivations likely to systematically bias an attorney's advice about cooperation.

<sup>165</sup> The potential for conflicts of interest inherent in the simultaneous representation of two individuals—formally charged or otherwise—able to incriminate one another has long been recognized, although the potential benefits of such arrangements, see *supra* note 75, have led courts to allow such arrangements where clients make informed waivers. See FED. R. CRIM. P. 44 (establishing waiver procedure); *Burger v. Kemp*, 483 U.S. 776, 776–77



attorney may have an instinctive distaste for cooperation—as might her client—she should be quite able to offer an objective assessment of the benefits and liabilities of this option.<sup>166</sup> The lawyer who looks beyond her client's interests and finds motivation in ideology or economic self-interest, however, may not be so neutral, and will have good reason to discourage her clients from choosing cooperation.

### 1. *Ideological Resistance to Cooperation*

Derrick Bell noted that the same “idealism and commitment to school integration” that “help explain the drive that enables the civil rights lawyer to survive discouragement and defeat and renew the challenge for change” can prevent the lawyer from effectively representing parents more interested in the quality of their children's education than in broader ideals of integration.<sup>167</sup> A similar clash between the ideology motivating a lawyer's advocacy and the narrower interests of her clients may also arise in criminal defense work, especially where clients are contemplating cooperation.

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(1987) (finding no Sixth Amendment violation when defense counsel's partner represented co-defendant because no showing that defense counsel ever had to choose between conflicting interests); *Holloway v. Arkansas*, 435 U.S. 475, 475 (1978) (holding court's failure to appoint separate counsel or make further inquiry into potential for conflict, where defense counsel representing three co-defendants warned of such conflict, violated Sixth Amendment); *United States v. Kenney*, 911 F.2d 315, 320–22 (9th Cir. 1990) (disqualification of trial counsel where same attorney represented associate of defendant in pending grand jury investigation); *Stringer v. Jackson*, 862 F.2d 1108, 1117 (5th Cir. 1988) (finding no conflict of interest in simultaneous representation of three co-defendants with consistent defenses); *Thomas v. Foltz*, 818 F.2d 476 (6th Cir.) (holding “all or nothing” plea offer to three defendants represented by the same attorney created conflict of interest as to each defendant), *cert. denied*, 484 U.S. 870 (1987); *see also* John S. Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119 (1978); Gary T. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939 (1978); Nancy J. Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. REV. 1 (1979); Peter W. Tague, *Multiple Representation of Targets and Witnesses During Grand Jury Investigations*, 17 AM. CRIM. L. REV. 301 (1980).

<sup>166</sup> Every lawyer will doubtless have some personal bias for or against cooperation, based on some mix of ideology, experience, and the like. Any effect that such biases may have on the client-centered lawyer's advice, however, would probably be dwarfed by the effects of biases, like those discussed here, rooted in the very sources of other lawyers' zeal.

<sup>167</sup> Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 511–12 (1976).

In *Lopez*, Barry Tarlow proclaimed snitching morally repugnant.<sup>168</sup> He is far from the only defense attorney to enunciate this view.<sup>169</sup> Although such attitudes echo the common disdain for the “snitch,”<sup>170</sup> they also reflect—and are reinforced by—the ideology that sustains some of the most zealous criminal defense lawyers. The lawyer motivated by a sense of “heroism” understandably may see nothing heroic about negotiating an alliance between her client and the government that will allow the government to bring all its resources to bear on somebody else.<sup>171</sup> A client’s cooperation will not merely be distasteful but—in contrast to a simple guilty plea—can make the attorney an active ally of the very entity whose power inspires her advocacy. Indeed, the cooperating defendant’s attorney may find herself spending long hours preparing her client

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<sup>168</sup> See *United States v. Lopez*, 765 F. Supp. 1433, 1440 n.12 (N.D. Cal. 1991) (quoting an affidavit submitted by Barry Tarlow, Esq.), *rev’d.*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993); *supra* note 3.

<sup>169</sup> See *Brown v. Doe*, 2 F.3d 1236, 1240 (2d Cir. 1993) (defendant’s “revolutionary lawyers” allegedly opposed his cooperating because they “pursued a confrontational defense strategy . . . in furtherance of ‘radical political beliefs’”), *cert. denied*, 114 S. Ct. 1088 (1994); Monroe Freedman, *The Lawyer Who Hates Snitches*, LEGAL TIMES, May 3, 1993, at 28 (noting that “[m]any other defense lawyers, and even some prosecutors and judges, share [Tarlow’s] . . . view”).

In his open letter to U.S. Attorney Martinez, *supra* note 137, Michael Metzger wrote:

I must tell you that it is contrary to my own principles to turn my clients into snitches. I believe that the present policy of the United States is going to result in a nation of informants much the same as prevailed under the regimes of Adolph Hitler and Joseph Stalin. The buying of witnesses with money and freedom destroys the soul of the defendant, corrupts the adversarial system and is totally un-American. It is not only un-American, it is a practice that has been hated since the beginning of civilization. Where, after all, did the condemnation of Judas come from? Or as a famous poet wrote about Ireland “God help that country where informers thrive, where slander flourishes and lies can contrive to kill by whispers and men lie to live.”

See also DERSHOWITZ, *supra* note 27, at 22 (When Dershowitz and his co-counsel learned that a client had been a police informant, co-counsel announced: “We have to get out of the case. I don’t work for the government. And I don’t represent finks. Let the government get him a lawyer. He’s their boy.”). I have heard other defense lawyers make similar comments.

<sup>170</sup> See *supra* text accompanying notes 43–60.

<sup>171</sup> Cf. Bell, Jr., *supra* note 167, at 493 (Noting of civil rights class actions: “The psychological motivations which influence the lawyer in taking on ‘a fiercer dragon’ through the class action may also underlie the tendency to direct the suit toward the goals of the lawyer rather than the client.”).

to withstand another defense lawyer's cross-examination.<sup>172</sup>

The prospect of entering an alliance directed against the interests championed by a fellow defense attorney may also repel the ideologically committed defense lawyer who sees the solidarity of the defense bar as a critical counterbalance to overzealous prosecutors. Lawyers like Tarlow—who complain that “[t]he war on crime has become a war on the defense bar,” whose office has been described as “a nerve center for the criminal defense bar,”<sup>173</sup> and who has regularly contributed to *The Champion* (the magazine of the National Association of Criminal Defense Lawyers, an organization on whose board of directors he has sat)<sup>174</sup>—have long challenged the government's monolithic power in debates over criminal justice policy. The representation of a cooperator not only would require such a lawyer to forswear ties to the rest of the defense team in the immediate case, but might also make her feel like a defector from the common cause.

## 2. *Economic Disincentives to Counseling Cooperation*

The lawyer whose adversarial zeal is powered by a desire to impress educated consumers or purchasing agents in the market for legal services may also be biased against cooperation, not as a matter of personal conviction, but as a consequence of the interests of those consumers.

We start with two basic premises. First, we can assume, as a general proposition, that a defendant's decision to cooperate will ultimately become public, or at least suspected by interested parties. This will not be true if cooperation entails only undercover activities that never require the defendant to testify or have his role exposed. If a cooperator does testify, however—as those who have been formally charged frequently do—his decision will be public knowledge and the details of his deal with the government will be explored at length during cross-examination. Even when a case does not end up going to trial, a cooperator's readiness to testify will often become known during plea negotiations. Second, we can assume that the risk-averse consumer who learns that a defendant has cooperated will consider that defendant's lawyer at least partially responsible for her client's decision. Given the extent

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<sup>172</sup> See *United States v. Alvarez*, 580 F.2d 1251, 1258 (5th Cir. 1978) (holding attorney has duty to prepare client to testify; must do more than simply advise client to tell the truth); *Littlejohn v. State*, 593 So. 2d 20, 24 (Miss. 1992) (same).

Although many defense lawyers prefer to make themselves scarce while a client is cooperating, such lack of attention can work to the client's detriment, should the extent of the client's cooperation be disputed at sentencing.

<sup>173</sup> Cox, *supra* note 3, at 1, 29.

<sup>174</sup> See Tarlow, *supra* note 27, at 40.

to which many, perhaps most, defendants are likely to rely on their attorneys' advice before making this leap into the unknown,<sup>175</sup> and the active role that a cooperator's attorney may be expected to play in promoting the success of her client's relationship with the government,<sup>176</sup> this attribution of responsibility might indeed be justified. At the very least, it is a fair inference for the risk-averse consumer who cannot know precisely what was said in attorney-client conferences.<sup>177</sup>

What are the consequences in the market for the lawyer who gets a reputation as someone who "cooperates" her clients?<sup>178</sup> It depends on which buyers one is talking about. Among the relatively small group of individual defendants—or potential defendants—who have the resources to make an informed search for a defense lawyer,<sup>179</sup> there will doubtless be some already contemplating cooperation who believe that a lawyer who has previously dealt with the government on such matters will have an "in" with the prosecutor, and can thereby get a better deal.<sup>180</sup> However, unless such a defendant is prepared to surrender unconditionally to the government, he might be wary of a lawyer with *too* much experience cooperating clients, because the selection of such a lawyer could be taken as a signal that the defendant has already decided to cooperate and therefore will not need to be given additional concessions. The extent to which this sort of defendant will prefer a lawyer with a reputation for

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<sup>175</sup> Because defendants who choose cooperation over their lawyers' objections and contact the government on their own will often obtain a new lawyer for negotiating a cooperation agreement, *see infra* text accompanying note 191, a cooperator's failure to change lawyers is some indication that his attorney was not hostile to the idea.

<sup>176</sup> *See supra* note 172.

<sup>177</sup> Perhaps a consumer aware of a lawyer's "defection" in a previous case might be "forgiving," focusing on the particular circumstances of the previous case and declining to draw any broader conclusion from it. Such forbearance is unlikely to continue if the second lawyer cooperates a second (or third) client in a different case, however.

<sup>178</sup> The frequent use of "cooperate" in this active, transitive form is itself evidence of the control that those in the criminal justice system think a lawyer has over her client's decision to cooperate.

<sup>179</sup> *See Karlan, supra* note 149, at 608 ("Sophisticated white-collar targets who can 'shop' for counsel are quite differently situated from naive arrestees who must select an attorney while incarcerated.").

<sup>180</sup> The assumption that a lawyer's ability to cooperate clients can bring in business lay behind the plaintiff's claim in *Bourexis v. Carroll County Narcotics Task Force*, 625 A.2d 391 (Md. Ct. Spec. App.), *cert. denied*, 632 A.2d 150 (Md. 1993), *cert. denied*, 114 S. Ct. 1303 (1994), where a defense attorney sued a narcotics enforcement group claiming that its refusal to "work with" any of his clients "interfered with his occupational opportunities" by making him less desirable to have as a lawyer. No specific reason was given for the task force's position, although one officer testified that the policy "was based on . . . [a] perception that . . . [the lawyer] was an 'asshole.'" *Id.* at 393-94.

cooperating with the government is therefore difficult to predict.<sup>181</sup>

On the other hand, some individual consumers will carefully avoid lawyers who either counsel cooperation or view it with equanimity. If a group of defendants—with or without legal advice—concludes that the solution to their particular prisoner's dilemma lies in a joint agreement not to cooperate, they may understandably fear that unenforceable pledges of solidarity will prove fragile as the pressures of a prosecution mount. If the defendants want a better guarantee of group cohesion—but do not want to be jointly represented by a single lawyer—they might well search for separate lawyers who can be counted on to oppose, or at least not encourage, defection. The lawyer with a reputation for representing clients who stand fast against the government will be well positioned to be selected for this joint defense team. Indeed, as Gilson and Mnookin have shown, selection of a lawyer interested in protecting her reputation for not defecting can “bond” a defendant's solidarity promise.<sup>182</sup>

In sum, the demands of educated individual consumers will be varied. Some may place a premium on lawyers with a track record of cooperation. Others may strive to avoid those lawyers. For perhaps an even greater number of individuals, a lawyer's reputation on this score may not be a factor at all, whether because the consumer's case presents no cooperation possibilities or

<sup>181</sup> Mann reports:

Clients who are told by attorneys that voluntary disclosure would not help their case or that cooperation with the government would be self-defeating often feel insecure with their attorney's advice. . . . Openly proclaiming innocence is a stance that some guilty clients do not have the courage for—they prefer an attorney who will help them plead guilty in favorable circumstances. Though he tries, the defense attorney may fail in persuading the client that he would be better off by not cooperating.

MANN, *supra* note 42, at 127 (also detailing how client, after consulting with two different attorneys, chose the one who said he could “arrange a settlement”).

<sup>182</sup> Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 564 (1994). Gilson and Mnookin address the prisoner's dilemma posed by civil litigation in which each side “may feel compelled to make a contentious move either to exploit, or to avoid exploitation by, the other side.” *Id.* at 514. They explain:

[T]he lawyer's investment in reputation serves two functions. First, it identifies the lawyer as one who possesses the desired, but otherwise unobservable, attribute; the client must be able to find a cooperative lawyer. Second, it represents the penalty that the market will impose if the lawyer treats his reputation as bait rather than as bond by turning into a gladiator at the request of an opportunistic client.

*Id.* at 525.

because the consumer brings no preferences on the matter to his search. If the market for criminal defense services were simply comprised of individuals purchasing representation for themselves, a lawyer's reputation for cooperating clients thus might have no effect on his livelihood, one way or another.

The market does not consist simply of autonomous individual clients, however. Some of the most active and sophisticated purchasers of legal defense services act on behalf of enterprises, formal or informal, that stand to lose, or even be destroyed, by cooperation. The classic scenarios involve the drug ring<sup>183</sup> or organized crime family<sup>184</sup> that provides "house counsel"<sup>185</sup> to subordinates, not merely as a perk of membership in the enterprise, but in the hopes that the lawyers will deter, or at least mitigate the effects of, cooperation by their clients.<sup>186</sup> More "legitimate" enterprises like corporations or labor

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<sup>183</sup> See, e.g., *United States v. Simmons*, 923 F.2d 934, 948-49 (2d Cir.) (evidence that drug kingpin paid legal fees of crew members and encouraged them to use his lawyer), *cert. denied*, 500 U.S. 919 (1991); *United States v. Phillips*, 699 F.2d 798, 799 (6th Cir. 1983) (defendant tells agents that he wants to cooperate but fears that his lawyer, who had been retained by his drug boss, would inform that boss).

In *United States v. Allen*, 831 F.2d 1487 (9th Cir. 1987), *cert. denied*, 487 U.S. 1237 (1988), one law firm represented petitioner, his co-defendant and boss, and the unindicted "generals" of their smuggling operation. "Unidentified persons" paid the legal fees for all. After his initial appearance, petitioner, like the other subordinate members of the operation, was referred to another lawyer, whose fees were also paid anonymously, but not before a member of the lead law firm polygraphed petitioner, to ensure that petitioner had not turned state's evidence. Lead counsel conducted plea negotiations on behalf of all defendants. In *Quintero v. United States*, 33 F.3d 1133, 1137 (9th Cir. 1994), the defendant alleged after conviction that his lawyer, retained by a third party (whom the lawyer would not identify) had announced to him: "I've never worked, and will not work, for a 'snitch,' am I working for one now?"

<sup>184</sup> See *United States v. Locascio*, 6 F.3d 924, 933 (2d Cir. 1993) (describing how Mafia family provided and paid lawyers for its members), *cert. denied*, 114 S. Ct. 1646 (1994); *United States v. Castellano*, 610 F. Supp. 1151, 1158 (S.D.N.Y. 1985) ("uncontroverted" testimony suggests that some members of Mafia "crew" "were paying . . . [attorney] for legal services performed for other crew members, and were also choosing attorneys for members who got in trouble").

<sup>185</sup> See Bruce A. Green, "Through a Glass, Darkly": *How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1227 (1989); Roxanne Malaspina, Note, *Resolving the Conflict of the Unsworn Witness: A Framework for Disqualifying House Counsel Under the Advocate-Witness Rule*, 67 N.Y.U. L. REV. 1073, 1094 (1992) ("A lawyer who acts as house counsel provides legal services to an organization and its members and generally participates actively and intimately in the client's business.").

<sup>186</sup> As the Supreme Court noted:

unions<sup>187</sup> may have similar interests when they retain or refer lawyers to represent employees or members.<sup>188</sup> The effect that these entities' preferences will have on the market is particularly great because most are repeat players—or at least represented by repeat players<sup>189</sup>—able to steer future business based

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Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interest.

Wood v. Georgia, 450 U.S. 261, 268–69 (1981). Similarly, Alan Dershowitz has explained:

The bosses have an interest in assuring that their own lawyers—lawyers they are paying—are representing the mules. The last thing the boss wants is for an independent lawyer—or worse, a lawyer friendly to prosecutors—to encourage the mules to buy their freedom in exchange for turning on the boss. . . . [A] smart boss will generally try to retain the best possible lawyers for his mules. But he will try to get lawyers who will urge the mules to 'fight rather than switch' allegiances.

DERSHOWITZ, *supra* note 27, at 398–99.

The boss's interests in avoiding the defection of his subordinates will not depend on his own intentions in the case. Even if he intends to cooperate, he will want to maximize his reward by being the first one into the prosecutor's office; this is the lesson of the prisoner's dilemma. This may mean, however, that a lawyer who represents only bosses can profitably develop a reputation for dealing with the government. To the extent that bosses are represented by boss-lawyers (who need not fear developing a reputation for cooperating clients), this may further skew the inequities of a system in which bosses regularly cooperate against, and get lower sentences than, subordinates. *See supra* note 49.

<sup>187</sup> *See* Commonwealth v. Kelly, 463 A.2d 444, 449 (Pa. Super. Ct. 1983) (defendant police officer represented by lawyer retained and paid by Fraternal Order of Police, which had policy of noncooperation with Special Prosecutor's Office investigating this and other corruption cases); Pirillo v. Takiff, 341 A.2d 896, 899 (Pa.) (same Fraternal Order of Police lawyer barred from representing twelve policemen called before grand jury by same Special Prosecutor's Office), *aff'd on reh'g*, 352 A.2d 11 (Pa. 1975) (per curiam), *cert. denied*, 423 U.S. 1083 (1976).

<sup>188</sup> *See* STEWART, *supra* note 99, at 314–15 (When considering which lawyers to recruit to represent potential witnesses in the Milken case, "[m]ore important" than the "lawyers' skills and reputations . . . were the lawyers' track records in government cases. [Edward Bennett] Williams and company wanted lawyers whose strong philosophical preference was to fight the government rather than cooperate with it.").

<sup>189</sup> *See, e.g.*, United States v. Turchi, 645 F. Supp. 558 (E.D. Pa. 1986) (defendant alleges that this attorney failed to advise him about cooperation because of that attorney's professional relationship with codefendant's lawyer, for whom petitioner's attorney had

on a lawyer's performance or, more precisely, her clients' decisions as to cooperation.<sup>190</sup>

There is one repeat player whose favor a lawyer may gain by representing cooperators—the government. Although prosecutors ordinarily have little control over a defendant's choice of lawyer, they occasionally make referrals for defendants or witnesses who have already decided to cooperate—or are at least seriously considering doing so—and who request assistance in finding a new attorney.<sup>191</sup> It has been suggested that lawyers appear on such “approved”

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been an associate and thereafter did other work), *aff'd*, 815 F.2d 697 (3d Cir.), *cert. denied*, 484 U.S. 912 (1987); THOMAS, *supra* note 164, at 318 (recounting how a potential witness against John Connolly suddenly “clammed up and refused to cooperate” after Edward Bennett Williams, Connolly's lawyer, arranged for him to be represented by an “old buddy” who was “renting space in Williams' building and taking many of his cases as referrals from his landlord.”); *id.* at 408 (The “independent” lawyer whom Williams found to represent a client's employee, and who would be paid by Williams's client, “was often a friend of Williams' and dependent on Williams for referrals in the future. He felt both personal and marketplace pressures to do exactly what Williams told him to do.”).

One white-collar attorney told Kenneth Mann that, when looking for someone to represent a potential witness against his client, he “wanted a friend in the case who would not turn this guy against his client.” But he went on to modify this: “The understanding . . . among lawyers who have some sophistication and decency is that you do whatever you have to do for your client but, at the same time, without injuring your client's interest, you can help your brother who represents someone else, you do that. I do that anyway.” MANN, *supra* note 42, at 91.

<sup>190</sup> See *United States v. RMI Co.*, 467 F. Supp. 915, 923–24 (W.D. Pa. 1979) (acknowledging that a desire for more business from corporation may affect attorney's advice to employee-clients immunized in grand jury); Tate, *supra* note 36, at 54 (“The temptation [for a corporate employee's separate counsel] to respond to corporate counsel with inappropriate cooperation concerning separate counsel's representation of the employee might be great because it is unlikely separate counsel will remain on the corporation's referral list if she was perceived as obstreperous.”).

As Lowenthal noted:

If a corporation under government investigation or an organized crime syndicate retains counsel for an employee-defendant, for example, the lawyer may accept the case with the hope of obtaining future business from the employer. His loyalty to the person or entity paying the fee thus may impair his flexibility in representing the employee in such matters as negotiation with the prosecution, because cooperation with government investigation or prosecution of the employer will jeopardize the possibility of future retainers.

Lowenthal, *supra* note 165, at 963.

<sup>191</sup> See, e.g., *Boulas v. Superior Court*, 233 Cal. Rptr. 487, 489 & n.4 (Cal. App. 1986) (police officer attempts to steer defendant seeking to cooperate toward retaining



lists only if they “can be trusted to encourage their ‘clients’ to cooperate.”<sup>192</sup> Even assuming this to be true, however, the practice provides little economic incentive because the representation of a defendant who already has essentially decided to cooperate is not likely to be particularly lucrative—certainly not compared to the fees paid by private repeat players committed to having cases either taken to trial or concluded after motion practice and vigorous plea discussions.

Finally, although the analysis so far has focused only on how client interest may lead lawyers representing potential targets to ensure that potential cooperators are represented by “reliable” attorneys, the targets’ lawyers may have immediate economic incentives as well. Especially in white-collar cases, defense lawyers will frequently enter into joint defense agreements, which allow them to exchange information about their clients within the defense camp without jeopardizing the confidentiality of the information.<sup>193</sup> If a defendant who is party to such an agreement cooperates, the government can claim “that the remaining joint defense attorneys cannot remain in the case without violating their ethical duties” to the cooperator.<sup>194</sup> The consequences of such a defection from the defense camp can thus be disqualification—and loss of as yet unearned fees<sup>195</sup>—for the remaining lawyers.<sup>196</sup>

Only tentative conclusions are possible here without better data. It does seem, however, that among those sophisticated buyers of criminal defense services with any preference as to a lawyer’s reputation for cooperating clients, the demand for lawyers who can be counted on to recommend solidarity will far outweigh demand for those willing or happy to represent cooperators.

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defense attorney who had been local prosecutor for fourteen years); *United States v. Giovanelli*, No. 88 CR. 954 (S.D.N.Y.) (CBM), Trans. at 951–56 (testimony of Vincent Cafaro) (cooperator tells how, after he had decided to cooperate and reached out to government on own, he selected a new attorney from a list provided by a prosecutor).

<sup>192</sup> DERSHOWITZ, *supra* note 27, at 401.

<sup>193</sup> See Matthew D. Forsgren, Note, *The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine*, 78 MINN. L. REV. 1219, 1221 (1994); Susan K. Rushing, Note, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 TEX. L. REV. 1273 (1990).

<sup>194</sup> Forsgren, *supra* note 193, at 1222.

<sup>195</sup> See *Kin Cheung Wong v. Kennedy*, 853 F. Supp. 73, 76 (E.D.N.Y. 1994) (discussing types of fee arrangements in case where retainer agreement provided that if lawyer’s services “are terminated because of an unforeseen event” initial fee of \$75,000 (with another \$150,000 due two weeks before trial)—would be reduced to one based on lawyer’s hourly rate and “services actually rendered”).

<sup>196</sup> See Forsgren, *supra* note 193, at 1240 (noting “at least three instances” in which government successfully urged co-defendant’s defection as basis for disqualification of remaining defendants’ lawyers).

Conflict of interests analyses that focus on lawyers with case-specific reasons to deter cooperation—the “house counsel” interested in protecting the crime family that sends him cases and fees, or the white-collar attorney who hopes for more referrals and fees from the target corporation or lawyers to whom she owes her employment—thus fail to capture the systemic effects that the opportunity for such arrangements can have on the defense bar. One would expect those lawyers whose zeal is based on economic self-interest to respond to these market pressures, producing a corps of defense attorneys, in numbers commensurate to the demand, prone to deter cooperation, irrespective of a client’s interests.

### *C. Conclusion*

The ideologically or economically motivated “lawyers” discussed here are just stick figures, presumed to have but one goal and to be ready to disregard the duty of loyalty central to their profession. On the other hand, faith in the professionalism of attorneys should not prevent us from admitting that, at the very least, many of the most zealous defense attorneys may prefer that their clients not cooperate. Those with practices based on appointments to represent indigent clients or retainers from clients with little or no ability to review an attorney’s track record will have no economic reason to deter cooperation. But these are the lawyers who, if zealous as a matter of ideology, are most likely to be motivated by an ideology that is hostile to cooperation. At the other end of the economic spectrum, those lawyers who handle the white-collar, organized crime, and large-scale narcotics cases where large fees are to be had from sophisticated clients may similarly be biased by the same ideological motivations. And this ideological bias will surely be reinforced by (or be used to mask) the powerful economic interest that they have in keeping their clients from snitching.

## IV. ACTUAL VS. POTENTIAL CONFLICT?

That a significant number of defense lawyers may be personally biased against cooperation need not be, in itself, cause for concern. Many defendants are similarly biased, and a defendant’s champion against the extraordinary power of the state ought not to be forced to tout the benefits of cooperation to someone who just doesn’t want to snitch. The issue thus becomes whether we can be confident that a defendant is aware of what he may be giving up when he retains a lawyer likely to discourage cooperation. Next, even if defendants are not likely to make informed decisions in this regard, we must ask whether there is any real evidence that the biases identified here actually infect the

advice given to clients.

### A. Disclosure Issues

The typical client who walks into William Kunstler's office knows that Kunstler is not going to look favorably on an alliance with the government.<sup>197</sup> That knowledge is probably why the client came in the first place; he does not want or need to be reminded of the sentencing breaks awarded to snitches. Similarly, how can one suggest that Lopez did not receive adequate advice from Barry Tarlow, who made clear from the outset that he would withdraw if Lopez wanted to cooperate?<sup>198</sup> And doesn't the defendant who accepts a lawyer paid or referred by his employer or criminal "boss" realize that such arrangements are intended to breed solidarity against the government? The issue in these cases appears to be one of disclosure. What degree of disclosure is needed before we can be satisfied that a defendant has made an informed choice?

Perhaps no degree of disclosure will suffice. Even the defendant who makes an informed selection of a lawyer averse to cooperation may, as the time for trial or plea—and possibly prison—draws near, want to revisit the option. If he has the means, he might consult a new lawyer. But if he stays with his original lawyer, he is not likely to get a fair assessment of his situation. In the interests of preserving vigorous advocacy within the defense bar, however, we should first consider a scheme that assumes a proper initial "waiver" might be adequate.

The starting point for a satisfactory waiver would have to be a lawyer's candid disclosure to her client that she will not represent a client who cooperates or that she has a personal interest (economic or ideological) in her client's not cooperating. This sort of announcement is what Tarlow did in *Lopez*.<sup>199</sup> It comports with ethical rules requiring a lawyer to disclose any "interest" that might affect her representation of a defendant and then obtain that client's consent before proceeding any further.<sup>200</sup> Full compliance with this

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<sup>197</sup> Kunstler has never been reticent about his ideological commitment to his work. See David Margolick, *Still Radical After All These Years*, N.Y. TIMES, July 6, 1993, at B1-B2 (Kunstler stated: "I enjoy the spotlight, as most humans do, but it's not my whole *raison d'être*. My purpose is to keep the state from becoming all-domineering, all powerful. And that's never changed.").

<sup>198</sup> See *supra* text accompanying notes 1-9.

<sup>199</sup> *United States v. Lopez*, 765 F. Supp 1433 (N.D. Cal. 1991), *rev'd*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993).

<sup>200</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1994) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the

ethical norm would sweep quite broadly, extending not only to lawyers personally repulsed by snitches or those with direct economic relationships with the putative targets of a client's cooperation, but also to lawyers seeking to avoid a reputation as a defector from defense camps.

Given the extent to which a defendant must rely on his lawyer's assessments of the benefits and risks of cooperation,<sup>201</sup> the consequences of incomplete disclosure can be severe, even where the defendant is aware that the government is actively seeking his cooperation.<sup>202</sup> But will full disclosure of an

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lawyer's responsibilities to another client or a third person, or by the lawyer's own interests, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1983) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."); ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-3.5(a) (1993) ("At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him or her. . . .").

<sup>201</sup> The importance of a lawyer's participation in this decision has, on occasion, been ignored. Rejecting an ineffective assistance of counsel claim based, in part, on counsel's failure to discuss the cooperation option with his client, the court in *United States v. Turchi*, 645 F. Supp. 558 (E.D. Pa. 1986), *aff'd*, 815 F.2d 697 (3d Cir.), *cert. denied*, 484 U.S. 912 (1987), reasoned that if the defendant "knew of the various options that were his," his lawyer's "failure to initiate a discussion concerning them is irrelevant." *Id.* at 568. *See Commonwealth v. Kelly*, 463 A.2d 444, 449 (Pa. Super. Ct. 1983) (Even though the attorney of a police officer in a police corruption case had been retained and paid by police union with policy of noncooperation with the special prosecutor, the court found no prejudicial conflict of interest because (1) defendant did not claim that he was actually dissuaded from cooperating, and (2) the attorney never advised him not to cooperate.).

<sup>202</sup> *See Robert S. Redmount, Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972, 982 (1961) (A client's "uncertainty, fear, or ignorance of law renders him putty in an attorney's hands.").

A lawyer is bound to communicate the government's overtures to her client. *See, e.g., United States v. Baylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *United States v. Bowers*, 517 F. Supp. 666, 671 (W.D. Pa. 1981) ("The lawyer-client relationship encompasses at the very least . . . an informed client who is cognizant of all proposals made by the prosecutor."). It does not follow, however, that knowing of the government's interest in his cooperation will allow a defendant to make an informed decision about that option. *But see United States v. Canessa*, 644 F.2d 61, 63-64 (1st Cir. 1981) (affirming the district court's rejection of defendant's claim that attorney, who himself was a target of the grand jury's investigation, rendered ineffective assistance by initially failing to communicate a cooperation "invitation" from the government, and then failing to advise that the offer should be accepted; because the defendant "had learned independently of the government's

attorney's bias against cooperation cure the problem?<sup>203</sup> Our respect for the ideologically committed lawyer demands that we accept disclosure as a satisfactory solution. Is a lawyer's professional duty so incompatible with her political freedom that she should be barred from declaring and acting on an ideological position against snitching (even where economic self-interest actually motivates that position)?

This question brings us back to Barry Tarlow—whose ideological commitment to an adversarial relationship with the government has not been questioned (at least to my knowledge). Crampton and Udell have argued that:

Tarlow, by conditioning his representation of Lopez on an abandonment by Lopez of any plea negotiations, restricted the scope of representation in violation of professional ethics. Professional rules require a lawyer to "abide by the client's decision . . . as to a plea to be entered," and an agreement limiting the scope of representation that deprives the client of this authority is professional misconduct.<sup>204</sup>

One might respond that Lopez was not foreclosed from considering cooperation; Tarlow simply declared that he would withdraw if Lopez chose that route. The coercive effect of such arrangements should not be underestimated, however, because they threaten to impose significant, even prohibitive, costs on a defendant.<sup>205</sup> Sometimes the costs will be financial, as when the defendant has paid a substantial fee up front that will not be refunded, or when the fee was paid by a third party who will not pay for a different

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offer through his brother, knew the basic facts of his case, and had indicated his intention not to cooperate," the district court reasoned, it was "immaterial whether [his lawyer] had promptly conveyed the offer or ever recommended that it be accepted.").

<sup>203</sup> There is no evidence that candor typically goes this far. See Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 342 (1987) ("[c]ertain financial conflicts of interest between the attorney's needs and the client's may discourage full communication.").

<sup>204</sup> Roger C. Crampton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contract and Subpoena Rules*, 53 U. PITT. L. REV. 291, 352 n.256 (1992) (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) & cmt. 5 (1994) ("[T]he client may not be asked to agree . . . to surrender . . . the right to settle litigation that the lawyer might wish to continue.")).

<sup>205</sup> See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 722-23 (1986-87) (lawyer's threat of withdrawal if client does not act as lawyer wishes is "an attempt to persuade or pressure or intimidate" that can have "coercive" effect). This is not to suggest a client will always be deterred from cooperating by his lawyer's withdrawal. See *United States v. Perez*, 694 F. Supp. 854 (S.D. Fla. 1988) (After counsel refused to enter cooperation discussions with government and withdrew from case, the defendant obtained new counsel and quickly entered into a cooperation agreement.).

lawyer, especially if the defendant chooses to cooperate.<sup>206</sup> A change in counsel may cause a prolonged pretrial delay, which may be especially onerous for a defendant who is not free on bail. Particularly where a defendant's initial lawyer is known to refuse to pursue cooperation, switching lawyers may also telegraph the defendant's consideration of this option, thereby placing the defendant at risk or diminishing the value of his cooperation (if secrecy was needed for it).<sup>207</sup>

A lawyer like Tarlow might respond that these costs are simply the price of allowing lawyers some freedom to fix limits on their advocacy. Rule 1.16(b) of the *Model Rules of Professional Conduct* permits withdrawal if it "can be accomplished without material adverse effect on the interests of the client"<sup>208</sup> or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."<sup>209</sup> Although Tarlow himself could not have relied on this rule,<sup>210</sup> the provision envisions that a lawyer's refusal to pursue a "repugnant" objective will adversely affect her client's interests.<sup>211</sup> Still, it is far from clear that Rule 1.16(b) licenses a lawyer unilaterally to impose or to threaten imposing costs on her client for exercising his fundamental right to

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<sup>206</sup> See *Pirillo v. Takiff*, 341 A.2d 896, 904 (Pa.) (fee arrangement chills police officer client from considering cooperation where his access to counsel paid by Fraternal Order of Police depends on agreement not to cooperate), *aff'd on reh'g*, 352 A.2d 11 (Pa. 1975) (per curium), *cert. denied*, 423 U.S. 1083 (1976). No evidence appears to have been presented in *Lopez* indicating that Tarlow's fees were not paid by his client. *United States v. Lopez*, 765 F. Supp. 1433, 1452 (N.D. Cal. 1991), *rev'd*, 989 F.2d 1039 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993).

<sup>207</sup> The defendant who changes counsel simply to get unbiased advice may be forced to snitch if his co-conspirators take (or are feared to take) this substitution as a sign that he has actually made up his mind to do so. Where there is a risk that the co-conspirators will respond with extra-legal sanctions (like mob "hits") or by rushing to make their own deals, this defendant will find himself pressed to make his peace with the government quickly.

<sup>208</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1994).

<sup>209</sup> *Id.* Rule 1.16(b)(3).

<sup>210</sup> No analogous provision appears in the Rules of Professional Conduct of the State Bar of California, adopted by the District Court of the Northern District of California in its Local Rules. *United States v. Lopez*, 989 F.2d 1032, 1043 (9th Cir.) (Fletcher, J., concurring), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993). Under these Rules, a defense attorney "is not free to terminate his or her representation of a client at will, or for mere personal considerations, or without the permission of the court." *Id.* at 1042-43.

<sup>211</sup> See Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 260 (1985) ("The fact that the lawyer may ethically withdraw despite an 'adverse effect' on a client's interests if she considers one of the client's objectives 'imprudent' is an especially striking compromise of client autonomy.") (footnote omitted).

pursue the most advantageous plea agreement possible.<sup>212</sup> And even were this a defensible ethical norm, it would violate the Sixth Amendment absent a defendant's consent.<sup>213</sup>

The issue, then, becomes whether Lopez could have intelligently consented to his arrangement with Tarlow at its outset, as envisioned by *Model Rule* 1.2(c) which allows a lawyer to "limit the objectives of the representation if the client consents after consultation."<sup>214</sup> This is not merely a question of an attorney's freedom of action. As Gilson and Mnookin have recently shown, a client seeking credibly to assure fellow participants in a prisoner's dilemma that he will not defect on them would want a regime that allowed him to pick a lawyer with a reputation for not defecting ("cooperating," in game theory

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<sup>212</sup> The *Model Rules* distinguish between "objectives" and "means," allowing an attorney to withdraw where a client's "objective" is repugnant, but offering no such license where the attorney merely objects to the client's "means." To the extent that snitching is just a defendant's means of getting the lowest sentence possible, a lawyer's quarrel with this course would seem to be based on choice of means. Any such classification, however, while barring withdrawal, would arguably render cooperation the sort of "technical and legal tactical issue" that the *Rules* entrust to lawyers. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1994). The *Rules* admit that "[a] clear distinction between objectives and means sometimes cannot be drawn," *id.*, and this certainly is such a case. See Gilson & Mnookin, *supra* note 182, at 554 n.138 (explaining that the *Model Rules* are generally ambiguous with respect to allocation of authority and arguing, with respect to Rule 1.2, that "a choice of means that substantially effects attainment of the client's objective amounts to an objective, which puts the matter under the sole authority of the client").

The *Model Code of Professional Responsibility* leaves far less room for debate. EC 7-8 notes that "[i]n the final analysis . . . , the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1983); see *id.* DR 2-110(C)(1)(c) (lawyer can withdraw only if client "[i]nsists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.>").

<sup>213</sup> See *Lopez*, 989 F.2d at 1043 (Fletcher, J., concurring) ("a criminal defense lawyer may not be entitled to assert moral repugnance to plea bargaining"); cf. *Brown v. Doe*, 2 F.3d 1236, 1246 (2d Cir. 1993) ("Having selected confrontational counsel who found plea bargaining repugnant, [defendant] . . . cannot claim that his lawyer was inadequate at that stage of the proceeding."), *cert. denied*, 114 S. Ct. 1088 (1994); *United States v. Wilson*, 922 F.2d 1336, 1341-42 (7th Cir.) (attorney's threat to withdraw if defendant refused to plead guilty "may have been improper," but no prejudice found), *cert. denied*, 502 U.S. 850 (1991); *Commonwealth v. Forbes*, 299 A.2d 268 (Pa. 1973) (counsel's threat to withdraw if defendant moved to withdraw guilty plea held coercive).

<sup>214</sup> MODEL RULES OF PROFESSIONAL CONDUCT (1994); see Freedman, *supra* note 169, at 35 ("Tarlow limits the scope of the representation at the outset, in a way that maintains the client's fundamental rights.") (footnote omitted).

language) and allowed the lawyer to withdraw if the client sought to renege.<sup>215</sup> To the extent we bar a client from “tying his hands” at the outset, we deprive him of a signaling and bonding device that he might find critical to his chosen defense.

We thus arrive at the question that arises not only when a lawyer wants her client to eschew cooperation at the outset but also when a lawyer simply discloses a bias against snitching: Is a client really in a position to assess his lawyer’s advice about cooperation in light of such disclosures? Here is where the sharp divergence between the calculus of an actual defendant and that of a hypothetical “prisoner” facing a precise and certain payout structure becomes critical. The criminal defendant will likely know that cooperation is rewarded, but through what filter should he view reports about the government’s credibility—and the benefits of cooperation more generally—when they come from someone admittedly hostile to working with the government?<sup>216</sup> How can a defendant who gets such advice conceive of the payouts available to him? The defendant who does not make the effort because he is so repulsed by the notion of snitching probably has lost nothing. Others, fully appreciating their lawyers’ biases or possessing the ability to seek additional legal counsel from other sources, might get the information they need. But if required to obtain—and, if

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<sup>215</sup> Gilson & Mnookin, *supra* note 182, at 556 (“Enhancing the cooperative lawyer’s ability to protect her investment in reputation expands rather than restricts the client’s control over how the lawyer conducts the client’s litigation.”).

<sup>216</sup> In one example of the pro forma advice that can be given by lawyers admittedly hostile to cooperation, a law firm simultaneously representing several co-defendants advised each, in part:

[W]e have informed you . . . orally and we, by means of this communication, inform you formally in writing that anyone whom we presently represent may, perhaps, make an excellent self-serving negotiated plea bargain with the United States Attorney’s Office for cooperation and/or testimony; that you should carefully consider both the benefits and the disadvantages to negotiating a plea bargain with the government which involves cooperation, but that the most prominent advantage which you should be formally aware of is the possibility of being able to obtain, from the United States Attorney’s Office, a promise of a non-custodial sentence or even perhaps a dismissal of the charges; that if you . . . intend[] to cooperate or wish[] for an attorney to commence negotiations for purposes of cooperation, then please do not sign the appropriate place at the end of this correspondence for you would be best served by obtaining independent counsel to effectuate that intention . . . .

United States v. Allen, 831 F.2d 1487, 1500–01 n.14 (9th Cir. 1987) (finding this affidavit to be “perfunctory” and incomplete in its recitation of possible conflicts of interest), *cert. denied*, 487 U.S. 1237 (1988).



not indigent, pay for<sup>217</sup>—a second lawyer in order to explore an option already characterized as disadvantageous by one attorney, many defendants can be expected to do nothing. This is especially true where a defendant finds his lawyer's advice against snitching reinforced by social norms and by fears of physical or economic retaliation. The point is not that defendant waivers can never be knowing under these circumstances, but that many are not likely to be so.

To suggest, as the Second Circuit recently did, that a defendant receives his due when he chooses a lawyer who has explicitly "abjured cooperation with law enforcement authorities or plea bargaining"<sup>218</sup> is thus to ignore the role that an attorney must play in explaining the cooperation calculus. Defendants are regularly forced to make uncounseled decisions about cooperation in stationhouses after they are arrested and are told that "the ship is sailing," "cooperate now if you want to get off easy." But once a defendant does have a chance to consult with counsel—and has a constitutional right to do so—he should not have to give up the chance to cooperate at the same time he picks his lawyer.

### B. Evidence of Actual Effect

In assessing the threat to a defendant's ability to get fair advice about cooperation, one must do more than show that many of the most zealous defense lawyers may have a motive to skew their advice, or even present evidence that some do have that motive. Is there any reason to believe that those motives actually affect the advice that defendants receive? It is no answer to say that even though lawyers are often beset by personal conflicts that could lead them to manipulate a client against his best interests, we can generally presume that they will rise above self-interest.<sup>219</sup> This presumption, while appropriately developed to prevent excessive judicial or prosecutorial intrusion into the defense function,<sup>220</sup> can hardly predetermine our factual inquiry. So, where to start?

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<sup>217</sup> Even assuming courts have discretion to authorize reimbursement where indigent clients seek such second opinions, it is far from clear that judges would be so free with public funds absent egregious conflicts of interest.

<sup>218</sup> *Brown v. Doe*, 2 F.3d 1236, 1245 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1088 (1994).

<sup>219</sup> *See, e.g., Fiumara v. United States*, 727 F.2d 209, 212 (2d Cir.) ("A trial counsel worthy of the name should be capable of subordinating his personal predilections to his professional duty.") (quoting *United States v. McClean*, 528 F.2d 1250, 1258 (2d Cir. 1976)), *cert. denied*, 466 U.S. 951 (1984); *Green, supra* note 185, at 1224–27.

<sup>220</sup> *See infra* text accompanying notes 236–39.

Certain data are of little use. That many thousands of defendants decide to cooperate<sup>221</sup> says nothing about whether the “right” defendants are cooperating. Some defendants may be pushed into cooperation. Some may be willing to leap into uncertainty despite their attorneys’ advice (whether biased or disinterested) not to cooperate. Given the critical role that a lawyer’s advice will likely play in a client’s cooperation decision, the existence of a class of defendants (like Lopez) whose lawyers actively discouraged them from cooperating but who nonetheless pursued that option and told the government about their lawyers’ efforts, suggests that there is an even larger class of defendants who were deterred by their lawyers’ advice. But this is only speculative circumstantial evidence. Moreover, it may be that an attorney’s advice against cooperation reflects her honest assessment of the government’s credibility.

Postconviction challenges to a defense counsel’s performance provide some direct, albeit anecdotal, evidence of biased efforts to discourage cooperation.<sup>222</sup> But this proof is not very trustworthy. The defendant facing a long stay in prison, with his criminal associates already convicted and his information stale, will be all too quick to claim that he “would have” cooperated, but for his

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<sup>221</sup> Between October 1, 1990, and September 30, 1991, 3,786 defendants received downward departures from their presumptive *Guideline* sentences based on “substantial assistance” to the government. ANNUAL REPORT, *supra* note 33, at 140. This number—which covers only federal defendants—does not include defendants whose intentions or efforts did not meet with government approval, or defendants whose cooperation led to the dismissal of their indictments. A sampling of presentence reports in seven federal districts for offenders convicted or sentenced in fiscal years 1976–78 found that 7.7% of the white-collar defendants had cooperated with the authorities—20% for securities fraud—compared to 11.9% of the “common crime” defendants. See WEISBUND ET AL., *supra* note 126, at 104.

<sup>222</sup> See, e.g., *United States v. Rodriguez Rodriguez*, 929 F.2d 747 (1st Cir. 1991) (per curiam) (allegation that defendant was advised to retain lawyer by superior in terrorist organization which paid half of attorney’s fees; attorney advises defendant not to cooperate); *United States v. Allen*, 831 F.2d 1487 (9th Cir. 1987) (allegation that defendant’s original counsel, whose fees were paid by third party and who simultaneously represented defendant’s “boss,” discouraged cooperation), *cert. denied*, 487 U.S. 1237 (1988); *United States v. Shaughnessy*, 782 F.2d 118, 119 (8th Cir. 1986) (per curiam) (An attorney retained by defendant’s co-defendants “made no attempt to explore the possibility of [defendant’s] . . . cooperation with the government’s investigation, even though the government was willing to negotiate about such cooperation.”) (footnote omitted); *United States v. Turchi*, 645 F. Supp. 558 (E.D. Pa. 1986), *aff’d*, 815 F.2d 697 (3d Cir.), *cert. denied*, 484 U.S. 912 (1987); *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992) (Marine embassy guard convicted of espionage claims that defense attorney William Kunstler saw the case as political cause and pressed defendant to cease cooperating.), *cert. denied*, 113 S. Ct. 1813 (1993).

lawyer, and to seek a reversal of his conviction, or a reduction of sentence, on that basis. Although attorneys may also be less than candid in denying allegations of unprofessional conduct,<sup>223</sup> the account of a defendant who seeks the benefits of cooperation without taking the risks must always be suspect.<sup>224</sup>

Appropriately discounted, postconviction claims do offer some insights on certain attorney-client conflicts that affect cooperation decisions, but the sources of these alleged conflicts are generally case specific: the legal fees of a putative cooperator have been paid by a putative target, or the target is simultaneously represented by the same lawyer. On occasion, a defendant has alleged that his attorney's ideological biases impeded his access to fair advice about cooperation.<sup>225</sup> But I have not been able to find any claim that a lawyer's interest in maintaining a professional reputation as a promoter of defense solidarity prejudiced a defendant. The unlikelihood that a defendant would even be aware of this problem makes the absence of such claims not surprising. And

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<sup>223</sup> Some lawyers can be completely unperturbed by a former client's allegations of ineffective assistance. In response to the claim of the defendant in *Lonetree*, 35 M.J. 396, William Kunstler, described as "the New York lawyer associated with politically charged trials," was reported to say "that as a matter of principle he would not dispute claims of ineffective counsel. 'If they can win their case by proving any dereliction on my part, it would be all for the good and I cheer him on,' he has said." Neil A. Lewis, *Convicted Marine's Legal Advice to Be Reviewed*, N.Y. TIMES, Oct. 3, 1992, at 29.

<sup>224</sup> Such postconviction challenges are typically opposed by the government, which must ensure that defendants who have not actually cooperated do not receive the benefits reserved for those who have taken the plunge. Yet this understandable hostility to postconviction claims means that the government is least interested in exploring alleged conflicts when defendants are most anxious to tell about them. Conversely, at the investigative or pretrial stage, when, as a basis for disqualifying his lawyer, the government claims that a conflict of interest is improperly deterring a defendant from cooperating, the defendant will often deny that any conflict exists. *See, e.g.*, *United States v. Kenney*, 911 F.2d 315 (9th Cir. 1990); *United States v. Phillips*, 699 F.2d 798 (6th Cir. 1983); *In re Investigation before February, 1977 Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977); *In re Investigation before April 1975, Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976) (*per curiam*); *In re Special Grand Jury*, 480 F. Supp. 174 (E.D. Wisc. 1979); *Pirillo v. Takiff*, 341 A.2d 896 (Pa.), *aff'd on reh'g*, 352 A.2d 11 (Pa. 1975), *cert. denied*, 423 U.S. 1083 (1976). These litigation postures may be quite explicable, but they impede efforts to explore defender attitudes toward cooperation.

<sup>225</sup> *Brown v. Doe*, 2 F.3d 1236, 1240 (2d Cir. 1993) (defendant in armored car robbery committed on behalf of Weather Underground claims that his "revolutionary lawyers" refused to consider cooperation and "pursued a confrontational defense strategy jointly with counsel for his co-defendants in furtherance of 'radical political beliefs'"), *cert. denied*, 114 S. Ct. 1088 (1994); *Lonetree*, 35 M.J. 396 (concerning Marine embassy guard convicted of espionage who claims that defense attorney William Kunstler saw the case as political cause and pressed defendant to cease cooperating).

given that postconviction claims supported by far more concrete conflict of interest allegations face an uphill battle in court,<sup>226</sup> a savvy defendant may realize the slim chances of such a speculative claim.

There is, then, a marked paucity of hard evidence that defendants are deterred from cooperating by lawyers seeking to protect reputations in the marketplace. Still, we find important clues in Kenneth Mann's insightful study of the white-collar defense bar in New York City. Attorneys told Mann that they frequently felt pressured by other lawyers to participate in a joint defense against the government irrespective of their clients' best interests.<sup>227</sup> Mann also found evidence of "messages communicated between attorneys that they are prepared to influence their clients."<sup>228</sup> Yet he resisted drawing any conclusions:

[D]espite the[se] messages . . . , the actual occurrence of this kind of cooperation [against the government] was more difficult to capture than perhaps any other research topic. The findings did not reveal directly any instance of an attorney who appeared to resist providing information to the

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<sup>226</sup> To obtain postconviction relief on the theory that a conflict of interest prevented his counsel from rendering constitutionally effective assistance, a defendant must show an "actual" conflict, not merely "the possibility of conflict." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); see *United States v. Gonzalez*, 970 F.2d 1095, 1101 (2d Cir. 1992). Then he must show that the conflict "adversely affected his lawyer's performance," by demonstrating that the actual conflict caused an identifiable "lapse in representation." *Cuyler*, 446 U.S. at 348; see also *United States v. Iorizzo*, 786 F.2d 52, 58 (2d Cir. 1986).

One court recently required even more. In *Brown v. Doe*, although presented with a claim that counsel's ideology led her to provide ineffective assistance, the court declined to apply the *Cuyler* standard and applied the more demanding standard of *Strickland v. Washington*, 466 U.S. 668 (1984), reasoning that a lawyer needed to have a conflicting loyalty to another *person* for there to be a cognizable conflict of interest:

Whatever baggage Ms. Williams brought to Brown's case, she had no conflict of interest. Ms. Williams represented Brown only, and could therefore counsel him on whether to plead guilty or become a witness for the state, without regard to the interests of any other defendant. . . . Ms. Williams made a reasoned decision to make common cause with other defendants and defense counsel; whether or not that decision was motivated by revolutionary solidarity, it was arrived at free of any legal or ethical obligation to any defendant but Brown.

*Brown*, 2 F.3d. at 1247 (citation omitted). *But see United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984) (conflict of interest where counsel implicated in crimes for which client on trial).

<sup>227</sup> MANN, *supra* note 42, at 178-79.

<sup>228</sup> *Id.* at 180.

government where it would help his client, in order to serve the interest of another attorney's client, nor did any attorney state that he actually ever did this or saw others do it. The question left open, then, was whether these attorneys simply feign this kind of cooperation while always acting in their client's own best interest or whether the particular cases did not provide instances of this kind of cooperation in spite of the fact that it does occur.<sup>229</sup>

A third alternative is that the attorneys interviewed were loathe to admit to unethical conduct, or accuse others of it.<sup>230</sup> The white collar bar is only so big, and it is hard to imagine an attorney continuing to "feign" a readiness to maintain a joint defense after she had reneged on similar assurances to her colleagues in previous cases. She may be able to "puff" once, but if she intends to remain in that segment of the market, where information pooling opportunities abound, her colleagues will judge her on results, not assurances.<sup>231</sup> That such assurances are given thus suggests that lawyers seek to "deliver" on them.

Although more evidence is needed before this hypothesis about market incentives disfavoring cooperation can be deemed "proved," it seems likely enough. When such informed speculation is taken together with what we know about more case-specific conflicts of interest, and about the declared ideologies of certain defense attorneys, a troubling picture emerges: the systemic failure of some of the most zealous defenders to give clients fair advice about cooperation. If this picture is true, the government certainly has cause to be concerned because this agency cost in the market where the government "buys" information is over and above that created by more case-specific conflicts.<sup>232</sup>

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<sup>229</sup> *Id.*

<sup>230</sup> The bias in a biased attorney's advice will not always be intentional. As Robert Gordon has noted:

Lawyers who say they just provide technical input and lay out the options while leaving the decisions and methods of implementing them up to their clients are kidding themselves by failing to recognize or admit that clients will process their advice differently depending on the form and manner and setting in which they give it.

Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 30 (1988).

<sup>231</sup> See also Gilson & Mnookin, *supra* note 182, at 562 (Professional organizations "make it easier and cheaper to impose informal sanctions for defection through gossip and reputational damage than would be true in a more atomistic world.").

<sup>232</sup> See Kobayashi, *supra* note 21, at 508 (addressing "plea bargaining system's role as a device through which a prosecutor 'buys information'"); Schulhofer, *supra* note 148, at 49-50 (discussing conflicts of interests as "agency costs" in context of plea bargaining); cf. Standen, *supra* note 71, at 1488 n.51 (suggesting that prosecutors bid against criminal conspiracies for a defendant's information, each offering some combination of threats and

But the government can at least partially compensate for these costs by tinkering with the incentives it offers—making them larger or more certain. Individual defendants have no corresponding options, and when society's disdain for snitching is reinforced by a defense attorney's pressures, the harm to them is clear.

## V. OTHER SOURCES OF ADVICE ABOUT COOPERATION

Although evidence, however tentative, that defendants are not likely to receive fair advice about their cooperation options must be cause for concern, the problem is far easier to identify than to cure. The numerically more significant aspect of the problem—the “cop out” lawyers who push their clients into cooperating in order to get rid of cases with a minimum of effort—might, and ought to, be addressed, as Stephen Schulhofer has suggested, by “restructur[ing] the economic relationship between defense attorney and client” in order to encourage more zealous advocacy.<sup>233</sup> Such a restructuring could entail a voucher system, like the one recently proposed by Professors Schulhofer and David Friedman,<sup>234</sup> that gives indigent defendants some freedom of choice. Although the purchasing decisions of many—if not most—of these new consumers might be based on less information than their richer or more experienced brethren, a market approach seems more promising than the illusory guarantee of state monitoring on which we now rely.<sup>235</sup> But what can we do about the problem of defendants steered away from cooperating because

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benefits).

<sup>233</sup> Schulhofer, *supra* note 17, at 1999; *see* REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT, 52 Crim. L. Rep. (BNA) 2265 (Jan. 29, 1993); Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993).

<sup>234</sup> Schulhofer & Friedman, *supra* note 152.

<sup>235</sup> Schulhofer and Friedman note:

While the state's primary role . . . is providing the voucher, there is no reason why it cannot also provide information. The court or county government could inform indigent defendants as to which firms it believes do a good job. Defendants would be free to discount the recommendation if they suspected that the state was more concerned with their interests than with theirs. Such an arrangement allows defendants to have both the informational advantage of state choice of provider and the incentive advantage of defendant choice.

*Id.* at 114. The official dissemination of information about private attorney performance—if accurate—could also help those defendants able to retain counsel but searching in the same segment of the defense bar that competes for indigents' vouchers.

of their attorneys' personal interests?

### A. *Judicial Intervention*

It is of little help to say that lawyers who place their own ideological or economic concerns over their clients' interests should be disqualified. Even when a defendant wishes to waive his right to unconflicted representation, trial judges have "an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."<sup>236</sup> However, in the absence of particularized evidence, an attorney will not, and should not, face disqualification on the basis of suppositions about how her ideological or economic interests might affect her advice to a potential cooperator. Any standard that permitted an attorney's removal in such cases, if regularly invoked, would either, deprive the defense bar of many of its most zealous advocates, or, if selectively invoked (as is far more likely), be susceptible of abuse by prosecutors seeking to remove their ablest adversaries.<sup>237</sup> Moreover, disqualification proceedings, regardless of their outcomes, can put undue pressure on those defendants who have made informed decisions not to cooperate and are comfortable with lawyers committed to standing fast against the government.<sup>238</sup>

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<sup>236</sup> *Wheat v. United States*, 486 U.S. 153, 160 (1988); see *Green*, *supra* note 185.

<sup>237</sup> See Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interests*, 16 AM. J. CRIM. L. 323 (1989); Ephraim Margolin & Sandra Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 AM. CRIM. L. REV. 227, 229 (1982) (The authors opined, "based on familiarity with more than a dozen cases in which . . . disqualification 'inquiries' have been filed, . . . [that] the government's primary motive in bringing such motions is to disqualify the most competent lawyers and firms, with little regard for their reputation for ethical practice.").

<sup>238</sup> Green explains:

The [disqualification] . . . inquiry may undermine the defendant's confidence in his attorney by causing him to question whether defense counsel is qualified to provide a vigorous defense. It may also threaten the effectiveness of counsel's representation by dampening counsel's ardor. And, unless the trial judge receives information from defense counsel *ex parte* or precludes the prosecution from making evidentiary and investigative use of defense counsel's representations to the court, a hearing on a disqualification motion may result in the disclosure of otherwise confidential information, which may then be used by the prosecutor against the defendant.

Green, *supra* note 185, at 1233.

Limiting disqualification to cases where there is particularized evidence of a conflict can result in significant under-enforcement of ethical norms, because such evidence will often not be known outside of the defense camp or even be disclosed to the client. A lawyer is not apt to tell her client that she intends to dissuade him from cooperating in order to protect a third party or her professional reputation, and may not even announce an ideological rejection of snitching. The client who is aware of such conflicts may not disclose them to the court or government, either out of fear or because he has taken his lawyer's advice.<sup>239</sup> Nonetheless, because any coercive effort to acquire this information would have the unfortunate effect of threatening the very right the effort purports to guarantee—the right of a defendant to get fair advice about whether he ought to cooperate or fight—disqualification must remain an extraordinary measure. The response to vague allegations of conflict must, therefore, be a presumption, albeit rebuttable, that attorneys will behave ethically irrespective of their ideological or personal interests.

A far less intrusive way to correct any imbalance in advice about cooperation might be to provide additional advice about cooperation from another source. If, after understanding his options, a defendant wished to pursue a strategy of solidarity with his co-defendants, he could—save in extraordinary cases where a court found disqualification appropriate—be free to waive his right to unconflicted representation and choose an attorney committed to do battle with the government. Were judges to preside over this process, they would have essentially two options: They could give the advice to defendants themselves, or they could bring new defense counsel into the case for this purpose—a sort of limited-purpose disqualification. Neither of these

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The issue of judicial pressure was dramatically raised when three of the defendants convicted in the World Trade Center bombing trial sought to be represented at sentencing and on appeal by William Kunstler and Ronald Kuby, who also represented defendants in a related conspiracy case awaiting trial. The district judge summarily disqualified Kunstler and Kuby, suggesting that the convicted defendants had to consider cooperating and would be ill-served by lawyers who also represented the putative targets of any such cooperation. *United States v. Salameh*, 93 No. Cr. 180 (KTD), 1994 U.S. Dist. LEXIS 7904 (S.D.N.Y. June 14, 1994). Unsuccessfully seeking to overturn the disqualification order, counsel argued that “all three defendants had long ago been informed of their ‘right’ to become informers and to make deals to better themselves at the expense of others,” and “by their choice of Kunstler and Kuby [had] made it clear that they reject such an option.” *Petition for Writ of Mandamus*, at 14, *In the Matter of the Application of Mahmoud Abouhalima*, No. 94-3038 (2d Cir. Apr. 20, 1994).

<sup>239</sup> *See, e.g., United States v. Phillips*, 699 F.2d 798 (6th Cir. 1983) (When arrested, the defendant told agents that he wanted to cooperate but feared that his lawyer, retained by his drug boss, would tell the boss about his defection. When the lawyer's disqualification was sought, the defendant denied having made these statements.).



options, however, is satisfactory.

Judges often find themselves obliged to advise defendants about potential conflicts of interest where particularized facts give reason for concern, but any conflict is waivable. *Federal Rule of Criminal Procedure* 44(c) requires that inquiry be made whenever co-defendants are jointly represented by the same attorney, and case law has mandated similar procedures for other potential conflicts.<sup>240</sup> But what facts should lead a judge to fear that a defendant has not been sufficiently advised about his cooperation options? The judge will know when a defendant shares the same lawyer with a potential target, but she may not be aware that a defendant's lawyer has been paid by a target or was referred by the target's lawyer. Certainly she is unlikely to know that an attorney, although independently retained by the defendant, wants to establish a reputation for not representing snitches.

Even if judges, with the eager assistance of the prosecution, could reliably identify those defendants needing additional advice about cooperation, their intervention would likely be to no avail. For a judge merely to inform a defendant that his lawyer may have reason to deter cooperation does nothing to make cooperation any less a leap into the unknown. Yet the judge is not positioned to provide much more than that. Without knowing the details of the government's case and hearing a proffer from the defendant, a judge cannot assess the value of his information, much less evaluate how much of a sentencing discount it could bring, even when she would be the sentencer. Moreover, even were she able to give such an evaluation, its value could quickly be nullified by the defendant's lawyer who will likely have a far closer relationship with the defendant.<sup>241</sup> The judge who appears to be touting the

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<sup>240</sup> See, e.g., *United States v. Lanni*, 970 F.2d 1092 (2d Cir. 1992); *United States v. Rodriguez*, 968 F.2d 130 (2d Cir.), cert. denied, 113 S. Ct. 140 (1992); *United States v. Roth*, 860 F.2d 1382, 1387 (7th Cir. 1988), cert. denied, 490 U.S. 1080 (1989); *United States v. Akinseye*, 802 F.2d 740, 744-45 (4th Cir. 1986), cert. denied, *Ayodeji v. United States*, 482 U.S. 916 (1987); *United States v. Curcio*, 680 F.2d 881, 888 (2d Cir. 1982).

<sup>241</sup> Lowenthal's observations about the advice given to defendants in joint representation cases are equally apposite here:

[A] simple admonishment by a trial judge who is unfamiliar with the intricacies of the defense and cannot pierce the defendant's privilege against self-incrimination is no substitute for a confidential and frank exchange of thoughts between a defendant and his lawyer. In addition, many criminal defendants inherently regard the court with suspicion and are unlikely to give the judge's words much credence.

Lowenthal, *supra* note 165, at 970; see *United States v. Garafola*, 428 F. Supp. 620, 624 (D.N.J. 1977) (limitations of judicial advice about joint representation), *aff'd*, 570 F.2d 1177 (3d Cir. 1978).

virtues of snitching will only confirm a defendant's worst fears about an alliance between court and prosecutor, leading him to disregard the advice, or to feel some additional pressure to cooperate—two equally unfortunate results.<sup>242</sup>

The danger of judicial coercion—intended or not—might be avoided by bringing in an independent lawyer, a device courts often use to ensure that defendants get fair advice about the pitfalls of joint representation.<sup>243</sup> However, such attorneys may themselves have reason to deter cooperation (or unduly encourage it<sup>244</sup>). And even were their advice unbiased, the likelihood that it could be nullified by the defendant's original lawyer would remain. In sum, judicial intervention, if circumscribed to prevent coercion, would not likely be effective in correcting any imbalance in the advice that defendants receive about cooperation.

### B. Prosecutorial Intervention

The other candidate to supplement the advice a defendant gets from his lawyer about cooperation is the prosecution, which would love to step into the breach and deal directly with a defendant on this issue. Indeed, government agents or prosecutors regularly solicit cooperation from defendants soon after arrest<sup>245</sup>—or even before<sup>246</sup>—when “interference” from lawyers can best be

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<sup>242</sup> See Alschuler, *supra* note 82, at 1123 (“For a judge to raise the prospect that a particular defendant might plead guilty would be likely to indicate a judicial preference that he do so—at least to a defendant willing to read between the lines. Even this possibly unintended persuasion would be inconsistent with a trial judge's obligation of impartiality.”). Judicial advice about cooperation might also be considered a violation of FED. R. CRIM. P. 11(e)(1)'s ban on judicial participation in plea discussions. See *United States v. Garfield*, 987 F.2d 1424, 1426–27 (9th Cir. 1993) (blanket prohibition on judicial participation in plea discussions ensures that no defendant is coerced, protects integrity of courts, and preserves judge's impartiality).

<sup>243</sup> See *United States v. Villarreal*, 554 F.2d 235 (5th Cir.) (trial court appoints special public defender to advise defendant about potential conflict), *cert. dismissed*, 434 U.S. 802 (1977); *United States v. Bailin*, 731 F. Supp. 865, 872 (N.D. Ill. 1990), *aff'd*, 977 F.2d 270 (1992); *United States v. Biometric Affiliated Research Lab., Inc.*, 486 F. Supp. 106 (S.D.N.Y.) (private attorney, acting *pro bono*, appointed to advise defendant awaiting sentencing about “desirability or lack of desirability” of cooperating with government against target represented by same lawyer who had represented her at trial), *aff'd*, 634 F.2d 619 (1980), *cert. denied*, 449 U.S. 1083 (1981); Lowenthal, *supra* note 165, at 970 n.102.

<sup>244</sup> An attorney who seeks more such appointments, or has other reasons for currying favor with the court, may advise a defendant to cooperate simply to help a judge get a case off her docket.

<sup>245</sup> WILSON, *supra* note 51, at 73 (“Efforts to flip a suspect begin almost with the

avoided. Until formal charges have been brought, defendants generally have no constitutional right to counsel,<sup>247</sup> and those without money to retain an attorney will invariably not yet have one. But once a defendant's Sixth Amendment right to counsel attaches, courts (at least by assumption) have barred the government from circumventing his lawyer simply to tout cooperation.<sup>248</sup> A defendant's waiver of his right to counsel under these circumstances—where, for example, the government has disrupted his relationship with counsel either by giving contrary advice or by calling counsel's integrity into question—will

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moment of his arrest. The critical period is the hours between his being taken into custody and his formal arraignment. In this period, his uncertainty is greatest and his defense the lowest.”); *see* Dix, *supra* note 30, at 247 (“For a variety of reasons, and perhaps especially in drug cases, officers may be willing to ‘deal’ with a suspect only if the suspect is willing to deal immediately, with the officers, and without consulting counsel or others.”).

Perhaps the government's ability to tout cooperation at this early stage can be seen as counteracting, or even justifying, a bias against cooperation in the advice that a defendant later receives from his lawyer. But this “balance” is false, if the autonomy of a defendant is to be respected.

<sup>246</sup> *See, e.g.,* United States v. Weiss, 599 F.2d 730, 733–34 (5th Cir. 1979) (prior to seeking indictment, agents and prosecutor confronted suspect with evidence of his criminal activity and sought his cooperation, suggesting that he might walk away “scot free”).

<sup>247</sup> United States v. Gouveia, 467 U.S. 180, 188 (1984).

<sup>248</sup> *See* United States v. Morrison, 449 U.S. 361, 362–64 (1981) (assuming, without deciding, that agents violated indicted defendant's Sixth Amendment right to counsel when they met with defendant without her counsel's knowledge, disparaged counsel's performance, and touted benefits of cooperation); United States v. Chavez, 902 F.2d 259, 266 (4th Cir. 1990); United States v. Walker, 839 F.2d 1483, 1486 (11th Cir. 1988) (assuming, without deciding, that defendant's right to counsel was violated when informant and agent encouraged cooperation without knowledge of defense attorney); People v. Hayes, 246 Cal. Rptr. 750, 755 (Cal. App. 1988); State v. Ford, 793 P.2d 397, 400–01 (Utah App. 1990). *But see* Weiss, 599 F.2d at 739 (holding that cooperation pitches by government agent and prosecutor that included suggestion that it would not be in defendant's “best interests” to contact his attorney would not have violated Sixth Amendment, even if they had occurred during accusatory stage, because attorney was a target of investigation and defendant had reason to know “what was behind” this warning).

Some courts, like the district court in *Lopez*, will not characterize government interference with a defendant's right to counsel as a Sixth Amendment “violation” unless the defendant can show the “prejudice” that, at least since *Morrison*, 449 U.S. 361 (1981), is a prerequisite for relief. United States v. Lopez, 765 F. Supp. 1433, 1443 (N.D. Cal. 1991), *rev'd*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993); *see also* United States v. Glover, 596 F.2d 857 (9th Cir.), *cert. denied*, 444 U.S. 860 (1979). But these courts would likely agree that, as a prospective matter, the government is constitutionally barred from circumventing defense counsel for purposes of soliciting a defendant's cooperation.

be at least presumptively invalid.<sup>249</sup> The issue thus becomes whether this understandable effort to prevent the government from driving a wedge between defendant and attorney once adversarial proceedings have commenced should be reconsidered in light of evidence suggesting a bias within the defense bar against cooperation. The question almost answers itself.

To allow the government free reign to circumvent defense counsel would undermine the influence of a possibly biased advisor only to leave a defendant at the mercy of a party whose bias is certain. Conceivably, a prosecutor or agent could supplement defense counsel's advice by giving the defendant a better idea or just an alternative view about the strength of the government's case and the likely benefits of cooperation. However, the defendant who acts on this information without ascertaining the government's track record for holding up its end of cooperation agreements does so at his peril. The only reliable source of information about the government's record will be his defense lawyer—or at least a defense lawyer. A lawyer who wants to deter cooperation may mislead her client as to the government's credibility or otherwise cause him to reject anything he may have heard from the government. But any scheme that permits the government to court a defendant's cooperation behind his lawyer's back by giving advice at odds with the lawyer's or, even worse, by disparaging counsel's ability or integrity can only drive a wedge between attorney and client<sup>250</sup> and rob the defendant of his only real guarantee that the government will deal fairly with him.

But what is to prevent the government from violating the Sixth Amendment by trying to "flip" a defendant behind his lawyer's back? Certainly not the constitutional provision itself—at least not since *United States v. Morrison*.<sup>251</sup> In *Morrison*, federal agents met with an indicted defendant without her lawyer's knowledge and, after disparaging her attorney's abilities, touted the benefits of cooperation. The defendant refused to cooperate, kept her lawyer, and instead sought the dismissal of the indictment based on the agent's violation of her right to counsel. After the Third Circuit held dismissal to be the

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<sup>249</sup> Where the government's postindictment contact with a defendant is limited to interrogation, waiver will be upheld "[s]o long as the accused is made aware of the 'dangers and disadvantages of self-representation.'" *Patterson v. Illinois*, 487 U.S. 285, 299–300 (1988) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

<sup>250</sup> Although the Justice Department would distinguish between simply giving a defendant "information" about cooperation without his lawyer knowing about it and "disparag[ing]" opposing counsel, *Communications with Represented Persons*, 59 Fed. Reg. at 10,092–93 (1994) (commentary to §§ 77.8 and 77.9) (to be codified at 28 C.F.R. § 77), any cooperation pitch at odds with defense counsel's advice will inevitably call counsel's ability and/or integrity into question, especially if the point at issue involves the degree to which the government can be trusted. The distinction, thus, may often be illusory.

<sup>251</sup> 449 U.S. 361 (1981).

appropriate remedy,<sup>252</sup> the Supreme Court reversed, holding that to obtain such relief for a Sixth Amendment violation, a defendant must show prejudice even where the violation has been deliberate.<sup>253</sup> Here, the Court concluded, the defendant had “demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings.”<sup>254</sup>

Whatever *Morrison*'s logic, its effect is virtually to remove all constitutional constraints on government efforts to recruit cooperators without the knowledge of their attorneys. The overreaching prosecutor can send an agent to visit an indicted defendant in his jail cell or home and explain how cooperation is his only sensible option; maybe the agent will disparage the integrity or legal abilities of the defendant's lawyer. If the defendant is unpersuaded, and opts to keep his lawyer and fight the government, the only cost to the government will be the suppression of any statements the defendant may have made during this improper interview.<sup>255</sup> Even if the government drives a wedge between attorney and client that forces the defendant to find a new lawyer, no relief will be forthcoming so long as the new lawyer is adequate.<sup>256</sup> If, on the other hand, the defendant is persuaded by the

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<sup>252</sup> *United States v. Morrison*, 602 F.2d 529 (3d Cir. 1979).

<sup>253</sup> *Morrison*, 449 U.S. at 365.

<sup>254</sup> *Id.* at 366.

<sup>255</sup> *United States v. Chavez*, 902 F.2d 259, 265–67 (4th Cir. 1990) (no constitutional violation resulting from improper government cooperation pitch that disparaged defense counsel where no information used by government and defendant afterwards reaffirmed his loyalty to attorney; prejudice said to be “element” of Sixth Amendment claim); *see also* *United States v. Walker*, 839 F.2d 1483, 1486 (11th Cir. 1988).

In *United States v. Martinez*, two prosecutors, while waiting for a defendant's lawyer to arrive to examine evidence with his client, and contrary to the defense lawyer's specific request, spoke with the defendant at length, trying to convince him to cooperate. 785 F.2d 111 (3d Cir. 1986). The prosecutors assured the defendant that his family could be protected, and that he would “not violate any Catholic principles” or be a “Judas” if He testified truthfully. *Id.* at 113. When defendant's lawyer finally arrived, the prosecutors told him of their conversation, and then discussed the possibility of a plea without cooperation. After a deal was reached and defendant pleaded guilty, he later sought to withdraw his plea, claiming, *inter alia*, that the government's conduct constituted “a *per se* justification for withdrawal.” *Id.* at 114. Upholding the district court's denial of his motion, the Third Circuit found that the defendant had “failed to make a credible showing that the government's conduct had any effect on his decision to plead guilty.” *Id.* at 114–115.

<sup>256</sup> *See* *United States v. Lopez*, 765 F. Supp. 1443, 1456 (N.D. Cal. 1991), *rev'd*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993); *State v. Ford*, 793 P.2d 397, 403 (Utah App. 1990) (A defense lawyer's resignation as result of government's improper contacts with client was found not to support relief under Sixth Amendment, where there was no claim by defendant that the “loss of [his original lawyer]

government's overtures, he likely will cooperate, and having tied his fortunes to the government's favor, never challenge the way the government recruited him.<sup>257</sup> The only real danger will come from the cooperation arrangement that goes sour. But even here, the defendant will still need to show prejudice.<sup>258</sup> In constitutional terms, the unscrupulous prosecutor or agent thus risks little by trying to circumvent the lawyer of the defendant whose cooperation he seeks.<sup>259</sup>

The weakness of present constitutional restraints<sup>260</sup> highlights the salutary

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prevented him from effectively asserting his defense at trial or that substitute counsel otherwise inadequately represented him.").

<sup>257</sup> This is not to say that the defendant may not have been prejudiced. Perhaps he would have been acquitted had he gone to trial; perhaps his attorney could have obtained a more favorable deal from the government had she controlled all contacts with the defendant.

<sup>258</sup> Where the government goes so far as to conclude an agreement with the defendant in the absence of his lawyer, some courts have found cognizable prejudice in the fact that the agreement was not as favorable to the defendant as one a lawyer could have negotiated. *See Ford*, 793 P.2d at 404 (ordering remand to determine whether defendant would have received a better bargain from the state for agreeing to act in sting operation before his trial had state not circumvented his lawyer in recruiting his cooperation).

In *People v. Hayes*, 246 Cal. Rptr. 750 (Cal. App. 1988), the police approached the defendant after indictment and, without his lawyer's knowledge, recruited him to cooperate in an investigation of his lawyer. Remanding for a finding as to whether defendant cooperated in good faith, the appellate court noted:

[A] defendant's Sixth Amendment right to counsel is violated where governmental agents initiate contact and negotiate an agreement directly with a defendant who is represented, concerning the case in which he is represented. However, absent a defendant's assent and his attempt to comply with that agreement in good faith, we fail to see what prejudice may have accrued to the defendant. . . . [I]f a defendant goes forward in good faith and attempts to comply with an agreement that is less than what counsel reasonably could have negotiated for him, he has been prejudiced.

*Id.* at 757 (citations omitted); *see also* *People v. Moore*, 129 Cal. Rptr. 279 (Cal. App. 1976) (basing relief on Due Process Clause where, after defendant contacted authorities and agreed to cooperate, they instructed him not to tell his lawyer about his cooperation, and disparaged counsel's professional abilities).

<sup>259</sup> The defendant at whose trial a cooperator testifies lacks standing to claim a violation of the witness's Sixth Amendment rights. *United States v. Partin*, 601 F.2d 1000, 1006 (9th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980).

<sup>260</sup> When confronted with abuses they deem egregious, courts may still act even where the only prejudice to the defendant is that he was forced to switch lawyers. In *Boulas v. Superior Court*, 233 Cal. Rptr. 487 (Cal. App. 1986), the defendant, without telling his retained attorney, contacted the authorities to discuss cooperation. A prosecutor then told

role that the disciplinary rules can play in regulating contacts by government attorneys or their “agents”<sup>261</sup> with potential cooperators after indictment. While the dust has yet to settle on the debate about the extent to which DR 7-104’s “no contact” rule should apply to prosecutors,<sup>262</sup> the provision at least increases the likelihood that a prosecutor will face a cost if he or one of his agents tries to flip an indicted<sup>263</sup> defendant without the knowledge of his lawyer.<sup>264</sup> The cost might under extraordinary circumstances be the dismissal

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him that a deal could be made only if he were to replace his lawyer “with counsel who would be acceptable to the district attorney.” *Id.* at 488. The following day, a police officer reiterated this condition, explaining that “the authorities did not trust . . . [the lawyer] because . . . [he] was a user of drugs.” *Id.* Defendant discharged his lawyer, and the police steered him to a former prosecutor now in private practice. On being informed that defendant was already going to cooperate, however, the new lawyer withdrew, leaving the defendant to cooperate on his own. When the police soon informed him that the deal was off, he went back to his original lawyer and moved to dismiss the indictment, claiming violations of his rights to counsel and a fair trial. Rejecting the state’s claim that defendant could not prove prejudice within the meaning of *Morrison* because he had ended up with competent counsel and no information relating to the pending charges had been obtained from him, a California appeals court required the trial court, which had declined to dismiss the charges, to do so. Noting that “[c]riminal defense lawyers are not fungible,” *id.* at 491, the court distinguished *Morrison* by pointing to the participation of the prosecutor’s office in the violation here, holding “the government conduct . . . to be outrageous in the extreme, and shocking to the conscience,” *id.* at 494, and finding support for its ruling in the California Constitution, as well as the Sixth Amendment. *Id.*

<sup>261</sup> See *Green*, *supra* note 10, at 300–09 (discussing varying extents to which courts have held prosecutors responsible for the conduct of police officers and federal agents).

<sup>262</sup> See *supra* note 10. For me, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1983), is merely a second-best means of protecting defendants against unfair attempts by the government to gain cooperation, in the absence of a more sensitive Sixth Amendment jurisprudence. Whether we ought to be relying on disciplinary rules, as enforced by local disciplinary authorities, to restrict government conduct in this delicate area is beyond the scope of this Article.

<sup>263</sup> Although DR 7-104’s bar extends to contacts with “represented” parties and does not explicitly recognize the distinction between indicted and unindicted defendants so important in Sixth Amendment cases, a number of courts have held that prosecutors are bound by the rule only after indictment. See *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986). *But see United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (refusing to “bind[] the Code’s applicability to the moment of indictment” because “an indictment’s return lies substantially within the control of the prosecutor”), *cert. denied*, 498 U.S. 871 (1990). In any event, this Article focuses only on defendants who have already been formally charged.

<sup>264</sup> No recourse to the disciplinary rules is needed where the government does not discuss the legal ramifications of cooperation with a defendant but merely seeks information

of the indictment, as an exercise of a court's supervisory power.<sup>265</sup> Or it might be the threat of personal disciplinary sanctions. In either case, however, there will be some real deterrent to Sixth Amendment violations.<sup>266</sup>

### C. Defendant-Initiated Contacts

Although DR 7-104 can help ensure that an indicted defendant has a lawyer by his side to put the government's cooperation pitch into perspective, the likelihood that there are a significant number of defense lawyers biased against cooperation strongly counsels against using the rule to flatly prevent the government from speaking with the defendant who initiates cooperation discussions without his lawyer's knowledge.<sup>267</sup> The defendant who

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about his alleged crimes. Suppression of the defendant's statements may be an adequate remedy here if a Sixth Amendment violation is found.

<sup>265</sup> Even as the Ninth Circuit found the dismissal of the indictment to have been inappropriate on the facts in *Lopez*, it suggested that "such an extreme remedy" might have been an appropriate exercise of the district court's supervisory powers had the "government's conduct . . . caused substantial prejudice to the defendant and been flagrant in its disregard for the limits of appropriate professional conduct." *United States v. Lopez*, 989 F.2d 1032, 1041 (9th Cir.), *amended and superseded*, 4 F.3d 455 (9th Cir. 1993). It remains to be seen whether the "prejudice" the Circuit was referring to is something different from the "prejudice" that the Supreme Court required in *Morrison* for Sixth Amendment relief, *see supra* text accompanying notes 253-54. A rule permitting the dismissal of indictments as an exercise of supervisory power in cases where *Morrison* would not authorize such relief might not offend the Supreme Court, which has noted that the power has been used "to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself." *United States v. Williams*, 112 S. Ct. 1735, 1741 (1992). Lately, however, the Court has been hostile to the expansive use of supervisory powers by lower courts. *See Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); *United States v. Hastings*, 461 U.S. 499 (1983); Sara S. Beale, *Reconsidering Supervisory Powers in Criminal Cases*, 84 COLUM. L. REV. 1433, 1455-62 (1984).

<sup>266</sup> Internal regulations—like those proposed by the Bush and Clinton Justice Departments, *see supra* note 4—can provide an additional deterrent for prosecutors and other law enforcement personnel.

<sup>267</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1983), if applied to prosecutors, would bar them from communicating with a lawyer's client "on the subject of the representation . . . unless he has the prior consent of the lawyer representing such other party." *See United States v. Partin*, 601 F.2d 1000, 1005 (9th Cir. 1979) (prosecutor violated DR 7-104 when he failed to notify defendant's attorney that defendant had called to indicate desire to cooperate even though defendant "requested that his cooperation be kept a secret because he feared for his safety if his cooperation became known"), *cert. denied*, 446 U.S. 964 (1980). *But see Cramton & Udell, supra* note 204, at 343 (observing that



circumvents his attorney does not necessarily doubt her ability or integrity or fear that she will alert potential targets of his interest in cooperation. Lopez apparently feared only the loss of a good trial lawyer's services.<sup>268</sup> However, while courts and prosecutors may not be the appropriate parties to identify those defendants deprived of fair advice about cooperation by their attorneys,<sup>269</sup> the likelihood that such a class does exist requires that we heed the call of that defendant who finds his lawyer a hinderance to cooperation negotiations.

What is needed is a scheme that ensures representation for a defendant in his dealings with the government, but allows him, at least temporarily, to avoid using an attorney who he believes will impede those discussions.<sup>270</sup> The defendant with the means to do so can retain a separate lawyer to explore cooperation and keep his other lawyer in the dark. Defendants without these resources should not be cast adrift for lack of them. When contacted by a defendant wishing to explore cooperation behind his lawyer's back, the government thus should be permitted to arrange for a judicial officer to appoint a new lawyer for the limited purpose of advising the defendant about cooperation. The Justice Department's proposed regulations—promulgated to “reconcile the purposes underlying [the ‘no contact’ disciplinary rules] with effective law enforcement”<sup>271</sup>—are thus salutary in setting out a procedure for

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interpretations to permit defendant waiver “reflect sound attempts to reconcile the anti-contact rule with substantive law”); Green, *supra* note 10, at 314 (arguing that courts applying DR 7-104 should not limit themselves to “the traditional tools of statutory interpretation”); John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683 (1979) (urging restructuring of DR 7-104 to give client more control over whether opposing counsel can communicate with him directly).

<sup>268</sup> *United States v. Lopez*, 765 F. Supp. 1443 (N.D. Cal. 1991), *rev'd*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993).

<sup>269</sup> See *supra* text accompanying notes 236–44.

<sup>270</sup> Given the Supreme Court's hostility to claims that a defendant's constitutional right to self-representation, as recognized in *Faretta v. California*, 422 U.S. 806 (1975), leaves him free to assume responsibility for certain aspects of his defense but keep his lawyer for other aspects, see *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (no constitutional right to “hybrid” representation”); LAFAYE & ISRAEL, *supra* note 80, at 556, there is little force to the argument, unsuccessfully urged by the government in *Lopez*, 989 F.2d at 1040–41, that *Faretta* gives a defendant a “right” to talk to the government about cooperation behind his lawyer's back.

<sup>271</sup> *Communications with Represented Persons*, 59 Fed. Reg. at 10,088 (Mar. 3, 1994) (to be codified at 28 C.F.R. § 77). DR 7-104(A)(1) allows an attorney to directly contact an opposing party if he has been “authorized by law to do so.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1983). The Justice Department's regulations are intended to provide that authorization. *Communications with Represented Persons*, *supra* at 10,087–

the appointment of "substitute counsel" in such situations.<sup>272</sup>

More troubling is that part of the new Justice Department regulation which authorizes prosecutors, in the alternative, to have "substantive" discussions directly with a defendant who "waives" his right to representation. Upon such a waiver, the regulations would allow prosecutors actually to negotiate a cooperation agreement directly with the defendant.<sup>273</sup> The defendant who fears that his lawyer will not serve him well in cooperation discussions with the government may thus commit himself to an agreement without ever having heard fair advice about the government's track record with cooperators. This unfortunate result may be justified by actual or perceived security concerns: Perhaps the defendant who fears some harm if his lawyer learns of his overtures to the government ought not to be forced to place his trust in some outsider. Respect for the defendant's autonomy may itself argue against the imposition of unwanted counsel. But the cost of allowing defendants the freedom to forgo the only real guarantee of the government's good faith should not be minimized.

At bottom, our chief concern must be not the decisions that a defendant makes but his access to fair advice about his options. The defendant who remains undeterred by his attorney's anticooperation stance, and all the other disincentives to snitching, and endeavors on his own to explore the advantages of cooperation has at least identified himself as one in need of additional advice and judicial protection. We can try to design procedures to protect his interests. But he is the extraordinary defendant. Other defendants, trapped within the constraints of the adversary system, are unlikely to receive any such help and may never even know that they need it.

## VI. CONCLUSION

Should we pity the snitch? Do the misdeeds of those he "betrays" justify the betrayal? Can one condemn the betrayal but applaud the prosecution it facilitates? The answers to these questions, to me at least, are far from clear, and quite beyond the scope of this Article. One need not approve of a sentencing scheme awarding extraordinary leniency to snitches to believe that, where such a scheme prevails, a defendant with information to trade ought to be permitted to make his own decision about cooperation and should, for this purpose, get advice from a lawyer loyal to his interests. Indeed, a world in which defendants' decisions about cooperation are a function of their lawyers'

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<sup>272</sup> Communications with Represented Persons, 59 Fed. Reg. at 10,100 (1994) (to be codified at 28 C.F.R. § 77.6(c)(ii)).

<sup>273</sup> *Id.* at 10,100-01 (to be codified at 28 C.F.R. §§ 77.6(c)(2)(i), 77.8).

predilections is one where the snitch's windfall, already a challenge to a sentencing scheme based on desert, becomes even more arbitrary.

We may be living in such a world. The principal source of agency costs in cooperation negotiations doubtless is the failure (or inability) of a great many attorneys—particularly those representing indigent defendants—to stake out and pursue adversarial positions against the government. The literature about this problem is forceful and clear, although little heeded by those with the power to ameliorate the situation.<sup>274</sup> But a pathology of the defense bar should also recognize that a significant number of lawyers, although quite prepared to negotiate ordinary plea bargains, have strong incentives to prevent clients from cutting deals that include cooperation. A lawyer with a financial or other relationship with the potential target of a client's cooperation is certainly likely to deter such cooperation. This is the house counsel problem. What I have suggested in this Article, however, is that even a lawyer without such specific allegiances may find cooperation inimicable to the economic or ideological interests that drive her practice, and may advise her clients accordingly.

To what degree are lawyers depriving defendants of the chance to make their own decisions about cooperation? The evidence that is not anecdotal is speculative. But the problem may not be susceptible to empirical inquiry because both lawyers and clients are bound to be less than candid about these matters. Whether, on the present record, we consider countermeasures<sup>275</sup> must depend on where the burden of persuasion lies. And any proposal for reform ought to face an uphill battle, because the same ideological and economic motivations that can lead lawyers to deter clients from cooperating also power those lawyers' adversarial efforts in a system where zeal is all too rare.

So the answer may be to do nothing, save in those exceptional cases where there is clear evidence of the conflicts of interests discussed here. But one is left with a nagging suspicion that many defendants, at the time when they are most in need of legal advice, are prisoners of the adversary system that, for so many other purposes, is their best protection.

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<sup>274</sup> See generally Klein, *supra* note 233.

<sup>275</sup> One such countermeasure might bar the payment of a client's fees by an interested third party. See Lowenthal, *supra* note 165, at 988–89 (proposing disciplinary rule “explicitly” forbidding “representation of a criminal defendant when a person or entity who may incur criminal liability as a result of the defendant's cooperation with the government pays the lawyer's fee”). But this rule—to the extent that third parties did not circumvent it, for example, by giving money directly to clients and then referring them to defense attorneys—would deny many defendants access to the higher end of the defense bar, a deprivation that might equally disserve defendant autonomy.

