COMMENT

"NO ONE ELSE WAS IN THE ROOM WHERE IT HAPPENED": ENSURING THE CAREFUL USE OF ACCOMPLICE-WITNESS TESTIMONY WITHOUT RESORTING TO CORROBORATION REQUIREMENTS

ETHAN COHEN†

† Research Editor, University of Pennsylvania Law Review, Volume 172; J.D. Candidate, University of Pennsylvania Carey Law School, Class of 2024; B.A., Middlebury College, 2019. I am indebted to Professor Kimberly Ferzan for her guidance and support. Thank you to Professors Daniel Richman and Jessica Roth for their insights on this project. Last, but certainly not least, thank you to the online team at the University of Pennsylvania Law Review for all their hard work and feedback during the publishing process.

I. SETTING THE STAGE

In Lin Manuel-Miranda's *Hamilton*, Aaron Burr sings the now iconic line: "No one really knows how the game is played / The art of the trade / How the sausage gets made / We just assume that it happens / But no one else is in the room where it happens."[1] Manuel-Miranda's Burr is referring to a backroom political deal between Alexander Hamilton, Thomas Jefferson, and James Madison known as the Compromise of 1790.[2] Due to the secretive nature of this conversation, the details of how the Compromise came to be are unknown.[3]

"The room where it happens" might make for a good Broadway lyric, but secretive criminal conduct[4] poses a difficult problem for prosecutors seeking to obtain convictions of bad actors.[5] One solution prosecutors utilize is trading leniency, ranging from a reduced sentence to complete immunity,[6] for the testimony of someone who was in the room where it happened.[7] Often this person will be an accomplice-witness:[8] a person who was involved in the commission of the crime for which the defendant is charged in such a manner

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1 LIN MANUEL-MIRANDA, THE ROOM WHERE IT HAPPENS (Atlantic Records 2015).

2 Claire Lampen, *The Secret Meaning Behind the Lyrics to "The Room Where It Happens" from 'Hamilton'*, YAHOO! NEWS (Feb. 17, 2016), https://news.yahoo.com/secret-meaning-behind-lyrics-room-144900200.html?guccounter=1&guce_referrer=aHR0cHM6Ly9lbi53aWtpcGVkaWEub3JnLw&guce_referrer_sig=AQAAAMaHqeYH0qwfZcEDdGyuYf7K_emAusk8ZwWbduLoUVvuL28SqCO_pISfHnSYjsSbxPY-BQX5szwQCG2aHAxDHznC8qBBFR_4x3CNLPqEqxkCBBT8ndDaqLO_60jET4ra6d9MpMJveNevbzp1cOsmfjfJMdpPjgq07Mbed2rbRO16 [perma.cc/GR39-UG37].

3 *See* Jacob E. Cook, *The Compromise of 1790*, 27 WM. & MARY Q. 523, 523-24 (1970) (explaining that the traditional account of the Compromise is rendered suspect by available evidence).

4 To be clear, in no way is there evidence that the Compromise of 1790 was of dubious legality, nor is such a conclusion implied by this Comment.

5 *See* Daniel Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT'G REP. 292, 292 (1996) (explaining that crimes involving secretive conduct are difficult to prosecute).

6 Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 785 (1990).

7 *See* Richman, *supra* note 5, at 292 ("Without the assistance of defendants willing to trade testimony for the expectation of sentencing discounts, many cases worth prosecuting could not be made.").

8 *See* Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 817 (2002) ("[A]t the core of almost every complex criminal case sits an accomplice (or cooperating) witness.").

that they could be charged for the same crime.[9] A person is an accomplice as a matter of law, a determination made by the judge, if they were convicted of or charged with that same crime or if they clearly could have been so charged.[10] Where it is not as clear that they could have been so charged, the jury is empowered to conclude that a witness is an accomplice as a matter of fact.[11]

Without accomplice-witnesses "many cases worth prosecuting could not be made."[12] Cases "involving secretive conduct and no available victim," such as murder, corruption, organized crime, and narcotics prosecutions, particularly benefit from accomplice-witness testimony.[13] White collar crime and public corruption can also be difficult to prosecute without an accomplice-witness.[14] Prosecutors are especially willing to turn to accomplice-witnesses in order to ensure the most culpable actors,[15] the "mastermind" or the "kingpin" of a criminal operation, are convicted.[16]

Although accomplice-witnesses are valuable to the pursuit of justice, it is widely accepted that their testimony is inherently problematic.[17] If accomplice-witness testimony is accepted by the jury without consideration of the incentives that might motivate the accomplice to lie, then the likelihood of wrongful convictions increases because the jury is ignoring

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9 Saverda, *supra* note 6, at 791.

10 *See, e.g.*, Torres v. State, 560 S.W.3d 366, 371 (Tex. App. 2018) (internal quotation marks omitted) ("A witness is an accomplice as a matter of law when the witness has been charged with the same offense as the defendant or a lesser-included offense, or when the evidence clearly shows that the witness could have been so charged.").

11 *See* Casas v. State, No. 13-98-303-CR, 1999 Tex. App. LEXIS 9071, at *8 (Tex. Ct. App. Dec. 2, 1999) ("If . . . it is not clear whether the witness is an accomplice, the jury must initially determine whether the witness is an accomplice as a matter of fact.").

12 Richman, *supra* note 5, at 292.

13 *See id.* at 293 (explaining that the brains behind criminal operations design them in such a way that there is no direct evidence of their involvement).

14 *See* H. Lloyd King, Jr., *Why Prosecutors Are Permitted to Offer Witness Inducements: A Matter of Constitutional Authority*, 25 STETSON L. REV. 155, 155 (1999) ("[F]ew accomplices will choose to cooperate with the prosecutor unless they have the expectation of receiving some benefit for their efforts . . . .").

15 *See* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 14 (1992) (describing how even in serious felony cases prosecutors might offer a deal in order to obtain cooperation so as to increase the possibility that the most culpable actor is successfully prosecuted).

16 Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1382 (1996). To be fair, a few states have passed statutes which prohibit a conviction based solely on the testimony of a single jailhouse informant. Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 744 (2016).

17 *See, e.g.*, R. Michael Cassidy, *"Soft Words of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1140 (2004) (explaining that accomplice-witnesses have both the motive to fabricate and the ability to do so convincingly).

information which might undermine the accomplice's credibility.[18] With that concern in mind, the Supreme Court in *Caminetti v. United States* stated: "[I]t [is] the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence."[19] Scholars concur with the Court.[20] And the ABA likewise cautions against the use of accomplice-witness testimony.[21]

Even more concerning is innocent defendants pleading guilty due to the fear of a lying accomplice testifying against them. Almost 90% of cases end in a plea bargain.[22] But not all are guilty of the crime to which they plead. Judge Stephanos Bibas explains that innocent defendants sometimes plead guilty as a result of "overwhelming pressures and incentives."[23] A defendant's fear that they may look guilty even though they are not, coupled with their fear of a harsher punishment at trial relative to what they would receive if they plea bargain is the root of this phenomenon.[24] Accomplice-witness testimony exacerbates this problem by increasing the likelihood that an innocent defendant is wrongfully convicted at trial, thus increasing the incentives for them to plead guilty despite their innocence.

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18 *See* Michael E. Rusin, Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887, 887 (1981) ("If promises of favorable treatment are not disclosed, the trier of fact is deprived of evidence crucial to a fair assessment of the witness' testimony.").

19 242 U.S. 470, 495 (1917). However, corroboration was not made mandatory in *Caminetti*. *See id.* ("[T]here is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them.").

20 *See* Hughes, *supra* note 15, at 10 ("With the cooperation agreement, the prosecutor buys a witness's testimony against another defendant. This raises sensitive questions about the credibility of the testimony . . . ."); Saverda, *supra* note 6, at 787 (calling accomplice-witness testimony "presumptively unreliable"); Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreement,* 72 CORNELL L. REV. 800, 802 (1987) ("Accomplice plea agreements tend to produce unreliable testimony because they create an incentive for the accomplice to shift blame to the defendant or other co-conspirators.").

21 *See Achieving Justice: Freeing the Innocent, Convicting the Guilty—Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process*, 37 SW. U. L. REV. 763, 850-51 (2008) [hereinafter *Achieving Justice*] (describing the dangers of accomplice-witness testimony).

22 RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, VERA INST. OF JUST., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 2 (2020), https://www.vera.org/publications/in-the-shadows-plea-bargaining [perma.cc/G2V5-VUUY].

23 Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1060 (2016).

24 *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014) (describing the concerns and pressures faced by criminal defendants).

A third problem with accomplice-witness testimony is that it increases incidences of perjury.[25] While lying witnesses are problematic because they lead to wrongful convictions in individual cases, their propensity for perjury also has a detrimental impact in the aggregate as repeated instances of perjury have a "corrosive" effect on the legal system.[26]

For many commentators[27] and states[28] the solution to the threat of the lying accomplice is to depart from the common law approach of merely providing a jury instruction[29] and instead require corroboration. In most states with an accomplice-corroboration requirement, before the accomplice-witness testimony may be considered by the jury, the judge decides as a "threshold" matter whether there is corroboration.[30] An alternative approach is that the judge does not make a threshold determination and the existence

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25 *See* Saverda, *supra* note 6, at 785 (footnote omitted) ("[E]xisting sanctions and strictures have proved inadequate in detecting and curtailing the numerous instances of perjury that result when the government, via the prosecutor, entices a witness to testify in return for some type of consideration.").

26 Anne B. Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331, 333 (2011); *see also* Renée M. Hutchins, *You Can't Handle the Truth! Trial Juries and Credibility*, 44 SETON HALL L. REV. 505, 539-40 (2014) ("Some studies have found that a lack of confidence in the criminal justice system results in communities that are less safe . . . .").

27 *See, e.g.*, Saverda, *supra* note 6, at 787 (footnote omitted) ("[T]he federal system should follow the example of a number of state jurisdictions and establish corroboration requirements for accomplice testimony in criminal trials in order to reduce an accomplice's opportunity to fabricate testimony . . . ."); *Achieving Justice*, *supra* note 21, at 782-83 (proposing that just as some jurisdictions require corroboration for accomplice testimony, they should also require corroboration for the testimony of jailhouse informants); Melanie B. Fessinger et al., *Informants v. Innocents: Informant Testimony and Its Contribution to Wrongful Convictions*, 48 CAP. U. L. REV. 149, 161 (2020) (noting that a "potential safeguard" to the dangers of informant testimony is a corroboration requirement); Barry Scheck, *Closing Remarks*, 23 CARDOZO L. REV. 899, 906 (2002) ("A number of Symposium participants . . . expressed support for the [accomplice-corroboration] rule.").

28 *See, e.g.*, ALA. CODE § 12-21-222 (1975) ("A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense . . . ."); ALASKA STAT. § 12.45.020; ARK. CODE ANN. § 16-89-111(e)(1) (West 2013) (applying to felonies only); CAL. PENAL CODE § 1111 (West 1915); GA. CODE ANN. § 24-14-8 (West 2013) (applying to treason, perjury, and "felony cases where the only witness is an accomplice"); IDAHO CODE § 19-2117; IOWA CODE ANN. 2.21(3) (West 2022) (applying to all crimes except those where the victim is also an accomplice); MINN. STAT. § 634.04 (2023); MONT. CODE ANN. § 46-16-213 (West 1991); NEV. REV. STAT. ANN. § 175.291 (West 1967); N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1970); N.D. CENT. CODE § 29-21-14 (1943); OKLA. STAT. ANN. tit. 22, § 742 (West 1910); OR. REV. STAT. § 136.440; S.D. CODIFIED LAWS § 23A-22-8 (1978); TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 1966); State v. Collier, 411 S.W.3d 886, 894 (Tenn. 2013) ("If solely based upon the uncorroborated testimony of one or more accomplices, the longstanding rule is that the evidence is insufficient to sustain a conviction.").

29 7 WIGMORE, EVIDENCE § 2056 (Chadbourn rev. ed. 1978) (footnotes omitted) ("As a matter of common law . . . the doctrine was widely understood (except by a few courts) as amounting to no rule of evidence, but merely to a *counsel of caution* given by the judge to the jury.").

30 Saverda, *supra* note 6, at 791.

of corroboration is left solely for the jury to determine.[31] Regardless of whether the judge makes a threshold determination, the jury may consider the accomplice-witness's testimony only if it determines that the accomplice's testimony is corroborated.[32] This requires a showing of evidence besides that of the accomplice-witness "that, viewed independently from the testimony of the accomplice, would tend to connect the defendant to the commission of the crime charged."[33] Corroborating evidence can include, but is by no means limited to, the testimony of another witness,[34] incriminating statements made by the defendant,[35] physical evidence,[36] and audio-visual recordings.[37] Such evidence is not always found, thus reducing the use of accomplice-witnesses.[38] Moreover, the majority of states with an accomplice-corroboration requirement do not permit accomplices to corroborate each other,[39] further limiting the use of accomplice-witness testimony.

If it functions as intended, a corroboration requirement prevents wrongful convictions by ensuring the existence of additional evidence which supports the veracity of an accomplice's testimony.[40] Similarly, such requirements indirectly protect innocent defendants who might otherwise believe that pleading guilty is their best option. If a defendant knows that accomplice-witness testimony will not factor into their trial unless it is corroborated, then they may be more willing to risk trial because they will be less fearful of lies by an accomplice leading to their wrongful conviction. Due to the reduced fears of wrongful convictions, there will be fewer instances of innocent defendants pleading guilty. Finally, by requiring corroboration,

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31 *See* State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994) ("Whether a witness' testimony has been sufficiently corroborated is a matter entrusted to the jury as the trier of fact.").

32 *See* Torres v. State, 560 S.W.3d 366, 371 (Tex. App. 2018) ("Only if the jury makes an affirmative finding that the witness is an accomplice, does it apply the corroboration requirement portion of the instruction.").

33 Derek J. T. Adler, *Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 FORDHAM L. REV. 1191, 1204 (1987).

34 Casas v. State, No. 13-98-303-CR, 1999 Tex. App. LEXIS 9071, at *11 (Dec. 2, 1999).

35 *See, e.g.*, State v. Davenport, 947 N.W.2d 251, 264 (Minn. 2020) (discussing how the defendant had told the accomplice-witness that he had attempted to rob someone, and it had gone wrong and asked him not to ask any questions about it).

36 *Id.*

37 *Id.*

38 *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 932 (1999) (interviewing former prosecutors who explain that there are categories of cases in which corroboration is often unobtainable).

39 *See* John C. Jeffries Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1105 n.45 (1995) (noting that in at least eleven states the testimony of one accomplice cannot corroborate the testimony of another accomplice).

40 *See* Saverda, *supra* note 6, at 787 (explaining that accomplice-corroboration requirements limit opportunities for accomplice-witnesses "to fabricate testimony").

perjury in the aggregate is limited, and the general legitimacy of the criminal justice system is not undermined.

Despite the potential benefits and the general push for the expansion of accomplice-corroboration requirements, in 2019 the Maryland Supreme Court "abrogate[d]" the state's accomplice-corroboration requirement in *State v. Jones*,[41] becoming the first state to do so in almost forty years.[42] This decision decreased the number of states requiring accomplice-corroboration to seventeen.[43] Is *Jones* a sign that proponents of accomplice-corroboration requirements have lost? Or is it only a momentary setback in their quest? Whether accomplice-corroboration requirements *will* become more or less common might be revealed by whether they *should* become more or less common.

II. ACCOMPLICE-CORROBORATION REQUIREMENTS: A FLAWED SOLUTION

Accomplice-corroboration requirements should be removed because they are (1) at odds with traditional conceptions of the jury's role; (2) at odds with modern support for leniency and disapproval of stigmatization; (3) distinct from other evidentiary rules in both the scale and way they encroach on the aforementioned traditional and modern conceptions; and (4) ineffective. These flaws suggest that other states should follow Maryland's lead. But given the serious shortcomings of accomplice-witness testimony, other solutions are necessary. Because many of the concerns with accomplice-witness testimony are universal to the adversarial system, rather than implement reforms that focus acutely on accomplice-witnesses, we must instead strengthen the competency of our adversarial system in general.

A. *Accomplice-Corroboration Requirements Undermine the Role of the Jury*

In American jurisprudence a key role of the jury is to make credibility determinations. For instance, in 1829 a Pennsylvania federal court stated that "when a witness is admitted to be competent, his credibility rests entirely with the jury."[44] More recently, courts have called the jury the "sole arbiter of

41 *See* 216 A.3d 907, 912 (Md. 2019) ("[W]e adopt today a new rule that will no longer require that accomplice testimony be corroborated by independent evidence to sustain a conviction.").

42 *See* Adler, *supra* note 33, at 1205 n.81 (noting that between 1973 and 1980 Arizona, Kentucky, New Hampshire, Utah and Wyoming repealed their accomplice-corroboration requirements).

43 *See supra* note 28 and accompanying text.

44 United States v. Kessler, 26 F. Cas. 766, 769 (C.C.D. Pa. 1829) (No. 15528).

credibility."[45] Scholars similarly highlight that credibility determinations are the jury's domain.[46] Under this traditional view, a witness says to the jury "believe me" and it is up to the jury to decide whether they should be believed.

Although corroboration is a useful tool which helps juries judge credibility,[47] a *requirement* of corroboration can usurp this central component of the jury's role.[48] In states which require accomplice-witness corroboration, if the judge determines that the corroboration is not met, then the jury will be instructed not to consider the accomplice-witness's testimony.[49] Even if the jury has every reason to believe the accomplice, the jury has no opportunity to make a credibility determination. In theory, where the question of corroboration is left to the jury, it can reclaim its role as the arbiter of credibility by either intentionally or subconsciously finding there to be corroboration despite the reality that absent a desire to get around the corroboration requirement, it would have concluded that there was not corroboration.[50] While it is a positive that the jury retains its role through that process, having the jury operate through a backdoor corrupts our legal system.[51]

Proponents of corroboration requirements might argue that these requirements and the usurpation of the jury's role are necessary because jurors carelessly believe accomplices. However, accomplice-witness testimony is not clearly more suspect than many other forms of testimony. Judge Stephen Trott explains that jailhouse witness testimony suffers from

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45 *See, e.g.*, State v. Westley, No. 2019AP342-CR, 2020 Wisc. App. LEXIS 378, at *13 (Aug. 18, 2020); Durham v. State, 877 S.E.2d 865, 868 (Ga. Ct. App. 2022); State v. Lindsay, 66 A.3d 944, 951 (Conn. App. Ct. 2013).

46 *See* WIGMORE, *supra* note 29, at § 2056 (describing the jury's role as determining the weight and credibility of evidence); Hutchins, *supra* note 26, at 546 (describing the problems with the jury serving as the "assessor of credibility" but concluding that it should retain that role).

47 *See* Hutchins, *supra* note 26, at 518 (listing various types of evidence juries can use to determine credibility).

48 *See, e.g.*, WIGMORE, *supra* note 29, at § 2056 (explaining how accomplice-witness corroboration statutes undermine the jury's role of determining the weight and credibility of evidence).

49 *See supra* notes 30–33 and accompanying text.

50 *See* Heidi H. Liu, *Provisional Assumptions*, 95 S. CAL. L. REV. 543, 552-53 (2022) ("[A] bevy of studies, across contexts and over the decades, show that jury admonitions and instructions may function contrary to their goals (and even backfire at times) because jurors are likely to incorporate inadmissible information in their decisions—and possibly even more so when they are issued an instruction not to do so.").

51 *See* Orin Kerr, *The Problem with Jury Nullification*, WASH. POST (Aug. 10, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/10/the-problem-with-jury-nullification/ [perma.cc/5B72-L98Y] (explaining that when the jury ignores instructions it makes the system more "arbitrary" and "less accountable").

worse defects.[52] Another commentator argues that paid informants suffer from similar credibility problems.[53] Eyewitness testimony has also been shown to have serious credibility issues,[54] with one scholar even calling for the institution of a corroboration requirement.[55] There are many other types of witnesses which may suffer from defects similar to those that plague accomplice-witnesses.[56] Despite shared flaws, these other suspect categories of witnesses are almost universally not met with corroboration requirements.[57] Either juries are capable of assessing the testimony of suspect categories of witnesses or they are not. The existence of accomplice-corroboration requirements is irreconcilable with the absence of parallel requirements for other suspect categories of witnesses.

We are faced with two paths. We could retain (and expand to all jurisdictions) accomplice-corroboration requirements, as well as impose similar requirements for jailhouse witnesses, paid informants, eyewitnesses, and all other particularly and similarly suspect witnesses. Adopting this position would result in a consistent approach towards all types of suspect testimony. It would also comport with the argument that the jury struggles to effectively judge certain types of witnesses and should not be permitted to independently make a credibility determination about the evidence offered.[58] However, it is unclear where corroboration requirements would end. Would we prohibit all former perjurers from testifying unless there is corroboration? Would we impose corroboration requirements if we found that juries too easily believe police officers? In short, this solution could lead to corroboration requirements permeating nearly every trial. This would result in further infringement on the jury's traditional role, as well as a decrease in the punishment of culpable individuals, as corroboration is not always

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52 *See* Trott, *supra* note 16, at 1394 ("The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him.").

53 *See* Roth, *supra* note 16, at 747 (grouping paid informants with other forms of unreliable informant testimony, including accomplice-witnesses).

54 *See* Sara Conway, Note, *A New Era of Eyewitness Identification Law: Putting Eyewitness Testimony on Trial*, 50 NEW ENG. L. REV. 81, 102-03 (2015) ("[J]uries are susceptible to accepting eyewitness evidence at face value.").

55 Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1545 (2008).

56 *See* Eliahu Harnon, *The Need for Corroboration of Accomplice Testimony and the Need for "Something Additional" to the Testimony of Someone "Involved"*, 6 ISR. L. REV. 81, 97 (1971) (arguing that those convicted of perjury in other cases (criminals), those subject to police pressure (like owners of gambling establishments), and others might be just as or more suspect than accomplice-witnesses).

57 The one exception is that a few states have recently passed statutes which prohibit a conviction based solely on the testimony of a *single* jailhouse informant. Roth, *supra* note 16, at 744.

58 *See supra* notes 17–21 and accompanying text.

obtainable.[59] Such a significant departure from the traditions of the American justice system seems unlikely.[60]

Alternatively, we could trust juries to make credibility assessments about accomplice-witnesses just as we trust them to make assessments about jailhouse witnesses, paid informants, eyewitnesses, and all other suspect and non-suspect witnesses. This would unify the law and the jury would retain its role as the arbiter of credibility. Given the empirical evidence which suggests the jury struggles to accurately assess accomplice-witness testimony,[61] other protections would likely be necessary. However, it is more logical to attack issues with the jury's ability to assess credibility in general, rather than impose a special rule for a type of witness that does not actually have unique shortcomings.[62]

In sum, accomplice-corroboration requirements, instituted to solve a problematic feature of the criminal justice system, create one of two new problems. The first possible problem is that the jury does not operate as the arbiter of credibility in circumstances where corroboration is not found, a departure from American legal tradition. The other possible problem is that the jury ignores the court's instructions, which perverts our legal system, but in doing so remains the arbiter of credibility. To achieve consistency, in either of these circumstances, corroboration requirements would need to be instituted for other similarly suspect forms of testimony. However, this would result in the proliferation of the aforementioned problems. Corroboration requirements may exist to solve a problem, but they create problems of their own. Thus, they should be abrogated.

B. *Accomplice-Corroboration Requirements Stigmatize Accomplices and Are Incompatible with Leniency*

It is important to test all witnesses rigorously.[63] But the traditional approach of doing so is to leave the question of credibility to the jury after

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59 *See supra* note 38 and accompanying text.

60 *See* Hutchins, *supra* note 26, at 508-09 (refusing to argue for a "radical overhaul" of the existing criminal jury system or for abandoning the jury's role as a primary fact finder, even while acknowledging that jurors are bad at evaluating when a witness is lying).

61 *See* Jeffrey S. Neuschatz, Deah S. Lawson, Jessica K. Swanner, Christian A. Meissner & Joseph S. Neuschatz, *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 L. & HUM. BEHAV. REV. 137, 138-39 (2008) (researching the jury's propensity to over-buy the testimony of accomplice-witnesses even where they are knowledgeable about their incentives to lie).

62 *See infra* Section III.

63 *See* Kimberly K. Ferzan, *#WeToo*, 49 FL. S. L. REV. 693, 728 (2022) ("[A] court of law requires that we examine testimony rigorously . . . .").

the witness has been treated to the crucible of cross-examination.[64] Although accomplice-corroboration requirements leave that process intact, they also create a prerequisite. The problem with this prerequisite is that although one accomplice-witness may lie, another may not.[65] There are many reasons an accomplice-witness might truthfully confess and cooperate, including "true remorse," a desire to not delay the inevitable, or "even . . . a selfless desire to free others from false suspicion."[66] There also are conditions that while not corroborative indicate that there should be increased confidence in an accomplice's veracity.[67] Yet, accomplice-corroboration requirements completely ignore these individual circumstances. Approaching all accomplice-witnesses in the same manner—unworthy of belief—despite individual reasons to conclude they are credible is problematic.

First, treating all accomplice-witnesses as unworthy of belief unless there is corroborating evidence is stigmatizing.[68] Sociologist Erving Goffman explained that stigma becomes problematic where we impute a characteristic upon a person due to their status when as an individual they do not actually have that characteristic.[69] The problem is that by so doing we reduce that individual "from a whole and usual person to a tainted, discounted one."[70] It is also theorized that stigma is incompatible with "individual dignity."[71] Likely motivated by these concerns, there are anti-stigmatization movements throughout the American criminal justice system.[72]

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64 *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) (explaining that the Confrontation Clause requires cross-examination because it is considered the best way to determine reliability).

65 *See* WIGMORE, *supra* note 29, at § 2057 ("[I]t is impossible and anachronistic to determine in advance that, with or without promise, a given man's story must be distrusted . . . .").

66 John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1828 (2001).

67 *See* Cohen, *supra* note 8, at 821-24 (describing the tools prosecutors use to ensure credibility of an accomplice-witness).

68 *Stigma*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/stigma#:~:text=%3A%20a%20set%20of%20negative%20and,of%20people%20have%20about%20something [perma.cc/T8NZ-535G] (last visited Apr. 1, 2024) (defining stigma as "a set of negative and unfair beliefs that a society or group of people have about something").

69 ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2 (2022 ed. 1963).

70 *Id.*

71 DEREK S. JEFFREYS, AMERICA'S JAILS: THE SEARCH FOR HUMAN DIGNITY IN THE AGE OF MASS INCARCERATION 102 (2018).

72 *See* Regina Austin, *"The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 192 (2004) ("[T]he very activity felon disenfranchisement seeks to stifle, may be the only effective mechanism for implementing the law's moral vision of rehabilitation and redemption and putting constraints on the stigma's reach."); *Labels Like 'Felon' Are an Unfair Life Sentence*, N.Y. TIMES (May 7, 2016), https://www.nytimes.com/2016/05/08/opinion/sunday/labels-like-felon-are-an-unfair-life-sentence.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-left-region&region=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region

But despite the negative views of stigmatization, by requiring corroboration, we are saying to individual witnesses: even if you provide every reason for us to believe you, because of our concerns with accomplice-witnesses in general, unless something else supports your statement then your word does not matter. Goffman writes that one of the three forms of stigmatization is "blemishes of individual character," including prescribing the characteristic of "dishonesty."[73] Indicating to a witness that they are beyond belief even if they give us every reason to think otherwise certainly fits that characterization of stigma and is therefore cause for concern.

Admittedly, stigmatization may be justified where it serves a purpose.[74] Accomplice-corroboration requirements do intend to serve the purpose of limiting wrongful convictions. Perhaps it is appropriate to stigmatize individuals who contribute to wrongful convictions through lies. Yet, accomplice-corroboration requirements imply that *all* accomplice-witnesses are liars. It casts too wide of a net, harming those who are undeserving of stigmatization. Moreover, the silencing of an individual who is attempting to cooperate with the government to ensure the most culpable individuals are punished impedes another legitimate and important purpose. Therefore, accomplice-corroboration requirements cannot be justified as providing an overall benefit to society.

In sum, anti-stigmatization appears to be a guiding light throughout the criminal justice system and the stigmatization of accomplice-witnesses does not serve an overall beneficial purpose. The logical conclusion of these findings is that accomplice-corroboration requirements resulting in stigmatization is a legitimate reason to avoid them, especially if wrongful convictions can be limited through less stigmatizing means.

The second problem with treating all accomplice-witnesses as beyond belief is that doing so is inconsistent with increasing calls for the criminal justice system to embrace leniency.[75] Whether there has been sufficient cooperation as to warrant leniency is most often up to the discretion of the

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[https://perma.cc/6MRK-5T5V] ("Lately, the administration has also recognized that the vocabulary of incarceration—the permanently stigmatizing way we speak about people who have served time—presents a significant barrier to reintegration."); OPEN SOC'Y FOUNDS., 10 REASONS TO DECRIMINALIZE SEX WORK (2015) ("Decriminalization means sex workers are more likely to live without stigma . . . .").

73 GOFFMAN, *supra* note 69, at 4.

74 *Cf.* Austin, *supra* note 72, at 174 (arguing that ex-offenders should be granted the right to vote because that form of stigmatization serves no purpose).

75 *See, e.g.*, Göran Duus-Otterström, *Why Retributivists Should Endorse Leniency in Punishment*, 32 L. & PHIL. 459, 461-62 (2013) (arguing that it is natural to think that penal leniency is desirable and even retributivists should endorse leniency); Alfred Blumstein, *Dealing with Mass Incarceration*, 104 MINN. L. REV. 2651, 2662-63 (2020) (describing approaches taken by states to reduce prison populations).

prosecutor.[76] While prosecutors could provide the benefit of leniency even where an accomplice's cooperation is not useful, it is unlikely that they are willing to do so because that approach would conflict with the view that in order to obtain leniency a cooperating accomplice must provide something of value.[77] The underlying rationale for this approach is that if leniency is not dependent on the provision of something of value, then accomplices might withhold important information.[78] Regardless of why prosecutors tether leniency to value, if the evidence provided cannot be testified to as a result of an accomplice-corroboration requirement it is substantially less valuable, and the accomplice may lose their opportunity to obtain leniency.

Admittedly, concerns about the loss of leniency only exist where there is no corroboration found, which limits the cost. Nonetheless, corroboration is not always available;[79] therefore, in at least some cases this opportunity is lost. This loss would become much greater if corroboration requirements were expanded to apply to other suspect types of witnesses.[80] Meanwhile, that an accomplice-witness may be able to testify because corroboration is found does not necessarily result in the absence of stigmatization. The mere existence of a law can impact its target.[81] Even when corroboration is found, the knowledge by an accomplice that they might have been viewed as beyond belief or the simple fact that they had to pass an additional test to be viewed as worthy of belief can result in stigmatization.

The stigmatization of accomplice-witnesses and the lost opportunity for leniency are problematic and at odds with reform movements. Consequently, accomplice-corroboration requirements must be reconsidered.

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76 *See* Rajan S. Trehan, Note, *An "Unfortunate Bit of Legal Jargon": Prosecutorial Vouching Applied to Cooperating Witnesses*, 114 COLUM. L. REV. 997, 1006 (2014) ("The section 5K1.1 substantial-assistance motion allows [prosecutors] to grant sentencing leniency in exchange for testimony."); Neuschatz et al., *supra* note 61, at 138 ("There have also been cases in which the prosecuting lawyer or the investigating officer had a reputation for reducing sentences for informants who testify.").

77 *See* Cohen, *supra* note 8, at 820 ("[T]he greater the misdeeds the defendant needs to overcome, the greater the need for the defendant to provide abundant useful information to the prosecutor.").

78 *See id.* at 822 (discussing how cooperating witnesses will often attempt to take advantage of prosecutors by not being entirely forthcoming).

79 *See supra* note 38 and accompanying text.

80 *See supra* notes 52–59.

81 *See* Sara E. Burke & Roseanna Sommers, *Reducing Prejudice Through Law: Evidence from Experimental Psychology*, 89 U. CHI. L. REV. 1369, 1372 (2022) ("Even laws that are seldom enforced can be powerful tools for communicating norms and values to the public.").

C. *Accomplice-Corroboration Requirements Are Distinguishable from Other Evidentiary Rules*

There are other evidentiary rules which require some form of a prerequisite reliability check. Proponents of accomplice-corroboration requirements may therefore argue that accomplice-corroboration requirements are justifiable for the same reasons those other rules are justifiable.[82] However, those rules are distinguishable from accomplice-corroboration requirements in terms of the degree in which they undermine the jury, stigmatize witnesses, and reduce opportunities for leniency.

1. Hearsay

Hearsay is inadmissible both federally[83] and at the state level.[84] The impetus behind its exclusion is the overweighing of this evidence by the jury,[85] which is a similar rationale to that which has led to support for accomplice-witness corroboration requirements.[86] Nonetheless, these two areas of law are clearly distinguishable.

Uncorroborated accomplice-witness testimony is not admitted because of concerns about the reliability of the *witness*.[87] In contrast, hearsay is not admitted because of concerns about the reliability of the *statement*.[88] Under hearsay rules, the jury may consider the testifying witness's other statements and thus, outside of the particular inadmissible statement, generally assess their credibility. Therefore, while the jury's role is undermined by hearsay requirements, the degree in which it is undermined is far narrower as the exclusion only extends to the specific testimony the witness is offering and not everything they say while on the stand. In addition, accomplice-corroboration requirements do not include exceptions to the rule. If there is no corroboration, the testimony is not admitted.[89] There are "[r]oughly 30

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82 *See, e.g.*, Saverda, *supra* note 6, at 800 (arguing that accomplice-corroboration requirements can be viewed similarly to requirements which must be met for a confession to be admissible).

83 FED. R. EVID. 802.

84 *See, e.g.*, CAL. EVID. CODE § 1200(b) ("Except as provided by law, hearsay evidence is inadmissible."); MINN. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by the Legislature.").

85 *See* Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1972 (2008) ("[Hearsay] evidence is excluded precisely on the ground that the factfinder is likely to ascribe it more weight than it deserves.").

86 *See supra* notes 17–21 and accompanying text.

87 *See supra* notes 17–40 (describing how the motivating factor behind accomplice-corroboration requirements is the accomplice-witness's incentives to lie).

88 *See* FED. R. EVID. 801(c) ("'Hearsay' means a statement . . . .").

89 *See supra* notes 30–33 and accompanying text.

exceptions" to hearsay rules.[90] Accordingly, there are many instances where, despite the use of hearsay, the credibility determination is left to the jury.[91] This further reduces the degree to which the jury's role is undermined.

The stigmatization of the witness and the lost chance of leniency are also far more limited under hearsay rules. Because the witness on the stand is allowed to testify about other matters, they are not stigmatized, as the exclusion relates to a particular portion of their testimony and not their overall trustworthiness. Similarly, if a witness's testimony about other matters can be considered, the lost opportunity for leniency is drastically reduced because they have provided other information which may factor into the jury's decision. As a result, prosecutors may be more willing to provide leniency.

2. Unfair Prejudice, Confusion, or Risk of the Jury Being Misled

Under the Federal Rules of Evidence, judges can find probative and credible evidence inadmissible if the probative value of that evidence is "substantially outweighed" by dangers including unfair prejudice, confusion, or risk of the jury being misled.[92] State rules of evidence provide a similar power.[93] Yet, these rules do not intend to exclude any category of *witness*. Instead, they are intended to be applied to particular portions of a witness's testimony.[94] As is the case with hearsay, the degree to which the jury's role as the arbiter of credibility is undermined is far narrower because only limited portions of a witness's testimony are kept from the jury's consideration, not the witness's testimony in its entirety. Similarly, the witness is neither

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90 CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & LIESA L. RICHTER, EVIDENCE 754 (6th ed. 2018).

91 *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 168-69 (1988) (affirming the admission of public records containing opinion under FRE 803(8) for consideration by the jury); Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 82 (7th Cir. 1950) ("We agree with defendants that the complaint letters received by them should have been admitted, not for their testimonial use, to prove the facts contained therein, but to show the information on which they acted. This is a well-established exception to the hearsay rule.").

92 FED. R. EVID. 403.

93 *See, e.g.*, 225 PA. CODE § 403 (2013) ("The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); MINN. R. EVID. 403 (1977) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

94 *See, e.g.*, United States v. Napout, No. 15-CR-252 (PKC), 2017 U.S. Dist. LEXIS 204133, at *41 (E.D.N.Y. Dec. 12, 2017) (discussing the admissibility of particular portions of the defendant's testimony under FRE 403).

stigmatized nor is there a significant lost chance of leniency because the jury can consider their other testimony.

3. Corroboration Requirements for Statements Against Penal Interest

Corroboration requirements for statements against penal interest bear a particularly striking resemblance to accomplice-corroboration requirements. They are also justified by a concern about fabrication[95] and require corroboration.[96] Yet, once again, these requirements exclude particular *statements*[97] and not the witness in their entirety. The degree to which the role of the jury is undermined is far more limited. And as with the foregoing rules, the witness's other testimony may be considered, which limits their stigmatization, and they may otherwise provide value through testimony, which limits the lost chance of leniency.

4. Confessions and Eyewitness Identification

Proponents of accomplice-corroboration requirements may also argue that reliability hearings for confessions[98] or eyewitness identifications[99] undermine the jury's role because they permit the judge to analyze the evidence and determine that it is too unreliable to be considered by the jury. But the way these rules operate are distinct from accomplice-corroboration requirements. First, these rules do not prevent the witness from testifying

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95 *See* FED. R. EVID. 804(b) advisory committee's note to proposed rule ("The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.").

96 FED. R. EVID. 804(b)(3).

97 *See id*. ("But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.").

98 18 U.S.C. § 3501(a) provides the rule that allows a judge to assess a witness's testimony before allowing the jury to complete its designated task:

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

18 U.S.C. § 3501(a).

99 State v. Ramirez, 425 P.3d 534, 541 (Wash. Ct. App. 2018) (emphasis added) ("The federal standard requires a trial court to find two things prior to excluding eyewitness testimony: (1) law enforcement's pretrial identification *procedure* was unnecessarily suggestive, and (2) the improper police *procedure* 'created a substantial likelihood of irreparable misidentification.'").

about other matters; thus, as with the foregoing evidentiary rules, the scope of the impact is narrower. Second, these hearings are concerned with the *procedure* that led to the creation of the evidence.[100] If proper procedure is followed, then the evidence may be admitted. In contrast, no matter how perfect the procedure used to obtain cooperation, if there is no corroboration then accomplice-corroboration requirements prevent an accomplice's testimony from being considered.[101] The crucial distinction is that procedure can be improved but corroboration is sometimes never obtainable.[102] In other words, accomplice-corroboration requirements will inevitably result in the jury's role being undermined in some instances; however, if proper procedure is followed, a similar outcome is avoidable with confessions and eyewitness identifications.[103]

Furthermore, reliability hearings for confessions and eyewitness identifications do not result in the loss of leniency for the individual testifying because testimony on these matters is generally not offered by an individual facing punishment of their own. They also do not result in the stigmatization of witnesses because the focus is on the reliability of the evidence itself and not the reliability of the individual making the confession or identification.

5. Expert Witnesses

Apart from accomplice-witness corroboration requirements, the only other widely accepted evidentiary rule which allows for the exclusion of a particular *type* of witness are those which constrain the use of expert witnesses.[104] Without a doubt these rules undermine the role of the jury. As

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100 *Id.*

101 *See supra* notes 30–32.

102 *See supra* note 38 and accompanying text.

103 In fact, confession and eyewitness testimony procedure requirements are intended to have prophylactic effect. *See* Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1039-41 (2001) (discussing prophylactic rules in the context of self-incrimination and eyewitness identification). While at least one commentator believes that accomplice-corroboration requirements improve prosecutors' efforts to obtain corroboration, they considered that outcome to be a consequence of accomplice-corroboration requirements and not their purpose. *See* Saverda, *supra* note 6, at 803 (arguing in a Note focused on how accomplice-corroboration requirements help ensure the veracity of testimony, that accomplice-corroboration requirements also improve police and prosecutorial investigations).

104 *See, e.g.*, FED. R. EVID. 702 (detailing the requirements that a witness and their testimony must meet in order to testify as an expert); TEX. R. EVID. 702 (same); FED. R. EVID. 703 (detailing the bases an expert may rely upon); UTAH R. EVID. 703 (same); FED. R. EVID. 704 (permitting an expert to provide their opinion even where it "embraces an ultimate issue"); VT. R. EVID. 704 (same).

stated in the Federal Rules of Evidence "Advisory Comments," judges are the "gatekeepers to exclude unreliable expert testimony."[105]

Although the jury's role is undermined by expert witness reliability hearings, this is justifiable because expert witnesses are actually distinct from all other types of witnesses: they are uniquely permitted to opine.[106] Neither accomplice-witnesses nor any other lay witnesses are provided a similar power. In contrast, the only justification for treating accomplice-witnesses differently from other witnesses is the fear that they are inherently unreliable; however, it is not clear that accomplice-witnesses are uniquely unreliable.[107] If accomplice-witnesses are not unique, the lack of distinction between accomplice-witnesses and other lay witnesses should not result in special rules for the former.[108] Moreover, even if accomplice-witnesses were less reliable than other lay witnesses, reliability concerns present a different problem than those posed by granting an expert the power to opine. Therefore, providing the same solution may not be appropriate.

Another crucial difference between expert witnesses and accomplice-witnesses is that pre-trial reliability hearings for the former are focused on whether the expert is using reliable and trustworthy evidence,[109] whereas accomplice-corroboration requirements are concerned with personal credibility.[110] This distinction suggests that there is not the same level of stigmatization caused by expert rules because the focus is not on the reliability of the individual offering the evidence but the reliability of the evidence itself. Moreover, concerns about stigmatization are probably moot because the expert witness is holding themselves out to be different. Finally, concerns about leniency are not present because expert witnesses are not facing the threat of punishment.

In light of the anomalous evidentiary treatment of accomplice-witnesses, accomplice-corroboration requirements must be seriously questioned.[111]

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105 FED. R. EVID. 702 advisory committee's note to 2000 amendment.

106 *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 148 (1999) ("Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the 'assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.'" (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

107 *See supra* notes 52–56 and accompanying text.

108 In general, the only requirement of a witness is that they are competent. *See, e.g.*, FED. R. EVID. 601 ("Every person is competent to be a witness unless these rules provide otherwise.").

109 *See* MUELLER, KIRKPATRICK & RICHTER, *supra* note 90, at 678 ("If the judge believes the [expert's] evidence is reliable and trustworthy . . . she should admit the evidence . . . .").

110 *See* Saverda, *supra* note 6, at 787 (arguing in favor of accomplice-corroboration requirements because they reduce opportunities for accomplice-witnesses to lie).

111 If corroboration requirements were expanded to other forms of suspect testimony, accomplice-corroboration requirements would no longer be anomalous. However, as previously illustrated, such an expansion would be problematic in its own right. *See supra* Section II.A.

D. *Accomplice-Corroboration Requirements Are Ineffective*

Finally, in some circumstances, corroboration requirements do not effectively combat the dangers of accomplice-witness testimony. There are at least two versions of this argument. One scholar explains that because it is impossible to seal off accomplice-witnesses from all sources of information, the accomplice can "parrot . . . [or] tailor[] his confession to fit the independent evidence."[112] As a result, it may appear that there is corroboration but in reality "[t]he supposedly corroborating facts have created [the] story in the first place."[113] Another view is that in most instances the little corroboration which is required exists, and where more is required the jury is likely to consider it no matter what rules are in place if the testimony is "key[.]"[114] The efficacy flaw that accomplice-corroboration requirements suffer from combined with their many other shortcomings suggests that they are not worth the trouble.

III. AN ALTERNATIVE APPROACH: IMPROVING THE ADVERSARIAL SYSTEM IN GENERAL

Corroboration requirements are more trouble than they are worth. But the fact remains that accomplice-corroboration is inherently problematic. Other reforms are necessary.

Many proposals for reform focus on constraining or enhancing the discretion of prosecutors in instances where they utilize accomplice or cooperating witnesses.[115] That those reforms focus acutely on cooperating and informant witnesses is itself a problem[116] because there are many other types of witnesses and testimony which are inherently suspect and with which jurors also struggle.[117] "Studies increasingly show that without additional guidance, jurors are fairly poor evaluators of witness deception," regardless of the witness being a member of a particularly suspect category.[118]

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112 Douglass, *supra* note 66, at 1834.

113 *Id.* at 1834-35.

114 Hughes, *supra* note 15, at 32.

115 *See, e.g.*, Cohen, *supra* note 8, at 825-27 (arguing that prosecutors need improved training regarding how to properly and effectively use cooperating witnesses); Hughes, *supra* note 15, at 68-69 (proposing, among other solutions, the institution of internal standards for prosecutors, greater internal supervision for prosecutors, and independent commissions to monitor prosecutors, when utilizing cooperating witnesses); Roth, *supra* note 16, at 784 (proposing reforms including more robust disclosure requirements and reforming prosecutors' offices).

116 To their credit, these scholars generally do not focus solely on accomplice-witnesses. But this further indicates that accomplice-witnesses are no different than other cooperating and informant witnesses. Therefore, it is odd that corroboration requirements exist almost solely for accomplice-witnesses.

117 *See supra* notes 52–56 and accompanying text.

118 Hutchins, *supra* note 26, at 508.

In light of the fact that the concerns raised about accomplice-witnesses are not unique to accomplice-witnesses or even the larger category of cooperating witnesses, reforms should target the competencies of the adversarial system in general. And, even if the flawed contention that accomplice-witnesses are more suspect than certain other categories of witnesses is accepted, attempting to solve for a discrete problem when there are system-wide problems is an inefficient use of time and resources. A detailed proposal of reforms could, and will have to, be a discussion for a later date. But a few suggestions are worth highlighting.

First, the jury's ability to make credibility assessments must be improved because increased sensitivity to the risks and incentives particular witnesses pose will reduce the likelihood that the jury is misled. One problem is that jurors assume certain actions made by a witness on the stand, such as fidgeting, particular postures, and increased manipulation of body parts, are indicative of lying.[119] But these mannerisms often occur for reasons entirely unrelated to the veracity of statements.[120] By creating a baseline understanding of a witness and their mannerisms before they begin to testify about the matter at issue by asking neutral, non-case related questions, a jury's misunderstanding of these mannerisms can be mitigated.[121] Jurors must also be educated—through mandatory jury instructions and expert testimony—about the incentives witnesses have to lie.[122] These solutions should be instituted for all categories of witnesses because witness credibility issues are always a concern.[123]

Admittedly, these processes will lead to some stigmatization, but it will be far less than that which occurs where accomplice-witnesses are prohibited from testifying at all or where their testimony may not be considered. Another concern might be that these reforms contain some of the particularized solutions that were earlier critiqued. However, these solutions institute specialized jury instructions and promote increased acceptance of expert testimony in *all* cases with suspect witnesses. The instruction or expert would be particularized to the type of witness, but the solution itself would not be. Therefore, this approach remedies a shortcoming of the adversarial

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119 *Id.* at 536.

120 *Id.*

121 *Id.* at 555.

122 *See, e.g.*, *Sample Jury Instructions*, N.Y. STATE UNIFIED CT. SYS. 17-25, https://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Final_Instructions.pdf [https://perma.cc/5ZZX-HMUS] (providing sample jury charges that instruct jurors to consider a myriad of credibility factors).

123 *See, e.g.*, Robert M. Bloom, *What Jurors Should Know About Informants: The Need for Expert Testimony*, 2019 MICH. ST. L. REV. 345, 355-56 (2019) (discussing the use of expert witness testimony to inform jurors about the problems with eyewitness identification).

system—a lack of jury knowledge—in general, even though the information jurors receive is witness-category specific.

Second, disclosure requirements must be expanded. More expansive disclosure and increased time to review those disclosures will help the defense to more effectively cross-examine witnesses by enabling improved preparation and access to relevant information.[124] New York's recently passed discovery laws are a good starting point.[125] Under those laws, there are twenty-one kinds of materials which prosecutors must automatically turn over to the defense, including the names and adequate contact information for "*all* persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto," electronic recordings, rewards, promises, or inducements offered to a witness, statements by lay persons with relevant information regardless of whether they will be called as a witness, and any scientific tests or examinations performed.[126] Prosecutors are required to turn over these materials within twenty days of arraignment if the defendant is held in custody or within thirty-five days if they are not held.[127]

Admittedly, New York's requirements have been difficult for prosecutors to meet.[128] It is possible that the New York statutes go beyond what is practicable. Moreover, to achieve compliance with these laws more funding may be necessary, as New York legislators have recognized.[129] Yet, while there may be growing pains, the merits of an expansion of discovery requirements are clear.

Third, funding for defense counsels must be increased. Although there is a constitutionally guaranteed right to counsel,[130] in practice that counsel is often overworked, underfunded, and at times even incompetent.[131] This can

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124 *See* Roth, *supra* note 16, at 784-86 (describing the benefits of early and significant disclosures to the defense).

125 NY CRIM. PROC. LAW §§ 245.10-85 (LexisNexis 2020).

126 NY CRIM. PROC. LAW § 245.20 (emphasis added).

127 NY CRIM. PROC. LAW § 245.10.

128 *See* Jonah E. Bromwich, Hurubie Meko & Grace Ashford, *Why 3 Liberal New York D.A.s Want to Change a Law Backed by Progressives*, N.Y. TIMES (Apr. 25, 2023), https://www.nytimes.com/2023/04/25/nyregion/discovery-laws-ny.html [perma.cc/S4BE-2TYX] (discussing attempts by prosecutors to reform the recent discovery laws because of difficulties with complying).

129 *See Governor Hochul Announces FY 2024 Budget Historic Investments and Initiatives to Drive Down Gun Violence, Improve the Criminal Justice System, and Create a Safer New York State*, N.Y. STATE (May 3, 2023), https://www.governor.ny.gov/news/governor-hochul-announces-fy-2024-budget-historic-investments-and-initiatives-drive-down-gun [perma.cc/G4X7-HDTT] (announcing increased funding for prosecutors and defense counsels to enable them to comply with discovery requirements).

130 Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963).

131 Bibas, *supra* note 23, at 1060.

lead to subpar performance by defense attorneys pre-trial, including mistakenly or foolishly advising their client to plead guilty.[132] More funding will help defense counsels handle expansions in disclosures. If more money is available, then more attorneys could be hired, which would enable attorneys to reduce their caseloads and devote more time to their remaining cases, presumably improving the quality of their efforts on their remaining cases.[133] More funding would also allow the defense to hire more private investigators and conduct their own forensic testing, which would make them less dependent on the government's disclosures.[134] Better preparation should help ensure that there are fewer wrongful convictions at trial. And if the risk of wrongful convictions decreases, then innocent defendants will feel less pressure to plead guilty.[135]

CONCLUSION

Accomplice-witness testimony is inherently problematic. We can and should be suspicious about its use. Yet, the solution of imposing accomplice-corroboration requirements creates serious problems. There are cases where prosecutors unequivocally and justifiably believe an accomplice is credible, but corroboration requirements prevent their testimony from being heard or considered, thus undermining the role of the jury. Even where the accomplice-witness's testimony is considered, the role of the jury is still undermined by the extra step of corroboration. Moreover, although opportunities for leniency are sometimes reobtained because the accomplice-witness's testimony is considered, the stigmatization of witnesses is unavoidable. Accomplice-corroboration requirements also cannot be justified by the existence of other evidentiary restrictions because other evidentiary rules are far more limited than accomplice-corroboration requirements in terms of the degree to which they undermine the role of the jury, stigmatize witnesses, and limit opportunities for leniency. Finally, accomplice-corroboration requirements are ineffective. Even if accomplice-corroboration requirements rarely prevent an accomplice from having their testimony considered by the jury, a poorly functioning rule that has concerning side-effects is not worth retaining.

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132 *Cf. id.* at 1060-61 ("[B]ad defense lawyering, coupled with mystifying procedures and strong pressures to plead quickly, can make it hard for defendants to choose intelligently among the alternatives before them and understand the likely convictions, sentences, and consequences that would flow from each one.").

133 *See id.* at 1064 ("[D]efense lawyers have too many cases, too little time, too little pay, and too little support to investigate and advocate vigorously.").

134 *See id.* (noting the inability of most defense attorneys to do so currently).

135 *See supra* notes 23–24 and accompanying text.

At the same time, the legitimate motivations behind accomplice-witness corroboration requirements cannot be ignored. Alternative steps must be taken. The jury's ability to make credibility judgments must be improved, disclosures to the defense must be reformed, and funding for defense counsels must be increased. These improvements are much easier said than done. Nonetheless, any solutions implemented should focus on the competencies of the adversarial system in general because the only thing truly unique about accomplice-witness testimony is the existence of accomplice-corroboration requirements.