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Prosecutors "Doing Justice" through Osmosis - Reminders to Encourage a Culture of Cooperation

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PROSECUTORS "DOING JUSTICE" THROUGH OSMOSIS—REMINDERS TO ENCOURAGE A CULTURE OF COOPERATION

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A cooperating defendant[1] can be an invaluable source of insider information about unsolved crimes and unidentified criminals. For instance, in June 2007, the Federal Bureau of Investigation revealed that it had foiled a terrorist plot to bomb a fuel pipeline supplying the John F. Kennedy International Airport in New York based on assistance from a "cooperating," convicted drug dealer.[2] The cooperator had been convicted in a New York state court.[3] Subsequently, he agreed to pose as a terrorist and infiltrate a group suspected of developing the terrorist plan directed at JFK. The men composing the suspected terrorist group were ultimately charged in a federal district court in New York. According to news reports of the drug dealer's assistance to authorities, the cooperating defendant traveled overseas, including to Trinidad, where he met with the suspected terrorists and pretended to help in plotting the explosions.[4] He then reported surreptitiously to agents of the FBI about the progress of the plan. The drug dealer agreed to the risky task of infiltrating the terrorist group and, correspondingly, to provide the FBI with inside information about the group's activities because, like the typical cooperating defendant, he hoped to reduce the severity and length of his sentence for his

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1. In this Article, the term "cooperating defendant" includes persons charged (or targeted to be charged) with a federal crime, or those already convicted, who offer information or testify in an effort to assist the government in the prosecution of another crime or criminal. Cooperating defendants offer such assistance in hopes of gaining some leniency from the government on the charges they face. The idea, of course, is to enter into an agreement in which one defendant agrees to "trade information and testimony, with the promise of enabling the [government] to make a case against other defendants who, for one reason or another, are regarded as most deserving of the severest form of prosecution." Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 1 (1992) (citations omitted).

2. Cara Buckley & William K. Rashbaum, *4 Men Accused of Plot to Blow Up Kennedy Airport Terminals and Fuel Lines*, N.Y. TIMES, June 3, 2007, at 37; Larry McShane, *Federal Authorities Say Informant's Role Crucial in Exposing New York City Airport Plot*, ASSOCIATED PRESS, June 4, 2007.

3. In fact, recent accounts of the informant's criminal past suggest that his criminal history is extensive and that he has cooperated and received leniency before. Samantha Gross, *Court Documents Detail History of Kennedy Airport Terrorism Plot Informant*, ASSOCIATED PRESS, June 14, 2007 (reporting that court documents indicate that the informant had substantially assisted the government in 1996 and received a seven-year prison sentence for a crime for which the sentencing guidelines normally called for twenty-seven years).

4. McShane, *supra* note 2.

state-court drug conviction.[5]

Commenting on why the FBI would rely on a convicted drug dealer for such an important mission, a former member of the FBI-NYPD Joint Terrorist Task Force explained: "In most cases, you can't get from A to B without an informant."[6]

Given the potential importance of cooperation, one might assume that the Department of Justice (DOJ) and federal prosecutors[7] employ systematic methods to attract and process such tips and that prosecutors always pursue a cooperator's lead. Although there is no specific, scientific data to show how DOJ receives or handles information from cooperating defendants or to measure how aggressively prosecutors pursue cooperation,[8] the empirical evidence suggests that prosecutors could make more effective and more equitable uses of these important tips.[9] The limited data indicates that valuable cooperation is underutilized by the DOJ and

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5. Gross, *supra* note 3.

6. McShane, *supra* note 2 (quoting Tom Corrigan); *see also* Carol Eisenberg, *Kennedy Airport*, NEWSDAY, June 10, 2007, at A16 (discussing the use of informants in solving terror plots, including frustration of the Herald Square Subway bombing and quoting a former assistant U.S. attorney, who prosecuted the 1993 World Trade Center bombing, as saying: "When we have human intelligence, we can stop things before they happen").

7. The scope of this Article is confined to the federal system of criminal justice in recognition of the differences in the way federal and state systems undertake prosecutions and the use of cooperating witnesses. *See* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 353 n.235 (2001) [hereinafter Gershman, *Duty to Truth*] (noting the differences in various prosecutors' offices and the lack of discussion on the differences between state and federal prosecutors); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 216 (2000) (recognizing that "federal prosecutors have long considered themselves unique" and that "federal prosecutors have always seemed different than state prosecutors"); Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 920 n.11 (1999) [hereinafter Yaroshefsky, *Cooperation*] (noting the "[s]triking differences between state and federal systems," including differences in investigatory resources and types of crimes prosecuted). Nevertheless, the basic concepts presented in this Article apply to all prosecutors (federal and state) who strive to maximize the benefits of information gleaned from cooperating defendants.

8. *See* Yaroshefsky, *Cooperation*, *supra* note 7, at 919-20 (explaining that analyzing how prosecutors deal with cooperators "does not lend itself to traditional methods of scholarly study" and that "[b]y its nature, dealing with cooperators is dependent on a constellation of factors whose impact on the process is extremely difficult to analyze"); LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, UNITED STATES SENTENCING COMMISSION, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 6 (Jan. 1998), http://www.ussc.gov/publicat/5kreport.pdf [hereinafter MAXFIELD & KRAMER, SUBSTANTIAL ASSISTANCE] (noting that when a Substantial Assistance Staff Working Group studied substantial assistance practices in the United States attorneys' offices, the group learned that the DOJ did not maintain such information and that the U.S. attorney's offices did not keep the information in a consistent, usable form).

9. *See* MAXFIELD & KRAMER, SUBSTANTIAL ASSISTANCE, *supra* note 8, at 7-9 (finding inconsistencies in the U.S. attorneys' office policies on substantial assistance departures, and also finding that while roughly sixty-eight percent of defendants provided assistance to the government in some form, only about thirty-nine percent received a substantial assistance departure); *see also* Memorandum from Linda Drazga Maxfield, U.S. Sentencing Comm'n Office of Policy Analysis, to Judge Hinojosa, Chair, U.S. Sentencing Comm'n, on Numbers in Post-Boooker Sentencings: Data Extract on April 5, 2005 (Apr. 13, 2005), *available at* http://www.ussc.gov/sc_cases/Booker_041305.pdf [hereinafter Maxfield Memo] (reporting post-*Booker* sentencing statistics, including a finding that in only 15.2% of cases, defendants received a government sponsored 5K1.1 sentence reduction for substantial assistance to the government); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 570, 603-22 (1998) (discussing the disparities in the way the District of Connecticut and the District of Massachusetts promoted sentencing departures).

that prosecutors within the Department can improve their consistent and vigilant use of credible cooperating defendants and the important information that such cooperators sometimes provide.

This Article posits that although federal prosecutors are shielded from any legal duty to pursue such leads, they always bear a separate duty to thoroughly and thoughtfully evaluate a cooperating defendant's information. This duty to carefully consider every cooperator's tip arises from a prosecutor's unique ethical obligation to "do justice."[10] The prosecutor's duty of justice requires careful consideration of seemingly valid tips because of the potential importance of the information to crime prevention and successful prosecution and because Congress has mandated that prosecutors seek equitable and proportional sentences for all defendants.[11]

Prosecutors must, therefore, act on all tips when action is required to fulfill the expressed mission[12] of the DOJ, which includes the goal of "ensuring the fair and impartial administration of justice for all Americans," and when pursuit of such information assists the prosecutor in carrying out the demand for sentencing fairness and uniformity expressed by Congress in the Sentencing Reform Act.[13]

The DOJ can foster a federal prosecutor's desire and ability to discharge this ethical obligation to assess cooperators and their corresponding information by creating a culture in which prosecutors are motivated and rewarded for thoughtfully evaluating such witnesses and for pursuing or rejecting such information equitably and effectively. DOJ should also encourage prosecutors to remain open to discussing the potential value of a cooperator's information with crime victims and sentencing judges. Such conversations will encourage prosecutors to take into account the value of victims' rights and Congress's sentencing goals when assessing cooperation in a given case.

This Article develops in five parts. Part I discusses the importance of cooperation to an effective criminal justice system. Part II examines the competing interests federal prosecutors often confront when deciding whether or not to follow a cooperator's lead and the sentencing inequity and the underutilization of valuable

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10. This ethical obligation that I contend is imposed on every federal prosecutor as part of her duty to "do justice" might be viewed as part of the prosecutor's general ethical "duty to truth" espoused by Bennet Gershman. Gershman, *Duty to Truth*, *supra* note 7, at 314.

11. *See* discussion *infra* at Part IV.

12. The DOJ's Mission includes a responsibility "to enforce the law and defend the interests of the United States according to the law; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; . . . and to ensure fair and impartial administration of justice for all Americans." DOJ.gov, About the DOJ - Mission Statement and Statutory Authority, http://www.usdoj.gov/02organizations (last visited Feb. 10, 2008).

13. Although not in the context of dealing with cooperating defendants, Bennett Gershman touched on this affirmative obligation in his article exploring the prosecutor's legal and ethical duty "to promote truth and to refrain from conduct that impedes truth." Gershman, *Duty to Truth*, *supra* note 7, at 313. As Gershman recognized, "the prosecutor has the overriding responsibility not simply to convict the guilty but to protect the innocent." *Id.* at 314. The ideal of protecting innocent defendants may be furthered by ensuring that the guilty are prosecuted.

cooperation that can result from prosecutors' unguided evaluation of cooperating defendants. Part III outlines the federal prosecutor's ethical obligations and the general duty to "do justice" in her role as "minister of justice," and it discusses the ambiguous nature of the duty in the context of dealing with defendants who seek to assist in the investigation and prosecution of other persons and crimes. Part III also addresses the impact of a prosecutor's expansive discretion on her duty to "seek justice." Part IV explores the parameters of the federal prosecutor's duty to adequately assess every cooperator's tip, given the value such tips can have in preventing and solving crimes and in ensuring that guilty defendants receive adequate, proportional punishment. Finally, Part V offers some thoughts on how a "culture of cooperation" can foster an individual prosecutor's ability to fulfill her ethical and professional responsibility to "do justice." In addition, Part V offers some practical suggestions to increase the positive pressures on and incentives for every federal prosecutor to make the most thoughtful and well-informed decisions about accepting or rejecting cooperation.

I. THE GOVERNMENT'S RELIANCE ON COOPERATION

Although news reports and court cases are full of instances in which the government used a cooperating defendant's information to prevent, solve or successfully prosecute a crime, relatively few federal defendants are rewarded at sentencing for their efforts to assist the government in the prosecution of other crimes or persons. The 1999 U.S. Sentencing Commission's report to the Judicial Conference revealed that between 1995 and 1998, no more than twenty percent of defendants received a sentencing departure based on his or her substantial efforts to assist the government.[14] A more recent report of the Commission from 2005 found that only 15.2% of federal defendants received a 5K1.1 sentence reduction based on his or her assistance to the government.[15] Thus, while cooperation is an important law enforcement tool, it is used or, at least, rewarded in a small minority of cases, suggesting that prosecutors underutilize cooperation.

A. The Importance of Cooperation

The value of untapped cooperation is immeasurable, but the impact of coopera-

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14. *See* U.S. SENTENCING COMM'N, REPORT TO THE JUDICIAL CONFERENCE OF THE U.S. 4 (Sept. 1999), *available at* www.ussc.gov/publicat/judcn999.pdf [hereinafter SENTENCING COMM'N REPORT TO THE JUDICIAL CONFERENCE].

15. Maxfield Memo, *supra* note 9. A 5K1.1 sentence reduction is a reduction expressly authorized in the U.S. Sentencing Guidelines Manual. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002). The 5K1.1 provision allows that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." *Id.* Provided the prosecutor files the necessary motion, the amount of the reduction is left to the sentencing judge. *Id.*

tors and "snitches" on reducing and preventing crime is well documented.[16] Kendall Coffey recently compiled examples of some of the more famous cases successfully prosecuted with cooperating defendants, including the following: 1) a case in which Sammy "the Bull" Gravano helped convict "Teflon Don" John Gotti; 2) the trial of Martha Stewart in which Douglas Fanueil testified in exchange for "a sweetheart deal;" 3) the "Enron" case in which Andrew Fastow, former chief financial officer, testified against Jeffrey Skilling and Kenneth Lay.[17] The cases in which the government relied on cooperating witnesses to successfully prevent or prosecute crimes are too numerous to list.[18] Recently, albeit in the specific context of addressing international terrorism and the gathering of foreign intelligence information, the DOJ touted the potential significance of cooperators' information to crime prevention. In a memorandum dated January 10, 2007, Deputy Attorney General Paul J. McNulty reminded federal prosecutors that criminal defendants are potentially rich sources of valuable "f[oreign] i[ntelligence] information that may prove critical to thwarting terrorist attacks, espionage, sabotage, and other threats to our national security."[19] Testifying before the House Subcommittee on Crime, Terrorism and Homeland Security in 2005, former Assistant Attorney General Christopher A. Wray proclaimed that "[c]ooperation agreements are an

16. *See, e.g.*, United States v. Bernal-Obeso, 989 F.2d 331, 334-35 (9th Cir. 1993) (stating that "our criminal justice system could not adequately function without information provided by informants").

17. Kendall Coffey, *Milestones in Cooperation*, 189 N.J.L.J. 587 (Aug. 10, 2007).

18. *See, e.g.*, William K. Rashbaum, *Police Informer In Terror Trial Takes Stand*, N.Y. TIMES, at B1 (Apr. 25, 2006) (reporting how a paid informant tape recorded a twenty-three-year-old Pakistani immigrant suspected of planning to bomb the Herald Square Subway Station); Gary Mihoces, *Man in Vick Case Makes Plea Deal: Co-defendant Taylor alleges dogfighting funded chiefly by QB*, USA TODAY, at C1 (July 31, 2007) (reporting that former Atlanta Falcons quarterback Michael Vick's co-defendant in a case alleging crimes arising from dog fighting had decided to cooperate with the government authorities); Rudolph Bush, *Man Gets 18 Years in 1997 Killing: Ex-gang member had helped prosecutors*, CHI. TRIB. at B3 (Apr. 10, 2006) (reporting that a teenage, former gang member of the Latin Kings gang became a key cooperating witness and helped authorities devastate another gang); George Anastasia, *Former Philadelphia Mob Boss Gets 13-year Sentence*, KNIGHT RIDDER, (Jan. 22, 2005) (reporting that former Philadelphia mob boss Ralph Natale received a reduced sentence after cooperating with federal authorities in the prosecution of a series of cases, including former Camden, New Jersey Mayor Milton Milan and mob leader Joseph "Skinny Joey" Merlino).

Questionable and even totally unfounded tips can prove important in solving crimes. For instance, following a homicide in Richmond, Virginia in April 2007, law enforcement officers found a note in a police car at the scene of the crime. *See* Kristen Gelineau, *Richmond, Virginia Says 'Enough Is Enough,"* ASSOCIATED PRESS (Apr. 6, 2007). The note, which was unsigned, claimed to identify the killer. The note represents one of a growing number of tips provided to police by citizens of Richmond. The tips, which are often anonymous, have been credited with identifying numerous criminal wrongdoers. As a result of this type of citizen involvement in its criminal justice system, Richmond experienced a "remarkable drop" in its crime during the first three months of 2007. Compare Richmond's success story with New Jersey's struggles against increased and unsolved crimes because witnesses are unwilling to report what they see. David Kocieniewski, *A Little Girl Shot, and a Crowd That Didn't See*, N.Y. TIMES, at A1 (July 9, 2007) (describing how a man shot a seven-year-old girl, knocking her off her bicycle, as at least twenty people watched, but no one would admit to seeing the shooter).

19. Memorandum from Paul J. McNulty, Deputy Att'y Gen., to All Federal Prosecutors on Incentives for Subjects and Targets of Criminal Investigations and Defendants in Criminal Cases to Provide Foreign Intelligence Information 6 (Jan. 10, 2007) *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00792.htm [hereinafter McNulty Memo].

essential component of law enforcement and are necessary to penetrate criminal organizations and to obtain convictions in court."[20] Wray further told the committee that crimes such as drug trafficking, gangs, corporate fraud and terrorism offenses would be difficult, if not impossible, to adequately investigate without cooperators.[21] Thus, in some contexts, the DOJ has expressly acknowledged the need to encourage cooperation.

B. The Critics of Cooperation

Law professors and other commentators have often criticized the government's generous use of "cooperating defendants," "informants," and "snitches." These detractors typically emphasize the risk of wrongful convictions that can accompany reliance on a cooperating defendant's information, while downplaying the benefits that such "snitches" can provide.[22] For instance, in claiming that the use of "snitch witnesses" can "[o]ccasionally . . . result in dramatic miscarriages of justice[,]" George C. Harris cites the book, "Actual Innocence," which details the story of Ron Williamson, a man convicted of murder who was eventually freed by exonerating DNA evidence.[23] Other commentators have, similarly, maintained that "there is an inherently high risk that cooperating witnesses will testify falsely and will be believed by juries, thus resulting in convictions of the innocent."[24] Such legal commentators usually express particular skepticism at the way federal prosecutors prepare the cooperating witnesses to testify at trial.[25]

The core of the criticism rests with the claim that prosecutors or their investigative agents act unethically, unprofessionally, or otherwise inappropriately in

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20. *Implications of the* Booker/FanFan *decisions for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 13 (2005) (statement of Christopher A. Wray, Assistant Attorney General).

21. *Id.*

22. *See, e.g.*, Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 107 (2006) [hereinafter Natapoff, *Beyond Unreliable*] (citing studies on wrongful convictions "traced" to "false informant testimony").

23. George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 2 (2000) (citing JIM DWYER, PETER NEUFIELD & BARRY SCHECK, ACTUAL INNOCENCE (2000)).

24. Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews With Accomplices and Snitches?*, 74 FORDHAM L. REV. 257, 260 (2005) (footnotes omitted); *see also* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 664 n.85 (2004) (citing numerous studies documenting wrongful convictions in which cooperators testified).

25. *See* Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875, 884 (2002) ("[W]hen a prosecutor tells a defendant or defense counsel what testimony is expected of the defendant . . . in order to qualify for cooperator/leniency/immunity status, the defendant is powerfully motivated to parrot what the prosecution wants and expects to hear."); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 848 (2002) (stating that the dynamics of the preparation process allow cooperating witnesses to be "able to present [their] testimony to the jury in a truthful and convincing manner"); *see also* R. Michael Cassidy, *Soft Words of Hope:* Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1140 (2004) [hereinafter Cassidy, *Soft Words*] ("Not only do accomplice witnesses have a *motive* to fabricate, they have an *ability* to fabricate and to fabricate convincingly.").

communicating with cooperating witnesses. On this point, Professor Alexandra Natapoff asserts that "informants do not generate wrongful convictions merely because they lie. After all, lying hardly distinguishes informants from other sorts of witnesses. Rather, it is how and why they lie, and how the government depends on lying informants, that makes snitching a troubling distortion of the truth-seeking process."[26] Natapoff's criticism continues: "[p]olice and prosecutors are heavily invested in using informants to conduct investigations and to make their cases."[27] Natapoff claims that as a result of prosecutors' interest in using informants, "they often lack the objectivity and the information that would permit them to discern when informants are lying."[28] Natapoff concludes: "This gives rise to a disturbing marriage of convenience: both snitches and the government benefit from inculpatory information while neither has a strong incentive to challenge it."[29]

These critics express valid concerns. The risks of relying on biased, cooperating witnesses are well documented. The criticisms are especially convincing when they are properly directed at the inadequately trained, inexperienced prosecutor and the occasional, bumbling, unethical or overzealous prosecutor. But the condemnation of prosecutors' use of cooperating witnesses generally is undeserved. There is no doubt that the use of a cooperator's information creates a danger of false testimony and, correspondingly, wrongful convictions. But, false testimony and wrongful convictions are not unique to trials involving cooperating witnesses. Erroneous testimony and convictions of the innocent also result from inaccurate eye-witness identifications, even when witnesses have the purest of motives.[30] In fact, there are several documented reasons for erroneous trial results, including: ineffective assistance of counsel, coerced or false confessions, inaccurate child testimony, and the accidental (or even intentional) mishandling of forensic evidence, to name a few.[31] Also, there are powerful checks in place to

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26. Natapoff, *Beyond Unreliable*, *supra* note 22, at 108.

27. *Id.* at 108 & n.6 (citing Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 652 (2004)).

28. *Id.* at 108 & n.7 (citing Yaroshefsky, *Cooperation*, *supra* note 7, at 945 (1999)).

29. *Id.* at 108.

30. *See* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, ANN. REV. OF PSYCHOL., 277, 278 (2003) (asserting that of the 100 convicted persons exonerated by DNA testing, seventy-five percent were victims of mistaken eye-witness testimony); *see also* Gershman, *supra* note 7 at 313 & n.14 (discussing numerous documented reasons leading to wrongful convictions, including: coerced or false confessions, inaccurate child testimony, misidentification, prosecutorial misconduct, etc.).

31. Gershman, *supra* note 7 at 313; *see also* The Innocence Project.org, The Causes of Wrongful Conviction, http://www.innocenceproject.org/understand (last visited Jan. 15, 2008) (citing eyewitness misidentification, unreliable science, false confessions, misconduct by the government, and "bad lawyering" as causes of wrongful conviction in addition to informant/snitch testimony); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 285 (2004) (discussing prosecutorial misconduct's role in wrongful convictions but acknowledging that at least one study has found that "bad lawyering" is a factor in thirty-two percent of wrongful convictions and that police misconduct also accounts for about fifty-percent of wrongful convictions); Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 272 (2004) (noting

reduce the risks that the critics identify, including: 1) cross examination of the cooperator to expose bias and inconsistencies; 2) jury evaluation of the cooperator's testimony for credibility; 3) the prosecutor's legal obligations under *Brady v. Maryland*[32] and *Giglio v. United States*[33] to disclose favorable information to the defense; and 4) the right to effective assistance of counsel.[34] Not only do the criticisms about cooperating witnesses overlook the many other reasons for wrongful convictions,[35] but the critical analyses also unduly minimize the benefits cooperating witnesses bring to crime resolution, so long as prosecutors comply with their ethical duty—to seek justice—when dealing with such witnesses.

Without encouraging criminals who have information about other crimes to come forward and reveal information, many guilty and some incredibly dangerous people would remain unhindered in pursuing new crimes and victimizing law-abiding people. Furthermore, even accepting the critics' concerns about the use of cooperation, prosecutors will continue to use cooperation, at least sometimes, so prosecutors will need to decide how to make a smart and an equitable use of the information. Even the critics do not call for a categorical ban of all information provided by cooperators.[36] The key, of course, is for prosecutors to investigate, corroborate,[37] and use informants only when it is ethically and professionally responsible to do so and always when "doing justice" requires.[38]

II. THE COMPETING VALUES OF COOPERATION AND PROSECUTORS' DISPARATE USE OF IT

A prosecutor's decision to use a cooperating defendant can be anything but straightforward. In deciding whether or not to pursue a tip, the prosecutor must

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numerous flaws in the criminal justice system that may lead to a wrongful conviction, including unreliable eye-witness testimony, perjured testimony by "jailhouse snitches," false confessions, "junk" science, government misconduct and incompetent lawyers).

32. 373 U.S. 83, 86-88 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

33. 405 U.S. 150, 154 (1972) (holding that prosecutors must provide impeachment evidence to the defense).

34. *See* Strickland v. Washington, 466 U.S. 668 (1984).

35. A full analysis of the risks of cooperation and the off-setting checks on those risks is beyond the scope of this Article.

36. For instance, Professor Natapoff supports a pretrial reliability hearing for cooperating witnesses. *See* Natapoff, *Beyond Unreliable, supra* note 22, at 126 ("[I]t is appropriate to hold a hearing to establish the reliability of the witnesses through adversarial questioning and a neutral evaluation by the Court.").

37. *See* Yaroshefsky, *Cooperation, supra* note 7, at 932 (noting that former assistant U.S. attorneys emphasize that corroboration of facts provided by cooperators is "the key factor" in assuring cooperators' truthfulness); *see also* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 659 (2006) [hereinafter Cassidy, *Character and Context*] (asserting that every decision on whether to "flip" a co-defendant requires a contextual assessment of the strengths and weaknesses of the case and a determination of whether the accomplice's testimony can be corroborated, among other considerations).

38. This Article recognizes that these criteria for the appropriate use of cooperators create a nebulous standard. The amorphous concept is discussed in more depth *infra* Part III.B.1.

balance numerous, often competing, interests. If one prosecutor balances the interests differently than his next-door neighbor, disparity and sometimes inequity results in the way crimes are prosecuted and the manner in which similarly-situated defendants are treated.

In spite of DOJ's acknowledgement of the potential importance of information received through cooperation, as expressed by Mr. McNulty's recent memo to prosecutors and Mr. Wray's previous testimony before Congress, the Department's attention to cooperation has been neither consistent nor standardized. There are insufficient procedures and policies in place to adequately guide assistant U.S. attorneys who frequently deal with cooperators.[39] There is little official written guidance on the topic. And while training is available to assistant U.S. attorneys about how to deal with cooperation, the training is not mandatory.[40] As a result of this inconsistent message from the DOJ about the value and use of cooperating defendants, prosecutors' use of cooperation is inconsistent.

A. The Difficulty Prosecutors Face in Fairly Assessing the Competing Interests Inherent in an Offer of Cooperation

Consider the following hypothetical scenario.[41] While sitting in her office, a seasoned federal prosecutor ("Lisa") hears the familiar chime of the computer, indicating that she has received a new email message. Instinctively, she checks the subject-matter line and sender identity. Lisa sees that she has received an intra-office, district-wide email from another prosecutor ("Steven") who is new to the office and to prosecuting cases. In his email, Steven asks who is responsible for the prosecution of Defendant Tom Smith. Because Lisa is assigned to prosecute Smith for a recent bank robbery in the district, she opens the email and reads further. Steven says that "his" Defendant, Jones, claims to have important information about additional crimes committed by Smith.[42] Steven reports that Jones was a significant participant in an interstate drug ring. Evidence also suggests that Jones and several others bought and sold unlawful, automatic weapons, and that the group sometimes engaged in physical violence, including

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39. *See* discussion *infra* at Part II.C.

40. There are a variety of training opportunities available to assistant U.S. attorneys at a National District Attorneys Association (NDAA) facility in Columbia, South Carolina, which is designed especially for training federal lawyers. *See* NDAA.org, NDAA Training at the National Advocacy Center, www.ndaa.org/education/nac_index.html (last visited Feb. 7, 2008) (describing the National Advocacy Center, the centralized facility for all federal prosecutors). The individual U.S. Attorneys sometimes encourage or require attendance for certain training, however, there is no DOJ-wide mandate. Although the DOJ does require yearly ethics training, the training does not focus on the use of cooperating witnesses. *See, e.g.*, 5 C.F.R. § 2638.704 (2008) (mandating yearly training for persons required to file public financial disclosure reports).

41. This is a fictional account created by this author to demonstrate the difficulty federal prosecutors sometimes confront when fulfilling their duty to carefully and thoughtfully assess the pros and cons of cooperation. While fictional, the scenario is based on the author's experiences as a former assistant U.S. attorney.

42. The names of the prosecutors and the defendants have no relation to an actual case and were chosen merely to make a point.

several violent assaults on rival drug dealers. Jones now wants to "cooperate" with authorities and provide "substantial assistance in the investigation and prosecution of Smith"[43] for Smith's other crimes, in hopes of earning a reduction in the length and severity of his own sentence.[44]

Concerned that Smith receive the punishment he is due for *all* the crimes he has committed, Lisa arranges an interview[45] with Defendant Jones during which Lisa (and the FBI agent assigned to aid in the prosecution of Smith) learns about Smith's other crimes. During the interview, Jones claims to know about four additional bank robberies Smith committed and provides details of each robbery, which are not publicly known. Jones also says that Smith has raped several women and that Smith molested and then attempted to murder a young child. Two of the bank robberies Jones discusses are unsolved crimes in Lisa's own district. The other two were committed outside the district. The rapes and the attack on the child are state crimes over which Lisa's office lacks jurisdiction and venue to prosecute.[46] One of the violent crimes happened in another state.

To complicate matters, because it took a week to arrange the interview of Jones and another week for the FBI agent to begin his investigation of Jones's information (to attempt to corroborate or refute it as part of an assessment of its truth) enough time passed that Steven[47] has soured on Jones. Steven now reports that Jones balked at the plea agreement offered to him; that Jones insists on arguing for a sentence reduction for his "minor role"[48] in the charged crime, although Jones does not qualify as such a "minor participant;" that Jones is "minimizing his

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43. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002) (allowing for a sentence reduction by means of a departure from the otherwise applicable, but advisory, sentencing guideline range for a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense").

44. *See* 18 U.S.C. § 3553(e) (2000) (permitting the sentencing court to depart below a statutory minimum sentence if the government files a motion indicating that the defendant substantially assisted in the investigation or prosecution of another person).

45. In prosecutor jargon, such an interview is called a "proffer session." Such a meeting is normally accompanied by a "proffer letter" outlining the rules that will govern the proffer. *See, e.g.*, United States v. Burke, 243 Fed.App'x. 69, 73 (6th Cir. 2007) (describing the contents of a typical proffer letter in which the government agreed that "no statements made by your client during this proffer will be used in the United States' case-in-chief"). The cooperating defendant usually agrees to talk honestly and candidly about his own involvement in crimes and about the crimes of others. In exchange, the interviewing prosecutor agrees not to use the cooperator's words against him.

46. *See* United States v. Lopez, 514 U.S. 549, 551 (1995) (recognizing the limits on Congress's commerce clause authority to reach crimes that do not involve the regulation of a commercial activity nor contain a connection to interstate commerce).

47. Because Steven is assigned to prosecute Jones, he makes all "government" recommendations to the sentencing judge about the value of Jones's cooperation and the appropriate sentence that Jones should receive. *See generally* Wade v. United States, 504 U.S. 181, 185-86 (1992) (recognizing that the government possesses the power but no duty to file a substantial assistance motion, and that a prosecutor's discretion in making such a motion is limited only by the defendant's due process rights). Presumably, this is the standard procedure in most, if not all, U.S. Attorney's Offices. This was the custom in both U.S. Attorney's Offices where I worked.

48. The U.S. Sentencing Guidelines provide for a decrease in the length of a defendant's sentence, if he plays a lesser role in the commission of a crime. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2002) (explaining that based on a defendant's role as a "minimal participant" in criminal activity, his offense level under the federal

involvement" in the drug conspiracy for which he is being prosecuted; and that "there is no way Jones is receiving a 5K1.1 sentence reduction for substantial assistance."[49]

This factually representative scenario demonstrates that a prosecutor's interaction with a cooperating defendant routinely raises questions about whether and how a prosecutor should use a cooperator's information to maximize the goals of the federal system of justice.[50] Without Jones's information, the federal government may never have discovered Smith's involvement in the four other federal crimes of bank robbery, and without Jones's tip, two states may never solve the violent crimes committed by Smith in those jurisdictions.[51] Unless the leads are investigated or disseminated, Smith will receive less punishment than he is due and may completely escape responsibility for several of his crimes. Unsolved crimes result in additional angst for victims who may continue to suffer from unanswered questions about the perpetrators of their crimes, prolonging their healing and denying them retribution and restitution. Furthermore, if the prosecutors ignore Jones's tip or fail to disseminate it to the appropriate law enforcement authorities, someone other than Smith could be wrongly prosecuted for Smith's acts, and Jones will likely believe that he was treated unfairly by "the system."[52] Jones is likely to share his unfavorable experience with other would-be cooperators who may conclude that there is no benefit to speaking honestly and openly with the government.[53] A somewhat competing, but equally important, concern the

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sentencing guidelines should be decreased by four levels and that a role as a "minor participant" will reduce his offense level by two levels).

49. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.").

50. Although terms like "maximize justice" are admittedly vague and ambiguous, it will be assumed that in maximizing justice through her use of a cooperator, a federal prosecutor should, at a minimum, seek to adhere to the DOJ's Mission: "to enforce the law and defend the interests of the United States according to the law; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; . . . and to ensure fair and impartial administration of justice for all Americans." DOJ.gov, About the DOJ - Mission Statement and Statutory Authority, http://www.usdoj.gov/02organizations (last visited Feb. 10, 2008). In addition, the prosecutor must evaluate the value of every cooperating witness in light of Congress's desire for proportional and equitable sentences. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A3 (2002) (explaining that two of the three primary goals of Congress in adopting the Sentencing Reform Act of 1984 was "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders" and "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity"). Finally, due regard should be given to the effectiveness of cooperation on crime prevention and successful prosecution, whether or not the crime is one over which the federal government has jurisdiction.

51. Although these other jurisdictions unquestionably have an interest in Jones's information, Steven may squelch the ability of those jurisdictions to effectively use the information.

52. *See, e.g.*, Alan Ellis, *Federal Sentencing: Practice Tips: Part 1*, 20 CRIMINAL JUSTICE 55, 55 (2006) (noting that many criminal defendants have cooperated with the government in anticipation of a sentencing benefit without receiving a downward departure or other favorable sentencing treatment).

53. In other words, Steven's treatment of Jones could chill a potential cooperator from offering cooperation. *See* Hughes, *supra* note 1, at 40 (noting that a "bargain is, after all, a bargain" and suggesting that double dealing

scenario raises is sentencing disparity. The DOJ has expressed a desire that defendants like Jones and Smith receive a sentence in the same range as other defendants of similar culpability and comparable to those who have engaged in similar efforts to assist law enforcement.[54]

In fact, through the federal sentencing statutes, and indirectly through the federal Sentencing Guidelines, Congress has mandated sentencing proportionality and the equitable imposition of criminal sentences.[55] In deciding whether to pursue Jones's lead, the prosecutors must decide the relative importance of Jones's information. They must also determine whether or not Jones is the type of defendant who should be granted a significant sentence reduction. Although Jones's information about Smith's other crimes appears accurate, Jones was a major participant in a violent drug ring, and, some would argue, is not worthy of a sentence reduction. Plus, Lisa will have to resolve her conflict with Steven to make the fullest use of the information, assuming she deems the cooperation worthy of pursuit.

It is common for defendants to offer "cooperation" in hopes of gaining a substantial assistance departure,[56] but the routine nature of the scenario offers no guarantee that prosecutors will make consistent or sound decisions about whether to pursue the cooperation.

B. The Evidence of Prosecutors' Disparate Use of Cooperating Defendants

In 1998, two high-level employees of the U.S. Sentencing Commission produced a report that compiled information gathered between 1993 and 1997 by the Commission's Substantial Assistance Staff Working Group. That Working Group

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by the government "will create doubts about the rectitude of the criminal justice process"). On the other hand, if Steven is too lenient in his dealings with Jones, Steven may encourage other would-be cooperators to concoct false information about other criminals and crimes. *See* discussion *infra* Part I.B.

54. *See* Memorandum from John Ashcroft, U.S. Att'y Gen., to All Federal Prosecutors on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, Introductory Comment. (Sept. 22, 2003), *available at* http://www.usdoj.gov/ops/pr/2003/September103_ag_516.htm [hereinafter Ashcroft Memo] (recognizing the desirable goals of the Sentencing Reform Act, including: "to guide sentencing discretion, so as to narrow the disparity between sentences for similar offenses committed by similar offenders; and [] to provide for the imposition of appropriately different punishments for offenses of differing severity").

55. *See generally* 18 U.S.C. § 3553(a) (2000) (directing the sentencing court to "impose a sentence sufficient, but not greater than necessary," to comply with the purposes of sentencing as otherwise identified in the sentencing statute); 28 U.S.C. § 991(b)(1), (2) (2003) (indicating that the purpose of the U.S. Sentencing Commission is to further the purposes of sentencing identified in 18 U.S.C. § 3553(a)(2) and to provide certainty and fairness in sentencing while "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct"); 28 U.S.C. § 994(n) (2006) (directing the U.S. Sentencing Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance").

56. *See* MAXFIELD AND KRAMER, SUBSTANTIAL ASSISTANCE, *supra* note 8, at 9 (acknowledging data gathered by a substantial assistance working group formed by the U.S. Sentencing Commission in 1991, which indicated that "assistance to authorities was a common occurrence," regardless of whether the substantial assistance resulted in a departure, including a finding that about two-thirds of all defendants sought to provide assistance to the government in the prosecution of others).

study uncovered disparity in the way federal districts defined and rewarded "substantial assistance" resulting in sentencing departures.[57] The working group employed multiple methodologies, to analyze disparity in 5K1.1 motions including: 1) a mail survey directed to U.S. Attorneys; 2) site visits to eight federal districts in which the group conducted interviews of judges, prosecutors, defense lawyers, and probation officers, and telephone interviews with staff of several U.S. Attorney's Offices; and 3) a "case coding" project.[58] The working group was studying whether or not the sentencing guidelines had reduced unwanted sentencing differences.[59] Data collected by the group in 1994 found that prosecutors continued to vary in the way they awarded 5K1.1 departures, even after adoption of the guidelines.[60] The study also found that while all U.S. Attorney's Offices claimed to have an office policy governing 5K1.1 departures, the policies were often ignored.[61] The evidence "consistently indicated that factors that were associated with either the making of a 5K1.1 motion and the magnitude of the departure were not consistent with principles of equity."[62] Moreover, the working group was "not able to find direct correlations between type of cooperation provided, type of benefit or result received by the government, the [government's] making of a § 5K1.1 motion [for a sentence reduction], and the extent of substantial assistance departure received."[63] While this information is dated, there is no new evidence to suggest that recent events have significantly changed these statistics.

In addition to this empirical evidence that suggests an inequitable use of government 5K1.1 motions to award cooperation, statistics compiled by the Sentencing Commission show that the number of cases in which defendants are granted sentence reductions for substantially assisting the government remains quite low.[64] As recently as 2005, only about 15.2% of defendants received a sentence reduction based on their substantial assistance to the government in the prosecution of another.[65] Thus, the evidence suggests that cooperation could be more equitably, effectively, and aggressively pursued by prosecutors within the DOJ.

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57. *Id.* at 20 ("[T]his analysis uncovered that the definition of "substantial assistance" was not being consistently applied across the federal districts. Not only were some districts considering cooperation that was not being considered by other districts, but the components of a given behavior that classified it as "substantial" were unclear.").

58. *Id.* at 6.

59. *Id.* at 4.

60. *Id.* at 5.

61. MAXFIELD AND KRAMER, SUBSTANTIAL ASSISTANCE, *supra* note 8, at 8.

62. *Id.* at 21.

63. *Id.* at 20.

64. *See supra* note 9.

65. *Id.*

C. *The Source of Disparity*

Disparity in the manner in which prosecutors use and reward cooperation is not surprising. There are ninety-four U.S. Attorney's offices of varying sizes. Each office is managed by a separate U.S. Attorney.[66] Each U.S. Attorney has his or her own policies and procedures, and some of those U.S. Attorneys cloak assistant U.S. attorneys with extensive autonomy.[67] Furthermore, the DOJ offers only limited guidance about the factors prosecutors should balance when making decisions about cooperation, and the Department provides no indication of which factors should carry the most weight. For example, within the U.S. Attorney's Manual, which acts as a policy manual for federal prosecutors, (but provides no rights to defendant to enforce the policies), Section 9-23.210 speaks to a prosecutor's decision to grant immunity to someone when the testimony or information that person is expected to provide "may be necessary to the public interest."[68]

Similarly, Section 9-27.620 identifies factors pertinent to entering into a non-prosecution agreement in exchange for cooperation.[69] But neither provision attempts to balance the competing interests or to direct prosecutors who must do so. Furthermore, the United States Attorney's Manual is silent regarding the value of cooperation in support of both crimes committed in other districts and state crimes over which the federal prosecutor lacks venue and jurisdiction.

Exacerbating the lack of direction from the DOJ is the fact that prosecutors (such as Lisa and Steven in the hypothetical) have different personal backgrounds, different levels of prosecutorial experience, and a personal and professional interest in prosecuting their "own" defendants. All of these factors flavor how prosecutors assess the particular value of a cooperator and his information.[70] Thus,

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66. There is one exception. Only one U.S. Attorney oversees Guam and the Northern Mariana Islands.

67. In some offices, assistant U.S. attorneys act much like sole practitioners. They manage their own cases, determining which cases to pursue to trial and which to push toward a plea. They also decide whether and when to pursue or accept a defendant's cooperation.

68. U.S.A.M. ¶ 9-23.210 (1997). Section 9-23.210 says that prosecutors should consider the following factors: 1) the importance of the investigation to effective law enforcement; 2) the value of the testimony or information to the investigation; 3) the person's relative culpability in connection to the offense being investigated; and 4) the possibility of successfully prosecuting the person prior to compelling her testimony. *Id.*

69. *Id.* ¶ 9-27.620 (listing: 1) importance of the case; 2) value of the cooperation; and 3) relative culpability and criminal history as three important factors in prosecutor's decision to enter such an agreement).

70. As representatives of the federal sovereign, the prosecutors in the hypothetical represent the interests of society in fully and fairly prosecuting Smith for all federal crimes he committed. They represent the interests of the victims of the various federal bank robberies. They represent the sovereign's interest in ensuring that similarly situated federal defendants are treated and punished similarly. Arguably, the federal prosecutors represent the interests of others too, potentially including a responsibility to citizens of the states impacted by Smith's crimes, as well as the individual victims of those crimes. In DOJ's Strategic Plan for 2000-2005, the Department declared its commitment "to continuing and strengthening collaborative efforts with other federal agencies, states and localities, tribal governments, community groups, foreign countries, and others." Department of Justice, DOJ's Strategic Plan for 2000-2005 – Chapter II: Department of Justice Goals and Objectives: Fiscal Years 2000-2005, http://www.usdoj.gov/archive/mps/strategic2000_2005/chapter2.htm (last visited Feb. 9, 2008). DOJ also announced: "We are committed to fulfilling our leadership responsibilities in forging a coordinated national and

the individual prosecutor's broad discretion is necessarily exercised in a way that reflects his or her own values and interests. Accordingly, individual prosecutors are left to make decisions about cooperation that are destined to be different than those another prosecutor would make under the same circumstances.

Why should federal prosecutors worry about these difficult issues? The answer —ethics, professionalism and (most of all) justice.[71]

III. A FEDERAL PROSECUTOR'S ETHICAL OBLIGATIONS

The scholarly literature and decisions from the federal courts have been quick to chastise prosecutors for overzealous exercise of prosecutorial discretion.[72] But the opposite is similarly troubling—prosecutors who through inexperience, lack of training, personal interest, bias (known or subconscious), apathy, poor judgment, or mistake tend to ignore, reject, or overlook information that could have and would have solved crimes and resulted in convictions of guilty persons with just a

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international response to crime and justice and assisting states, localities and tribal governments." *Id.* DOJ's announced goals certainly seem to indicate that the prosecutors should consider the interests of the states in which Smith committed crimes and the interests of all of his victims, even the state victims. *See also* Brady v. Maryland, 373 U.S. 83, 87 (1963) (noting an inscription on the wall in the Department of Justice stating, "The United States wins its point whenever justice is done its citizens in the courts").

71. Professor Michael Cassidy has also concluded that when a prosecutor decides to strike a deal with a defendant's accomplice in exchange for cooperation, the prosecutor's decision to deal with the accomplice implicates the prosecutor's ethical obligations. Cassidy, *Character and Context, supra* note 37, at 655-56. Cassidy believes that the prosecutor's ethics are implicated because the decision to deal with an accomplice gives the cooperator an incentive to fabricate testimony and to minimize his own involvement in a crime. *Id.* Cassidy says that such dealings "implicate[] the prosecutor's obligation of candor to the tribunal" and "sometimes impact[] morality." *Id.* I conclude that a prosecutor's ethical obligations are implicated when dealing with a cooperator and assessing the value of his information simply because the prosecutor is duty bound by the ethics rules to maximize or "do" justice. "Doing justice," at a minimum, requires that every federal prosecutor expend her best efforts and thoughtful analysis of cooperation to ensure that defendants are sentenced equitably and proportionally. This duty arises from Congress and DOJ's expressed desire for sentencing fairness and uniformity. The duty also rests on the imperative that a prosecutor evaluate whether or not a cooperator's information will lead to the prevention of crime or successful prosecution of other criminals.

72. *See* Cassidy, *Character and Context, supra* note 37, at 639 (advocating for a greater focus on the character of the individual prosecutor who makes discretionary decisions and asserting that in a largely discretionary system, better training and closer supervision of prosecutors, as well as the strengthening of rules, will not "insulate criminal defendants from the potentially ruinous decisions of overzealous prosecutors"); *see also* Caldwell v. Mississippi, 472 U.S. 320, 336 (1985) (addressing misstatements in the prosecutor's argument to the jury); Brady v. Maryland, 373 U.S. 83, 87-88 (1963) (holding that suppression of evidence favorable to the defendant can be prosecutorial abuse). Much of the scholarship discussing the ethical obligations of a prosecutor focuses on the risk of convicting an innocent person because of the powerful discretion prosecutors wield. *See, e.g.*, Gershman, *Duty to Truth, supra* note 7, at 311-12 (discussing a prosecutor's ethical obligation to believe in a defendant's guilt before seeking conviction and citing the risk that discretion creates—"the criminal justice system often miscarries, almost always with tragic results"); *see also* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 728 (2006) ("[T]he absence of any legal or ethical sanctions to make prosecutors accountable for violations produces a system marked by willful abuse of law, cynicism, and the real possibility that innocent persons may be wrongfully convicted because of the prosecutor's misconduct."); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

telephone call or some minimal follow-up investigation. Simply put, sometimes federal prosecutors fail to capitalize on accurate and compelling cooperation. Although the Executive Branch (and, thus, federal prosecutors) has exclusive legal authority and extensive discretion to decide whether to prosecute a case,[73] prosecutors must bear some responsibility beyond their purely legal obligations when they evaluate whether to accept a valid lead or communicate the tip to some investigative or prosecutorial agency that can effectively pursue it.

This Article posits that a prosecutor's unique, ethical duty to "do justice" always demands a thoughtful and thorough evaluation of a cooperating defendant's seemingly valid tips. Because of the potential importance of such leads, a cooperator's seemingly valid information cannot ethically be rejected for the prosecutor's personal gain, dislike of an informant, convenience, or other reasons inconsistent with the mission of the DOJ, which is directed at ensuring justice for all Americans. Likewise, when receiving tips from cooperators, prosecutors must act in a way that complies with Congress's mandate for treating similarly-situated defendants fairly and equitably.

Accordingly, to faithfully satisfy her ethical and professional duties as a prosecutor, Lisa (in the hypothetical) must not accede to Steven's assessment of Jones's value to the system of justice, if her thoughtful analysis of the tips suggests that the federal government should pursue Jones's information, disseminate the leads to state authorities, or award Jones a sentence reduction for assisting the government. She must decide whether to seek supervisory or other intervention to mediate and resolve the tension between her view and Steven's. She must thoughtfully assess whether there is a need to communicate Jones's information about the rapes and the child molestation to the state jurisdictions that may capitalize on those tips. Finally, Steven and Lisa must attempt to exercise their extensive prosecutorial discretion in a way that provides incentives for valuable cooperation without undermining other goals of a procedurally and substantively equitable and proportional system of justice.[74] They must look beyond their own cases, self-interests, and personal agendas and determine from a more global[75] perspective how justice can best be accomplished.

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73. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (asserting that, while a prosecutor's discretion is subject to constitutional constraints, the decision whether or not to prosecute and what charges to bring generally rests entirely in the discretion of the Attorney General and the U.S. Attorneys); United States v. Nixon, 418 U.S. 683, 693 (1974) (recognizing that the Executive Branch holds exclusive authority and "absolute discretion" to decide whether to prosecute a case).

74. While the hypothetical situation presents intra-office, inter-office, and sovereign-wide dilemmas, similar questions arise when a federal prosecutor evaluates proposed cooperation within a case in which one defendant proposes to assist in the prosecution of a co-defendant.

75. By "global" perspective, I mean that the interests of states, counties, communities, and victims matter, as do the societal interests represented within the district in which the prosecutor is authorized to prosecute cases.

A. *"Doing Justice"*[76]

A federal prosecutor is subject to the ethical standards imposed on every practicing lawyer by the state in which he or she practices law and to the local federal court rules of that state.[77] In addition, "[t]he federal courts in analyzing conduct unbecoming to a member of the bar turn invariably to the Model Rules or other codes of professional conduct."[78] The ABA Model Rules of Professional Conduct, as well as the parallel rules in many states, place "special," additional responsibilities on prosecutors.[79] All of these rules essentially demand that a prosecutor act fairly, honestly, impartially, and with a sense of fair dealing that the rules categorize as "seeking justice." For instance, the comment to Model Rule of Professional Conduct 3.8 amplifies the prosecutor's responsibilities this way: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[80]

The American Bar Association, Criminal Justice Section, also provides general guidance for federal prosecutors.[81] In particular, Standard 3-1.2, entitled "The Function of the Prosecutor," explains in pertinent part: "(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor

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76. The terms "doing" and "seeking" justice are used interchangeably in this Article.

77. *See* 28 U.S.C. § 530B(a) (2000) (commonly called the "McDade Amendment") ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."); *See* 28 C.F.R. § 77.2(h) (defining the phrase "state laws and rules and local federal court rules governing attorneys" to mean "rules enacted or adopted by any State or Territory of the United States or the District of Columbia or by any federal court, that prescribe ethical conduct for attorneys and that would subject an attorney, whether or not a Department attorney, to professional discipline, such as a code of professional responsibility"); 28 C.F.R. § 77.3 (1999) ("In all criminal investigations and prosecutions . . . attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."). *See also* 28 C.F.R. § 77.2(a) (1999) (defining "attorney for the government" as including "any assistant United States attorney").

78. United States v. Colorado Supreme Court, 189 F.3d 1281, 1285 (10th Cir. 1999); *see also* United States v. Young, 470 U.S. 1, 8, 26 (1985) (citing the ABA Model Code of Professional Responsibility, the ABA Model Rules of Professional Conduct, and the ABA Standard for Criminal Justice in evaluating the ethical conduct of a federal prosecutor at trial).

79. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002) (listing several directives to prosecutors, including that the prosecutor in a criminal case "shall" refrain from prosecuting a charge that he or she knows is unsupported by probable cause and requiring that prosecutors "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel"); *see* GEORGIA RULES OF PROF'L CONDUCT R. 3.8 (stating similar special requirements on prosecutors in the state of Georgia).

80. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2002). As compared to the Comments, the Model Rules are more definitive about a prosecutor's additional ethical obligations, but none of the responsibilities outlined in either the Rules or the Comments addresses a prosecutor's dealings with cooperating witnesses. *See* MODEL RULES OF PROF'L CONDUCT Rule 3.8.

81. *See* ABA CRIMINAL JUSTICE SECTION STANDARDS 3-1.1 (1993) (explaining that the standards "are intended to be used as a guide to professional conduct and performance").

must exercise sound discretion in the performance of his or her functions. (c) The duty of the prosecutor is to seek justice, not merely to convict."[82]

In addition, Ethical Consideration[83] 7-13 says, "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict. This special duty exists because . . . the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute."[84] In short, the various model rules and codes of professional conduct are uniform in demanding that federal prosecutors "seek justice" and exercise their discretion soundly. But the rules and codes are equally consistent in their failure (or inability) to delineate what these benevolent "do justice"-type concepts mean.

Federal court decisions also discuss attributes of an ethical prosecutor.[85] But the courts, too, talk in utopian platitudes. Perhaps the most quoted case discussing a prosecutor's ethical responsibilities (or at least the best known among federal prosecutors) is *Berger v. United States*,[86] in which the United States Supreme Court declared:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer . . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[87]

Even when the federal courts have discussed the prosecutor's special duties in the context of dealing with cooperators, the guidance has been general. For instance, discussing the risks of using and rewarding "criminals as witnesses," the Ninth Circuit has said, "Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their services, the

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82. *Id.* 3-1.2.

83. The Ethical Considerations "are aspirational in character and represent the objectives toward which every member of the profession should strive." MODEL CODE OF PROF'L RESPONSIBILITY, Preliminary Statement (1983).

84. *Id.* at EC 7-13.

85. *See, e.g.*, Cheney v. U.S. Dist. Ct., 542 U.S. 367, 386 (2004) (noting the publicly accountable prosecutor's ethical obligation to win, advocate for his client, and to "serve the cause of justice"); Gray v. Mississippi, 481 U.S. 648, 671 (1987) (Powell, J., concurring in part and concurring in the judgment) (expressing the view that a prosecutor has "the right, indeed the duty, to use all legal and ethical means to obtain a conviction" including the right to exercise peremptory jury strikes); United States v. Ash, 413 U.S. 300, 320 (1973) (reiterating that prosecutors may strike "hard blows" but not "foul ones") (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

86. 295 U.S. 78 (1935).

87. *Id.* at 88.

government stands uniquely positioned to guard against perfidy. By its actions, the government can either contribute to or eliminate the problem."[88] In sum, the rules and the courts concur – a federal prosecutor is duty bound to "do justice," whatever "doing justice" requires.[89]

B. The Trouble with "Justice"

Even when prosecutors "seek justice" in their dealings with cooperators, there is no guarantee that justice will result. After all, what does it mean to "do justice?" And how can individual prosecutors gauge whether or not they are achieving it?

1. "Doing Justice" Has Multiple Meanings

As numerous legal experts have recognized, "doing justice" is a concept that "has no universally accepted meaning and does not lend itself to easy interpretation."[90] The concept may have one meaning when a prosecutor is trying a case and another when she is advising an investigative agent.[91] One legal scholar has said that the vague nature of the ethical directive "leaves prosecutors with only their individual sense of morality to determine just conduct."[92]

Undoubtedly, if prosecutors are left to weigh justice for themselves, their sense of "right" and their beliefs about the wisest course to follow will inevitably depend on infinite, opaque factors, many probably unknowable and unidentifiable even to the prosecutors themselves. When left unguided about its meaning, a prosecutor's

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88. United States v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th Cir. 1993).

89. When a federal prosecutor engages in allegedly improper conduct, the conduct is investigated by the Department of Justice's Office of Professional Responsibility. *See* 28 C.F.R. § 0.39 (2007).

90. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 n.4 (1991). *See also* Cassidy, *Character and Context*, *supra* note 37, at 637 (noting the general nature of the ethical directive to prosecutors and the lack of criteria for them to "determine what is just"); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 608 (1999) (noting that the source of the prosecutor's responsibility was "never identified" and that "[i]t assumed different meanings in different contexts"); *id.* at 622 (describing the phrase "seek justice" as vague and asserting that "[s]tanding alone . . . [the phrase] points in many directions"). *But see* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1120 (1988) (acknowledging that the meaning of justice in the ethics context is less than clear but contending that judgments about "justice" are not arbitrary, only controversial, and asserting that "judgments" about legality and justice are grounded in the norms and practices of the surrounding legal culture).

91. *See* Zacharias, *supra* note 90, at 46 nn. 3-4 (acknowledging that the term "do justice" has no universal meaning and that "[t]he duty to 'do justice' applies to all governmental attorneys, but takes on its most dramatic significance in criminal prosecutions"); *see also* Cassidy, *Character and Context*, *supra* note 37, at 638 (noting that justice may mean several overlapping but different things simultaneously, including safeguarding the substantive and procedural rights of an accused, exhibiting general "fairness" to others, and showing consistency in decision making); Green, *supra* note 90, at 616 (describing the disciplinary rules applicable to prosecutors as "barely scratch[ing] the surface" of defining the prosecutor's duty to "seek justice" in different aspects of their jobs).

92. Zacharias, *supra* note 90, at 48 (citing George T. Frampton, *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 8 (1976)); *see also* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 738 (1999) (noting the "remarkably little references to the prosecutor's investigative function in ethical codes").

sense of justice will be impacted by her personal ambitions, life experiences, religious beliefs, history (if any) as a victim of crime, degree of cynicism about the world, peer pressures in the office (whether conscious or subconscious), attitudes of the leaders within her office, pressures from the defense bar, and the list goes on.[93] Because there can be as many definitions of "do justice" as there are prosecutors and fact scenarios,[94] without some discussion of its meaning in a given context, there will be a built-in disparity in how prosecutors undertake to fulfill their duty to "seek justice."[95]

In an article published in 1999, Professor Bruce A. Green explored how prosecutors should "conduct themselves in light of the principle that has traditionally been thought to define the prosecutor's professional ethos: the duty to seek justice."[96] In his article, Green avoided addressing specific areas of a prosecutor's conduct in favor of targeting "the overarching concept."[97] In evaluating the concept, he delineated two types of "ethical" implications: 1) prosecutorial decisions, which may be "subject to legal rules that have been (or arguably should be) adopted by courts or other appropriate bodies to control lawyers' conduct";[98] and 2) a more nebulous, broader sense of ethics; "involving what a prosecutor should do in situations where the law offers a choice."[99] Assessing the value of a cooperator's information and deciding whether and how to act in response to the information could not fall more squarely within the second, "choice," category described by Green. It would be impossible for Congress or the courts to fashion effective rules to guide each prosecutor in the myriad of dilemmas she will face in dealing with cooperators. Worse yet, any such rules could unduly restrict the prosecutor's ability to respond quickly and with a tailored reaction to the varying scenarios cooperating defendants are certain to present.

Because of the difficulty in creating rules effective for every situation, and given the need for prosecutorial discretion and flexibility in dealing with unique factual

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93. These factors of life experiences, beliefs, history of victimization, and the like are the same indicators that a trial lawyer seeks to uncover in jurors during voir dire because such factors impact the way a juror will view and decide a case. Such factors suggest bias, conflicts, and leanings for and against certain positions that are not logically connected to a case or defendant.

94. Professor Bruce A. Green suggests that doing justice "assume[s] different meanings in different contexts, meanings that one [can] only infer." Green, *supra* note 90, at 608. He asserts that in the context of exercising discretion in deciding whether to charge someone or defer prosecution, "doing justice" means "seeking to achieve a just, and not necessarily the most harsh result." *Id.* Green says that in the "trial context, the concept seem[s] to mean something else . . . something to do with fidelity to the fairness of the process." *Id.*

95. Some prosecutors value convictions the most; others give maximum value to ensuring that innocent persons are never convicted. *See* Zacharias, *supra* note 90, at 48 ("Some [attorneys] will decide that justice lies in conviction at all cost; others will bend over backwards to vindicate defendants' rights") (citing Dr. George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98 (1975)).

96. Green, *supra* note 90, at 611.

97. *Id.* at 611-12.

98. *Id.* at 618-19 (citing John M. Burkoff, *Prosecutorial Ethics: The Duty Not "To Strike Foul Blows,"* 53 U. PITT. L. REV. 271 (1992)).

99. *Id.* at 619.

situations, no specific rules should be adopted.[100] Instead, as further discussed in Parts IV.A and V.B., the DOJ should develop and publicize an extensive list of factors pertinent to a prosecutor's evaluation of cooperators and provide numerous examples of how such factors might be balanced in different contexts. Through communication about the factors and the weight that each factor might carry, the Department can begin to create a "best practices" for evaluating tipsters. The Department should discuss these best practices in an effort to encourage "a culture" that fosters an environment in which federal prosecutors can better define what "doing justice" means when they seek to make effective, balanced and consistent use of cooperators and their information.

2. The Prosecutor's Broad Discretion Can Impair Her Ability To "Do Justice"

Federal prosecutors wield broad discretion with little guidance from the Constitution,[101] statutes, or the DOJ's policies and procedures[102] when they are asked to decide whether to use and investigate information proffered by a defendant who seeks to "cooperate" in the investigation and prosecution of another criminal. The established law does not demand any response to a defendants offer to cooperate, let alone dictate a particular one.[103]

Although a federal prosecutor's discretion is broad when charging crimes, it is, perhaps, the broadest when dealing with cooperating witnesses.[104] Even the power that a low-level, assistant U.S. attorney levies over cooperating defendants is

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100. *But see* Little, *supra* note 92, at 752 (proposing specific ethical rules to guide prosecutors in the investigative stage).

101. The Constitution would most assuredly prohibit a prosecutor from selecting or rejecting cooperators based on their race, gender or religion. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (acknowledging that a prosecutor's discretion is subject to constitutional constraints, including limits imposed by the equal protection component of the Due Process Clause of the Fifth Amendment).

102. There is some DOJ guidance that generally discusses sentence reductions for a defendant's substantial assistance. *See, e.g.*, Memorandum from Janet Reno, U.S. Att'y Gen., to all U.S. Attorneys on Ensuring Racial Neutrality in Prosecution Practices 1-2 (Jan. 9, 1998), *available at* http://www.usdoj.gov/ag/readingroom/racenut.htm [hereinafter Reno Memo] (discussing the need for race neutral decisions about substantial assistance motions and requiring that all such motions be approved at the supervisory level). *See also* U.S.A.M. ¶ 9-27.400, and 9-23.210 (2002) (outlining factors that a prosecutor should consider when determining whether to grant immunity to someone in exchange for testimony or information); *Id.* 9-27.620 (addressing non-prosecution agreements). But there are no policies prohibiting a prosecutor from ignoring information from a potential cooperator.

103. *See* Cassidy, *Character and Context*, *supra* note 37, at 656 (arguing that "there are very few systematic checks on a prosecutor's discretionary decision to offer leniency in exchange for cooperation").

104. The Attorney General and the U.S. Attorneys have enormous discretion in deciding whom and how to prosecute. "This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 489-90 (1999) (quoting Wayte v. United States, 470 U.S. 598, 607-08 (1985)) (brackets in original). Historically, assistant U.S. attorneys had much more discretion in charging decisions than they do today. The "Ashcroft Memo" issued in 2003 by then Attorney General John Ashcroft restricted the freedom of prosecutors in selecting charges. *See* Ashcroft Memo, *supra* note 54 (setting forth basic policies that all federal prosecutors must follow in charging). In the Ashcroft Memo, the Attorney General announced that DOJ policy requires that "federal prosecutors . . . charge and pursue the most serious, readily provable offense or offenses that are supportable by

extensive.[105] Moreover, there is no rule of ethics speaking to the specific topic of cooperating witnesses.[106]

Because a willing and able federal defendant cannot provide substantial assistance to the government or glean any benefit at sentencing without the prosecutor's participation and support, a prosecutor's use or non-use of a cooperator and his information presents an acute ethical dilemma. A prosecutor can decide unilaterally and in secret whether or not to pursue a lead from a cooperator. The prosecutor is not obligated to tell her supervisor that a defendant has offered to cooperate.[107] She has no legal duty to tell the victims of the target defendant's crime. And even if the prosecutor explores the tip to some degree, she bears no obligation to seek a sentence reduction on behalf of the cooperating defendant. From a legal perspective, she can act negligently, or maybe even randomly.[108]

a. Substantial assistance departures encompass extensive prosecutorial discretion

Many a federal defendant has asserted that he was willing, able, and (often) did provide substantial assistance to the government but was never rewarded for his cooperation because the prosecutor refused to file the necessary motion.[109] A typical cooperation provision in a plea agreement leaves the prosecutor almost unlimited discretion to decide whether to support a 5K1.1 departure.[110] For

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the facts of the case" *Id.* Neither former Attorney General Alberto R. Gonzales nor his successor Michael B. Mukasey has rescinded the directives in the Ashcroft Memorandum.

105. *See* Gershman, *Duty to Truth*, *supra* note 7, at 314 (noting the prosecutor's ethical duty "to truth" because of "prosecutor's domination of the criminal justice system and his virtual monopoly of the fact-finding process").

106. *See* Cassidy, *Character and Context*, *supra* note 37, at 654 (noting that neither the text of Model Rule 3.8 nor the ABA's criminal Justice Standards provide any direction for conscientious prosecutors on the related topic of granting leniency to a codefendant in exchange for cooperation and noting a lack of academic attention to the subject).

107. There is no legal or regulatory obligation imposed on the individual prosecutor. Presumably, an individual U.S. Attorney's Office or an individual supervisor within an office could impose a policy or practice requiring supervisory consultations. Nevertheless, if an individual prosecutor decides in favor of using a cooperator, the assistant U.S. attorney would be obligated to seek supervisory approval for a 5K1.1 sentence reduction. *See* U.S. A.M. 9-27.400 (2002).

108. But see *infra* note 109 for a discussion of *Wade v. United States*, 504 U.S. 181 (1992) (explaining that the Supreme Court seems to deny prosecutors the power to act arbitrarily in denying substantial assistance motions).

109. *See* Wade v. United States, 504 U.S. 181, 185-86 (1992) (recounting a defendant's claim of substantial assistance but holding that the federal district court maintains authority to review a prosecutor's decision refusing to file a substantial assistance motion only if the prosecutor's decision "was based on unconstitutional motives"); *See also* Ellis, *supra* note 52, at 55 ("Many of us have been in situations where our client has cooperated to comply with the purposes of sentencing under 18 U.S.C. § 3553(a) and yet the government has refused to file a 5K1.1 motion for downward departure based on substantial assistance."); Jonathan D. Lupkin, Note, *5K1.1 And Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guidelines*, 91 COLUM. L. REV. 1519, 1519-20 (1991) (recounting case in which assistant U.S. attorney acknowledged at sentencing that defendant provided vital testimony for government but refused to file 5K1.1 motion based on office policy against such motions without the defendant's having gone "under cover").

110. *See, e.g.*, U.S. v. Singleton, 144 F.3d 1343, 1344 (10th Cir. 1998) *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999) (recounting the language in a typical plea agreement related to cooperation).

instance, a typical plea agreement might provide the following language relevant to cooperation efforts: "[T]he government would file a motion under USSG § 5K1.1 or 18 U.S.C. § 3553(e), if, in its sole discretion, [the cooperator]'s cooperation amounted to substantial assistance."[111]

John McTiernan, the director of several Hollywood movies (including *Die Hard*, *Predator*, and *Basic*), recently confronted a similar provision when he pled guilty to making a false statement to the FBI during its investigation of Anthony Pellicano, who is suspected of masterminding "a long-running wiretapping conspiracy on behalf of stars, studio executives and others in the entertainment industry."[112] Defendant McTiernan lied to investigators about hiring Mr. Pellicano to wiretap conversations of the producer of one of his films.[113] After pleading guilty, Mr. McTiernan offered to assist in the investigation and prosecution of Mr. Pellicano, but the prosecutors "thought he was not being truthful" and rejected his help.[114]

From the defendant's perspective, the federal prosecutor's refusal to support a substantial assistance departure is particularly discouraging because the defendant cannot simply look to the sentencing judge's generosity for some other equivalent sentencing departure.[115] While it is true that a cooperating defendant is "not a strong candidate for sympathy . . . whatever his moral worth, his fate under and after the cooperation agreement deserves attention because it is an important index of the fairness and integrity of the prosecutorial system."[116]

There are only two legal sources for a sentencing judge's authority to downwardly depart from the otherwise applicable (now advisory) federal Sentencing Guideline range based on a defendant's "substantial assistance" or "cooperation" to the government. Both sources derive from the federal prosecutor's decision to hear and then use the cooperator's information. The first source rests in the sentencing statute. That statute permits a sentencing court to depart below an otherwise mandatory statutory minimum sentence, if a defendant substantially assists authorities.[117] The federal sentencing Guidelines provide the second source for a sentence reduction, but they do not authorize a sentence below a statutory

111. *Id.*

112. David M. Halbfinger and Allison Hope Weiner, *Movie Director Given 4 Months for Lying About Hiring Detective*, N.Y. TIMES, Sept. 25, 2007, at C-4.

113. *Id.*

114. *Id.*

115. *See* Noelle Tsigounis Valentine, Note, *An Exploration of the Feeney Amendment: The Legislation That Prompted the Supreme Court to Undo Twenty Years of Sentencing Reform*, 55 SYRACUSE L. REV. 619, 627-29 (2005) (explaining the history and effect of the Feeney Amendment on downward departures).

116. Hughes, *supra* note 1, at 40.

117. *See* 18 U.S.C. § 3553(e) (2000) (providing that upon "motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense").

minimum.[118]

In either instance, a defendant is virtually impotent to gain a sentence reduction, unless the federal prosecutor chooses to investigate (hopefully corroborate) and rely on the cooperator's information, and even then, arguably, only if the prosecution files the necessary formal motion at the defendant's sentencing hearing or thereafter.[119]

i. The first legal source for a substantial assistance departure—18 U.S.C. § 3553(e)

According to 18 U.S.C. § 3553(e), a sentencing judge must not reduce a defendant's sentence below a statutorily mandated minimum sentence, unless a prosecutor files a motion and authorizes such a departure.[120] A defendant's unilateral claim that he "provided substantial assistance will not entitle a defendant to [a sentence reduction,] a remedy or even to discovery or an evidentiary hearing."[121] Section 3553(e) always requires a "motion of the Government."[122] A sentencing court is rarely empowered even to review the government's decision in

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118. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002) (expressly authorizing a departure from the otherwise applicable Guidelines when "a convicted defendant provides 'Substantial Assistance to Authorities'"). Until January 2005, trial courts were required to apply the federal Guidelines in a mechanical manner. *See* United States v. Booker, 543 U.S. 220 (2005) (declaring the mandatory nature of the Sentencing Guidelines unconstitutional). Except in very circumscribed instances, sentencing courts did not have discretion to withhold application of the Guidelines to certain defendants or to lessen the severity of the Guidelines for specific factual scenarios. *Id.* at 233-35 (finding that the "availability of a departure in specified circumstances does not avoid the constitutional issue"). But in *Booker*, the Supreme Court decided that as long as the sentencing statute mandated that trial courts apply the Guidelines, the Guidelines were unconstitutional. *Id.* at 245. In reaching its conclusion, the Court remarked:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment . . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant. The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.

Id. at 233. Finding the Guidelines mandatory and, therefore, unconstitutional, a majority of the Court "remedied" the unconstitutionality of the Guidelines by declaring them "advisory." More specifically, the Court struck two provisions in the Sentencing statute—18 U.S.C. § 3553(b)(1) (which made the Guidelines mandatory) and 18 U.S.C. § 3742(e) (which the Court said "depend[ed] upon the Guidelines' mandatory nature"). *Id.* at 245. According to the Court, these "modifications" to the sentencing statute "[require] a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well." *Id.*

119. A federal defendant can receive a downward departure at the time of his sentencing. He can also receive a sentence reduction for substantial assistance after imprisonment. *See* FED. R. CRIM. P. 35(b) (permitting the court to reduce a convicted defendant's sentence even post-imprisonment "[u]pon the government's motion").

120. 18 U.S.C. § 3553(e) (2000); *see also* Melendez v. United States, 518 U.S. 120, 123-24 (1996) (holding that a government motion attesting to the defendant's substantial assistance and requesting the sentencing court to depart below the applicable Guideline range does not simultaneously permit the court to depart below a statutory minimum sentence).

121. Wade v. United States, 504 U.S. 181, 186 (1992).

122. *Id.* at 185.

refusing to file a substantial assistance motion under Section 3553(e).[123] As declared by the Supreme Court in *Wade v. United States*, Section 3553(e) limits the sentencing court's authority and gives the prosecutor "a power, [but] not a duty, to file a motion when a defendant has substantially assisted."[124]

ii. The second legal source for a substantial assistance departure—the federal Sentencing Guidelines

The applicable substantial assistance departure provision in the federal Sentencing Guidelines states: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."[125] Thus, the government also arguably holds the only key to a departure accorded by the Guidelines. Nevertheless, many experts assert that after the Supreme Court's 2005 decision in *United States v. Booker*,[126] "judges can now impose a sentence that is below the advisory guidelines ([but] not [below] a [statutory] minimum sentence), even without a government motion for cooperation."[127]

Even if a sentencing judge can depart downward for the defendant's substantial assistance without the government's motion, the defendant, as a practical matter, cannot provide such assistance without some willingness and participation by the federal prosecutors or their agents. The defendant will be hard pressed to demonstrate assistance, let alone "substantial" assistance, if his tips are ignored or

123. *Id.* Notably, though, *Wade* was decided long before the Court declared the mandatory nature of the federal sentencing Guidelines unconstitutional in *Booker*, 543 U.S. at 245.

124. *Wade*, 504 U.S. at 185. Defendant Wade presented a compelling case. He pled guilty to drug charges and unquestionably provided law enforcement agents with information that led to the arrest of another person who had been distributing drugs. *Id.* at 181, 183. But the government refused to file a motion for a substantial assistance downward departure. *Id.* at 184. Although the Court rejected Wade's contention that he was entitled to a departure without the government's motion, the Court, nevertheless, suggested that a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion based on "an unconstitutional motive," *id.* at 185-86, or "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." *Id.* at 186.

125. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002).

126. 543 U.S. 220 (2005). For an additional discussion on *United States v. Booker*, see *supra* note 118.

127. Ellis, *supra* note 52, at 55. *See also* India Geronimo, Comment, *"Reasonably Predictable:" Reluctance to Embrace Judicial Discretion for Substantial Assistance Departures*, 33 FORDHAM URB. L.J. 1321 (2006) (discussing judge's increased discretion after *Booker* to depart from the federal Guidelines pursuant to 5K1.1 without a government motion); *but see* United States v. Crawford, 407 F.3d 1174, 1181-82 (11th Cir. 2005) (holding that after *Booker* a defendant is not entitled to a 5K1.1 departure without a government motion). Whether a government motion is required or not, "[t]he appropriate [amount of any] reduction [for substantial assistance] shall be determined by the court." U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a) (noting that in deciding the "appropriate reduction" the court may consider: (1) "the court's evaluation of the significance and usefulness of the defendant's assistance, taking into account the government's evaluation of the assistance;" (2) "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;" (3) "the nature and extent of the defendant's assistance;" (4) the risk of injury to the defendant or his family resulting from his assistance; and (5) the timeliness of the assistance).

never investigated and used.

Because federal prosecutors independently decide whether and when to grant a defendant an opportunity to cooperate (and usually also unilaterally determine whether the cooperation is worth any sentence reduction), the prosecutor's power to award or deny a substantial-assistance sentence reduction is virtually unlimited.[128] There are few restraints even on prosecutors' arbitrary and capricious decisions about cooperation, and fewer restrictions still on a prosecutor's poorly-reasoned decisions about cooperators and the use of their information. There is no automatic review of a prosecutor's malicious decision to disregard a cooperator's seemingly valid information. There is no legal mandate that a supervisor re-assess a lower-level prosecutor's decision to ignore a seemingly valid tip. Thus, there is virtually unfettered discretion and no review of an unwise, malevolent, or random decision on cooperation.

b. The DOJ's policies and procedures provide only limited guidance to prosecutors

The U.S. Attorney's Manual[129] provides the only formal direction for federal prosecutors grappling with decisions about cooperation, and that direction is quite general.[130] Sometimes policy-makers within DOJ disseminate informal guidance about cooperation, but those directives typically target a perceived and specific problem. For example, on January 10, 2007, Deputy Attorney General Paul J. McNulty provided some informal guidance to prosecutors dealing with coopera-

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128. Disparity in the way similarly situated defendants are treated is one negative aspect of a prosecutor's unbridled discretion in dealing with cooperators. *See* MAXFIELD AND KRAMER, SUBSTANTIAL ASSISTANCE, *supra* note 8, at 20-21(indicating findings that the definition of "substantial assistance" was not consistently applied across federal districts and that the making of 5K1.1 motions was not based on factors indicating principles of equity). The federal Sentencing Guidelines were adopted, at least in large part, to avoid such disparity. Koon v. United States, 518 U.S. 81, 113 (1996) (indicating that the goal of the federal Sentencing Guidelines was "to reduce unjustified disparities" and "reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice"). Likewise, past administrations of the DOJ have expressed concern about unintended gender, race and religious bias when prosecutors exercise unguided discretion. *See* Reno Memo, *supra* note 102, at 1-2 (advising that as the chief federal law enforcement officers in their districts, U.S. Attorneys should take a leadership role in ensuring an awareness of issues of racial disparity and should examine their office's practices regarding race-neutral exercise of prosecutorial discretion).

129. The United States Attorneys' Manual outlines internal operating procedures for assistant U.S. attorneys. USAM Tit. 9 (2000). Although the Manual does not talk in terms of "seeking justice," the guidance it contains is designed to standardize charging, and add to uniformity in the way defendants are treated. These goals are presumably designed to "maximize justice." *Id.*; *see also* Ashcroft Memo, *supra* note 54. (implementing a policy in which federal prosecutors are generally directed to "charge and pursue the most serious, readily provable offense or offenses" in an effort to encourage consistency in prosecutorial discretion in charging and sentencing recommendations).

130. *See, e.g.*, USAM ¶¶ 9-27.600-630; 9-23.210; 9-27.620; *supra* notes 68-69 and accompanying text. The U.S. Sentencing Guidelines provides the most specific guidance to prosecutors, but the Guidelines are not binding, and a judge cannot force a prosecutor to rely on them. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002) and *supra* Part III.B.2.a.

tors who offer information about foreign intelligence.[131] In his memo, Mr. McNulty discussed the need for "all federal prosecutors to be trained on the identification and utilization of F[oreign] I[ntelligence] information"[132] and urged U.S. attorneys to increase incentives for such cooperating defendants.[133] Likewise, in 1998, then Attorney General Janet Reno sent assistant U.S. attorneys a memo discussing the need to ensure race neutral decisions on cooperation.[134]

Although there is limited direction to prosecutors who must decide whether to pursue or reject a cooperator's efforts, there are DOJ procedures to monitor the size of every 5K1.1 sentence reduction.[135] In my experience, these procedures tend to reduce the size of sentence reductions a prosecutor may recommend for a defendant's substantial assistance. Moreover, while there is this check on the amount of the reduction a cooperating defendant can receive once the assistant U.S. attorney pursues the cooperator's information, there are no equivalent requirements that a prosecutor advise a supervisor or anyone else when she rejects what appears to be valuable and accurate information about other crimes and criminals. There is no legal requirement or DOJ policy prohibiting a prosecutor from ignoring a valid tip, even if the prosecutor ignores the tip out of ignorance, lack of training, convenience, apathy or personal dislike of the cooperator. Furthermore, a defendant has no recourse through the prosecutor's supervisor or from any other DOJ policy.

Even if a prosecutor chooses to listen to a defendant's claims about other criminals and other crimes, the prosecutor has no well-defined legal responsibility to follow-up on a lead, charge the target of the information, relay the information to another, appropriate law enforcement authority or, even, to share the information with her supervisor or other assistant U.S. attorneys. The prosecutor is left to decide for herself,[136] and, aside from possible tarnish to her reputation, there are no designated penalties for her failure to act wisely in deciding what response to take to a valid tip.

It is axiomatic that federal prosecutors rely to some degree on their own subjective gauges when exercising their prosecutorial discretion, but when they depend solely on their instincts, without concrete guidelines to direct their discretion, they risk making subjective, biased and self-interested decisions.[137]

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131. McNulty Memo, *supra* note 19.

132. *Id.*

133. *Id.*

134. *See supra* note 102.

135. *See* USAM ¶ 9-27.400 (2007) (requiring supervisory approval of an assistant U.S. attorney's proposed downward departure).

136. *See* Barry Scheck, *Closing Remarks*, 23 CARDOZO L. REV. 899, 899 (2002) (indicating that decisions about "the credibility of snitches" are made "outside the crucible of trial and the adversary system").

137. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590 (2006) (arguing that prosecutors sometimes fail to make decisions that rationally further justice because prosecutors are irrational human beings).

These opportunities for such subjective and biased choices result in strong potential for inconsistent and inequitable handling of similarly situated defendants and situations, the very evils Congress hoped to combat when it enacted the Sentencing Reform Act of 1984.[138]

The lack of concrete direction for prosecutors who use cooperating witnesses undermines every federal prosecutor's ethical and professional duty to "do justice." There is simply no guarantee that a cooperator with information crucial to the avoidance or resolution of a heinous or particularly dangerous crime will be effectively heard or rewarded at the charging or sentencing phase of the case or thereafter. There is, likewise, no guarantee that a defendant who provides important information to resolve a case in one federal district will receive the same level of reward for his cooperation as a defendant similarly situated in another federal district.

c. The incentives for prosecutors to "do justice" are inadequate given the various conflicting interests associated with cooperation

Other than a desire and responsibility to "do justice," often there are no incentives (sometimes there are disincentives) for a prosecutor to pursue a cooperator's lead. For instance, there is no personal or observable benefit to a prosecutor who learns from a cooperating defendant that another defendant has committed numerous, albeit heinous, *state* crimes. Assuming the cooperator's information is accurate, the prosecutor will not be able to capitalize on the information to improve her record of successful prosecutions. The victims of the cooperator's federal crimes will not usually be impressed that through "cooperating" on some other crime the perpetrator of their crime is gaining a lighter sentence. At best, the prosecutor will pass the cooperator's information along to someone in the proper state who maintains the authority to investigate and prosecute state crimes, and that person will exercise his own vast discretion to determine whether and what to charge. Of course, there is no guarantee that the state will prosecute the case or that such prosecution will succeed in convicting the wrongdoer.

The same is true of information about crimes committed in other federal

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138. The federal Sentencing Guidelines seek to impose comparable sentences for comparable crimes and convicts. *See* Rita v. United States, 127 S. Ct. 2456, 2464 (2007) (outlining Congress's desire to further "basic purposes of criminal punishment," including "deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender" and Congress's goals of "uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct" and "proportionality in sentencing") (quoting U.S. SENTENCING GUIDELINES MANUAL § 1A.1, pt. A ¶¶ 2-3 (2002)); *see also* Mistretta v. United States, 488 U.S. 361, 363-67 (1989) (explaining the history behind adoption of the federal Sentencing Guidelines). Congress has also expressed its interest in the imposition of comparable and equitable sentencing. *See* 18 U.S.C. § 3553(a) (2000) (directing the sentencing court to impose a sentence on each defendant that reflects sufficient but not unnecessary punishment and that supports the purposes of sentencing, including promoting respect for the law and providing for "just" punishment).

districts.[139] Even if a prosecutor learns valuable information from a defendant about crimes in her own district, which she could indict, there is no assurance that the prosecutor assigned to the cooperating defendant's case will adequately reward that defendant for sharing information. A prosecutor may expend time and resources pursuing a case that ultimately fails because the cooperator's prosecutor "sours" on "his" defendant and thereby encumbers the successful prosecution of the targets of the cooperator's information.

i. Conflicts can arise when a cooperator's information relates to state crimes

Not uncommonly, someone who violates a federal law has also broken one or more state laws.[140] When a defendant breaches both federal and state law, issues can arise over which sovereign should exercise priority to prosecute and whether or not a federal defendant should be rewarded for providing information valuable to the prosecution of one or more state crimes but not helpful to the resolution of another federal crime.[141]

Should a federal defendant who defrauds 500 elderly, minority victims receive a 5K1.1 sentence reduction, if he helps in a state's prosecution of another defendant who tortured and sexually assaulted one middle-aged woman? Such judgment calls have no correct answer, but they can match the interests of one jurisdiction against the interests of another. In a world where resources are unlimited, a criminal would be prosecuted fully and completely in every venue. But sometimes a serious and violent crime can be solved only with the help of a cooperating defendant's information and only with a corresponding and significant reduction in the length of his sentence in another serious case.

ii. Conflicts can arise from the interests of victims

Second only to knowing whether the perpetrator of his crime will be convicted, a victim wants to know how long a defendant's term of incarceration will be. Because a federal defendant's agreement to cooperate in the prosecution of others can significantly reduce the length of his sentence (although not the amount he owes victims in restitution), a victim may oppose his cooperation. Even with the expansion of victims' rights,[142] a federal prosecutor is not obligated to consult, or even inform, a crime victim before using a cooperator and his information in the

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139. The difference when dealing with crimes in other federal jurisdictions is that the prosecutor can seek to facilitate a global plea deal with the offending defendant.

140. *See* USAM ¶ 8-3.170 (2003) (noting that frequently "conduct which deprives persons of federally protected rights in violation of federal law also violates state law").

141. This analysis will obviously include some balancing of monetary costs and resource availability, but for purposes of this inquiry (one that the prosecutor must undertake before knowing the balance of interests and resources), the question is posed with little regard for the financial burdens on each sovereign in an effort to focus the query on the difficult decision prosecutors face when comparing state and federal interests.

142. *See infra* Part V.B.2.a. (discussing the Crime Victims' Rights Act).

prosecution of another. The victim has a right to be heard at sentencing but no right to "be heard" or object to cooperation.

This can pit one victim's interests against another's. Although one crime victim may oppose the prosecutor's reliance on information provided by the perpetrator of his crime, the victim of the target defendant would usually favor such cooperation. Without the cooperator's help, the second victim's crime may go unsolved or unprosecuted.[143] Which victim's interests are paramount? As with so many decisions about cooperation and cooperators, there is no one "right" answer.

iii. Conflicts can arise when prosecutors evaluate the relative culpability of defendants

In addition to questions that arise from the competing interests between sovereigns, districts, and victims, the interests and competing equities of defendants within multi-defendant cases can give rise to ethical concerns.[144] Should the defendant who first offers to cooperate in a multi-defendant case receive the greatest or sole benefit of cooperation? What if the first defendant to offer cooperation is also the defendant who appears to be the most culpable? Professor Michael Cassidy has evaluated the ethical problems presented by the "[t]urncoat [a]ccomplice" in an article arguing in favor of devoting more attention to the character of the prosecutors who make decisions about which defendants to reward.[145] As Professor Cassidy correctly notes, "These are the sort of difficult decisions that even the most seasoned prosecutors lose sleep over."[146]

d. Discretion allows strong potential for prosecutorial abuse

"There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse."[147] Without some specific guidance, or at least expressed

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143. *See* Douglas E. Beloof, *Judicial Leadership at Sentencing Under the Crime Victims' Rights Act: Judge Kozinski in* Kenna *and Judge Cassell in* Degenhardt, 19 FED. SENT'G REP. 36, 40 (2006) (noting that "the government [prosecutor] represents the people, not the individual victim" and that "[v]ictims are often under the illusion that prosecutors represent them, and are surprised when they find out it is not so").

144. For a fuller discussion of the competing interests presented by cooperating defendants within a given case, see Cassidy, *Character and Context*, *supra* note 37, at 655-56.

145. *Id.* at 640-53.

146. *Id.* at 660.

147. Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978). As the Court noted in *Bordenkircher*, the potential for prosecutorial abuse has "led to many recommendations that the prosecutor's discretion should be controlled by means of either internal or external guidelines." *Id.* at 365 n.9 (citing MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE FOR CRIMINAL JUSTICE §§ 350.3(2)-(3) (1975); ABA Project on Standards for Criminal Justice, The Prosecution Function §§ 2.5, 3.9 (App. Draft 1971); Norman Abrahms, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971)); *see also* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 913 (2007) (discussing prosecutorial discretion in the context of organizational prosecutions); Burke, *supra* note 137, at 1588 (noting instances of prosecutorial overzealousness, including one in which prosecutors refused to concede a defendant's innocence after DNA evidence led to a gubernatorial pardon);

expectations, about how to weigh the importance of pursuing and evaluating a cooperator's lead, a prosecutor may allow his personal interests, biases, unique background, and numerous other unidentifiable factors to infect his ability to "do justice." Such factors may inhibit a prosecutor's capacity to make the best decisions about a cooperator and his information.

In the Fourth Amendment context, the United States Supreme Court has often recognized the difficulty of resting law enforcement decisions with the person responsible for zealous enforcement of the law. As the Court remarked in *Horton v. California*,[148] "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."[149] Because of this preference for objective criteria to guide law enforcement decisions, the Fourth Amendment generally favors a warrant before law enforcement officers conduct a search for evidence or contraband.

The same basic principle—desire for impartial, fair and thoughtful decision making—applies to choices made by the numerous assistant U.S. attorneys who make most of the day-to-day decisions on how to prosecute cases, including decisions about which cooperators to use, whether their information is valid and credible, whether to pursue leads offered by such cooperators, and whether to relay information obtained from a cooperator to law enforcement authorities, federal or state. Like "a search warrant [that] 'provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'"[150] the federal prosecutor needs some clear direction about how to appraise a cooperator and make an intelligent, well-informed, logical, and just decision about whether (and, if so, how) to use a cooperator's information.[151] Even understanding that most federal prosecutors

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Lynn R. Singband, Note, *The Hyde Amendment and Prosecutorial Investigation: The Promise of Protection for Criminal Defendants*, 28 FORDHAM URB. L.J. 1967, 1971 (2001) (describing how the broad discretion given to federal prosecutors can result in innocent people losing their freedom).

148. 496 U.S. 128 (1990).

149. *Id.* at 138. This quote was offered by the Court in the context of analyzing a Fourth Amendment issue in which the Court ultimately held that the Fourth Amendment does not prohibit the seizure of weapons discovered in plain view during the execution of a search warrant, even when the warrant did not include such guns. *Id.* at 138-39.

150. United States v. Leon, 468 U.S. 897, 913-14 (1984) (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)).

151. Having noted a need for "clear notions" and "external guidance" is not to say that developing such concrete guides will be simple or a substitute for the individual prosecutor's sound judgment. Moreover, by drawing a parallel between law enforcement officers who must make split-second decisions about how to comply with the Fourth Amendment (and still uncover evidence), I do not intend to suggest that prosecutors make decisions hurriedly or to unduly minimize the need for prosecutorial discretion in making decisions about cooperators or any other choice important to the successful prosecution of federal crimes. Certainly, in making charging decisions, dealing with cooperating witnesses, advising investigative agents, preparing witnesses to testify, trial strategy and preparation, and in choosing sentences to recommend for persons who have been

seek to "do justice,"[152] "[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues."[153]

As part of its new culture of cooperation outlined further in Part V, all federal prosecutors should be trained and routinely reminded of the importance of dealing wisely with every cooperator, and DOJ should emphasize and reward (financially and through office-wide recognition) prosecutors who demonstrate an ability to make well-informed, good-faith decisions in the best interest of "doing justice." Such incentives will prove especially important if federal prosecutors are expected to ensure that tips about state crimes and crimes in other districts are adequately developed and pursued.

IV. THE FEDERAL PROSECUTOR'S SPECIFIC ETHICAL RESPONSIBILITY TO CONSIDER A COOPERATOR'S VALID TIP

Because there is no one "right" answer to whether, when, or how a federal prosecutor should use information she receives from a seemingly candid cooperating defendant,[154] there might appear to be no "wrong" way for a prosecutor to react to such defendants. That's where the logic fails. Although federal prosecutors are spared from a legal directive to use such seemingly valuable information, the prosecutor's ethical responsibility to "do justice" requires, at a minimum, careful deliberation of such tips. In the context of cooperation, this ethical obligation to "do justice" is given meaning by the potential importance of cooperation, by the DOJ's mission "to ensure fair and impartial administration of justice for all Americans," and by Congress's mandate for proportional and equitable sentencing.

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convicted of violating the federal criminal laws, someone must exercise discretion. The oft-debated question is whether the discretion should rest with the Executive Branch; that is, the U.S. Attorney General and concomitant U.S. and assistant U.S. attorneys, or the Judicial Branch; that is, the sentencing judge. My point is not that the power should shift to the Judicial Branch, but that there should be more dialogue and guidance from within the Executive Branch about the proper exercise of the prosecutor's discretion. Once there is an effective system within DOJ for exchanging ideas about cooperation in a way that maximizes the many benefits cooperators can provide, prosecutors should welcome additional dialogue with the sentencing judge when appropriate and applicable. I am content to rest the inevitable discretion with the individual prosecutor who deals with a cooperator, perhaps because I have seen first-hand how talented and conscientious federal prosecutors tend to be. Typically, the assistant U.S. attorney knows the most about the tipster, the tip, and its context, and is in the best position to accurately and fairly assess its value. Nevertheless, assistant U.S. attorneys need encouragement to remain vigilant in seeking justice in all their decisions, and they need clear notions about how they should confront the decision-making process.

152. Cassidy, *Character and Context*, *supra* note 37, at 638 (asking "what prosecutor doesn't think that he or she is 'seeking justice?'") (quoting Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO J. LEGAL ETHICS 355, 379 (2001)).

153. Brewer v. Williams, 430 U.S. 387, 406 (1977) (citing Haley v. Ohio, 332 U.S. 596, 605 (1948) (Frankfurter, J., concurring)).

154. Although not the subject of this Article, there would appear to be a single and obvious correct response to a cooperator's seemingly invalid or manufactured tip: the prosecutor would reject it. Furthermore, if the suggestions in Part V of this Article were adopted by DOJ, an erroneous and contrived tip would be recorded in a database. This record would constitute part of a cooperator's potentially discoverable history as a cooperating witness.

A. The Duty of Careful Evaluation

While "doing justice" is an amorphous concept, in the setting of evaluating a potential cooperator's seemingly valid lead its meaning becomes more discernable. "Doing justice" does not mean taking the easiest path[155] or making a random decision. It does not involve simply choosing the course that will please the greatest number of people. Instead, prosecutors must assess the believability of the tip and the importance and value of the cooperation, while remaining mindful of the many interests at stake in the criminal justice system.[156] Prosecutors must evaluate their options from the viewpoint of the various constituents they serve, while asking whether the proposed course will promote the following ideals:[157] 1) to convict a guilty perpetrator of a federal crime; 2) to assist the states in convicting persons who violate their criminal statutes; 3) to ensure that every perpetrator receives adequate but not disproportionate punishment; 4) to encourage cooperators to provide only truthful information; 5) to promote and protect the interests of victims, whether they are victims of federal or state crimes, who need to heal and hope to live without fear of further victimization; 6) to satisfy society's need for retribution; 7) to satisfy society's need to deter crime—both by the individual perpetrator[158] and by other would-be criminals;[159] and 8) to tailor each defendant's sentence and punishment to his individual culpability, likelihood of rehabilitation, and other individual characteristics.[160]

These ideals reflect the potential importance of cooperation and Congress's desire for equitable sentencing of comparable defendants. They also coincide with the goals expressed by DOJ in its Mission Statement. In pertinent part, that Mission requires prosecutors to "enforce the law and defend the interests of the United States according to the law; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful

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155. Arguably, a totally arbitrary decision would also violate a legal duty. *See supra* notes 108 and 124.

156. Professor Green discussed the prosecutor's multiple roles when exploring the source of the prosecutor's special ethical obligations. *See* Green, *supra* note 90, at 633-37.

157. *Id.* Green describes the prosecutor's duties as including "enforcing the criminal law by convicting and punishing some (but not all) of those who commit crimes; avoiding punishment of those who are innocent of criminal wrongdoing; and affording the accused, and others, a lawful, fair process." *Id.* at 634. Two other "aims" of doing justice, according to Green, are "to treat individuals with proportionality" and "to treat lawbreakers with rough equality." *Id.*

158. Often referred to as "specific deterrence."

159. Often referred to as "general deterrence."

160. *See* 18 U.S.C. § 3553(a) (2000) (noting important factors for choosing a sentence, including, the nature and circumstances of the offense; the history and character of the defendant; and the need for a sentence that reflects the seriousness of the offense, promotes respect for the law, and provides just punishment). This tailoring of punishment focuses on the individual characteristics of a defendant and his or her crime, whereas the desire for proportional punishment identified as the prosecutor's third ideal is concerned with ensuring that certain groups of defendants are not punished more harshly than other groups based on characteristics such as gender, race, ethnicity, or sexual orientation.

behavior; . . . and to ensure fair and impartial administration of justice for all Americans."[161]

There is no recipe or formula for prosecutors to employ in deciding when and how cooperators will maximize justice, but by considering all the circumstances of the situation and respecting all of the interests that may be served by a tip, the prosecutor is in a good position to evaluate whether or not pursuing the lead will serve these ideals. In some circumstances, justice will result from the fullest prosecution of the potential cooperator without rewarding or encouraging cooperation. For other defendants, who express strong remorse for a less serious federal crime, the balance of justice may well tip toward the need to pursue other crimes and criminals at the expense of awarding a sentence reduction to the cooperator.[162]

Because the prosecutor represents so many diverse interests within the criminal justice system, she will sometimes (perhaps even often) face direct conflicts in her representation of those interests. For instance, she may recognize that she can serve the interests of two victims, if she acts on a tip, but that such reliance will compromise the interests of two others who are expecting the cooperating defendant to receive a statutorily mandated minimum sentence. "It is the prosecutor's task, in carrying out the sovereign's objectives, to resolve whatever tension exists among them in the context of individual cases."[163] Professor Graham Hughes has explained the balancing of interests this way: "[A] prosecutor has a duty to neutralize the largest number of units possible of culpability and dangerousness expressed in behavior that the criminal code prohibits."[164] Accordingly, a prosecutor's ethical duty to "do justice" requires her to, at least, fully and carefully consider any and all information received from a potential cooperator and evaluate the information in light of the strong societal need to prevent and prosecute crime, DOJ's Mission seeking to ensure justice for all, and to further the goals of the Sentencing Reform Act of 1984.[165]

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161. *See supra* note 12 (discussing the DOJ's mission statement).

162. Although he proposed the solution in the setting of civil practice, my proposed solution is akin to the allotment of ethical discretion urged by William H. Simon. Simon, *supra* note 90, at 1090 (proposing that civil lawyers "should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice").

163. Green, *supra* note 90, at 634.

164. Hughes, *supra* note 1, at 14.

165. I do not go so far as to require federal prosecutors to affirmatively prompt potential cooperators to provide tips because in prompting a cooperator, I suspect that there is a greater likelihood that the cooperator may manufacture information and concoct a story in hopes of pleasing the prosecutor. *See* Bennett Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 833-34 (2002) (noting the vulnerability of a cooperating witness to easy manipulation by coercive and suggestive investigative techniques); Roberts, *supra* note 24, at 272 (arguing that cooperators are "skilled at learning details about the case or about what information the government wants to hear"); Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875, 884 (2002) ("[W]hen a prosecutor tells a defendant or defense counsel what testimony is expected of the defendant . . . in order to qualify for cooperator/leniency/immunity status, the defendant is powerfully motivated to parrot what the prosecution wants and expects to hear").

When dealing with cooperating defendants, a prosecutor should always consider: (1) What is the fairest and wisest course, given the interests of all of the crime victims affected, (whether victims of federal or state crimes), including, when appropriate, society as a victim, and the federal government as a whole?; (2) Is it necessary to investigate, communicate, or take any action at all in response to the tip? If so, what is the wisest course of action?; and (3) If the prosecutor does not act, will she abuse her prosecutorial discretion by impairing society's interest in crime resolution, DOJ's desire for "justice for all," or Congress's mandate for parity in sentencing defendants?[166] In answering the third question, the prosecutor should contemplate (a) Who will benefit from her actions or inactions?; (b) Who will suffer?; (c) Will a defendant avoid punishment he should receive?; (d) Will another defendant escape punishment altogether or receive less punishment than he is due?; (e) Will victims of crime be victimized a second time by the justice system itself?; (f) Which of these interests are the most important under the circumstances and why? In forcing herself to ask and answer these questions and evaluate her options, a prosecutor is sure to make a better choice than if she decides intuitively or with less conscious thought.

Moreover, while prosecutors are certainly subject to influence from their own personal interests and biases, the fact that prosecutors do not represent the interests of a particular client, but rather owe their primary duty to the sovereign, will tend to favor their ability to act independently and objectively, provided prosecutors are properly trained, and assuming DOJ provides adequate rewards for making sound decisions.[167]

One might assume that every federal prosecutor would carefully deliberate before rejecting or accepting an offer of cooperation. Such an assumption would, however, overlook the fact that prosecutors are human with human frailties.[168] It would ignore the fact that many federal prosecutors, while bright and well-meaning, lack training and experience.[169] Professor Ellen Yaroshefsky conducted

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166. *See* Green, *supra* note 90 at 634 (discussing the prosecutor's duties and objectives, some of which are in "tension" with each other); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002) (listing factors pertinent to a prosecutor's decision to sponsor a substantial assistance motion for a downward departure, including: 1) the truthfulness and completeness of the information; 2) the nature and extent of the assistance; 3) any injury to the cooperator or his interests or family that might result from the cooperation; 4) the timeliness of the cooperation; and 5) the relative importance of the information or testimony).

167. *See* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1697 (2000) ("The prosecutor doesn't have a client; he has a constituency. The local prosecutor is not responsible to the state government but to the people directly."); Gershman, *Duty to Truth*, *supra* note 7, at 340 & n.178 (making his own observations as a former prosecutor and describing those relayed by others in the criminal justice system that prosecutors are generally better evaluators of truth than jurors).

168. *See* Burke, *supra* note 137, at 1590-91, 1614 (asserting that prosecutors sometimes fail to make decisions that rationally further justice, "not because they fail to value justice, but because they are, in fact, irrational" and are "biased decision makers" as human beings).

169. *See* Yaroshefsky, *Cooperation*, *supra* note 7, at 950-51, 950 n.155 (1999) (reporting, based on interviews with former assistant U.S. attorneys in the Southern District of New York, a finding that many federal prosecutors lack life experiences).

research in the Southern District of New York that found many federal prosecutors lack life experiences and that assistant U.S. attorneys are typically hired with an average of three years of experience from a large, top-tier law firm.[170] Assuming careful deliberation of every tip would understate the heavy work loads prosecutors can confront, which also tend to favor a cursory consideration of tips.[171] It would overlook the fact that some prosecutors focus narrowly on convicting defendants and that such a myopic focus can unduly narrow their ability to evaluate tips in an unbiased manner.[172] Finally, assuming thoughtful consideration of every tip appears to contradict empirical findings that show a disparity in the way different U.S. attorney's offices award substantial assistance departures.[173] Reasoning logically from the empirical findings suggests that disparity in the way different offices award substantial assistance departures is due to disparity in the way cooperators and their information are valued, evaluated and, subsequently, rewarded by assistant U.S. attorneys.

B. The Duty of Careful Evaluation Derives From the Responsibility to "Do Justice"

The federal prosecutor's affirmative obligation to weigh the value of a cooperator's information in a way that maximizes the fulfillment of the goals of the DOJ and the ideals of the federal criminal system of justice derives from the prosecutor's well-established and express (albeit vague) ethical duty to "seek justice."[174]

Presumably, scholars would agree that a federal prosecutor acts unethically if he pursues a cooperator's lead that he knows (or is quite sure) is concocted and directed at assisting the government in the prosecution of another who is innocent of a crime. While there would presumably be no legal bar to such a prosecution, the ethical prohibition is clear. Although slightly less compelling, the prosecutor has a complementary ethical duty to carefully evaluate a cooperator's seemingly valid tip.

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170. *Id.*

171. *See* Darryl K. Brown, *Criminal Procedure, Justice, Ethics, and Zeal*, 96 MICH. L. REV. 2146, 2148 (1998) (noting that prosecutors and defenders work "in a world of heavy case loads").

172. Cassidy, *Character and Context*, *supra* note 37, at 667 (asserting that widespread reliance on accomplice bargaining leads prosecutors to view convictions as paramount to other values in the criminal justice system); Yaroshefsky, *Cooperation*, *supra* note 7, at 949 (finding evidence of a "gung ho" or "true believer" mentality in the Southern District of New York that caused these prosecutors to "target[] bad guys and then . . . push the margins to achieve a result").

173. *See* MAXFIELD AND KRAMER, SUBSTANTIAL ASSISTANCE, *supra* note 8, at 20 (reporting that the evidence compiled from the efforts of a working group who explored 5K1.1 departures indicated an equity problem in the way substantial assistance motions were made).

174. *See also* Gershman, *supra* note 7, at 316 (arguing that prosecutors have "both a negative duty to refrain from conduct that impedes the search for truth and an affirmative duty to protect and promote the search for truth"); *id.* at 337 (asserting that "[a]lthough not articulated in judicial decisions, a prosecutor's duty to truth embraces a duty to make an independent evaluation of the credibility of his witnesses, the reliability of forensic evidence, and the truth of the defendant's guilt").

Because cooperation has proven (in general) to be very important in reducing crime and convicting guilty defendants, in this setting, justice is usually fostered when prosecutors encourage cooperators to provide accurate information about other wrongdoers and other crimes. Therefore, the prosecutor's ethical duty to "seek justice" will often require a prosecutor to offer a potential cooperator the likelihood of sentence leniency in exchange for his assistance to the government. Vigilant, but cautious, use of cooperators will support justice because defendants' tips have proven to be effective crime prevention tools, provided that prosecutors guard against the manipulative cooperator.

A federal prosecutor's ethical and professional duty to carefully consider every seemingly valid tip also rests on the federal prosecutor's role as the representative of the government and, correspondingly, her position as protector of society's and victims' rights.[175] Imposing a duty on prosecutors to carefully consider every valid tip is consistent with Justice Sutherland's oft-cited view of the federal prosecutor's role in the criminal justice system. As Justice Sutherland explained, the prosecutor is the representative of

> a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[176]

If every federal prosecutor remembers that guilt can escape prosecution entirely and innocent victims may continue to suffer without answers, when seemingly valid tips are inadequately pursued, prosecutors will make more thoughtful decisions about how a tip can best serve justice. Prosecutors must also remember that unless and until the guilty are convicted, there is always a risk that an innocent person will be targeted for prosecution. Notwithstanding the criticism that cooperators sometimes lead to wrongful convictions,[177] the lack of reliance on valid leads can also result in injustice, including prosecution of the innocent. Thus, by careful evaluation of every tip, a federal prosecutor promotes DOJ's mission to ensure the fair and impartial administration of justice for all.

Finally, the duty to carefully consider the value of every tip proffered by a potential cooperating defendant will promote sentencing equity. While there is no guarantee that individual prosecutors will treat similarly situated defendants alike in every instance, their thoughtful efforts to apply the DOJ's standards in a careful and thorough manner will tend to result in more uniform decisions and sentencing parity.

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175. *See id.* at 315 (explaining that prosecutors are special guardians of facts of the case).

176. Berger v. United States, 295 U.S. 78, 88 (1935).

177. *See supra* note 25 and accompanying text.

C. *Consideration of a Tip Does Not Mean Acceptance*

To say that a prosecutor must fully evaluate information received (or obtainable) from a cooperating defendant is not to say that she must accept it as valuable, rely on it, cause the tip to be further investigated, or communicate the information to another law enforcement source. Her duty is to "seek justice" (as articulated above) by examining the tip and exercising her considered judgment and discretion to the best of her ability in an effort to ensure that justice is served. Not every tip merits the expenditure of government resources, and many leads may appear invalid, unworthy or contrived. Not every decision that a prosecutor makes will prove, in hindsight, to be the best choice. The ethical prosecutor should not be expected to be a clairvoyant, only engaged, thoughtful and diligent in protecting victims' and the public's interest in a safe society.

V. SOME THOUGHTS ON HOW TO ENCOURAGE PROSECUTORS TO "DO JUSTICE" AROUND COOPERATION

Certain prosecutors already successfully impede crime through their effective use of cooperating defendants; others are more apathetic or inconsistent in their reliance on seemingly valid information revealed through cooperators.[178] Increasing federal prosecutors' attention to cooperation will properly recognize the importance of such tips in preventing crimes and punishing wrongdoers and hopefully decrease the inconsistent manner in which federal prosecutors (often in the same office) treat and reward cooperating defendants.

A. *A Culture of "Doing Justice"*

In some U.S. attorneys' offices, "doing justice" is a more prominent theme than in others.[179] Likewise, in some divisions and sections within a U.S. attorney's office, there will be more emphasis on "justice," "fairness," "process" and "doing

178. Because prosecutors decide in secret with no reporting requirements and no personal accountability for poor decisions, no one knows how effective or ineffective federal prosecutors are (individually or collectively) at using and accurately assessing the value of cooperators' tips. But the inconsistent way that individual U.S. Attorneys reward cooperators with sentence reductions tends to suggest too much disparity at the individual prosecutor level too. *See* MAXFIELD AND KRAMER, SUBSTANTIAL ASSISTANCE, *supra* note 8, at 7-9 (noting many inconsistencies in policies on substantial assistance and limited numbers of departures awarded).

179. This observation is my own from the time I spent in the Northern and Middle districts of Georgia and the several weeks I spent on detail in the Southern District of Florida. *See also* Gershman, *Duty to Truth*, *supra* note 7, at 350 (asserting that a prosecutor's moral courage to seek truth is "possible only in an office that encourages prosecutors to be ministers of justice"); *id.* at 353 (noting that some prosecutors' offices fail to train and supervise young prosecutors on basic norms like not to lie, while others embrace a duty to the truth); Yaroshefsky, *Cooperation*, *supra* note 7, at 920 (indicating that within the ninety-four U.S. Attorneys Offices, there are "significant differences in legal culture and traditions, office policies and priorities").

the right thing" than in other factions of the same office.[180] Moreover, political changes in high-level officials within the Executive Branch regularly result in the appointment of new Attorneys General and different U.S. Attorneys. With such changes, the emphasis on "doing justice" fluctuates. Some administrations, some U.S. Attorneys, and some Criminal Division Chiefs within U.S. Attorney's Offices favor rules, procedures, and convictions. Others favor "justice" and doing the "right thing" in all its benevolent abstraction.[181] In other words, the ninety-three U.S. Attorneys[182] act independently of one another and from "Main Justice," which is located and operated from Washington, D.C. Because U.S. Attorneys act independently, they develop their own, unique culture of "doing justice,"[183] which may be unlike the culture in any of the other ninety-three offices. Furthermore, each section or division within the ninety-four U.S. Attorney's offices may have a unique culture.[184]

B. How to Promote the "Justice" Culture

As the primary procedural solution to the ethical dilemma federal prosecutors confront in the context of evaluating and using cooperating defendants, this Article urges better communication—a simple but historically effective method of problem solving.

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180. *See* Gershman, *Duty to Truth*, *supra* note 7, at 353 n.235 (stating that "[b]ecause prosecutor's offices are so very different, there has been relatively little discussion over the extent to which a 'prosecutorial culture' can be identified").

181. This Article asserts that these persons are the ones in the best position "to give meaning to a phrase that might otherwise seem to be an entirely empty vessel." Green, *supra* note 90, at 618 (discussing justifications for the duty to do justice). *See, e.g.*, Yaroshefsky, *Cooperation*, *supra* note 7, at 961-62 (noting one prosecutor who was taught to take minimal notes in sessions with cooperators so that the notes did not need to be produced to the defense); Dr. George T. Felkenes, *The Prosecutor: A Look At Reality*, 7 SW. U. L. REV. 98, 109, 116 (1975) (recounting the experience of some prosecutors who felt restricted in their ability to do the "right" thing). *See also* Gershman, *Duty to Truth*, *supra* note 7, at 309 (explaining that the "accepted ethos" in the office in which he once worked as a prosecutor required that each prosecutor be personally convinced of a defendant's guilt before pursuing a conviction).

182. While there are ninety-four U.S. attorney's offices, because an office in Guam shares a U.S. Attorney with the Northern Mariana Islands, there is one less U.S. Attorney.

183. *See* Farabee, *supra* note 9, at 570 (finding different prosecutorial cultures in two different districts and linking those different cultures to disparities in the manner sentencing departures were pursued). Professor Judith L. Maute has suggested that the ethical culture within a prosecutor's office may tacitly encourage repeat violators of prosecutorial ethics. Judith L. Maute, *"In Pursuit of Justice" in High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1750 (2002) ("Because the ethical culture within a prosecutor's offices may tacitly encourage certain repeat violations, lawyer disciplinary agencies must be willing to act, thus providing a disincentive for deliberate misconduct.").

184. In my experience, the prosecutors assigned to pursue drug crimes as their primary duty displayed a more "gung ho," win-at-(almost)-all-costs mentality than did prosecutors whose primary duty was to prosecute violent crimes, gun crimes or fraud offenses. The culture in the drug division was noticeably different than in other sections of the office.

1. Communication within DOJ

In frequent communication with all of the office's prosecutors, every U.S. Attorney and her managing attorneys should emphasize the significance of wisely using cooperation. Currently, there is a dearth of information, communication and conversation about the process of evaluating and using cooperators equitably and effectively. This lack of emphasis on cooperation within DOJ is inexcusable. With modern technology, disseminating ideas about how to maximize the effectiveness of cooperation is simple. Electronic mail messages can quickly and efficiently relay the U.S. Attorney's expectations to every federal prosecutor in an office. The topic of cooperation should also be a regular topic of discussion at office-wide meetings and meetings of the criminal division attorneys, as well as at inter-office gatherings.[185]

Tough decisions in which a prosecutor must employ her discretion and choose the most desirable course of action, or (at a minimum) the least undesirable course, "should be easier . . . when prosecutors serve in an office where the 'duty to seek justice' is fairly understood and taken seriously."[186] Assistant U.S. attorneys will know that the duty to use cooperation is taken seriously when management within an office and within DOJ communicates its significance. Management should communicate this message both in words and by rewarding prosecutors who effectively use cooperation. These rewards can be in the form of public recognition and monetary awards, such as salary increases. Such incentives may be the only effective means of ensuring that federal prosecutors have sufficient incentives to give adequate attention to the important interests of society and individuals victimized by state crimes over which the office lacks jurisdiction to prosecute.[187] As Professor William Simon asserted in his oft-cited law review article:

> In the dominant understanding, judgments about legality and justice are grounded in the norms and practices of the surrounding legal culture. These norms and practices are objective and systematic in the sense that they have observable regularity and are mutually meaningful to those who refer to and engage in them.[188]

The message that leaders within DOJ send to assistant U.S. attorneys will create objective and systematic norms for dealing with cooperating defendants and will give concrete structure to the otherwise amorphous and vague term of art—"doing

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185. When I was an assistant in Georgia, the three district offices met annually for continuing legal education. Such conferences are ideal for raising awareness of the importance of cooperation:

186. Green, *supra* note 90, at 643.

187. Because prosecutors are in a unique position to protect the "global" interests of society, (including the interests of the federal sovereign, the states, and victims (state or federal)), the need to motivate prosecutors is not akin to a desire to motivate employees faced by businesses everywhere, which seek to motivate employees to maximize profits. The interests represented by the federal prosecutor are much more diverse and complex.

188. Simon, *supra* note 90, at 1120.

justice."[189] "As 'professionals,' prosecutors probably are capable of exercising discretionary judgment in a manner consistent with [such] general norms of behavior."[190] In short, leaders within the DOJ can create a culture that values cooperation and thereby gives important meaning to the otherwise ambiguous term. By adding meaning to the term, "do justice," leaders within the Department can increase the likelihood that young, inexperienced and other prosecutors will maximize the justice they do.[191]

The importance of office culture to the way individual prosecutors pursue sentencing departures is illustrated by an empirical study of two federal judicial districts—the District of Connecticut and the District of Massachusetts.[192] Professor Lisa Farabee's study uncovered departure disparity between the districts and tracked that disparity, in large part, to "dissimilar local traditions and legal cultures."[193] The study found that in Connecticut there existed "a prosecutorial philosophy of rewarding only maximum cooperation by defendants."[194] The assistant U.S. attorneys in Connecticut "painted a picture of a federal district with rampant judicial independence and high standards for defendants seeking to cooperate with the government."[195]

In contrast to the District of Connecticut's philosophy on sentencing departures, in Massachusetts, the study found evidence of a "prosecutorial culture of discretion and cooperation."[196] In Massachusetts, where prosecutors filed large numbers of substantial assistance motions, assistant U.S. attorneys indicated that such motions were filed whenever "defendants agree[d] to cooperate and the targets [of the cooperation] plead guilty."[197] In other words, the standards imposed on defendants who sought to earn a sentence departure for cooperating were more easily satisfied in Massachusetts. The District of Massachusetts frequently sought and rewarded cooperation "to pursue 'bigger fish.'"[198] The United States Sentencing Commission has reported similar findings of disparity in the way districts award sentence reductions for defendants' substantial assistance in the prosecution of others. The Commission's 1999 report to the Judicial Conference indicated that

189. Gershman, *Duty to Truth*, *supra* note 7, at 350 (noting that "[p]rosecutors should be encouraged to evaluate a case critically with colleagues and supervisors to decide whether a prosecution should be undertaken").

190. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991) (*citing* Simon, *supra* note 90, at 1090-1113, 1131-35).

191. *See also* Gershman, *Duty to Truth*, *supra* note 7, at 351 (asserting that a prosecutorial culture can encourage prosecutors "to judge truth aggressively" or, conversely, advocate winning, which can discourage "critical examination of truth" and encourage misconduct too).

192. *See* Farabee, *supra* note 9, at 570 (noting the "statistical discrepancy in the types of departures granted most frequently between the District of Connecticut and the District of Massachusetts").

193. *Id.* at 570, 593.

194. *Id.* at 603-04.

195. *Id.* at 608.

196. *Id.* at 621.

197. Farabee, *supra* note 9, at 621-22.

198. *Id.* at 622.

"[a]cross districts, the roles of substantial assistance departures ranged from 1.7% to 43.6%."[199]

Although creating a culture of "doing justice" through encouraging discussion among assistant U.S. attorneys and their colleagues and supervisors may seem like an overly simplistic solution to the unanswerable question of what action to take in response to a cooperator, such discussions have proven highly effective in other settings.[200] As Professor Alafair S. Burke notes in her article on the affects of cognitive bias on prosecutorial decision making, there is empirical evidence that self awareness of cognitive limitations can improve the quality of individual decision making.[201]

Communicating about how to assess cooperating defendants and their information will allow DOJ and its leaders to give structure and content to factors the Department has identified as pertinent to the inquiry, including giving meaning to the following terms: the "trustworthiness" of the tip; the "relative importance" of the cooperation; its "timeliness;" the "harm" that the cooperator may suffer because of cooperation; and the "benefit" to be gained by reliance on the lead.[202] In explaining such factors and discussing how prosecutors can best assess these and other relevant factors, the Department can foster a culture of "doing justice" that will promote cooperation, an effective crime prevention and resolution tool.

Because this Article promotes communication as a primary solution, some might argue that I favor "doing justice" through osmosis.[203] After all, can talking about doing justice really change a prosecutor's willingness and ability to "do justice?" I strongly suspect that the answer is yes. Increasing prosecutors' awareness (subconscious or conscious) that opportunities are lost when a cooperator's tips are dismissed too summarily and increasing concern for careful, evaluative decision-making is likely to result in a more critical and effective evaluation of cooperation. Such discussions are far superior to the current, undirected process, which permeates some U.S. Attorney's Offices.

The Department or individual U.S. Attorneys might impose a communication requirement on individual prosecutors as well. Individual prosecutors could be required to communicate every cooperator's tip to a designated prosecutor, supervisor or committee. The designate would quickly vet the tip with the

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199. SENTENCING COMM'N REPORT TO THE JUDICIAL CONFERENCE, *supra* note 14, at 4; *see also* Ronald S. Safer and Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon?*, 12 FED. SENT. R. 41, 44 (1999) (observing that different U.S. Attorney's offices have different policies regarding cooperation agreements).

200. Burke, *supra* note 137, at 1617 (citing RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 191 (1980)); *id.* at 1621 (discussing the value of a "fresh-look" committee within a prosecutor's office to evaluate newly discovered evidence when evaluating the strength of evidence against a criminal defendant).

201. *Id.* at 1617.

202. USAM ¶9-27.620 (2007); *see also* discussion *supra* notes 68-72 and accompanying text.

203. Figuratively, osmosis is "[a] gradual, often unconscious process of assimilation or absorption." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1244 (Houghton Mifflin 4th ed. 2000).

individual prosecutor. This reporting requirement would increase the transparency of the use of cooperation, helping to remove the secrecy, if not the inconsistency, that currently surrounds the process. It would also encourage prosecutors to be more thoughtful and reflective about their own process of assessing tips.[204]

2. A Discussion with Victims and the Sentencing Judge

In addition to raising every prosecutor's awareness of the potential value of a cooperator's tip through inter-office and intra-office discussion, DOJ should urge its prosecutors to engage in more frank discussions with the victims of crime and, on some occasions, with the district judges who regularly sentence cooperating defendants. These additional discussions will act as a natural restraint on the prosecutors' broad discretion. Such transparency of the prosecutor's process (when such transparency does not undermine other competing law enforcement objectives), will allow victims to feel more a part of the justice system, will serve to raise society's, defendants' and defense counsel's confidence in the work of federal prosecutors, and will provide additional, positive pressure on prosecutors to use their best efforts in deciding how to respond to offers of cooperation.

a. A conversation with the victims

Whether the prosecutor engages in a personal conversation with a victim or allows her investigator to undertake that conversation, prosecutors will sometimes benefit from their feedback. Victims have a keen interest in ensuring that defendants are swiftly and justly prosecuted and punished. Because of their interest, they offer a unique perspective about the benefits and detriments of reducing one defendant's punishment to successfully prosecute another.

The Crime Victims' Right Act (CVA) passed in 2004[205] recognizes the need for federal prosecutors to protect victims' rights during the prosecution and sentencing of criminal defendants.[206] The CVA gives federal crime victims[207] several rights in the process. The Act codifies the right "to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing, or any parole proceeding[,]" the right "to confer with the attorney for the Government in the

204. Professor Natapoff has argued for a pretrial hearing process to vet the validity of tips and tipsters. *See* Natapoff, *Beyond Unreliable*, *supra* note 22, at 126-29.

205. Enacted in October, 2004, the proper name of the law is the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act." Pub. L. No. 108-405, 118 Stat. 2261 (codified as 18 U.S.C. § 3771 (2004)).

206. Contrast the spirit of the CVA with the description of a victim in Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 695 (2007) (stating that "the victim of a crime is relevant to a prosecutor only as a witness and as a symbol of the threat the defendant poses to society").

207. *See* 18 U.S.C. § 3771(e) (2004) (defining "crime victim" to include "a person directly and proximately harmed as a result of the commission of a Federal offense").

case[,]"[208] and the opportunity "to be treated with fairness and with respect."[209]

Although the CVA limits the types of proceedings in which the rights of victims attach and the amount of input a victim may demand in the prosecutor's decision making process, the underlying idea of the CVA is to allow victims greater input in the process that so directly impacts their interests.[210]

Even though the CVA increases victims' rights, it does not demand that a prosecutor seek input from any victim on any issue directly affecting cooperation. This Article in no way suggests that a prosecutor *must* consult a victim before deciding how to respond to a cooperator's lead. But the interests of justice will sometimes benefit from a victim's perspective. After all, ensuring that "victim[s'] participatory rights are appropriate and meaningful"[211] is a strong societal interest that the criminal justice system is designed to serve. Just like society and the government, individual victims are harmed by crime.[212] Therefore, their interests should be part of the calculus a prosecutor evaluates when deciding what action to take on a cooperator's tip. Consulting victims will prompt prosecutors to remain mindful of these important interests.

b. A conversation with the sentencing judge

There is a raging debate in Congress, the courts, and the literature about the proper balance of power between the Executive Branch and the Judicial Branch at the sentencing stage of a federal prosecution.[213] The Feeney Amendment[214]

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208. *See* KATHARINE L. MANNING, NAT'L INST. FOR TRIAL ADVOCACY, COMMENTARY: CRIME VICTIMS' RIGHTS (2007) (citing 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl)) (noting that the CVA "preserves prosecutorial discretion" by allowing victims to confer with the attorney for the government without giving the victim the right to direct the prosecution).

209. 18 U.S.C. § 3771(a) (2004).

210. *See* Kenna v. United States Dist. Ct., 435 F.3d 1011, 1016 (9th Cir. 2006) (describing the Crime Victims' Rights Act as providing crime victims a voice in the criminal justice process). *But see* Deborah P. Kelly & Edna Erez, *Victim Participation in the Criminal Justice System*, *in* VICTIMS OF CRIME 231, 236 (Robert C. Davis et al. eds., 2d ed. 1997) (acknowledging the argument that victim participation in sentencing is problematic because it can erode prosecutorial control over the case).

211. Peggy Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 103 (1999).

212. *See* Beloof, *supra* note 143, at 40.

213. *See, e.g.*, Nekima Levy-Pounds, *From the Frying Pan Into the Fire: How Poor Women of Color and Children Are Affected By Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 307 (2007) (arguing that the increase in incarcerated rates of poor women of color is due in part to the shift from judicial discretion to prosecutorial discretion in sentencing statutes); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 153 (2005) (describing the push and pull between prosecutors, judges, and Congress over sentencing decisions).

214. Pub. L. No. 108-21, Title IV, 117 Stat. 650, 667. The Feeney Amendment was enacted as a rider to part of the PROTECT Act. The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650. It changed the federal sentencing law and, thereby, shifted the power of judges to depart from a Guideline sentence to the prosecutor. *See* Wright, *supra* note 213, at 133 (arguing the Feeney Amendment restricted the "power of judges to depart from the presumptive guideline sentence, except in cases where the prosecutor recommends a discount").

appeared to shift the power balance in favor of the Executive Branch and, correspondingly, the prosecutor. The Supreme Court's decision in *United States v. Booker* arguably shifted some of that power back to the judiciary.[215] But no matter how one decides the balance, justice will be furthered when an intelligent, well-meaning prosecutor discusses the defendant's attempts at cooperation, or lack thereof, with a knowledgeable, accomplished sentencing judge. The thought, attention, and preparation such a meaningful conversation requires, will help guarantee that the prosecutor has thoughtfully assessed the role of the defendant in a fair, impartial, and just manner.

Prosecutors already engage in such discussions with judges in cases in which the government files a "substantial assistance" motion. Notwithstanding this practice, this Article proposes that sentencing judges insist on hearing about defendants' attempts at cooperation during *every* sentencing hearing, not just those hearings in which the prosecutor files a motion. The judge would simply add two to three questions to her plea colloquy. The judge might ask: Did the defendant make any attempt in this case to assist the government in the prosecution of other persons or crimes? If the answer is yes, the judge would ask the prosecutor to describe the extent of the defendant's efforts and inquire whether the cooperation aided (or is expected to aid) the government. The defendant's lawyer (or in the rare *pro se* case—the defendant himself) would be asked to respond to the prosecutor's characterization of the defendant's cooperation attempts. If necessary, this portion of the colloquy could be sealed to protect the interests of the defendant.

Although this conversation will transpire only after the prosecutor has decided to accept, pursue, or reject a cooperator's help, the prosecutor's need to articulate her reasoning in court, "on the record," will tend to ensure that she acts deliberately in exercising her discretion. To the extent the sentencing judge believes the prosecutor exercised poor judgment, the judge may rely on her post-*Booker* authority to grant a sentencing departure under section 5K1.1 of the Guidelines, so long as the mandatory statutory minimum does not prohibit such a departure.[216] In addition, because prosecutors routinely appear before the same district court judges for sentencing and other hearings, the prosecutor's inherent desire not to disappoint, or at least not to offend, the judge will urge the prosecutor to form and exercise sound decisions. This pressure also adds to the prosecutor's incentives to "do justice" with regard to cooperators. Finally, the additional time and resources that the conversation requires are negligible.

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215. United States v. Booker, 543 U.S. 220, 245 (2005) (finding that the mandatory nature of the federal Guidelines rendered them unconstitutional and declaring the Guidelines "advisory," which effectively gives sentencing judges more discretion than they possessed before *Booker*). For an additional discussion on the ruling in *Booker*, see also *supra* note 118 and accompanying text.

216. *See* discussion *supra* Part III.B.2.a.ii.

3. Communicate Informant Tips to a Databank

"[N]o process can assure one hundred percent accuracy in a prosecutor's decision making."[217] Even the best-trained, well-meaning prosecutors will make mistakes and under or over-value tips offered by cooperators. In addition, sometimes a tip will be too vague or incomplete for the prosecutor and his agents to effectively use the information. For these reasons, and because it is clear that federal and state law enforcement agencies need better methods of inter-agency communication,[218] DOJ should develop and establish a databank for informants' tips.

The databank should be accessible by both federal and state law enforcement authorities. The databank should permit and encourage law enforcement officers to input and retrieve information using the alleged perpetrator's name, the geographic local of the crime, and the victims' identities. Access to information in such a databank, which would be strictly guarded by firewalls and access passwords, will enhance law enforcement's ability to obtain pertinent information in a timely way that might otherwise go undetected and unused. Often the investigator or prosecutor who could make the greatest use of information has no means of learning that the information exists and is available. A databank also has the added benefit of ensuring that prosecutors (and agents) treat cooperators' tips with uniformity. Every tip would be loaded into the databank for further consideration. Like a conversation with victims and judges, reporting a defendant's attempts at cooperation will tend to ensure that prosecutors do not reject or overlook tips without conscious evaluation. Furthermore, the databank will help chart trends of a potential cooperator who concocts false information or, to the contrary, assists in establishing a record of reliable leads.

CONCLUSION

Cooperating defendants have proven to be necessary and valuable tools in preventing crime and prosecuting criminals. Federal prosecutors must exercise vigilance to thoughtfully decide how best to pursue the information cooperating defendants can provide. Such informed and good-faith judgment calls will inevitably require every prosecutor to weigh "the relative value or importance of different rights and interests"[219] and decide what, if any, action to take in response to a given tip. The DOJ and the ninety-three U.S. Attorneys can foster good decision-making by developing a culture of "doing justice" in which every prosecutor is encouraged

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217. Burke, *supra* note 137, at 1616.

218. *See, e.g.*, David E. Kaplan, Monica M. Ekman & Angie C. Marek, *Spies Among Us (Local U.S. police forces carry out aggressive anti-subversive campaign)*, U.S. NEWS & WORLD REP., May 8, 2006, at 40 (recounting the 9/11 Commission's findings of the government communications failures on September 11, 2005, and reporting that a 2003 study by the DOJ found no shortage of problems in sharing information among law enforcement).

219. Simon, *supra* note 90, at 1092.

and rewarded for making deliberate, good-faith, well-informed, and well-reasoned decisions about the use of potential cooperation. Encouraging a culture of cooperation will enhance every federal prosecutor's ability to "do justice."