

# Informants and Cooperators

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*The police have long relied on informants to make critical cases, and prosecutors have long relied on cooperator testimony at trials. Still, concerns about these tools for obtaining closely held information have substantially increased in recent years. Reliability concerns have loomed largest, but broader social costs have also been identified. After highlighting both the value of informants and cooperators and the pathologies associated with them, this chapter explores the external and internal measures that can or should be deployed to regulate their use.*

## INTRODUCTION

There's nothing new about the police relying on informants to make cases. Nor is there anything new about prosecutors relying on cooperators to prove them. Such informational transactions have come to be a hallmark of the American criminal justice system, not just because they are so frequently used, but because these morally fraught arrangements are largely unregulated by formal law, pose such a risk to investigative and adjudicative reliability, and yet hold such a promise of bringing to justice those who exercise illegitimate power.

Informants and cooperators have figured prominently in studies, spurred by DNA exonerations, of how innocent people get convicted.<sup>1</sup> The trading of leniency for information also undermines the goals of horizontal equity in sentencing and can leave dangerous offenders under-punished, even able to commit crimes with impunity. Yet without these arrangements, we'd have to forgo the prosecution of all too many gang, mob, corruption, fraud, terrorism, and murder-for-hire cases, as well as the drug-trafficking cases, big and small, that so often figure in critiques.<sup>2</sup> We also might have to consider levels of undercover policing and surveillance that we've found intolerable or prohibitively expensive.

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1 For a discussion of wrongful convictions, see Brandon L. Garrett, "Actual Innocence and Wrongful Convictions," in Volume 3 of the present Report.

2. See DEAN A. DABNEY & RICHARD TEWKSBURY, *SPEAKING TRUTH TO POWER: CONFIDENTIAL INFORMANTS AND POLICE INVESTIGATIONS* 1 (2016).

Even a well-regulated system would be hard-pressed to ensure that these deals are done in the right cases for the right reasons, and that, when done, they are free from the dangers of self-dealing by police overeager to make cases, prosecutors looking to post convictions at any cost, informants seeking impunity, and cooperators currying favor at the expense of truth. The challenge is qualitatively greater in a decentralized criminal justice system that, as a matter of formal law, gives plenary discretion to police officers and prosecutors to use criminal liability to buy information. Absent foundational changes in the judicial control of enforcement decision-making, the path to managing these risks thus lies through governance and administrative controls, not adjudication and adversarial testing.<sup>3</sup> To various degrees across diverse jurisdictions, these controls have been explored and need to be strengthened. At the same time, however, we need to embrace the reliability and transparency fostered when adversarial and public processes shine a light on these arrangements.

### I. PREVAILING LAW AND POLICY

The absence of formal legal clarity creates definitional challenges: Is a whistleblower—someone with knowledge of, and perhaps some culpability in, organizational misconduct, and who may be rewarded, even publicly celebrated for reporting it—an “informant”? What about the neighbor who tells the police about criminal activities next door? Both may well be condemned as “snitches” (or some other of the many pejorative terms reserved for those who breach real or hoped-for solidarity) by the offenders they implicate.<sup>4</sup> While fuzzy at the edges, however, the terms “informants” and “cooperators” are most usefully reserved for those with some personal criminal involvement who avoid prosecution or minimize punishment by incriminating others to law

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3. See Barry Friedman & Maria Ponomarenko, “Democratic Accountability and Policing,” in the present Volume; see also Rachel A. Harmon, “Legal Remedies for Police Misconduct,” in the present Volume.

4. Susan Clampet-Lundquist, Patrick J. Carr & Maria J. Kefalas, *The Sliding Scale of Snitching: A Qualitative Examination of Snitching in Three Philadelphia Communities*, 30 *SOC. F.* 265 (2015) (“Defining ‘snitching’ as it relates to the criminal justice system is complicated, as it can include someone caught with an illegal firearm giving police information on someone else, an individual not involved in criminal activity testifying as a witness in a trial, or a neighborhood resident calling the police about illegal activities on the block.”). For an insightful exploration of the “social construction of snitches,” see MALIN ÅKERSTRÖM, *BETRAYAL AND BETRAYERS: THE SOCIOLOGY OF TREACHERY* (1990).

enforcement authorities in some structured relationship of exchange. (Even those informants who receive cash payments in exchange for information are usually recruited with some informal grant of leniency or immunity.<sup>5</sup>)

That is how I use the terms here, with the distinction between the two lying chiefly in the stage of the criminal process in which the state uses them. “Informants” provide information, and sometimes operational assistance (like setting up stings), to police officers and federal agents pursuing investigations. “Cooperators,” as cooperating defendants are formally called, testify—or more likely, in a world of plea bargaining, are prepared to testify—for the prosecution at the trials of charged defendants. Although there is considerable overlap in these categories—with many informants formalizing their deals and becoming cooperators—many informants will deal only with the police, and many cooperators “sign up” with prosecutors only after they and others have been charged. The formal separation of responsibility between police and prosecutors and the lack of a hierarchical relationship between those two institutions in just about all U.S. jurisdictions makes the distinction between informants and cooperators less a matter of function and more one of institutional management.

One type of prosecution witness merits its own category and special attention: jailhouse informants. Lacking any prior knowledge or involvement in an offense and, often, any certainty of reward (though usually in hope of one), they come forward to the authorities claiming to have overheard or otherwise acquired incriminating evidence about a fellow inmate. A reward will inevitably be forthcoming, in the form of a reduced sentence or some other governmental consideration.

One can easily imagine a rigorous regulatory regime—both administrative and judicial—governing all governmental relations with informants and cooperators. Indeed, the comparative literature, particularly the work of Jacqueline Ross,<sup>6</sup> explores worlds in which the principle of legality (the obligation of law enforcers to pursue criminal activity that comes to their attention) and long-standing reservations about undercover policing and plea bargaining have led to regimes that considerably restrict the legal authority of

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5. There is also a category of informants who are primarily motivated by money—under some federal agency guidelines, informants can receive up to 10% (for HSI) or 20% (for DEA) of cash seizures, up to a maximum of \$100,000 to \$250,000 a year.

6. See Jacqueline E. Ross, *Undercover Policing and the Shifting Terms of Scholarly Debate: The United States and Europe in Counterpoint*, 4 ANN. REV. L. & SOC. SCI. 239 (2008); Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 555 (2007).

police and prosecutors to trade leniency for information and testimony. In the United States, however, strong legal norms of police and prosecutorial discretion relieve enforcers from having to rigorously justify these arrangements to judicial actors, and the effective regulatory regime is a mix of bureaucratic controls (of varying clarity and stringency, mostly weak), statutory controls (in some states), trial defenses of entrapment or outrageous government misconduct or appeals to juries' sense of proportionality,<sup>7</sup> and political accountability (to the extent it exists).

#### A. INFORMANTS

In an effort to highlight the special regulatory challenges of informants—as opposed to those generally posed whenever human sources of information become the basis for police activity—let us focus on two groups: (1) those individuals who, faced with the possibility of an arrest on related or unrelated criminal charges, agree to provide information to the police about the criminal activities of others; and (2) those individuals who, perhaps acting at the loose or tight direction of the police, endeavor, notwithstanding their outsider status, to introduce themselves into some ongoing or nascent criminal scheme, usually as a trafficking counterparty or some sort of abettor (i.e., purveyor of needed material). The second group will not necessarily be motivated by the desire for leniency—cash rewards may do the trick—but it is not likely to include pillars of society. A great many informants will have sustained, structured relationships with one or more police officers or agents.

Informants are not a unique feature of narcotics investigations, but they are particularly prevalent in that area. Decades ago, Malin Åkerström explained why by pointing, first, to the nature of drug trafficking: With so many links in a distribution chain, the chances that the police will be able to break a link are greater, as is an informant's confidence that his associates won't immediately recognize his defection. Åkerström also noted the police-demand side of the equation: Where a type of crime is a high enforcement priority but lacks self-identified victims, the pressure to find informants is particularly great.<sup>8</sup> Both of these explanations remain true today.<sup>9</sup> Even so, the “true utility” of informants, as Jon Shane notes, stems as much from their ability to infiltrate hard-to-penetrate groups such as gangs, organized-crime syndicates, criminal tax evasion, money-laundering and fraud schemes, and “dangerous conspiracies”

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7. See Jessica A. Roth, *The Anomaly of Entrapment*, 91 WASH. U. L. REV. 979, 987 (2014).

8. ÅKERSTRÖM, *supra* note 4, at 124.

9. See PETER K. MANNING, *THE NARC'S GAME: ORGANIZATIONAL AND INFORMATIONAL LIMITS ON DRUG LAW ENFORCEMENT* 147 (2d ed. 2004).

involving weapons trafficking, human trafficking, and terrorism—not just drug conspiracies.<sup>10</sup> Moreover, we should expect even more reliance on informants, not just to make particular cases but to provide grist for the “intelligence-led” policing increasingly touted as the wave of the future.<sup>11</sup>

The criminal background and self-interested motivations of many informants raise tough questions about their reliability and integrity—questions addressed, to some extent, through a patchwork of formal legal doctrines. When, for example, police draw on information obtained from an informant to support an application for a search or arrest warrant or to justify a warrantless search or arrest, a court will inquire into the informant’s reliability (perhaps his “track record” in past cases) and the extent to which he is corroborated.<sup>12</sup> When an informant helps put in motion the criminal activity for which a defendant is later prosecuted, the defendant may be able to get a court to scrutinize the government’s tactics by invoking the court’s “supervisory powers” (if the jurisdiction allows) or by raising an entrapment defense before the jury.<sup>13</sup> The likelihood of obtaining relief under either of these approaches is pretty low, however, because courts are adverse to using supervisory powers to regulate police operations, and entrapment defenses open the door to evidence of the defendant’s predisposition to commit the crime.<sup>14</sup> Moreover, what is unlikely to receive any judicial scrutiny at all is the informant’s role in target selection—the extent to which enforcement discretion has been effectively outsourced to him. The deference courts give to enforcer discretion prevents any scrutiny of this de facto power of the informant, with claims of “selective prosecution” doomed to fail.

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10. JON SHANE, CONFIDENTIAL INFORMANTS: A CLOSER LOOK AT POLICE POLICY 3 (2016); see also DABNEY & TEWKSBURY, *supra* note 2, at 66 (finding reliance on informants among homicide, narcotics, prostitution, fraud, firearms, robbery, white-collar crime, and burglary investigators).

11. U.S. DEP’T OF JUSTICE, GLOBAL JUSTICE INFORMATION SHARING INITIATIVE, NAVIGATING YOUR AGENCY’S PATH TO INTELLIGENCE-LED POLICING (2009); Adrian James, *The Advance of Intelligence-Led Policing Strategies: The Emperor’s New Clothes?*, 76 POLICE J. 45 (2003).

12. Mary Bowman, *Full Disclosure: Cognitive Bias, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431 (2013).

13. See Roth, *Anomaly of Entrapment*, *supra* note 7, at 983; PAUL MARCUS, THE ENTRAPMENT DEFENSE §§ 4.04 (4th ed. 2009).

14. Roth, *Anomaly of Entrapment*, *supra* note 7, at 983; MARCUS, *supra* note 13, §§ 4.04, 6.02.

That an informant's whims or even personal vendettas might lead him to implicate one person as opposed to another is a milder form of a more dangerous problem: that an informant will use the police to target criminal rivals, so that he can commit his own crimes.<sup>15</sup> Whitey Bulger's achievement of murderous impunity through his relationship with FBI agents is a notorious, but sadly not unique, example of this pathology.<sup>16</sup>

The broader social consequences of a police department's or federal agency's informant program, while bound to be significant, will always be difficult to assess. Some, doubtless large, number of investigations wouldn't go anywhere—particularly when it comes to identifying high-level conspirators—without informants. Moreover, the risk that associates might inform will destabilize conspiracies and thus reduce the long-term success of criminal organizations. On the other hand, because informants can substitute for more intensive investigative work, police officers may be tempted to “over buy” informant information and overlook more criminal activity by informants than necessary. And any perceived sense of impunity on the part of informants can only increase crime.

Of course informants themselves can be victimized by or as a result of their relationship with the police. The individual who faces prosecution because he refused to work with the police will at least have some adjudicative safeguards, including a lawyer. The individual who agrees to provide information will frequently not have had the benefit of counsel and will, unlike the innocent bystander, find himself at risk of illegitimate and unconstrained police exploitation. More grievous, of course, will be the risk of retaliation, not just from those about whom an informant provides information but from those worried about being targeted and those simply trying to gain status on the

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15. See J. Mitchell Miller, *Becoming an Informant*, 28 JUST. Q. 203, 214 (2011) (empirical study of informants finding: “Inequitable drug deals, reactions to rumors that the target tried to snitch on a friend, scorned partners in intimate relationships, and competition elimination are but a few of the more typical situations that motivate revenge seeking informants.”).

16. See DICK LEHR & GERARD O'NEILL, *BLACK MASS: THE TRUE STORY OF AN UNHOLY ALLIANCE BETWEEN THE FBI AND THE IRISH MOB* (2001); *United States v. Flemmi*, 195 F. Supp. 2d 243, 247–48 (D. Mass. 2001); *United States v. Flemmi*, 225 F.3d. 78 (1st Cir. 2000); HOUSE COMM. ON GOV'T REFORM, *EVERYTHING SECRET DEGENERATES: THE FBI'S USE OF MURDERERS AS INFORMANTS*, 3RD REPORT, H.R. REP. NO. 108-414, at 454 (2004), <https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt414/html/CRPT-108hrpt414-vol1.htm>.

street.<sup>17</sup> The violence that accompanies criminal fears of betrayal—whether those fears are justified or not—is another social cost of informant use.<sup>18</sup>

The extent that formal doctrine—particularly of the sort that can be invoked in the adversary process—constrains how the police use informants turns on whether information about police-informant interaction reaches prosecutors. With different priorities, interests, and accountabilities, prosecutors will often have different views on the deals that have been cut and the reliability of the information obtained.<sup>19</sup> Prosecutors are also the necessary conduit of information to defense counsel and judges. None of this oversight and transmission can occur, however, when police are not candid with prosecutors about informant activities, and the absence of such candor risks severe miscarriages of justice.

The other, operationally more significant, sources of regulation are, at least potentially, bureaucratic controls within agencies, and sometimes political oversight. What these are and the degree to which they address informant pathologies vary greatly across jurisdictions. The U.S. Attorney General's Guidelines, for example, require that U.S. Justice Department agencies conduct suitability inquiries before signing up an informant and regular suitability reviews thereafter. Any illegal activity that informants engage in must be authorized and carefully overseen.<sup>20</sup> State and local agencies have their own

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17. Cheryl W. Thompson, *Dozens in D.C., Maryland Paid the Ultimate Price for Cooperating with Police*, WASH. POST (Jan. 10, 2015); see also Brendan O'Flaherty & Rajiv Sethi, *Witness Intimidation*, 29 J. LEGAL STUD. 399 (2010).

18. See Richard Rosenfeld, Bruce A. Jacobs & Richard Wright, *Snitching and the Code of the Street*, 43 BRIT. J. CRIMINOLOGY 291, 306 (2003) ("snitching is a pervasive element of inner-city street life that posts dangers for street criminals and law-abiding residents alike"); MARGARET S. WILLIAMS, DONNA STIENSTRA & MARVIN ASTRADA, FED. JUDICIAL CTR., SURVEY OF HARM TO COOPERATORS (2016), [http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/\\$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf).

19. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

20. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS (2002); U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES (2006), <https://www.ignet.gov/sites/default/files/files/ag-guidelines-use-of-fbi-chs.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-807, CONFIDENTIAL INFORMANTS: UPDATES TO POLICY AND ADDITIONAL GUIDANCE WOULD IMPROVE OVERSIGHT BY DOJ AND DHS AGENCIES (2015), <http://www.gao.gov/assets/680/672514.pdf>; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES (2005), <https://oig.justice.gov/special/0509/final.pdf>; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, AUDIT DIV. 15-28, AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S CONFIDENTIAL SOURCE POLICIES AND OVERSIGHT OF HIGHER-RISK CONFIDENTIAL SOURCES (2015), <https://oig.justice.gov/reports/2015/a1528.pdf>.

guidelines, but often look to the policies and standards of the Commission on Accreditation for Law Enforcement Agencies (CALEA) and the International Association of Chiefs of Police (IACP).<sup>21</sup>

### B. COOPERATORS

Like an informant, a cooperator may assist in investigations, but, unlike an informant, his point of contact is likely to be a prosecutor rather than a cop or agent. And his status is rooted in the adjudicative, not the investigative, stage: His arrangement with the government will be in lieu of his own trial and will oblige him to testify against others at their trials.

Cooperators, too, are often associated with drug cases, and certainly play important roles in federal narcotics prosecutions. Indeed more than half of the federal defendants receiving reduced sentences for “substantial assistance” to the government came from drug cases.<sup>22</sup> Yet while the feds have the best data collection, drug cases are overrepresented in that system. To be sure, prosecutors from all jurisdictions rely on cooperators in cases involving underground markets and sustained organized crime. But cooperating witnesses are a feature in all multi-defendant cases, particularly where there are gradations in culpability that facilitate the driving of a wedge into what otherwise might be a joint defense. Indeed, the leading case on the Speedy Trial Clause arose when neither the prosecution nor the defense wanted to rush into the trial of one murder defendant before they knew the outcome of the multiple trials of a co-defendant who, the state hoped, would cooperate if convicted.<sup>23</sup>

In theory, rather than purchasing testimony with sentencing discounts, prosecutors could first convict someone and then procure his testimony through grants of immunity and compulsion orders. The oath alone, however, has its limits when it comes to extracting truthful testimony from those deeply involved in criminal conduct. “Perjury cases are rarely brought, hard to prove, and unlikely to add much time to sentences that have already been or will be imposed for serious crimes.”<sup>24</sup>

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21. SHANE, *supra* note 10, at 30.

22. In fiscal year 2015, of 71,003 cases, 8,470 received substantial assistance departure. More than half of these were drug trafficking cases, with the median percent decrease from the guideline minimum in those cases of 48.4%. U.S. SENTENCING COMM’N, SOURCEBOOK OF SENTENCING STATISTICS tbl.30 (2015), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table30.pdf>.

23. See *Barker v. Wingo*, 407 U.S. 514 (1972).

24. Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G REP. 292, 294 (1996).

Cooperator testimony thus must be obtained through explicit (although sometimes implicit) negotiation. Because introducing a cooperator's incriminating statements against a defendant without giving him a chance to cross-examine the cooperator would violate the Confrontation Clause, the cooperator must also be ready to appear at trial. Should he recant or otherwise muddy his testimony, the prosecution's case will be imperiled. The cooperator's protection against intimidation or persuasion from the defendant and his allies thus becomes a necessary part of prosecutorial planning. And his agreement will usually be structured to delay any sentencing leniency until after he has testified.

Even as prosecutors address one kind of risk from cooperator testimony—the risk that a cooperator will defect or otherwise torpedo the trial—they create another one: The risk that cooperators seeking to gain maximal leniency via the prosecutor's recommendation will shade their testimony to favor the government, at the expense of the defendant.<sup>25</sup> And there is a parallel risk that even prosecutors trying to restrict cooperators to truthful testimony won't be up to the task.<sup>26</sup>

Because they have considerable control over how plea deals are structured, prosecutors are well-placed to address the risks that cooperators pose to their cases.<sup>27</sup> If they attend to their truth-promoting duties as well as their adversarial interests, prosecutors can also endeavor to ensure that cooperators tell the truth. But where prosecutors can't or won't rise to this considerable challenge, the safeguards of reliability come from defense counsel's exposure of a cooperator's criminal background and self-serving motives<sup>28</sup> and from a jury's ability to properly assess this impeachment material. Both of these safeguards turn on the adequacy of the prosecution's disclosure of this information (including all agreements or informal understandings with the cooperator)—which it is constitutionally obliged to turn over<sup>29</sup>—and on the adequacy of cross-examination, perhaps supported by the trial judge's cautionary instructions. While several states have gone beyond the federal approach (which relies on

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25. See Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995).

26. See Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 774–77 (2016); Ellen Yaroshfsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999).

27. Richman, *Cooperating Clients*, *supra* note 25, at 94–111.

28. For a reminder that cooperation can reflect remorse and atonement, not simply self-interest, see Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1 (2003).

29. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). For a discussion of disclosure, see Darryl K. Brown, “Discovery,” in Volume 3 of the present Report.

cautionary instructions) and have required that cooperator testimony be corroborated, those rules “typically require only some additional evidence ‘tending’ to connect the defendant to the crime.”<sup>30</sup>

The social costs of cooperator testimony are not limited to those arising out of these reliability risks. Any sentencing regime committed to horizontal equity, proportionality, and to sentences that reflect offense seriousness must worry about the magnitude of the discounts that cooperators usually receive for testifying. To be sure, these costs are offset by the enforcement gains brought by the purchase of otherwise unavailable testimony, and the instability brought to every conspiracy by the Prisoner’s Dilemma (in which each conspirator worries that, should arrest occur, another conspirator will talk to the cops first). Yet the flip side of the Prisoner’s Dilemma is that the forward-looking conspirator might calculate that since, if quick enough, he can avoid his just deserts by informing or cooperating, he needn’t worry about—or be deterred by—highly punitive sanctions.<sup>31</sup>

## II. LITERATURE REVIEW

### A. INFORMANTS

Given that informants trade in betrayal of their associates and that the enforcement projects they assist often involve organizational misconduct whose targeting can itself be morally contestable (think Judas and any number of informants used against dissident political groups), it’s not surprising that the literature on informants is substantial and rich.<sup>32</sup> A large body of comparative work reminds us that—however necessary informants are to important law-enforcement projects—issues of reliability, impunity, and corruption inevitably attend their use.<sup>33</sup>

30. Roth, *Informant Witnesses*, *supra* note 26, at 760–61.

31. See Miriam H. Baer, *Cooperation’s Cost*, 88 WASH. U. L. REV. 903 (2011).

32. See, e.g., Richard C. Donnelly, *Judicial Control of Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); MALACHI L. HARNEY & JOHN CROSS, *THE INFORMER IN LAW ENFORCEMENT* (2d ed. 1968); GARY MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* (1988); Gary Marx, *Thoughts on a Neglected Category of Social Movement Participant: The Agent Provocateur and the Informer*, 80 AM. J. SOC. 402 (1974); Peter Reuter, *Licensing Criminals: Police and Informants*, in *ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* (Gerald M. Caplan ed., 1983). For a useful literature review, see DABNEY & TEWKSBURY, *supra* note 2, at 5–16.

33. See, e.g., Gustavo Fondevila, *Controlling the Madrinis: The Police Informer Management and Control System in Mexico*, 86 POLICE J. 116 (2013); Colin Dunnighan & Clive Norris, *A Risky Business: The Recruitment and Running of Informers by English Police Officers*, 19 POLICE STUD. 1 (1996).

Yet there are important new analytical strands. Perhaps because of the increasing scale of law enforcement activities and their carceral consequences in the United States, some scholars, particularly Alexandra Natapoff, have highlighted how police cultivation of and reliance on informants, particularly for narcotics cases, have pathological effects on “vulnerable communities.”<sup>34</sup> It is in these cases, she notes, where drug arrests and the “flipping” of arrestees to inform on their associates are concentrated and where the consequent toll on social capital is most marked. Others have written how the actual or perceived concentration of informant activity in inner-city, generally minority, communities has given rise to “an exaggerated anti-snitching ‘code of the street’” that “weakens informal social control by stigmatizing residents who witness and report neighborhood crime, and simultaneously interferes with the system of formal social control that is necessary for crime prevention and community safety and justice for victims.”<sup>35</sup> This “code,” when combined with other sources of distrust of police within minority communities, itself contributes to community devastation. Plunket and Lundman, for example, suggested in 2003 that “the significantly lower clearance rates in Black census tracts and integrated census tracts are a function of less trust and less cooperation and information from citizens.” They noted, “[w]hen people are reluctant to talk to homicide detectives, when they are uneasy about telling homicide detectives what they saw, what they know, and what they suspect, the necessary result is lower clearance rates.”<sup>36</sup>

These social costs lead Natapoff and others to argue for data collection and better reporting on informant creation and deployment, and, Natapoff hopes, better governance of arrangements that lack transparency or accessibility to wholesale, or much retail, legal intervention. Like many others writing before and after her, including Clifford Zimmerman,<sup>37</sup> Natapoff would tighten up

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34. ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 5 (2009); see also Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *A Multilevel Study of Collective Efficacy*, 277 *SCIENCE* 918 (1997).

35. Rachael A. Woldoff & Karen G. Weiss, *Stop Snitchin’: Exploring Definitions of the Snitch and Implications for Urban Black Communities*, 17 *J. CRIM. JUST. & POPULAR CULTURE* 184 (2010), [http://www.albany.edu/scj/jcipc/vol17is1/Woldoff7\\_6.pdf](http://www.albany.edu/scj/jcipc/vol17is1/Woldoff7_6.pdf).

36. Janice L. Puckett & Richard J. Lundman, *Factors Affecting Homicide Clearances: Multivariate Analysis of a Complete Conceptual Framework*, 40 *J. RES. CRIME & DELINQ.* 171, 185 (2003); see also Clampet-Lundquist, Carr & Kefalas, *supra* note 4; Jeffrey Fagan & Daniel Richman, *Understanding Recent Spikes and Longer Trends in American Murders*, 117 *COLUM. L. REV.* 1235 (2017) (highlighting connection between low clearance rates and homicide spikes in certain cities).

37. Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 *HASTINGS CONST. L.Q.* 81 (1994).

controls over the coercion exerted on potential informants and would demand more of the police in assessing reliability. Even though, because of federal visibility and the accessibility of federal guidelines, FBI informant guidelines receive considerable attention, Jon Shane has put a spotlight on the best-practice principles of the International Association of Chiefs of Police and has explored the extent to which police department policies around the country are consistent with them.<sup>38</sup>

Some recent calls for increased regulation of police-informant relationships come from those concerned as much for the plight of the informants themselves as for those on whom they inform and the communities in which they live. Michael Rich, in particular, has gone so far as to suggest a Thirteenth Amendment basis for regulating informant relationships and would demand, among other things, a far higher degree of counsel involvement in the recruitment process.<sup>39</sup>

### B. JAILHOUSE INFORMANTS

Because jailhouse informants usually have only passing knowledge of the defendants against whom their testimony is sought; because this thin interaction is often motivated by powerful self-interest; and because, not coincidentally, jailhouse informants have figured prominently in the conviction of a number of defendants who have thereafter been exonerated, this distinct category of witnesses has appropriately received special attention in the literature. Some, like Rory Little and Russell Covey, have cogently argued for their categorical exclusion.<sup>40</sup>

### C. COOPERATORS

Discussion of cooperators in the scholarly literature often overlaps with that of plea bargaining generally—for cooperation agreements are indeed a variant, albeit a distinctive variant, of plea agreements.<sup>41</sup> Moreover, it is true that prosecutorial power—the target of most plea-bargaining critiques—gets

38. SHANE, *supra* note 10.

39. Michael L. Rich, *Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 SANTA CLARA L. REV. 681 (2010); *see also* Robert L. Misner & John H. Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713 (1977); David Katz, *The Paradoxical Role of Informers within the Criminal Justice System: A Unique Perspective*, 7 U. DAYTON L. REV. 51, 68 n.104 (1981) (making a similar argument).

40. Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375 (2014); Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. L. REV. 965, 968–69 (2008). For a discussion of plea bargaining, see Jenia I. Turner, “Plea Bargaining,” in Volume 3 of the present Report.

41. Richman, *Cooperating Clients*, *supra* note 25 (suggesting that while plea agreements are generally executory contracts, cooperation agreements are more like relational contracts).

supercharged when legislators create mandatory minimums or mandatory guidelines over which prosecutors, and not judges, have control.<sup>42</sup> But the effects of these sentencing measures are often exaggerated by those who forget the extent to which judges, even when endowed with considerable sentencing discretion, would defer to prosecutorial leniency recommendations for defendants whose offenses would otherwise have led to maximal punishment. Cooperating witnesses are seeking deep discounts for their testimony and have generally received them, under any number of sentencing regimes.

If useful and reliable testimony is to come from such self-interested witnesses, a variety of actors must be capable of extraordinary discernment. Prosecutors, in particular, have to be able to figure out when a cooperator is fabricating or shading testimony to curry favor with the government, protect others, or advance some hidden personal agenda. They also, as Miriam Baer has noted, need to be able to discern whether they are making a deal with the right person and whether overall enforcement goals are served by a deal.<sup>43</sup> A growing literature has expressed skepticism that prosecutors have this capacity.<sup>44</sup> Others have focused on the capacity of juries—in the relatively small number of cases that go to trial—to assess cooperator credibility.<sup>45</sup> If they are going to properly assess testimony, juries, of course, need to know the full contours of deals with prosecutors, and scholars like Michael Cassidy have drawn attention to inadequate disclosure practices in this regard.<sup>46</sup>

Given the reliability concerns, effects on sentencing equity, and public costs of giving deep sentencing discounts to cooperators, some like Ian Weinstein and Caren Morrison have called for more scrutiny of deals within prosecutors' offices and greater transparency of those arrangements for the general public.<sup>47</sup> Jessica Roth has called for an exploration of the optimal incentives

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42. See Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report; see also Douglas A. Berman, "Sentencing Guidelines," in Volume 4 of the present Report.

43. See Baer, *supra* note 31, at 917.

44. See Yaroshefsky, *supra* note 26; Roth, *Informant Witnesses*, *supra* note 26, at 774–77.

45. See Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137 (2008) (experimental evidence suggests that information about cooperative witness' incentive did not affect participants' verdict decisions); see also Jeffrey S. Neuschatz et al., *Unreliable Informant Testimony*, in CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH (Brian L. Cutler ed., 2012).

46. R. Michael Cassidy, "Soft Words of Hope": Giglio, *Accomplice Witnesses*, and the Problem of Implied Inducements, 98 NW. U. L. REV. 1129, 1130 (2004).

47. Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 593 (1999); Caren Meyers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921 (2009).

in cooperation agreements and the optimal policies for handling cooperator trial preparation and testimony.<sup>48</sup> At the same time, it's also worth noting the growing interest in other countries in just these deals.<sup>49</sup>

#### D. CORPORATE CONTEXT

The basic structure of the deal in which a corporate insider implicated in criminal misconduct commits to testifying against others within the firm or the firm itself is little different from the deal in which one gangster agrees to testify against racketeering associates. Yet the corporate context of these arrangements, and the readiness of firms, for their part, to cooperate against their employees in order to obtain leniency has appropriately given rise to its own special literature. Because the corporate version of the Prisoner's Dilemma—in which corporate executives, lower-level employees, and the firm itself will regularly jockey to influence prosecutors' understanding of the nature and causes of corporate misconduct and their charging decisions—has been identified as a source of inequities and ineffectiveness in the government's pursuit of such misconduct, this cooperation literature overlaps with critiques of white-collar enforcement policy, particularly in the wake of the 2008 financial crisis.<sup>50</sup>

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48. Roth, *Informant Witnesses*, *supra* note 26, at 789, 795.

49. See DANIEL C. RICHMAN, ACCOUNTING FOR PROSECUTORS (Columbia Public Law Research Paper No. 14-506, 2016), [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2757811](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2757811); SHAWN MARIE BOYNE, THE GERMAN PROSECUTION SERVICE: GUARDIANS OF THE LAW? 138 (2013); Will Connors & Luciana Magalhaes, *How Brazil's "Nine Horsemen" Cracked a Bribery Scandal*, WALL ST. J. (Apr. 6, 2015); see also ORG. FOR ECON. CO-OPERATION & DEV., PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL 40–41 (Oct. 2014), <https://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf>.

50. See Daniel Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265 (2014); Baer, *supra* note 31; Brandon Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789 (2015); William S. Laufer, *Corporate Prosecution Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643 (2002); Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship"*, 76 ST. JOHN'S L. REV. 979 (2002); Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613 (2007); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007); Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS BUS. L.J. 2 (2006).

### III. ANALYSIS AND ASSESSMENT

Informants and cooperators will continue to be key components of all non-patrol-based law enforcement projects—at least to the extent these projects are pursued through arrest and prosecution.<sup>51</sup> Indeed, calls for better-targeted enforcement strategies and concerns about broad surveillance programs will only increase reliance on bad guys with critical inside information about the misconduct of others. The conversation about trade-offs between surveillance and “humint” (human intelligence) that is a standard trope in the intelligence business must be a part of criminal enforcement policy as well.<sup>52</sup> Moreover, growing limitations on law enforcement’s ability to obtain personal communications and data via warrant will make informants even more valuable.<sup>53</sup>

There is a cold brutality and inherent risk of unreliability in the way we use the threat of vastly greater prison time to squeeze information out of culpable defendants. But no equally effective tool for prying closely held information about corrupt dealings or other, less genteel forms of organized crime has been devised.<sup>54</sup> Even in the terrorism area—where any number of alternatives to criminal justice treatment have been explored—experts have come to appreciate the intelligence value of the “normal” coercive power of criminal sanctions.<sup>55</sup> In a criminal justice system like ours that has few clear priors on how police officers and prosecutors extract information from criminals through grants of leniency, it is unavoidable that one’s views on whether such deals are moral or proportionate will have much to do with one’s sense of the stakes, circumstances, and alternatives.

At a bare minimum, the use of informants should not be allowed to obstruct the accuracy and procedural fairness commitments of the adjudicatory system. Prosecutors must receive accurate and complete information about informants and their use from the police, so that prosecutors can adequately engage in their

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51. The growing literature on problem-oriented policing and situational crime prevention counsels more attention to the costs of standard penal responses. For a sketch of the costs associated with sting operations, see GRAEME R. NEWMAN, U.S. DEP’T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., *STING OPERATIONS* 29–33 (2007), [http://www.popcenter.org/Responses/pdfs/sting\\_operations.pdf](http://www.popcenter.org/Responses/pdfs/sting_operations.pdf).

52. See MARX, *UNDERCOVER*, *supra* note 32; Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125 (2008).

53. See MANHATTAN DIST. ATT’Y OFFICE, *REPORT ON SMARTPHONE ENCRYPTION AND PUBLIC SAFETY* (Nov. 2016), <http://manhattanda.org/sites/default/files/11.18.15%20Report%20on%20Smartphone%20Encryption%20and%20Public%20Safety.pdf>.

54. Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 LAW & CONTEMP. PROBS. 53, 67–68 (2013).

55. See David. S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT. SEC. L & POL’Y 1, 60–61 (2011).

gatekeeping functions and attend to their disclosure obligations. Prosecutors must, in turn, ensure that defense counsel receive the material they are legally entitled to in order to litigate defects in informant handling and reliability. Even so, much of the interaction between police officers and informants won't get aired in any adjudication process,<sup>56</sup> and other institutions are needed to address the risk of self-dealing endemic to informant arrangements.

A number of "agency costs" (distortions caused by self-interest) need to be addressed: Informants seeking impunity at the least personal cost will have reason to minimize their own culpability, maximize that of those they don't mind giving up to the police, and cut corners in information-gathering. Police officers will overlook informant misconduct, unreliability and targeting pathologies so as to make the next big case, or perhaps just a lot of little ones. Police agency costs can occur at the institutional as well as the individual level, with departmental priorities inappropriately skewed to case types in which informant information substitutes for expensive investigative work.

In theory, regulation of informant arrangements can be done by statute, and occasionally this has occurred. In the wake of a well-covered case in which an informant was killed during a sting operation, Florida enacted "Rachel's Law," establishing new guidelines for the police when dealing with informants.<sup>57</sup> Because lawmakers either doubt their competence to seriously regulate in this area or are averse to limiting police options, however, statutory regulation is rare. Even in Florida, one of the most significant proposed reforms—requiring that informants have the assistance of counsel before entering into any deal—was stripped out of Rachel's Law before its enactment.<sup>58</sup>

Internal regulation is thus the primary means of structuring and monitoring police-informant relationships. The Justice Department guidelines are the most conspicuous example of such regulation, and provide the basis for

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56. While showing the reliability benefits of recording conversations between informants and the police, Robert Mosteller notes the operational impediments to doing so. Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 566 (2009).

57. FLA. STAT. ANN. § 914.28.

58. Ian Leson, *Toward Efficiency and Equity in Law Enforcement: "Rachel's Law" and the Protection of Drug Informants*, 32 B.C. J.L. & SOC. JUST. 391 (2012); NATAPOFF, *supra* note 34, at 183.

audits of agency practices.<sup>59</sup> Outside the federal government, however, the decentralization of most law-enforcement authority has made regulation more varied and episodic. Even in New Jersey, where the constitutional structure allows for more regulation than usual, there remains no mandated statewide police rules for recruiting, cultivating and using informants.<sup>60</sup> The regulatory action, if it is going to come, will therefore be at the city and county level, and certainly ought to be encouraged.<sup>61</sup> The heterogeneity of police departments and their oversight mechanisms across the country precludes blind trust in internal regulatory mechanisms. But I'm not persuaded that this diminishes the promise of, and need for, pushing in this direction.

To some extent, the Confrontation Clause's demand that the witnesses against a defendant come into court and testify in person against him offers safeguards in the way of transparency and cross-examination that counsel less regulation of cooperators and even testifying jailhouse informants than may be needed for informants. For this to work, prosecutors must comply with their constitutional and statutory obligations to give defense counsel adequate information about the nature of the witness's deal. However clear the law is on these obligations, more training, enforcement, and sanctions are needed, because violations occur all too frequently.<sup>62</sup> There are some close issues, however. Those who would have every aspect of a cooperator's interaction with prosecutors recorded need, for instance, to consider whether judges should step in when defense counsel turns her license to use prior inconsistent statements into a clock-running exercise.<sup>63</sup>

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59. See, e.g., OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES (2005), <https://oig.justice.gov/special/0509/final.pdf>; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T JUSTICE, AUDIT DIV. 15-28, AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S CONFIDENTIAL SOURCE POLICIES AND OVERSIGHT OF HIGHER-RISK CONFIDENTIAL SOURCES (2015); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-807, CONFIDENTIAL INFORMANTS: UPDATES TO POLICY AND ADDITIONAL GUIDANCE WOULD IMPROVE OVERSIGHT BY DOJ AND DHS AGENCIES (2015), <http://www.gao.gov/assets/680/672514.pdf>.

60. DELORES JONES-BROWN & JON M. SHANE, AM. CIVIL LIBERTIES UNION, AN EXPLORATORY STUDY OF THE USE OF CONFIDENTIAL INFORMANTS IN NEW JERSEY 1 (2011), <https://www.aclu-nj.org/files/1113/1540/4573/0611ACLUCIReportBW.pdf>.

61. For a recent local audit, see NEW YORK CITY DEP'T OF INVESTIGATION, OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, AN INVESTIGATION OF NYPD'S COMPLIANCE WITH RULES GOVERNING INVESTIGATIONS OF POLITICAL ACTIVITY (2016), [http://www1.nyc.gov/assets/oignypd/downloads/pdf/oig\\_intel\\_report\\_823\\_final\\_for\\_release.pdf](http://www1.nyc.gov/assets/oignypd/downloads/pdf/oig_intel_report_823_final_for_release.pdf).

62. Roth, *Informant Witnesses*, *supra* note 26, at 785.

63. See Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673, 684–85 (2014).

Even heightened adversarial safeguards may not be good enough to justify the use of jailhouse informant witnesses. Russell Covey has argued:

Jailhouse snitch testimony is an inherently unreliable type of evidence. Snitches have powerful incentives to invent incriminating lies about other inmates in often well-founded hopes that such testimony will provide them with material benefits, including in many cases substantial reduction of criminal charges or sentences. At the same time, false snitch testimony is difficult if not altogether impossible to impeach. Because such testimony usually pits the word of two individuals against one another, both of whose credibility is suspect, jurors have little ability to accurately or effectively assess or weigh the evidence.<sup>64</sup>

Although it is far from clear that this reasoning makes jailhouse informant testimony qualitatively different from cooperator testimony more generally, experience may justify this line-drawing and argue for categorical exclusion. Certainly, every prosecutor's office should think long and hard, and draw on the judgments of those outside the trial team, before putting a jailhouse informant on the stand. Daniel Medwed has cogently set out how—in the wake of the explosive revelation in 1988 of the systematic fabrication of testimony by inmates of the county jail—the Los Angeles District Attorney's Office has developed an elaborate protocol for scrutinizing these potential witnesses.<sup>65</sup> It is tempting to advocate for banning these witnesses entirely, but one can imagine situations where a jailhouse witness's testimony is not only critical for proving a matter of grave consequence but comes with extraordinary circumstantial indications of reliability.

A softer regulatory intervention could include turning judges into gatekeepers, requiring them to hold reliability hearings before allowing *any* cooperator testimony. Jessica Roth has touted the benefits of such hearings:

First, they would provide an external check on prosecutorial decisions regarding informant witnesses. Although not all cases involving informants would proceed to that stage, the possibility of such hearings would operate as a powerful incentive to prosecutors and agents to think more carefully about their choice of informants, since it is not always possible to tell *ex ante* which case will result in a reliability hearing. Hearings would pry open the “black

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64. Covey, *supra* note 40, at 1428; see Little, *supra* note 40.

65. DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT, 90–91 (2013).

box” of informant use, to a far greater extent than does current practice, providing greater accountability for prosecutorial use of informants. Second, reliability hearings would provide courts with the opportunity to develop a common law regarding the factors and practices associated with greater informant reliability.<sup>66</sup>

While, if we are not going to categorically exclude jailhouse informant testimony, it makes sense to have searching reliability hearings for it, I’m not persuaded that we should use this judicial gatekeeping for all cooperating witnesses. It seems churlish, particularly in the wake of DNA exonerations, to question anything that promotes reliability, but this particular mechanism is troublingly asymmetrical, having the effect of keeping only key prosecution evidence out and to do so in many sorts of cases (corruption, organized crime, corporate fraud, police abuses) that, to my mind, go underprosecuted. However much we might, as a matter of theory, welcome thoughtful judicial interventions that avoid false negatives as well as false positives and leave adequate room for jury assessments, I would like to know more about the likelihood, as an institutional matter, that trial judges—in all their state and federal variation<sup>67</sup>—would strike the right balance. In any event, any reliability gain would be limited by the plea bargaining that makes trials the exception to the general rule.

Given the institutional capacity—though not always the inclination—of prosecutors’ offices, I think it far preferable for rigorous testing of cooperator reliability and serious deliberation about the need to “purchase” testimony with leniency to occur within those offices (and not be limited to the trial team), rather than in courtrooms. Interventions that force officials to step up to their responsibilities, like Caren Morrison’s suggestion for more public disclosure of cooperator deals,<sup>68</sup> Ellen Yaroshefsky’s call for better training,<sup>69</sup> and Jessica Roth’s call for more reliability-focused experimentation,<sup>70</sup> are therefore the most promising.

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66. Roth, *Informant Witnesses*, *supra* note 26, at 786; *see also* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 1 (2000); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 CRIM. LAW & CRIMINOLOGY 329, 364 (2012).

67. *See* Claire S.H. Lim, *Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Judges*, 103 AM. ECON. REV. 1360 (2013).

68. Morrison, *supra* note 47.

69. Yaroshefsky, *supra* note 26, at 964.

70. Roth, *Informant Witnesses*, *supra* note 26, at 786–90.

Even as we tinker with the conditions under which information is obtained from bad guys and the measures by which our adjudicative system and political structures come to grips with those conditions, we should also try to reach out more to non-criminal sources of information. Resources for protecting witnesses need to be increased, and efforts to intimidate must be punished severely. But unless a police force can win the trust of its citizenry and patiently knock on doors, untainted information will be scarce indeed.<sup>71</sup>

### RECOMMENDATIONS

1. **Clearer guidelines for assessing, monitoring, and protecting informants are needed, as well as better training for officers and agents, and compliance mechanisms.** Any deficiencies with respect to both guidelines and training should be attended to, with some sort of oversight by an entity insulated from the pressure to make cases. Deficiencies in the funding for witness protection, particularly in local jurisdictions, also need to be addressed.
2. **Departments and agencies should give far more consideration to the social costs of using informants and the alternatives.** Informants will inevitably be key investigative tools, but in the aggregate, their use can erode the social capital within crime-plagued communities. Protocols should be established to ensure that they are not overused. Moreover, their use should not be allowed to substitute for police efforts to develop bonds with law-abiding members of the communities they serve. Developing those bonds will require consideration of the impact of police tactics on those communities.
3. **Every jurisdiction should look closely at how it uses jailhouse informants, and should demand better justification of their use from prosecutors, both at the wholesale level and case by case.** Judicial gatekeeping may provide a satisfactory compromise, but rigorous testing of reliability is essential.

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71. On the need for more focused information gathering in homicide investigations, see Fagan & Richman, *supra* note 36; JILL LOEVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015); and Benjamin Mueller & Al Baker, *Rife Between Officers and Residents as Killings Persist in South Bronx*, N.Y. TIMES, (Dec. 31, 2016), <http://www.nytimes.com/2016/12/31/nyregion/bronx-murder-40th-precinct-police-residents.html?smprod=nytcore-iphone&smid=nytcore-iphone-share>.

4. **Prosecutors should be trained to scrutinize the reliability of possible cooperators, and each office should have protocols to ensure that deals are made with cooperators only when necessary.** Committees that allow senior prosecutors outside the trial team to assess reliability and need should be established whenever possible.
5. **Prosecutors must take care to comply with their discovery and disclosure obligations as to the nature of their deals with cooperators to ensure that cooperator reliability can be tested via cross-examination and explored by jurors.** To the extent possible—with due attention to the enormous personal risks that cooperators often take—information about such deals, both in individual cases and in the aggregate, should be disclosed to the public, to ensure that interested citizens can get a better sense of both the costs and benefits of cooperation.