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COOPERATION'S COST

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Abstract

This Article explores the costs and benefits of criminal cooperation, the widespread practice by which prosecutors offer criminal defendants reduced sentences in exchange for their assistance in apprehending other criminals. On one hand, cooperation increases the likelihood that criminals will be detected and prosecuted successfully. This is the "Detection Effect" of cooperation, and it has long been cited as the policy's primary justification despite the collateral effects associated with striking deals with admitted criminals. On the other hand, cooperation also reduces the expected sanction for offenders who believe they can cooperate if caught. This is the Sanction Effect of cooperation, and it may grow substantially if the government signs up too many cooperators, sentences them too generously, or causes them to become overly optimistic about their chances of receiving a cooperation agreement.

When the government allows the Sanction Effect to grow large enough to eclipse or undercut cooperation's Detection Effect, it undermines one of its key tools for improving deterrence. Indeed, when the Sanction Effect outweighs the Detection Effect, the cooperation policy reduces deterrence, and the government unwittingly encourages more *crime. Since cooperation is itself administratively costly, the policy perversely causes society to pay for its additional crime.*

This Article reorients the cooperation debate around the fundamental question of whether cooperation deters and provides a framework for better understanding how cooperation "works." Government actors who laud and rely on cooperation should pay greater attention to this fundamental deterrence question. To do otherwise is to leave society vulnerable to cooperation's greatest cost, which is its potential to undermine deterrence.

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Introduction

Cooperation is a pervasive component of criminal prosecutions.[2] Criminal defendants and their attorneys routinely offer information and assistance in the prosecution of other criminals in exchange for leniency at sentencing.[3] Criminal laws that cover a broad range of conduct and long sentences that apply upon conviction have combined to create substantial incentives for criminal defendants to trade their assistance in exchange for leniency. Given cooperation's popularity as a criminal law enforcement tool,[4] as well as its increasing importance in regulatory settings,[5] this Article reconsiders the long-held presumption that cooperation deters criminal conduct.[6]

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[2] "[A] large part of the job of being a prosecutor is identifying and interviewing potential cooperating witnesses, evaluating their credibility, and then seeking corroboration for their version of events." Steven M. Cohen, *What is True? Perspectives of Former Prosecutor*, 23 Cardozo L. Rev. 817, 817 (2002). Nationally, 13.5% of the defendants sentenced in the federal criminal justice system annually were cooperators. *See* 2008 Sourcebook of Sentencing Statistics, United States Sentencing Commission, Table N, available at http://www.ussc.gov/ANNRPT/2008/TableN.pdf . However, in numerous judicial districts, the number of cooperating defendants is well above 20%. *See id*. at Table 26, available at http://www.ussc.gov/ANNRPT/2008/Table26.pdf

[3] "'Cooperation' is a term of art for the process by which a federal criminal defendant gains the possibility of sentence mitigation by providing assistance in the prosecution or investigation of others." Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 563 n.1 (1999). This Article addresses solely those forms of cooperation whereby the government pays the defendant through leniency at sentencing. It does not address those instances in which the government trades a reduced charge ("charge bargaining") or agrees to portray false facts to the court ("fact bargaining") in exchange for assistance in prosecuting others. For more on these two concepts, see Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors and the Exercise of Discretion*, 117 Yale L.J. 1420 (2008) (describing attempts to eliminate fact bargaining), and Russell Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 Tulane L. Rev. 1237, 1260-63 (2008) (explaining intractability of charge bargaining in federal practice).

[4] "[I]n the view of Congress and the Sentencing Commission, assisting law enforcement is often critical to detecting and deterring crime, and punishing offenders." *United States v. Milo*, 506 F.3d 71, 77 (1st Cir. 2007) (Boudin, J.)

[5] See discussion in Part I, *infra*.

[6] This Article focuses on cooperation by individual persons, and not corporate business entities. The deterrent value of cooperating with corporate entities has been well explored by Jennifer Arlen and Renier Kraakman in *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U.L. Rev. 687 (1997) (arguing for

This analysis has implications not only for criminal law, where cooperation is most prevalent, but for other areas of government regulation, where public actors have steadily increased their reliance on the promise of leniency to induce the flow of information and assistance from individuals.[7] Moreover, it moves the cooperation discussion forward in a more productive way. Currently, the proponents and detractors of cooperation talk past each other. Supporters argue that it benefits society by increasing the government's ability to detect and prosecute crime. Detractors contend primarily that it is unfair to defendants (usually, those who have failed to secure an agreement) and provides the government with excess discretion and power. Cooperation's critics therefore seek procedural reforms, such as taping cooperating defendants' statements before they testify or limiting prosecutors' discretion to choose or decline. These reforms may make cooperation more costly (to the government) and more legitimate (in the eyes of non-cooperating defendants), but they do nothing to help us address the core question as to whether cooperation deters crime.

Drawing on economics and, to a lesser extent, behavioral psychology, the Article examines cooperation's value by unpacking the motivations of the government agents who supply cooperation and the defendants who demand them.[8] The neo-classical theory of deterrence holds that the rational person refrains from engaging in wrongdoing when the expected costs of such wrongdoing – the sanction modified by the probability that it will be imposed – exceed its expected benefits.[9] Cooperation deters wrongdoing by increasing the government's ability to locate, identify and prosecute those who flout the law.[10] This is the "Detection Effect" of cooperation; by trading leniency for information and assistance, the government increases its ability to prosecute and arguably deter crimes. This is the primary, if not exclusive, justification upon which cooperation's supporters often rely.

Apart from the Detection Effect, however, cooperation provokes an entirely different response from potential wrongdoers. Cooperation also reduces the sanctions of those who successfully cooperate and receive leniency at sentencing. Accordingly, it encourages criminals to expect a lesser sanction to the extent they believe they are likely to become cooperators and

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regime that mitigates liability for corporate entity that attempts to prevent and report crimes to the government), and by Jennifer Arlen in *The Potentially Perverse Effect of Corporate Criminal Liability*, 23 J. Legal Stud. 833, 836 (1994) (explaining that strict vicarious liability regime perversely increases the probability of punishment for crimes that corporate entities detect but fail to deter).

[7] *See* discussion *infra* Part I.

[8] "Cooperation bargaining occurs when the defendant has information to trade, and the gain from bargaining includes this information, which could be used in other trials." Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 Cardozo L. Rev. 1541, 1552 (1998).

[9] Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J.Pol. Econ. 169 (1968). Individuals also may refrain from wrongdoing for reasons unrelated to sanctions. *See, e.g.*, Richard H. McAdams & Janice Nadler, *Coordinating in the Shadow of the Law: Two Contextualized Tests of the Focal Point Theory of Legal Compliance*, 42 Law & Soc. Rev. 865, 866 (2008) (citing social science literature advancing legitimacy-based theories of legal compliance).

[10] "Indisputably, cooperators play a vital role in the Government's law enforcement efforts. Their assistance provides the Government with a powerful means to solve crimes and thereby to promote justice for the offenders, their victims and the larger society." *United States v. Losovsky*, 571 F. Supp.2d 545, 546 (S.D.N.Y. 2008) (Marrero, J.). For more detailed claims of cooperation's historical value in detecting and prosecuting organized crime, see John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095, 1103-09 (1995).

receive a discount for their valuable service. This is the "Sanction Effect" of cooperation and it has received little to no sustained analysis in the literature examining cooperation.

The Sanction Effect competes with the Detection Effect; the former increases incentives to commit crimes, while the latter decreases them.[11] When the individual perceives a greater Detection Effect than Sanction Effect, the costs of his criminal conduct increase; if those costs exceed his benefits, he will be deterred. But what if the criminal perceives a stronger Sanction Effect than Detection Effect? In that case, the policy reduces deterrence.[12] This is because the policy effectively lowers the expected cost of engaging in wrongdoing. Add to the mix cooperation's administrative and transactional costs, and we may have a policy whereby we literally pay for more crime.

Cooperation thus is a complex process that places competing forces on offenders' cost-benefit analyses.[13] Although traditional discussions of cooperation accept the premise[14] that the Detection Effect overwhelms the Sanction Effect and then criticize cooperation's many collateral costs,[15] their implicit assumption may not always be the case. Moreover, if the Sanction Effect exceeds the Detection Effect, the attempts to remedy this problem may upset other components of an already fragile sentencing echosystem. For all of these reasons, future analyses of cooperation must question its overall effect on deterrence.

This Article explores this problem in four parts. Part I lays out the backdrop for the Article's analysis. It briefly reviews the common criticisms of criminal cooperation and observes that despite these critiques, cooperation remains quite popular and may be "migrating" beyond its traditional criminal law context, most notably to the Securities and Exchange Commission (SEC), whose Enforcement Division chief notably announced an intention to ramp up investigations by relying on cooperators.[16] Part I then goes on to explain why regulators well versed in "organizational cooperation," whereby corporations cooperate with regulatory authorities in order to reduce fines and avoid criminal indictments, is significantly different from "individual cooperation," which is the core focus of this Article.

The remainder of the Article then considers whether and when cooperation is most likely to deter or fail as a law enforcement tool. Using the federal criminal justice system as its case

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[11] As discussed in Part III, *infra*, the analysis takes into account the fact that criminals are more influenced by increases in the probability of detection than increases in sanctions. *See generally* John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & Pol'y 189, 193-95 (2005); Samuel Buell, *The Upside of Overbreadth*, 83 N.Y.U.L. Rev. 1491, 1508 (2009) [hereinafter Buell, *Overbreadth*] (citing references).

[12] This argument is premised on the theory that criminals are deterred by law enforcement and sanctions, a matter of debate. *See generally* Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 Crime & Just. 279 (2008)(reviewing empirical literature).

[13] Obviously, some will question whether criminal acts are the product of rational decision-making. *See, e.g.*, John Darley and Paul Robinson, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 Oxford J. Legal Stud. 173, 178-81 (2004).

[14] *See, e.g.*, Covey, *supra* note 3, at 1266 (declaring cooperation "an essential tool of law enforcement").

[15] *See infra* Part I and notes 23-28.

[16] *See infra* Part I at __.

study[17], Part II starts by exploring the Detection Effect of cooperation on individual wrongdoers. Part II attempts to lay out the reasons why the Detection Effect exists, and identifies those characteristics of cooperation (the government's inability to use information effectively, the possibility that defendants may lie, the potential for government abuse) that place a downward drag on the Detection Effect.

Part III proceeds to consider the other side of cooperation, namely, the Sanction Effect. Presumably, any cooperation policy inherently reduces the sanction that defendants – at least those defendants who believe cooperation is a plausible outcome – expect to receive. Part III, however, attempts to identify those phenomena that might inflate the Sanction Effect beyond efficient levels. They include: (i) extending agreements to too many defendants; (ii) paying them too generously; and (iii) either causing or failing to debias the defendants' optimism regarding the likelihood of their cooperation and leniency they might receive at sentencing. Through all of these, government actors may undermine cooperation's value as a crime-fighting mechanism.

Part IV then considers the interplay between Detection and Sanction Effects. This Part begins by addressing the common perception that the Detection Effect will likely outweigh the Sanction Effect since defendants are substantially more attuned to changes in the probability of getting caught than changes in a given sanction. Despite this behavioral truism, Sanction Effects may be particularly pernicious in the cooperation context when defendants perceive a probable sentence of *no* incarceration instead of a mere reduction in incarceration when they cooperate.[18] Accordingly, it may not be the case that the Detection Effect is always stronger than the Sanction Effect.

In any event, when the Detection Effect does outweigh the Sanction Effect, we should still be concerned that our cooperation policy is not as effective as we presume it to be. Moreover, when the Sanction Effect does exceed or even equal the Detection Effect, society clearly loses, either by encouraging more crime or by implementing a costly policy that fails to reduce crime.

Finally, as Part IV explains, when government actors attempt to cure this imbalance, additional costs arise. For example, one way to cure the Sanction Effect is to raise the baseline sanction for an underlying crime. This, however, creates greater differences in how we treat cooperators and noncooperators at sentencing and therefore increases incentives for defendants to lie in order to secure cooperation agreements. Those falsehoods, in turn, reduce the

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[17] The federal system is particularly useful because federal prosecutors and defendants formalize their deals through "Section 5K1.1" substantial assistance letters, which prosecutors file prior to sentencing. The letter's moniker is derived from Section 5K1.1 of the United States Sentencing Guidelines, which provides, in relevant part: "[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". U.S.S.G. Sec. 5K1.1. Although the United States Sentencing Guidelines are no longer mandatory, the Section 5K1.1 letter remains one of the primary means by which criminal defendants obtain reduced sentences, particularly in the narcotics context, where more than half of all federal drug offenses are subject to mandatory minimum sentences. *See* Paul Cassell, *Too Severe?: A defense of The Federal Sentencing Guidelines (And a Critique of Federal Mandatory Minimums*), 56 Stan. L. Rev. 1017, 1046 (2004)(observing that mandatory minimums are applicable to approximately 60% of federal drug offenses).

[18] *See* discussion *infra* at ___.

government's ability to detect true wrongdoers. In other words, an attempt to cure the Sanction Effect may simultaneously harm cooperation's Detection Effect. Thus, cooperation's pathologies, even when acknowledged, are difficult to cure.

Part V concludes by considering the policy implications of the foregoing analysis and calling for more research. Even where cooperation has been relatively "formalized" in the federal criminal justice system, our knowledge of cooperation is informed by the limited data released by the Sentencing Commission, the anecdotal observations of federal judges, and several qualitative analyses published over the previous two decades.[19] The analysis contained in this Article seeks to encourage a new round of qualitative and quantitative research of both defendants and law enforcement actors.

The theoretical account of cooperation contained within the Article raises two additional points. First, given the incentives for prosecutors and law enforcement agents to "overcooperate," federal officials should consider implementing cooperation policy from the more centralized Department of Justice, instead of permitting individual United States Attorney's Offices (much less individual prosecutors) to craft their own cooperation policies.[20] Second, the Article offers a piece of advice to those regulators intent on expanding or adopting cooperation techniques outside the federal criminal context: Look before you leap. Cooperation may well deter, but it is likely to fall short of its enforcement goals when government actors fail to consider its subtle but vexatious costs.

Part I: Cooperation's Context

This Part briefly reviews the cooperation literature that has developed to date and introduces the context for which the remainder of the Article situates its analysis: the federal criminal justice system. As explained below, federal criminal law provides a particularly helpful window for analyzing and testing cooperation's theoretical costs and benefits.

Cooperation ordinarily is analyzed as a variant of plea-bargaining policy.[21] Although cooperation has long been the subject of scholarly analysis[22], much of what has been written

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[19] Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, United States Sentencing Commission (1998), *available at* http://www.ussc.gov/publicat/5kreport.pdf; Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy under the Sentencing Guidelines*, 92 Cal. L. Rev. 425, 464-68 (2004); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experience of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917 (1999).

[20] Over a decade ago, Dan Kahan advanced similar arguments with regard to the exercise of prosecutorial discretion. *See Is Chevron Relevant to Federal Criminal Law?* , 110 Harv. L. Rev. 469, 497 (1996). *See also* discussion *infra* at __.

[21] *Compare* Jeffries & Gleeson, *supra* note 10 (lauding cooperation's law enforcement capabilities), *and* Weinstein, *supra* note 3, at 567 (criticizing its effect on defendant due process). For classic debates on the general benefits and drawbacks of plea-bargaining, *see* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289, 308-09 (1983); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1995-98 (1992). Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. Chi. L. Rev. 931, 932-34 (1983). For more recent fare, see Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117, 1130 (2008); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463 (2004)

either focuses on procedural justice or distributive fairness concerns. In other words, much like the plea-bargaining literature in which cooperation is often lumped, the cooperation critique focuses on how the government's practices harms defendants, either by denying them due process[23] or by distributing punishment in a manner that is inconsistent with some retributive ideal. [24] As a result, cooperation's proponents and critics talk mostly past each other. Its defenders laud its crime-fighting abilities, and its critics attack its effect on defendants and those suspected of wrongdoing. [25]

With regard to cooperation's overall effect on society, some have argued that it undermines the government's legitimacy, particularly when cooperators receive overly generous sentences in exchange for their assistance.[26] Others have questioned the reliability of cooperators' information and convictions based on such testimony. [27] More recently, critics such as Alexandra Natapoff have questioned the policy's long-term effect on communities that are the sustained targets of criminal investigations, and the manner by which cooperation and undercover investigations increase possibilities for state-sponsored deception and abuse.[28]

[hereinafter Bibas, *Shadow*]; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2549 (2004).

[22] For a historical treatment of cooperation, see Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1 (1992) (discussing historical basis of cooperation); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1, 13-16 (2000) (describing historical practice of "approvement," cooperation's antecedent practice in England). For a more modern discussion of the problems that accompany cooperation, see the articles reproduced from a Symposium held at Cardozo Law School in 2001, entitled *The Cooperating Witness Conundrum: Is Justice Obtainable?*, 23 Cardozo L. Rev. 747, et. seq. (2002).

[23] *See, e.g.*, Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reining in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 Rutgers L. Rev. 199, 234-39 (1997) (arguing that Sentencing Guidelines vest excessive discretion in prosecutors).

[24] *See, e.g.*, Stephen J. Schulhofer, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature, Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199, 212 (1993)(criticizing cooperation "paradox" whereby more culpable defendants receive lesser sentences); Cynthia K.W. Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. Rev. 105, 139 (1994). *But see* Daniel Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 Fed. Sent. Rep. 292 at *3 (1996)(arguing that extent of "horizontal equity" between cooperators and noncooperators is an "open question").

[25] *See e.g.*, Weinstein, *supra* note 3, at 565 (arguing that cooperation imposes "externalities" such as "systemic problems of inequity, damage to the adversary system, and the moral ambivalence of snitching"). Although Weinstein treats cooperation as a market, his critique focuses on how it affects criminal defendants. In contrast, Richman's brief account of costs and benefits in *Cooperating Defendants* (*supra* note 24) is provided from a prosecutor's perspective.

[26] *See, e.g., United States* v. *Milo*, 506 F.3d 71, 78 (1st Cir. 2007) (observing that cooperation "lessen[s] public confidence in the law's insistence on just deserts, and [undercuts] equal treatment vis-a-vis those who similarly offended but happen to have nothing to trade"). *See also* Richman, *Cooperating Defendants*, *supra* note 24, at *3: "One must wonder at the damage done to the force of our laws … when murderers "walk" because they were fortunate enough to have others to "rat" on."

[27] Saul Kassin, *Human Judges of Truth, Deception and Credibility: Confident But Erroneous*, 23 Cardozo L. Rev. 809 (2002) (arguing that cooperator testimony is suspect because people "are poor human lie detectors").

[28] Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645, 658-59 (2004) (criticizing lack of transparency in cooperation process). *See also* Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. Crim. & Criminology 107, 112-13 (2005) (citing abuses in undercover investigations that used confidential informants).

Under this reasoning, cooperation, and the deceptive police practices that often accompany it, affront the social norms that keep criminal conduct at bay.[29]

Because the standard cooperation critique focuses on process and punishment, the reforms asserted by those critiques also focus on process and punishment. Cooperator statements should be taped, to deter lying and changing of stories.[30] Prosecutors should be accorded less discretion in deciding who will or will not receive a cooperation agreement.[31] And unwarranted sentencing disparity, to the extent it exists, should be reduced.[32] Whatever their individual merits, these reforms miss the larger point: if cooperation fails to deter, then government actors ought to reconsider whether to use the policy *at all*. Failure to address the question is thus a serious gap in the cooperation literature.

Indeed, this presumption of deterrence allows both current users and future adopters of the policy to overstate its value. For example, in an August 2009 speech to the New York City Bar Association, Robert Khuzami, the newly appointed Director of the Enforcement Division of the SEC, announced his intention to improve the SEC's enforcement muscle by "incentivizing cooperation by individuals" in SEC investigations.[33] In early January 2010, Khuzami announced the SEC's "Cooperation Initiative," which imported the broad outlines of federal criminal cooperation. As is the case for federal criminals, under the new initiative, offenders who assisted the SEC would be eligible to receive lower penalties.[34]

Khuzami's proposal was itself an extension of the SEC's "Seaboard" decision, whereby it has indicated its willingness to impose less punishment on regulated entities that cooperate with

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[29]Under the social norms theory, people avoid wrongdoing not because they fear formal punishment, but rather because of "the informal enforcement of social mores by acquaintances, bystanders, trading partners and others." Robert C. Ellickson, *Law & Economics Discovers Social Norms*, 27 J. Legal Stud. 537 (1998). For a critical analysis of norms theory as it has been applied to criminal law, see Robert Weisberg, *Norms and Criminal law, and the Norms of Criminal Law Scholarship*, 93 J.Crim. L. & Criminology 467, 489-95 (2003). For an argument of how cooperation may be used to alter *undesirable* social norms, see Tracy L. Meares & Dan M. Kahan, *Law and (Norms of) order in the Inner City*, 32 Law & Soc'y Rev. 805, 825 (1998)(arguing that snitching might undermine social norms of juvenile gangs in inner city). *But see* Bernard Harcourt, *After the "Social Meaning" Turn: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 Law & Soc. Rev. 179 (2000)(questioning evidentiary support for Kahan and Meares' argument).

[30]*See, e.g.*,Sam Roberts, Note, *Should Prosecutors be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 Fordham L. Rev. 257 (2005).

[31] *Compare* Lee, *supra* note 23, at 249 (arguing for greater oversight of prosecutorial decisions *not* to cooperate); Weinstein, *supra* note 3, at 568 (arguing for numerical cap on number of cooperators that prosecutors can use).

[32] Schulhofer, *supra* note 24, at 221 (arguing for replacement of mandatory minimum drug sentences with Sentencing Guidelines). Schulhofer's "cooperation paradox" argument was later rebutted by Maxfield and Kramer's report, *supra* 19, which indicated that self-professed high level drug dealers received cooperation agreements less often low-level offenders. Importantly, the report did not address the *reliability* of the prosecutors' determination as to the relative culpability of offenders. For a more recent indication that the paradox remains a problem, see David Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guideline Era*, 79 U. Colo. L. Rev. 1, 40 & n. 125 (2008)(reporting concerns of federal judges).

[33] Robert Khuzami, *My First 100 Days as Director of Enforcement*, Aug. 5, 2009, *available at* http://www.sec.gov/news/speech/2009/spch080509rk.htm#footi. Khuzami is also a former federal prosecutor in the United States Attorney's Office for the Southern District of New York (Manhattan).

[34]"SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations," January 13, 2010, available at http://www.sec.gov/news/press/2010/2010-6.htm.

the SEC during the course of an investigation.[35] Seaboard, in turn, is itself an offshoot of the Department of Justice's internal guidelines for prosecuting business organizations for their employees' criminal offenses; like the SEC, the DOJ awards cooperative corporations with lesser punishment (deferred prosecution agreements instead of criminal indictments), assuming the corporations meet conditions laid out by the Justice Department.[36] Separately, the DOJ's Antitrust Division grants immunity to those corporations (and in some instances, to the corporation's employees) who admit their participation in cartels and provide the Antitrust Division with information about the other members of the cartels.[37] Finally, administrative agencies have implemented a whole host of "self-regulatory" regimes whereby government agencies apply a lenient sanction to business organizations in exchange for their disclosure of legal and administrative violations and their assistance in identifying and sanctioning wayward employees.[38]

Until now, "regulatory cooperation" has focused primarily on corporate entities, who in turn are rewarded for identifying and turning on their own employees and officers.[39] The SEC's recent announcement, however, demonstrates a desire to import individual, criminal-style cooperation into the regulatory context. Regulators would do well to pause before doing that, however, because the entity and individual-level cooperation differ substantially.

First, whereas the government imposes cooperative obligations on corporations in order to leverage private enforcement resources[40], the purpose of individual criminal cooperation is to enable the government's own agents (prosecutors and investigators) to improve the public's enforcement mechanism.[41] Cooperation thus plays a more important role in the individual context.

Second, unlike corporate cooperation, individual cooperation does not condition the individual criminal's cooperation agreement on his *ex ante* efforts to prevent his own, much less others' crimes. This is a significant difference, because in order to secure the benefits of

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[35] *See* "Seaboard Report," 21(a) Report, Sec. Rel. No. 44969 (October 23, 2001); SEC Enforcement Division Manual 4.3, at 99-100, *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf

[36]The Filip Memorandum can be found in the United States Attorney's Manual, "Principles of Federal Prosecution of Business Organizations," Chapter 9-28.000, *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf.

[37] Christopher Leslie, *Cartels, Agency Costs and Finding Virtue in Faithless Agents*, 49 Wm. & Mary L. Rev. 1621 (2008).

[38] *See, e.g.*, Christopher Wray & Robert Hur, *Corporate Criminal Prosecutions in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1107-33 (2006) (observing that numerous federal administrative agencies and departments decide entity-based liability by considering the entity's cooperation with enforcement authorities in the identification and punishment of culpable employees).

[39] Ellen Podgor lays out some of the differences between individual and organization-level cooperation in *White Collar Cooperators: The Government in Employer-Employee Relationships*, 23 Cardozo L. Rev. 795 (2002).

[40]*Cf.* Arlen & Kraakman, *supra* note 6, at 696 (pointing out that firms may be able to sanction their employees more cheaply than government actors).

[41]The difference may be due partially to the fact that corporate cooperation interposes a third party, the corporate employer, between the government and targeted employee. *See* Samuel Buell, *Criminal Prosecution within the Firm*, 59 Stan. L. Rev. 1613, 1614 (2007) (developing "tripartite" model for understanding prosecutions of corporate employees). This additional layer alters both the incentives to seek cooperation (on both sides), as well as the ability to comply with, and verify compliance with, a given cooperation agreement. *See also* Arlen & Kraakman, *supra* note 6, at 834-35 (explaining that organizational crime includes additional agency cost component).

cooperation, putative corporate "cooperators" effectively must put in place policing and prevention systems long before any wrongdoing has been detected by the government.[42] By contrast, the average individual defendant need not decide whether to cooperate until he or she has been arrested, when she presumably has substantial incentives to seek a means of reducing her (likely) sentence. Thus, whereas corporate cooperation may impose *ex ante* compliance costs on firms, individual cooperation does not appear require any level of "self regulation" prior to the government's apprehension of wrongdoers.

In sum, although in both instances the government must "pay" a bounty to the cooperator (entity or individual person), the actors' incentives to consume and purchase cooperation in the individual context differ significantly from the incentives that arise in the corporate context.[43] Whereas much has been written regarding the incentives and disincentives for corporate entities to cooperate, this Article focuses primarily on the decision-making process from the perspective of the individual, and not the organizational, cooperator.

A final caveat is in order. Some readers may assume, based on media reports and popular culture, that the bulk of federal criminal cooperation is reserved either for the prosecution of blockbuster Enron-style corporate frauds, or for the prosecution of highly structured and organized crime families, such as the Gambino family. This is, however, an incomplete portrayal.

Nearly 10,000 defendants who were sentenced in the federal criminal justice system in 2008 were the beneficiaries of Section 5K1.1 motions[44], which expressed the government's view that they were in fact "cooperators" worthy of a reduction in their criminal sentence.[45] The

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[42] *See* Arlen & Kraakman, *supra* note 6, at 699 (describing difference between policing and prevention mechanisms). Because corporations must make this "cooperation" decision before they have become the focus of even a government investigation, they may shy away from cooperation-based measures that have the effect of detecting rather than preventing internal crime, thus increasing the entity's expected liability. *Id.* at 707-08.

[43] Under Arlen and Kraakman's model, the "bounty" that the government must pay to induce the corporation's private enforcement is either an adjusted sanction to reflect the firm's investment in the increased probability of punishment, or a two-tiered system that imposes strict liability on all firms, plus an added sanction on those firms that fail to implement adequate detection and prevention measures. *Id.* at 857.

[44] The United States Sentencing Guidelines ("Guidelines") set forth advisory sentence ranges for federal criminal offenses. *See United States v. Booker*, 543 U.S. 220, 245 (2005) (concluding that Guidelines must be advisory in order to pass muster under Sixth Amendment of Constitution). Although courts are no longer obliged to adhere to the ranges set forth in the Guidelines, a Section 5K1.1 letter remains one of the common methods by which defendants achieve substantial sentence reductions. *See* Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 Stan. L. Rev. 137, 148-49 (2005) (explaining that the Section 5K1.1 motion "unlock[s] the Guidelines, allowing the judge to depart below the otherwise applicable sentencing range"). Moreover, where mandatory minimum statutes apply, defendants seeking a sentence beneath the statutory minimum either must cooperate successfully, or, in narcotics cases, seek relief under Title 18, United States Code, Section 3553(f), the so-called "safety valve" provision. The "safety valve" permits first-time, non-violent defendants who were not supervisors in the offense to escape the mandatory minimum sentence, provided they plead guilty and provide law enforcement agents truthful information about their crime. *See* Ryan Scott Reynolds, Note, *Equal Justice Under Law: Post-Booker, Should Federal Judges Be Able to Depart from the Sentencing Guidelines to Remedy Disparity Between Codefendants' Sentences?*, 109 Colum L. Rev. 538, 544 (2009).

[45] *See* Annual Sourcebook 2008 at Table 30. 9,498 defendants received 5K1.1 letters. Caren Myers Morrison points out that this list is underinclusive as it does not include federal cooperators for whom the government filed motions pursuant to Fed. R. Crim. Proc. 35 ("Rule 35"). Whereas a 5K1.1 substantial assistance motion is filed prior to the defendant's sentencing, a Rule 35 motion is filed up to a year following the defendant's sentencing. The Sentencing

primary charge for over half of that group was a drug-related offense.[46] This is not new; drug dealers have represented at least half of the cooperator "pool" for the last ten years.[47] The rest of the pool is split between defendants convicted of firearms (854 defendants in 2008), fraud (1006), and a host of other crimes, which range from robbery (113), to more "white collar" fare such as forgery (102) and tax violations (108).[48] Even the "fraud" category of cooperators is quite broad, as it includes all cooperating defendants who have committed mail, wire, securities, bank, credit card and other frauds. Judging by the median sentence for fraud (12 months' imprisonment in 2008), most of these frauds are garden-variety scams and not billion-dollar *Ponzi* schemes.[49]

Thus, the low-level, mildly-culpable employee of a Fortune 500 company who assists the government in prosecuting 10 corporate officers is not typical of the cooperator pool. Instead, it is the mid-level drug dealer offering the government potential access to a diffuse network of cocaine suppliers and competitors. Nor is the transparently structured, publicly held corporation typical of the criminal organizations that the government prosecutes. To the contrary, most will be smaller, more informal groups with less certain and more fluid levels of hierarchy. Here again, the Guidelines statistics are illuminating: in 2008, of 67,887 defendants sentenced for criminal conduct, only five percent received an enhancement for an "aggravating role" as an organizer, leader or supervisor in an offense.[50] Either the government is doing a very poor job of identifying leaders, or most offenders avoid large, hierarchical criminal organizations.

Several implications flow from these conclusions. First, in many criminal cases, cooperators will promise payoffs – additional convictions and investigations – that are far more difficult to value than in those cases where a person agrees to cooperate against a well known criminal organization. It is one thing to "sign up" a cooperator who has information about insider trading within a well-known, successful and formerly respected hedge fund; such a prosecution may be quite salient for the other members of that industry. It is quite another matter to enter into an agreement with a cooperator who can implicate one or two of her cocaine suppliers; the arrest of two, three or even all of the cooperator's compatriots may be negligible with regard to the overall market for cocaine or heroin.

Second, and equally important, the informality of the criminal organization will allow more people to cooperate, even if the government sincerely seeks assistance in the prosecution of defendants of equal or more seriousness. Even if government agents prefer to use lesser criminals to cooperate against more serious ones, they may encounter difficulty discerning who the most culpable person is within an organization, if they can in fact even identify that organization fully. Moreover, because much of cooperation will involve smaller, fluid groups,

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Guidelines track the former, but not the latter. *See* Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant*, 62 Vand. L. Rev. 921, 936 (2009)(criticizing discrepancy in data collection).

[46] *See* Annual Sourcebook 2008 at Table 30. They are overrepresented in the cooperator pool; drug related offenses made up just 32.6% of the overall offender pool that year. *Id. and* Figure 1 at _.

[47] *See, e.g.* Weinstein, *supra* note 3, at 579-80 (observing, in 1999, that narcotics defendants were large proportion of cooperators).

[48] *Id.*

[49] *Sourcebook* 2008 at Table 13.

[50] *Sourcebook* 2008 at Table 18. *See also* USSG 3B1.1 (setting forth provisions and criteria for "aggravating role in offense" enhancement).

even the "heads" of those groups will have the ability to cooperate by providing assistance in prosecuting the members of other, (allegedly) more serious groups.

In sum, the paradigmatic image of the prosecutor using "little fish" to swallow "bigger fish" simply may not hold. With this more ambiguous backdrop in mind, the remainder of this Article picks apart cooperation's relative benefits and costs.

Part II: The Detection Effect of Cooperation

Cooperation exerts two competing effects on would-be violators. The first is a Detection Effect, whereby the government increases its ability to detect and prosecute wrongdoers. Because cooperation leverages the government's ability to enforce and detect crime, rational violators should presume that cooperation increases their chances of getting caught. Having come to this conclusion, they either will be deterred or take measures (themselves, potentially costly) to avoid detection. Commentators who commend cooperation's crime-fighting value implicitly reference the Detection Effect.

The second and less discussed aspect of cooperation, which I discuss in Part III, is cooperation's Sanction Effect. Because the cooperators themselves receive a lesser prison sentence in exchange for their cooperation, the policy inherently reduces the criminal's expected sanction.[51]

To understand the competing Detection and Sanction effects of a cooperation-based law enforcement policy, it is useful to first review the traditional theory of deterrence, which is premised on the neoclassical rational actor. Admittedly, the neoclassical view of intentional wrongdoing cannot provide a complete explanation of why people fail to comply with the law. Nevertheless, it provides a starting point for understanding the potential value – and corresponding limitations – of a law enforcement policy that relies in large part on the assumption that it improves deterrence.

A. Neoclassical Economics and Deterrence

Under Gary Becker's famous formulation, the rational actor refrains from wrongdoing when the expected costs of such conduct outweigh its expected benefits.[52] That is, when the benefit the actor can expect from a crime is outweighed by the sanction, S, multiplied by the probability of getting caught and punished, p, the actor rationally decides not to commit the crime. Society, in turn, should take efforts to deter criminals from engaging in such conduct when the aggregate benefits of such conduct are outweighed by the harm imposed on society.[53]

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[51] The "Sanction Effect" refers to the criminal's expected sanction *once she is caught*. Her overall expected cost of criminal conduct combines the Detection Effect and the Sanction Effect. Thus, her expected cost of criminal conduct may go up or down depending on how she weighs the two effects.

[52] *See generally* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J.Pol. Econ. 169 (1968).

[53] "Social welfare is taken to be the sum of gains less the harm associated with the subset of individuals who commit harmful acts." A. Mitchell Polinsky & Steven Shavell, *Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer*, 10 J. L. Econ. & Org. 427, 430 (1994). For torts, Polinsky and Shavell argue that society should ordinarily set the injurer's cost to exceed the harm, and not his gain. *Id.* Where wrongdoers derive utility solely from malicious conduct, however, Polinsky and Shavell agree that punishment should be set to wipe out the

Although Becker treated probability and sanctions as fungible variables, subsequent analyses (both theoretical[54] and empirical[55]) concluded that that offenders responded more readily to increases in probability than they did to increases in sanctions. Accordingly, government actors who wish to reduce crime must apportion some resources toward detecting offenders.

The government can increase the probability of detection by relying on a combination of mechanisms.[56] It can hire new agents and officers to investigate reports of wrongdoing or otherwise increase law enforcement agencies' budgets.[57] It can impose *ex ante* disclosure and monitoring requirements on regulated entities, thereby making it more difficult for wrongdoers to evade detection. It can encourage innocent victims and witnesses of crimes to come forward with information, either through laws that protect them from retaliation or that reward them financially for their assistance.[58] Finally – although this list is hardly exhaustive – the government can enact broad laws and regulations that cover a large swathe of conduct and reduce the likelihood that wrongdoers will find legal loopholes through which to justify or immunize their conduct.[59]

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wrongdoer's gain since the gain provides no value to society. A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*,11 Harv. L. Rev. 869, 909-10 (1998). *See also* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 Geo. L. J. 421 (1998) (explaining that "complete deterrence" in criminal law ordinarily attempts to wipe out the criminal's gain). For the sake of simplicity, I assume that harms and gains are equivalent.

[54] For theoretical accounts of why sanctions and probability of detection differ in importance, see Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 Colum. L. Rev. 1232, 1245-46 (1985) (explaining how uniformly maximal sanctions eliminate marginal deterrence of less harmful crimes); A. Mitchell Polinsky and Steven Shavell, *On the Disutility of Imprisonment and the Theory of Deterrence*, 28 J. Legal Stud. 1 (1999) (introducing concepts of both declining disutility and discounting of extended periods of imprisonment); Yair Listokin, *Crime and (with a Lag) Punishment: The Implications of Discounting for Equitable Sentencing*, 44 Am. Crim. L. Rev. 115 (2007) (arguing that time lag between commission of crime and imposition of punishment creates discount on sanction); Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 Ind. L. J. 155 (2005) (explaining that criminal defendants' ability to adapt to imprisonment reduces effectiveness of longer prison sentences).

[55] *See* Darley, *supra* note 13; Darley & Robinson, *supra* note 15 (citing recent empirical research). *See also* Dan Kahan, *Social Influence, Social Meaning and Deterrence*, 83 Va. L. Rev. 349, 380 and n.248 (1997) (citing empirical research and theorizing that changes in the probability of detection may signal greater "social meaning" about the community's view the crime than changes in the sanction).

[56]The "p" in Becker's equation is often referred to as a probability of detection. That term, however, encompasses the apprehension, conviction and implementation of a given sanction. "[T]he probability of sanction … is determined by a series of sequential events (such as being caught by the police being charged by a prosecutor, and being convicted by a court in accordance with the various procedural rules of the legal system)." Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U.L. Rev. 980, 983 (2009).

[57] For example, the Financial Economic Recovery Act of 2009, enacted in the wake of the subprime mortgage meltdown, authorized the appropriation of 245 million dollars to several law enforcement agencies, for each of fiscal years 2010 and 2011. *See* Congressional Budget Office Cost Estimate, S. 386, Fraud Enforcement and Recovery Act of 2009, *available at* http://www.cbo.gov/ftpdocs/100xx/doc10030/s386.pdf

[58] Within criminal organizations, witnesses who are themselves innocent but who are aware of wrongdoing by others are often referred to as "whistleblowers." For an economic analysis of whistle-blowing policies, see Anthony Heyes & Sandeep Kapur, *An Economic Model of Whistle-Blower Policy*, 25 J.L. Econ. & Org. 157 (2009).

[59] Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 Cardozo L. Rev. 1535, 1574 (2005) [hereinafter Stevenson, *New Theory*].

All of these tactics are helpful. Cooperation, however, provides unique advantages to law enforcement agents, several of which I describe below.

B. Cooperation's Detection Effect

Cooperation increases the probability of detection in a number of ways, all of which improve deterrence insofar as offenders properly perceive this risk.[60]

1. Eliciting Information

Cooperation benefits the government primarily by encouraging defendants to proffer information at an early stage[61] of the government's prosecution. This information includes: (a) details that fill in blanks in the government's case against the defendant; (b) new information about other defendants and suspects; (c) information about the efficacy of the government's investigation techniques; and (d) the defendant's bargaining position and willingness to go to trial.

It is no secret that the unequal bargaining position between prosecutor and defense attorney serves as an information-forcing device. Whereas the prosecutor often may choose her cooperator from a group of willing defendants, the defendant has no choice but to take his information to the prosecutor trying his case.[62] Except in those instances in which prosecutors in neighboring jurisdictions actively compete for the same case, prosecutors generally enjoy monopoly power over the cooperation process.[63]

Cooperation produces information not simply because the government controls the process, but also because it has the power to limit the number of cooperation agreements available to defendants.[64] As discussed below, scarcity provokes competition by defendants, and competition in turn yields information for government investigators and prosecutors.[65]

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[60] "To the extent that devoting more attention to one type of crime increases the probability of detection, conviction and punishment of criminal wrongdoing, this will result in a deterrent effect on that crime." Mark A. Cohen, *The Economics of Crime and Punishment: Implications for Sentencing of Economic Crimes and New Technology Offenses*, 9 Geo. Mason L. Rev. 503, 511 (2000).

[61] *See* Yaroshefsky, *supra* note 19, at 929 (discussing pressure to cooperate early).

[62] The defendant nevertheless retains some bargaining power depending on the uniqueness of his information, the strength of the government's case, and the abilities of the defendant's defense counsel to parlay these factors into a concrete benefit.

[63] Neighboring prosecutors' offices therefore have incentives to coordinate their power – formally or informally – in order to maintain their monopoly power over the cooperation process. *See, e.g.,* Michael Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893, 957 n.292 (2000) (describing federal-state coordination guidelines); U.S. Dep't of Justice, *Organization and Functions Manual No. 27: Coordination of Parallel Criminal, Civil, and Administrative Proceedings, in* United States Attorneys' Manual (coordinating criminal and civil proceedings across agencies).

[64] Pro-defense commentators have criticized the government's monopoly over such agreements. *See, e.g.,* Weinstein, *supra* note 3, at 581-82 (observing that many more defendants provide information than receive cooperation agreements).

[65] Weinstein's proposed reform – to cap the number of cooperation agreements at some arbitrary number – is thus unnecessary, since prosecutors will want to create sense of scarcity in order to pressure defendants to race to the prosecutor.

For every defendant who receives a cooperation agreement, some undefined additional number will at least "try out" for such an agreement by meeting with the government and proffering information. Even when the government "pays" a cooperator for her assistance in prosecuting another defendant, it receives far more than the single cooperator's assistance. In addition to the cooperator's help, the government receives the information streams from *all* of the defendants who have met with government agents in the course of its investigation and who attempted, but ultimately failed, to secure a cooperation agreement.

Consider the average defendant who seeks cooperation and attends a typical "proffer" session with the government. If the government's case already is strong, the defendant will likely conclude that the opportunity costs of cooperation are rather low.[66] The upside is a vastly reduced sentence which, prior to the Supreme Court's decision in *Booker* may have seemed quite unlikely given the (previously) mandatory nature of the United States Sentencing Guidelines.[67] Accordingly, even if the defendant maintains a healthy skepticism regarding his chances of becoming a cooperator (and behavioral psychology would suggest that he will do exactly the opposite[68]), he will likely conclude that he has much to gain by offering his assistance.

Once he attends the proffer, the defendant will answer the government's questions and provide information about his own crime, other crimes, and any number of topics. Regardless of whether he becomes a cooperator, at least some of his information will assist the government. He may identify new suspects; confirm the government's instincts (good or bad) about another cooperator's information; illuminate certain aspects of his crime that enables the government agents to improve its investigation; and clarify information that the government already possessed but previously did not comprehend.

Even a proffer that yields none of the benefits described above will provide value to the government. Apart from the content of a proffer, the fact that a defendant is willing to speak to the government conveys valuable "meta" information, such as the defendant's willingness to go to trial, his attorney's willingness to go to trial, and whether the defendant (or his attorney) believes that he has a viable defense.[69] Granted, the government may sometimes infer the wrong signal. Over time, however, cooperation provides additional information that aids and informs the government's litigation strategy.

The fact of the defendant's proffer (assuming it is communicated to others) also aids the government insofar as it exploits coordination and collective action problems among

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[66] See Weinstein, *supra* note 3, at 592 (theorizing that even small chance of mitigation causes defendants to "flock" to proffer sessions).

[67] In *Booker*, the Supreme Court held that sentencing courts were not bound by the Guidelines' sentencing ranges, thereby permitting courts to sentence defendants according to the broader factors set forth by Congress in Title 18, United States Code, Section 3553. *United States v. Booker*, 543 U.S. 220, 245 (2005)(concluding that Guidelines must be advisory in order to pass muster under Sixth Amendment of Constitution).

[68] On the overoptimism of defendants regarding their sentences, see Bibas, *Shadow*, *supra* note 21, at 2500.

[69] In some cases, the fact that the prosecution is willing to consider cooperating also transmits information to defense attorneys. Proffers may thus serve as the first step in a process that ultimately leads to a more efficient plea-bargain than if the parties had never met. *Cf.* Russell Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 Wash & Lee L. Rev. 73 (2009) (using similar argument to explain benefits of police interrogations).

defendants.[70] The possibility of cooperation enhances the government's bargaining position if all of the defendants in the case either know or assume that the government is conducting proffers and choosing cooperators.[71] In a classic example of the prisoner's dilemma, each co-defendant's self-interested conduct harms the group's collective interest in remaining silent.[72] Arguably, this dynamic would exist regardless of cooperation. Nevertheless, by elevating the stakes, cooperation exacerbates the prisoner's dilemma.[73]

Finally, the competition to become a cooperator often provides the government with sufficient information to convict multiple defendants, regardless of whether they become cooperators.[74] Although the proffering defendant often signs an agreement that limits how the prosecutor may use his statements in the government's case in chief, the prosecutor still can use much of the proffered information to the government's advantage.[75] For example, most agreements permit the government to use the defendant's statements for impeachment at trial.[76] Accordingly, once the defendant has himself admitted wrongdoing to agents and the government, his ability to testify in his own defense will likely be foreclosed, as will his ability to generate any argument that is inconsistent with what he said during the proffer session.[77] Moreover, proffer agreements usually do not preclude the government from gathering derivative evidence

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[70] *See* Oren Bar-Gill & Omri Ben Shahar, *The Prisoner's (Plea Bargain) Dilemma*, 2 J. Leg. Analysis 737 (2009) (explaining that collective action and coordination problems cause defendants to accept plea bargains rather than demand en masse that prosecutors take their cases to trial).

[71] *See, e.g., United States v. Garcia*, 926 F.2d 125, 127-28 (2d Cir. 1991) (finding that a downward departure under Section 5K2.0 of the Sentencing Guidelines was warranted despite government's unwillingness to file "substantial assistance" motion because defendant's cooperation with authorities "[broke] the log jam in a multi-defendant case").

[72] "Defendants are like a battalion of unarmed soldiers facing a single opponent with a single bullet in his gun demanding that they all surrender. If these soldiers collectively decide to charge their opponent in unison, they would be able to overcome the threat…. Their problem though, is that it is in the interest of any single soldier to duck, to defect from the front line, and to let others mount the charge." Bar-Gill & Ben Shahar, *supra* note 70, at 740.

[73] Although some defendants might overcome the prisoner's dilemma by threatening would-be-cooperators with violence, the strategy can backfire. *See, e.g., United States v. Spinelli*, 551 F.3d 159, 162 (2nd Cir. 2008) (explaining that organized crime family's threats upon one of its members caused him to agree to cooperate with the government).

[74] Justice Souter observed as much in his dissent in *United States v. Mezzanatto*, 513 U.S. 196, 218 (1995), that for the defendant who proffers but fails to secure a cooperation agreement, "the possibility of trial … will be reduced to fantasy."

[75] Proffer agreements are described at length by Rasmusen, *supra* note 8, at 1546-47 (describing three categories of proffer agreements that allow the government to use the defendant's proffer statements in subsequent prosecutions in increasingly broad circumstances). *See also* Steven Glaser, *Proffer Agreement: To Execute or Not to Execute*, NYLJ, July 17, 2008, and Benjamin A. Naftalis, Note, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules*, 37 Colum. J.L. & Soc. Probs. 1 (2003) (discussing use of agreements).

[76] Although the defendant's statements are made in the course of plea negotiations and therefore governed by Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f), the Supreme Court has held that the defendant can waive these rights with regard to the prosecution's impeachment of the defendant's testimony at trial. *United States v. Mezzanatto*, 513 U.S. 196 (1995).

[77] Although *Mezzanatto* addressed the narrower question of using the defendant's proffer statements to impeach his own testimony, proffer agreements have since expanded to allow prosecutors to use proffer statements "not only for impeachment of the defendant, but also in rebuttal and in the government's case-in-chief when defense counsel makes statements or elicits testimony that conflicts with the proffer." Naftalis, *supra* note 75, at 3.

from the defendant's proffered information.[78] This leaves government agents free to establish new leads and strengthen its case against the defendant regardless of whether he subsequently cooperates. Thus, although it does not take the place of a confession, the defendant's proffer session vastly reduces his option of proceeding to trial. Indeed, insofar as the proffer system reduces the effectiveness of lying subsequently at trial, cooperation increases the "truth-finding" function of the criminal justice system.

2. Altering Criminal Conduct *Ex Ante*

The preceding section reviewed how cooperation elicits information from defendants following post-arrest. Cooperation also alters behavior prior to arrest. Because anyone could be (or become) a cooperator, criminals must invest time and energy screening their co-conspirators, victims and associates. Moreover, because cooperators help undercover agents gain access to organizations by posing as potential clients, co-conspirators or victims, cooperation similarly forces defendants to screen for undercover stings.[79]

Scholars already have recognized cooperation's deterrent effect on conspiracies. In their seminal respective accounts of conspiracy law and collective sanctions in 2003, Neal Katyal and Daryl Levinson laid the ground for understanding how cooperation leverages law enforcement power.[80]

As Katyal and Levinson demonstrated, group liability creates incentives to cooperate[81]; cooperation, in turn, allows the government to realize the benefits of group liability and thereby weakens bonds between wrongdoers *ex ante*.[82] The uncertainty created by both dynamics destabilizes criminal conduct within group settings. Criminals who know that cooperators will trade information and assistance *ex post* are more inclined to choose their conspirators more carefully, use norms or payments to bond their co-conspirators to the conspiracy, and watch for signs of defection.[83] Collectively, these "agency costs"[84] divert criminals' energies away from

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[78] A standard proffer agreement form used in the United States Attorney's Office for the Southern District of New York plainly states, at paragraph 3, that government agents may gather and use derivative evidence against the defendant in a subsequent prosecution. Proffer Agreement Form (as of 2001) *available at* http://nycrimbar.org/Members/otherlinks/Forms/Proffer-SDNY.pdf.

[79] "[C]riminals must be more cautious once they are aware that their clients--or even their recruiters and bosses--in criminal transactions could be government agents." Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 Conn. L. Rev. 67, 108 (2004). Bruce Hay provides an expanded theoretical account of how undercover operations affect deterrence efforts. Bruce Hay, *Sting Operations, Undercover Agents and Entrapment*, 70 Mo. L. Rev. 387 (2005).

[80] Neal Kumar Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307 (2003). Daryl Levinson, *Collective Sanctions*, 56 Stan. L. Rev. 345, 398-400 (2003). Katyal's piece exhaustively sets forth the various benefits of imposing criminal conspiracy liability on group conduct. Levinson applies the broader concept of "collective sanctions" (criminal or civil) to, among others, individuals who are themselves innocent of wrongdoing but who "are in an advantageous position to identify, monitor, and control responsible individuals … by the threat of sanctions". *Id.* at 348.

[81] "Conspiracy law makes it possible for prosecutors to threaten low-level conspirators with severe sentences and then offer them reductions in exchange for inculpatory evidence about higher-level conspirators." Levinson, *supra* note 80, at 399. Levinson does not consider the extent to which prosecutors might fail to distinguish culpability among conspirators, much less whether such distinctions actually exist.

[82] Katyal, *supra* note 80, at 1342-43.

[83] "Conspiracy law encourages organizations to adopt practices, such as employee monitoring, that generate inefficiencies, stymie group identity, and sow distrust within the group." Katyal, *supra* note 80, at 1334.

the "profit-generating" premise of their criminal enterprise. They spend more time and energy watching their backs and less time harming others. Indeed, the dynamic is much broader than criminal conspiracy. Cooperation increases the costs of interacting with *anyone.*

The story, however, is not all positive for law enforcement. If cooperation increases the agency costs of groups, then criminals should respond either by reducing their size or finding alternate ways of screening and bonding their members. Notice, however, that these methods themselves (gang initiation rites and organized family oaths, for example) may generate additional costs. When one gang member threatens to kill another member if she "snitches" on the group, the second gang member may respond by committing *more* crime on the group's behalf in order to prove her loyalty. Thus, the agency costs of cooperation may result in more, and not less, harm to society.[85]

Moreover, by encouraging criminals to reduce the size of their conspiracies, cooperation ironically may result in leaner and more efficient groups. Just as corporate actors grow beyond efficient boundaries due to hubris or empire-building, so too might criminal groups. Cooperation thus reminds criminals to behave more efficiently.

Even worse, in markets for illegal substances, cooperation may generate a more "competitive" market, thereby reducing price and increasing availability. For example, between 1980 and 1992, despite the fact that the government strongly policed the drug trade, the per gram price of cocaine and heroin dropped significantly and output increased in the United States. Some researchers theorize that price dropped and output expanded because law enforcement efforts broke up previously large cartels.[86] Narcotics became cheaper, and demand increased.[87] Smaller, and perhaps more successful groups then committed (at least in the aggregate) more crime.[88] Cooperation may have reduced the size of the typical drug conspiracy, but the overall harm to society remained constant or in fact increased.

At best, then, the most we might say is that cooperation places certain pressures on group-oriented conduct. As Katyal and Levinson have argued, these pressures may indeed

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[84] Agency costs are the costs that accrue when an agent fails to act in accordance with his principal's wishes. To prevent "shirking", the principal must expend resources monitoring and bonding the agent. The total costs of the relationship include monitoring and bonding costs, plus the costs of whatever residual shirking remains. *See generally* Ward Farnsworth, The Legal Analyst: A Toolkit for Thinking About the Law 88 (2007) (chapter co-written with Eric Posner).

[85] Cooperators need not be accomplices or coconspirators; they can be victims or mere acquaintances. Accordingly, cooperation reduces not just the incentive to join with other criminals; it undermines the criminal's incentives to interact with *anyone*.

[86] Abdala Mansour, Nicolas Marceau & Steeve Margain, *Gangs and Crime Deterrence*, 22 J. L. & Econ Org. 315, 317 (2006). Prices may also decrease because the threat of enforcement forces purchasers and sellers to forego optimal bargaining. *See* Beth A. Freeborn, *Arrest Avoidance: Law Enforcement and the Price of Cocaine*, 52 J. L. & Econ. 19 (2009).

[87] Ironically, cooperation may force criminals who irrationally prefer large enterprises (due either to empire-building concerns or hubris) to implement their wrongdoing through smaller and more efficient entities.

[88] By the same token, cooperation might simply crowd out some of the more risk averse and possibly less dangerous criminals, leaving the rest of the field to their more entrepreneurial and risk-preferring colleagues. *See, e.g.*, Brendan O'Flaherty & Rajiv Sethi, *Why Have Robberies Become Less Frequent but More Violent?*, 25 J. L. & Econ. Org. 518, 519 (2009) (theorizing that deterrence strategies reduce absolute number of robberies, but leave more violent offenders in robbery pool).

redound to society's benefit and if they do, they are not limited to formal criminal conspiracies; criminals can cooperate against their competitors and sometimes even strangers. Nevertheless, cooperation's affect on *ex ante* conduct is not easy to control, and at least in some instances, it may leave society worse off. Yet again, the net Detection Benefit will likely depend on context.

3. Leveraging the Benefits of Stealth

Cooperation enables the government to improve its detection abilities stealthily, without alerting particular suspects that they are the subject of an investigation.[89] For example, when the SEC announces with great fanfare a massive increase in enforcement spending, it creates several responses among those who practice in the securities industry. It deters some potential offenders by causing them to revise the probability of detection and conclude that the costs of criminal conduct outweigh the perceived benefits. It alerts other individuals to invest in detection avoidance techniques.[90] Finally, it spurs other offenders to choose alternate forms of misconduct that cause equal or greater harm.[91]

Because it combines elements of conspicuous and unobserved policing, cooperation achieves the best of both worlds: it preserves the criminal's incentive to expend resources on detection avoidance, while rendering those efforts less effective.[92] That is, although criminal suspects know generally that any of their co-conspirators, victims or associates might be cooperators (or for that matter, undercover agents), they usually do not know *which* ones are cooperators. As a result, criminals lack perfect information to make efficient choices on how to order their affairs.

Accordingly, cooperation increases the risk of apprehension, but it does so in an ambiguous manner.[93] The ambiguity, in turn, may deter some offenders.[94] As for those who are *not* deterred, the "stealth" nature of cooperation at least enables to the government to apprehend and incapacitate those stalwart offenders who would go ahead with their intended course of action no matter what.

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[89] For a discussion of how police deception can usefully sort guilty and innocent actors, see William Stuntz, *Lawyers, Deception and Evidence Gathering*, 79 Va. L. Rev. 1903 (1993).

[90] *See generally* Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U.L.Rev. 1331, 1337 (2006).

[91] Neal Kumar Katyal, *Deterrence's Difficulty*, 95 Mich. L. Rev. 2385, 2391-2402 (1997). *See also* Daniel Nagin, *Criminal Research at the Outset of the 21st Century*, 23 Crime & Just. 1, 7-8 (1998) (explaining how deterrence is affected by perception).

[92] Avraham Tabbach recently theorized that because punishment avoidance efforts can be costly to criminals, they should be encouraged insofar as they substitute for costlier punishments such as imprisonment. Tabbach realizes, however, that avoidance efforts are socially undesirable if the offender can externalize them onto innocent parties. *See* Avraham D. Tabbach, *The Social Desirability of Punishment Avoidance*, 25 J. L. Econ & Org. (Dec. 2009, forthcoming).

[93] Although criminals may, as a general rule, be "risk-seeking," they still may avoid uncertain or ambiguous situations. *See* Stevenson, *New Theory*, *supra* note 59, at 1574-75 (distinguishing uncertainty from risk). *See also* Yuval Feldman & Doron Teichman, *Are All "Legal Dollars" Created Equal?*, 102 Nw. U. L. Rev. 223, 232 n. 45 (2008) (observing that "the behavioral literature distinguishes between perceptions of risk (when the probability of the event is known) and perceptions of uncertainty (when the probability of the event is unknown)").

[94] Tom Baker, Alon Harel &Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 Iowa L. Rev. 443, 473-74 (2005) (making similar arguments for periodic "enforcement campaigns"); Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law & Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1 Am. L. & Econ. Rev. 276 (1999).

Consider a City that wishes to increase the likelihood of catching those who deal in narcotics. Assume the City plans to do this by increasing the number of police detectives assigned to narcotics activity in certain neighborhoods.

When the City increases its enforcement efforts, it has two choices. It can increase enforcement efforts conspicuously or secretly. If the increase in enforcement efforts is transparent, the announced increase might deter putative wrongdoers by causing them to conclude that they are highly likely to be apprehended and that the expected sanction outweighs the expected value of the conduct. Moreover, announced increases in enforcement efforts may encourage private actors to assist the government in apprehending and identifying wrongdoing because a show of government force expresses the community's view that the conduct is wrong and will not be tolerated. The government's enforcement conduct strengthens social norms in favor of law-abiding and law-assisting behavior.[95]

Alternately, conspicuous enforcement may backfire. Among other things, it may cause putative victims to become less vigilant[96], and enable wrongdoers to engage in detection avoidance.[97] That is, by announcing its increase in enforcement the government gives ample warning to the wrongdoer to alter her conduct so as not to be apprehended. Still, similar to the increased agency costs of group conduct discussed in Section 2 *supra*, conspicuous enforcement is valuable when forces criminals to divert energy to cover-ups and away from additional harm.[98]

Unfortunately, as is the case with agency costs, criminals can pass avoidance costs on to others and thereby exacerbate the costs of crime.[99] A top executive who has already embezzled money from a company account may respond to an internal audit by creating fake customer invoices to cover his otherwise unexplained withdrawals of money from the company account. In doing so, the executive not only avoids detection for the initial crime, but he also increases the end-of-year bonus that the company will pay him for bringing in additional business. In other words, the action that the executive takes to avoid detection exerts an additional cost on the victim company, but does not reduce the profitability of his criminal conduct, at least in the short run.[100]

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[95] For more on how government actors shape norms, see generally Cass Sunstein, *Social Norms and Social Rules*, 96 Colum. L. Rev. 903 (1996) and Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997). For application in the criminal law context, see Dan Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413, 487-88 (1999); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement*, 80 B.U. L. Rev. 1227,1256-63 (2000).

[96] *See* Amitai Aviram, *Counter-Cyclical Enforcement of Corporate Law*, 25 Yale J. Reg. 1, 20 (2008)(explaining that conspicuous enforcement can reduce putative securities fraud victims' perceived risk of harm).

[97] Sanchirico, *supra* note 90, at 1336.

[98] Selling cocaine to only a select few clients in order to weed out possible undercover cops is another example of crime-reducing detection avoidance; the effort to avoid getting caught reduces the profitability of the enterprise.

[99] Tabbach, *supra* note 92.

[100] Over time, however, the cover-up may increase the offender's risk of detection and punishment, particularly if the government chooses to prosecute him for additional "process" oriented crimes such as perjury or obstruction of justice. *See* Erin Murphy, *Manufacturing Crime: Process, Pretext and Criminal Justice*, 97 Geo. L. J. 1435, 1444 (2009).

In sum, for a certain class of wrongdoers, conspicuous enforcement does not deter. Instead, it may perversely increase the wrongdoer's effectiveness. Therefore, to improve deterrence and avoid the costs of cover-ups and intensified harm, the government may wish to use less observable measures to increase its enforcement and the corresponding likelihood of detection.[101] A "stealthy" increase in enforcement means that the government increases its ability to apprehend and punish, but does so without announcing the increase to the general public. A completely stealthy enforcement regime incapacitates, but does not deter.[102] Nevertheless, incapacitation often is preferable to nothing.[103]

Nevertheless, stealth has its drawbacks. Purely unobserved surveillance fails to deter potential criminals since they have no idea that they face increased detection or punishment. Stealthy policing also fails to signal innocents that society views as a priority the eradication and punishment of certain conduct. If society mistakenly infers stealth enforcement as a lack of interest, social norms are weakened. More people may commit crimes (or fail to report them) simply because they assume no-one cares. Stealth also exerts a number of collateral costs, such as increased potential for abuse of power and corruption within government agencies; it also seems highly inconsistent with the notion of a robust adversarial process.[104]

For many of the reasons discussed above, the government should prefer a strategy that flexibly combines transparency and stealth.[105] In many instances, we will want the government to announce that it is increasing enforcement of certain areas of law, but we will also expect the government *not* to describe how it will specifically increase its ability to prevent or apprehend such conduct. We want the government to be able to explain what it has done *ex post* (at trial or during a hearing, for example) without foreclosing its ability to use similar techniques *ex ante*. The "right" combination of stealth and transparency will be one that: (a) deters putative wrongdoers who fear marginal increases in detection and sanctions; (b) fosters and supports law-abiding social norms; but (c) does not provide a detection-avoidance road map to wrongdoers intent on accomplishing or maintaining a given course of harmful conduct.

Arguably, cooperation provides just that mix. The public knows as a general rule that cooperators exist and that they may help the government by attending and recording meetings with other criminals *ex ante*, or by testifying against them at trial *ex post*. The public also knows that the government is committing resources to the reduction of crime, signaling not only its existence but also society's disapproval of such conduct.

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[101] Dru Stevenson makes a similar argument for uncertain application of substantive statutes. Stevenson, *New Theory*, *supra* note 59, at 1574-77.

[102] Society benefits when the costs of incapacitating the criminal (prison costs plus opportunity costs of lost contributions to society) are outweighed by the harm he would impose in a given period. *See* Hugo Mialon & Paul H. Rubin, *The Economics of The Bill of Rights*, 10 Am. L. & Econ. Rev. 1, 41-42 (2008), citing Steven Shavell, *A Model of Optimal Incapacitation*, 77 Am. Econ. Rev. 107, 107-10 (1987).

[103] Of course, the stealth strategy has a number of collateral costs, the most important being the fact that the government may become unaccountable and abuse its power. Stevenson, *New Theory*, *supra* note 53, at 1578-79.

[104] *See generally* McAdams, *supra* note 28 (citing abuses in undercover stings).

[105] For a discussion of the tradeoffs between transparency and stealth in undercover investigations, see Hay, *supra* note 79, at 412.

At the same time, absent some sleuthing, a document trail, and the ability to predict the future, the public often will not know the identity of specific cooperators.[106] Those who can be deterred will be impressed by the government's use of snitches *ex ante* and by the possibility that any of their friends might "flip" *ex post*. Those who cannot or will not be deterred will be apprehended when one of their colleagues flips. Whatever its drawbacks, cooperation's mix of transparent and unobserved policing improve the government's ability to deter *and* incapacitate offenders.

C. Some Limitations on the Detection Effect

Until now, I have explored the various benefits of cooperation, particularly as they relate to the government's ability to detect and deter wrongdoing. Certain aspects of cooperation, however, reduce the net Detection Effect. They include: (a) potential abuse of cooperation and cooperators; and (b) problems associated with the value and use of the cooperator's information.

1. Government Abuse

Cooperation's net Detection Effect falls insofar as government agents abuse the tool in a manner that causes them to detect, prosecute or convict fewer offenders.

If the cooperating defendant forfeits viable procedural claims in the course of seeking a cooperation agreement, cooperation permits prosecutors and law enforcement agents to ignore procedural obligations under the Fourth or Fifth Amendment. In that sense, cooperation is no different from the standard-issue plea agreement.[107] Prosecutors and agents can become less vigilant if they rely on cooperation as a means of encouraging defendants to refrain from filing motions to suppress illegally obtained evidence. The failure to follow procedural rules, moreover, may undermine law enforcement's legitimacy; force prosecutors to enter into agreements with suboptimal cooperators; and increase the overall likelihood of unchecked corruption and abuse within law enforcement agencies, all of which may lead to an increase in criminal conduct and a decrease in the prosecution of guilty actors.[108]

A second possibility is that prosecutors and agents use cooperators prospectively to apprehend offenders who never would have committed crimes in the first place or, who would have committed less serious crimes but for the cooperator's urging.[109] This is again

[106]Criminals cannot predict which associates eventually will cooperate, and the government may mask the identity of cooperators. *See* Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 Vand. L Rev. 921, 956-61 (2009) (describing how availability of cooperation agreements on internet has fueled efforts to obfuscate cooperators' identities).

[107] "[G]uilty pleas avoid most of the potentially costly requirements that criminal procedure imposes." William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L. J. 1, 4 (1997).

[108]For a sophisticated analysis of how procedural rules in criminal law prevent law enforcement actors from engaging in rent-seeking behavior and corruption, see Keith Hylton and Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 Sup. Ct. Econ. Rev. 61 (2007).

[109] McAdams terms this the "false offender" problem. McAdams, *supra* note 28, at 128.

problematic, particularly if it reduces the legitimacy of law enforcement institutions or decreases the opportunity costs of engaging in criminal conduct.[110]

The specter of government abuse certainly should not be ignored. It is unclear, however, how much additional abuse is caused by cooperation. Moreover, one should not overstate the extent to which cooperation offers the government a free pass to ignore the law. Reputation costs, media scrutiny, professional mores, and the possibility that some defendants might indeed decide to take their chances with a trial, all combine to lessen the risks of at least some of these abuses.

In sum, we know that abuse and corruption reduce cooperation's Detection Effect, but we do not know by how much. The answer likely depends on the context in which it occurs. Departments that tolerate less abuse generally will also tolerate little abuse with regard to cooperation. Lax departments, by contrast, will use cooperation inappropriately and thereby destroy it's Detection Effect.

2. Inaccurate and False Information

Even when government actors act in good faith, they nevertheless may find themselves acting on inaccurate or false information. To prevent this from occurring, prosecutors and government agents must spend a fair amount of time extracting and sifting information. They also must develop organizational mechanisms to maintain and use such information effectively. These challenges are themselves costly and therefore reduce the detection benefit of cooperation.

I address each of these problems below. They will vary depending on the type of crime involved and the manner in which the government intends to use the cooperator. (The government can use the cooperator prospectively to make new cases, or historically, to prove old ones). Although the government can take steps to minimize inaccuracies and falsehoods, these steps too are costly. Accordingly, information costs always exert a downward drag on the Detection Effect.

a. *Unintentionally Inaccurate Information*

Cooperators may unintentionally provide inaccurate information by jumping to conclusions, relying on a faulty memory, or accepting prosecutorial theories because of their desire to secure an agreement. Because it produces false positives (arresting innocents) and false negatives (failing to arrest the guilty), inaccuracy reduces deterrent effect of cooperation-based law enforcement.[111]

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[110] McAdams observes that imprisoning false offenders could temporarily increase general deterrence when aimed at a new population because it publicizes a new tactic. *Id.* at 128-29. As that population becomes aware of the tactic, deterrence should drop back to normal levels, *id.*, and indeed could drop if criminals become convinced that the opportunity costs of engaging in criminal conduct have decreased since innocent activity might result in a false conviction. *See also* Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 Va. L. Rev. 79, 89 (2008).

[111] *See generally* Louis Kaplow & Steven Shavell, *Accuracy in the Detection of Liability*, 37 J.L.Econ. 1 (1994).

Even worse, government interrogators themselves may introduce a certain amount of inaccuracy into the cooperation process by asking unduly suggestive questions or encouraging cooperating defendants to make conclusions that are not necessarily correct.[112] Inaccurate information, in turn, can lead either to dead ends in investigations, or even worse, wrongful convictions of innocents.

These problems are not impossible to overcome. Training can help prosecutors and government agents become more adept at flagging and screening out inaccuracies. Interrogators can ask more open-ended questions during proffer sessions and to seek additional corroboration from alternate sources to avoid situations in which cooperating defendants simply echo what they think prosecutors want to hear.[113] Moreover, prospective use of cooperators (to arrange meetings with co-defendants and undercover agents, for example) rather than historical use (recounting a two-year-old conversation), reduces the potential for inaccuracy.

Despite these efforts, inaccurate information infects the cooperation process. Therefore, the inaccuracies themselves, as well as the efforts the government takes to remedy and avoid them, all exert a downward drag on the Detection Effect.

b. *Information Overload and Agency Costs*

Even when it receives accurate information, the government may not use it effectively. For example, the government may find itself overloaded with so much information that it is unable to sort or process it effectively.[114] As Matt Bodie observes in other contexts, an excess of information can become "the equivalent of no information" or it can "drown out information that would otherwise be accessible."[115] Although technology may ease the government's ability to

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[112] Insofar as a defendant's guilt turns on statements the defendants made during conversations with cooperators, the risk for inaccuracies may be greater. *See, e.g.*, Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Pager, *A Picture's Worth a Thousand Words: Conversational versus Eyewitness Testimony in Criminal Convictions*, 44 Am. Crim. L. Rev. 1, 14 (2007) (explaining why testimony about prior conversations might be inaccurate).

[113] Richman suggests as much in his discussion of how a prosecutor might pressure a cooperating defendant to tell the truth without causing the cooperation to simply say what she wants to hear:

> Consider the skilled and ethical prosecutor. When a defendant comes in saying he wants to cooperation, the prosecutor does not tell the defendant what she's looking for. Nor does she sit passively when the defendant's first tale minimizes not just his own culpability but that of his friends. She won't throw him out of the room …. She'll confront him, trying to walk the fine line between showing the defendant that she can tell when he's lying (good) and giving the defendant a road map of what he needs to say to make the government happy (bad).

Daniel Richman, *Expanding the Frame for Cooperating Witnesses*, 23 Cardozo L. Rev. 893, 894 (2002).

[114] For a discussion of "information overload" and how it may affect the government's effective use of information, see generally Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 Wash. U. L.Q. 417, 470 (2003). *See also* Chad Oldfather, *Heuristics, Biases and Criminal Defendants*, 91 Marq. L. Rev. 249, 261 (2007) (voicing concern that information overload could infect plea-bargaining process in response to increased disclosure requirements); Michael Levi & Peter Reuther, *Money Laundering*, 34 Crime & Just. 289, 301 (2006) (raising information overload concerns in context of money laundering enforcement).

[115] Matthew T. Bodie, *Information and the Market for Union Representation*, 94 Va. L. Rev. 1, 72 (2008).

use and retain the information, such technology is not costless.[116] Someone must choose, test, train and monitor others in implementing and using such technology.

In other cases, information may become lost or underutilized due to the agency costs associated with its distribution.[117] Numerous federal law enforcement agencies overlap in their jurisdiction and compete for resources and prestige. The distribution of prestige and resources, in turn, may increase with an agent or agency's investigations, arrest and convictions.

A single drug conspiracy can be prosecuted by the DEA, the FBI, or some joint federal-local task force. Each of those agencies may have incentives to hoard information they receive about that conspiracy in order to retain control the investigation and the attendant conviction and arrest statistics that accompany it. Moreover, depending on the context, a single conspiracy case (exactly the type of case that would produce cooperating defendants) might trigger venue in two or more jurisdictions. As a result, multiple *prosecutors* (and not just law enforcement agents) may be competing for control over the same case. Competition, in turn, may fuel turf wars[118] and concerns that one group is "free riding" off of another's hard work.[119]

The information pathologies discussed above are not necessarily intractable.[120] They may be reduced when agencies form reciprocal relationships with each other[121], encourage the growth of information-sharing norms[122], enact formal protocols (and increase information technology capability) for distributing cases and sharing information[123], and create joint

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[116] For example, the United States Attorney's Office for the Southern District of New York implemented a cooperator mapping system that tracked, among other things, cooperators who might have information about violent crimes. *See* James B. Jacobs, *Legal and Political Impediments to Lethal Violence Policy*, 69 U. Colo. L. Rev. 1099, 1110 n.33 (1998) (citing mapping system). Such systems, however, cost money to build, maintain and improve.

[117] For an example of this dynamic in the private sector, see Amitai Aviram and Avishalom Tor, *Overcoming Impediments to Information Sharing*, 55 Ala. L. Rev. 231 (2004)(describing reasons why private competitors may decline to share information). Although Aviram and Tor focus on information-sharing failures in the private sector, portions of their analysis should also apply to government agencies (and offices within a single government agency) that compete for scarce resources.

[118] *See* Daniel Richman, *The Past, Present and Future of Violent Crime Federalism*, 34 Crime & Justice 377, 405 (2006)(describing history of "turf battles" between law enforcement agencies).

[119] Aviram & Tor, *supra* note 117, at 238 (explaining how fears of free-riding causes competitors to underproduce and withhold information from others). Since cooperation provides so many benefits to prosecutors the underproduction of information is not likely a concern here. By contrast, the *sharing* of information may well be a concern when multiple agencies and units can generate the same set of arrests and convictions, albeit with differing levels of effort and success. Instead of flowing to the agency or agent who can best utilize it, information will remain stuck with the agent or prosecutor who first elicits it.

[120] Nor will they always exist. In some instances, for example, a well regarded agency or prosecutor may share a cooperator's information either because she lacks the jurisdiction, time or interest in developing the case. The point here is that *some* residual amount of withholding will exist, and thereby drive down the Detection Effect.

[121] Aviram & Tor, *supra* note 117, at 241.

[122] In August 2008, the FBI has published a National Information Sharing Strategy that urged a "sharing" culture over a "need to know" approach to information between and within law enforcement agencies. *See*, FBI National Information Sharing Strategy, *available at* http://www.fbi.gov/publications/niss.htm.

[123] In the wake of the terrorist attacks on September 11, 2001, Congress enacted the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), which, among other things, directed the Department of Justice to revamp its information sharing capabilities. In 2005, the DOJ announced the Law Enforcement Information Sharing Program (LEISP), which created a "OneDOJ" network designed to share information. Although IRTPA was designed to address terrorism concerns, LEISP is designed to enable information sharing in the broader context of

investigatory bodies such as local and regional task forces.[124] These strategies, however, are themselves costly to enact and monitor, and they are sure to exhibit a residual level of defection. That is, when the interests of an agency, division, or individual prosecutor or law enforcement agent diverges from society's, *some* information withholding will occur despite cultural norms or more formal protocols that encourage or demand sharing.

Thus, even when cooperators provide useful and accurate information, there is no guarantee that the information will be transmitted efficiently to the person or persons who can best use it. The agency costs of information-sharing, in turn, drag down the Detection Effect.

c. *Cooperator Lies*

Finally, and perhaps most important, cooperators may lie. They certainly have ample incentive to do so; a potentially massive reduction in sentence is at stake.[125] Although cooperators can lie about any number of matters, I will discuss those that fall within the following categories: (a) attempts by the cooperator to minimize his culpability for conduct with which has been charged; (b) omissions of information about the cooperator's prior criminal conduct; and (c) lies that falsely implicate others.

i. Minimization lies

The first category, so-called "minimization lies" undermines the Detection Effect of cooperation because it enables the cooperating defendant to avoid taking full responsibility for the already-charged crime. Imagine the government arrests several public employees with embezzling money from the public agency that employs them. The accompanying complaint charges that Employee A stole in excess of $100,000 from the agency. During a subsequent proffer in which she seeks a cooperation agreement, Employee A contends that she stole only $10,000, but offers her cooperation in prosecuting her four co-conspirators. Since Employee A stole less money than some of her co-conspirators (assuming she is telling the truth), the prosecutor chooses Employee A as the government's cooperator.

If Employee A is lying and the government accepts her word and enters a cooperation agreement with her, the government prosecutor will tell the judge at sentencing that Employee A embezzled only $10,000. Not only will Employee A receive the benefit of a cooperation designation, but she will also start out with a lower baseline sentence due to the government's acceptance of her claim that she stole less money. In other words, Employee A's minimization improves her chances of obtaining a cooperation agreement *and* reduces the baseline sentence from which the court applies its cooperation discount.

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general criminal law enforcement. *See* 7 No. 5 Cybercrime Law Report 4 (March 6, 2007), *and* LEISP Background, *available at* http://www.justice.gov/jmd/ocio/leisp/background.htm. The FBI's Criminal Justice Information Service (CJIS), also maintains a number of programs designed to encourage the sharing of information between law enforcement agencies. *See http://www.fbi.gov/hq/cjisd/cjis.htm*

[124] *See* Richman, *supra* note 118, at 406 (discussing ways in which joint task forces and informal personal relationships reduce organizational costs).

[125] "[T]he temptation to lie in cooperation agreement cases is not just a natural feature of the landscape but specifically is introduced or inflated by the government when it offers immunity or leniency in return for cooperation." Hughes, *supra* note 22, at 35.

Employee A's conduct implicates the Detection Effect because Employee A's lies cause the government to detect *less* crime by the defendant. Now, assuming for a moment that Employee A is lying only about her own conduct but is truthful about everyone else, it may be that Employee A's lies are overcome by the government's increased ability to prosecute her co-workers. Nevertheless, minimization lies detract from whatever additional detection ability the government gains as a result of the defendant's cooperation.

Of course, prosecutors and agents realize that Employee A maintains strong incentives to minimize her culpability. So do the other employees' defense attorneys, who will fiercely cross-examine Employee A should any of her co-workers decide to take their chances at trial. For these reasons, prosecutors will have no choice but to test Employee A's minimization claims. They can interview Employee A multiple times to examine her story's internal logic; seek independent means of corroboration through documents, wiretaps or other forensic evidence; and interview additional witnesses and other would-be cooperators to test Employee A's claims (with the caveat that they too may lie).[126]

After such a process, the government either will convince itself that Employee A is telling the truth or that Employee A has lied. If the government concludes that Employee A is telling the truth, the prosecutor's attempt to corroborate Employee A's story still constitutes a drag on the Detection Effect because the effort itself is costly. If, on the other hand, the government concludes that Employee A has lied, it either will charge Employee A with obstruction of justice or force Employee A to accept a quick guilty plea on the original charges.

In sum, the government can and likely will take steps to filter truthful minimization claims from false ones. The mere fact of such filtering should deter some would-be cooperators from lying. Nevertheless, a number of defendants will lie anyway. Filtering thus remains essential, both to make the threat of corroboration credible, and to avoid meltdowns in the cases that do proceed to trial. [127]

Nevertheless, filtering imposes costs, and in a world where potential cooperators are plentiful, rational prosecutors should prefer the cooperators who impose the fewest costs. Accordingly, when cooperators are fungible and the government has a plentiful supply of them, minimization lies are unlikely to affect the Detection Effect because the government will be loath to choose cooperators who deny engaging in the scope of conduct with which they have already been charged.

ii. *Criminal History Lies*

[126] For discussions of how and how often prosecutors attempt to corroborate cooperator claims, see Yaroshefsky, *supra* note 19, at 932.

[127] The pooling problem discussed above is a variant of problems that arise in the interrogation of suspected criminals. A robust right to remain silent theoretically allows innocents to separate themselves from guilty defendants who would otherwise lie, Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 Harv. L. Rev. 430 (2000), but guilty offenders may be so optimistic about their ability to hoodwink government agents that they submit to interrogation anyway. *See* Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 Iowa L. Rev. 421, 427-30 (2003) (detailing suspects' multiple incentives to lie).

In some federal judicial districts, most notably the Southern District of New York, the federal prosecutor's office requires cooperating defendants not only to admit their responsibility for charged conduct, but also to disclose all prior criminal conduct and plead to the most serious crimes among the charged and uncharged conduct.[128] Cooperator defendants in the Southern District therefore may find themselves pleading guilty to charges of which the government was previously unaware prior to the initiation of the cooperation process. To retain cooperation's palatability, the United States Attorneys' Office specifies at sentencing which charges came about solely as a result of the cooperator's own admission, and Southern District judges ordinarily do not include those charges in their baseline sentencing calculations.[129]

Just as cooperators have incentives to minimize their charged conduct, they also have incentives to omit certain details of their criminal history. If, as a general rule, juries prefer "likeable" cooperators, prosecutors will choose defendants who have engaged in less serious wrongdoing in the past. Defendants therefore may omit details about prior crimes of which the government is completely unaware.[130] Moreover, defendants may omit information about prior crimes if they committed them with friends or family members and fear that the government will prosecute those friends or family members, or seek the fruits of said crimes.

Criminal history lies do not exert the same downward drag on the Detection Effect as minimization lies because they do not place the government in a worse position than if the defendant declined to cooperate. Returning to the example of Employee A, she might confess her involvement in the charged crime (i.e., that she stole $100,000), but decline to tell the government about a separate fraud that took place three years ago, but which has not been brought to any government agent's attention. In the earlier minimization scenario, the government charges Employee A with stealing $100,000 and she successfully (and willfully) convinces the prosecutor that she stole only $10,000; the employee therefore receives both the benefits of cooperation and a lesser baseline sentence. In the current scenario, Employee A receives the benefit of cooperation, but, because she takes responsibility for the full $100,000 loss, she starts with the same baseline sentence she would have received had there been no cooperation agreement. Since the government would have had no knowledge of the prior criminal conduct anyway, it is made no worse off by the defendant's lies about her criminal history.

The caveat to the foregoing is that the government *will* be made worse off if Employee A testifies against a coconspirator at trial and one of the other defense attorney learns about the prior conduct and successfully cross-examines her.[131] In that instance, the government's case against Employees B, C, D and E may very well fall apart. Then again, trials are scarce in the

[128] Yaroshefsky, *supra* note 19, at 928.
[129] For concerns that sentencing judges may be unaware of such practices, see *Id.* at notes 50-51.
[130] Moreover, defendants may have incentives to omit prior crimes insofar as they continue to benefit and use the fruits of those crimes.
[131] *See* Rasmusen, *supra* note 7 at 1566, quoting Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1566 (1996)(observing that government's cases can be substantially damaged by witnesses whose credibility have been successfully challenged at trial).

federal criminal system, and prosecutors often control the flow of information undermining their witnesses' own credibility.[132]

Moreover, if the government is smart, it may use the cooperator in such a way that the cooperator need never testify. For example, assume that the government approached Employee A before any legal proceeding had ever been brought against the other targets. Admitting her crime, Employee A agrees to cooperate with the government and wears an undercover wire to a meeting with Employees B, C, D and E. Since B, C, D and E have yet to be charged with any criminal misconduct, Employee A's undercover wire is beyond the boundaries of the Fourth, Fifth and Sixth Amendments.[133] During the meeting, B, C, D and E all make incriminating statements about the conspiracy. Even if Employee A's criminal history lies come to light as the case progresses, the government can avoid Employee A's testimony and instead rely on the taped conversations in the unlikely event any of the remaining Employees choose to go to trial.

For all these reasons, we should expect the government to address the specter of criminal history lies by minimizing its own reliance on a single cooperator's testimony. Not surprisingly, this is exactly what Ellen Yaroshefsky found when she interviewed former prosecutors in the Southern and Eastern Districts of New York regarding their strategies for using cooperating defendants.[134] If cooperator lies are costly, then prosecutors seem to be at least aware of this risk and appear to be taking precautions to reduce them.

iii. *Lies About Others*

Finally, cooperators may lie about others, either by implicating innocents, by exaggerating the culpability of other criminals, or attempting to minimize the culpability of others.[135]

The prosecution and sanctioning of persons for crimes they did not commit reduces the government's accuracy in enforcement. A reduction in accurate arrests, however, is not equivalent to a reduction in the Detection Effect because that effect is based on the government's *perceived* ability to identify and prosecute wrongdoers. Accordingly, the cooperator-fueled prosecution of innocents may increase the Detection Effect if the public[136] sincerely believes that such individuals are guilty, particularly if those individuals enter guilty pleas. Putting aside our

[132] If the cooperator testifies as a witness against another defendant, the government is obligated to disclose the cooperator's criminal history so that he may be cross-examined by the defense. *Giglio v. United States*, 405 U.S. 150 (1972). Once a trial is imminent or under way, prosecutors maintain fewer incentives to discover the cooperator's non-public criminal history.

[133] *See United States v. White*, 401 U.S. 745 (1971) (informant's covert taping of conversation does not implicate Fourth Amendment); *Illinois v. Perkins*, 496 U.S. 292 (1990) (Fifth Amendment inapplicable to defendant's undercover discussion with government agent). If the defendant has been indicted, an undercover agent or cooperator's attempt to elicit information from the defendant about the indicted offense violates the Sixth Amendment right to counsel, *Massiah v. United States*, 377 U.S. 201 (1964).

[134] Yaroshefsky, *supra* note 18 at 923-33.

[135] The above analysis considers each type of lie singularly. If cooperators employ combinations of such lies, the government's filtering task increases in difficulty.

[136] Criminals, however, will be less convinced by cooperator-fueled prosecutions because they themselves are aware of their own incentives and abilities to lie to the government.

moral revulsion, the prosecution of innocents can theoretically improve deterrence, at least temporarily.[137]

Nevertheless, inflating convictions inaccurately is not a very smart policy in the long run.[138] As Isacchar Rosen-Zvi and Talia Fisher aptly summarize:

> [Wrongful convictions] waste limited resources and instigate underparticipation in lawful and socially beneficial activity. [E]xposure to the risk of wrongful conviction impairs deterrence, since it lowers the marginal cost of choosing to engage in criminal behavior; when innocent people are systematically exposed to the risk of criminal sanctions, the price of criminal activity becomes cheaper in relation to noncriminal activity. [139]

Although the above account is largely theoretical, the well-publicized fruit of now ubiquitous "innocence projects" supports the theory.[140] Over the last two decades, numerous well-publicized DNA-fueled exonerations have demonstrated the innocence of over 200 state and federal criminal offenders, many of whom were convicted with the assistance of cooperating defendants, informants and jailhouse snitches.[141] Innocence findings, reported prominently in multiple media outlets, can undermine the law enforcement system's overall credibility, thereby reducing deterrence. To prevent this occurrence, prosecutors must corroborate their cooperators' stories.[142]

Here again, the nature of the cooperation itself will impact the government's willingness and ability to offer a cooperation agreement. For prospective cooperators (that is, defendants who assist the government in future cases), the undercover investigation itself will provide some of the corroboration for the cooperator's claim.[143] If Stacy contends that Bob sells Ecstasy at the local night club, then the government will corroborate Stacy's claim when Stacy visits the club wearing a body wire and, with undercover agents nearby, purchases Ecstasy from Bob. Thus, Stacy has very little incentive to implicate purely innocent actors.

Of course, the issue may not be so simple. Stacy might encourage Bob, a local Ecstasy dealer, to agree to distribute far more Ecstasy than he normally would. Stacy need not be an evil person to bring this event about. If Stacy perceives her own sentence as being tied to the dangerousness of the offender she helps prosecute, she will have every reason in the world to

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[137] *But see* Katherine Strandburg, *Deterrence and the Conviction of Innocents*, 35 Conn. L. Rev. 1321 (2003) (arguing that rules intended to avoid conviction of innocents is based in efficiency as well as morality concerns).

[138] Kaplow and Shavell, *supra* note 103 at 2-3, agree that inaccuracy reduces deterrence: "[A]ccuracy and enforcement effort are alternative ways of increasing deterrence."

[139] Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 Va. L. Rev. 79, 89 (2008).

[140] Brandon Garrett, *Judging Innocence*, 108 Col. L. Rev. 55, 56-58 (2008) (tracking growth of innocence movement and state and federal responses).

[141] For a rigorous analysis of the causes and treatment of the first 200 exonerated prisoners as compared to a control group. *Id*.

[142] Prosecutors understand this dynamic. *See* Cohen, *supra* note 2 at 821-22 (former federal prosecutor discussing process of testing cooperator's credibility); Yaroshefsky, *supra* note 18 at 932-33 (recounting interviews in which prosecutors stressed the importance of corroborating cooperators' claims).

[143] *Cf.* Cohen, *supra* note 2 at 822: "[I]t is not too difficult to determine if a defendant is being truthful about his illicit conversations with his confederates when the defendant and his confederates have been the subject of an extensive wiretap investigation spanning months and including hundreds of telephone calls."

urge Bob to increase his distribution. Assuming Bob is already predisposed to sell Ecstasy, Stacy's manipulation will not likely affect a jury's determination of guilt at trial, and may not even trigger a very strong sentencing claim, although a few courts have recognized a limited "sentencing entrapment" defense.[144]

Does Bob's "excessive" sentence reduce the Detection Effect of cooperation? Possibly. If the government allocates too many resources toward the apprehension and incarceration of criminals like Bob (what some might call "low hanging fruit") it may fail to deter more serious offenders. In fact, cooperation of this type may cause us to reduce the number of aggregate offenders, while clearing the field for the most aggressive and dangerous offenders.[145]

Finally, if we are worried about a cooperator's manipulation when she provides "prospective" assistance (by arranging undercover buys and taping her conversation with others, for example), then we should be even more concerned when her assistance is primarily "historical." A historical case is one in which the cooperator solely assists with solving a crime that has occurred in the past. Because the cooperator is retelling facts, it is far more difficult to corroborate her story – except by obtaining testimony from other witnesses, many of whom will likely be co-defendants.[146]

Admittedly, this may be less of a problem in cases that are dominated by emails and written documents.[147] Nevertheless, documents often fail to speak for themselves and cooperators can provide crucial interpretations for ambiguous statements. For all these reasons, prosecutors will find it necessary to corroborate historical cooperator testimony with *other* cooperator testimony. In other words, in the historical context, the government needs several cooperating defendants to demonstrate that the single cooperator's story is in fact truthful. Historical cooperation therefore increases the amount of time the government must spend working on the same case, as well as the number of defendants to whom it must extend potentially sentence-reducing agreements. For all of these reasons, we should expect the government to rely on historical cooperation primarily in the most serious and difficult-to-prosecute cases: massive corporate frauds or particularly violent gangs or similarly dangerous organized crime outfits.

In sum, there are a number of ways in which "bad information" can drag down the Detection Effect. The question, then, is whether prosecutors and investigators adequately mitigate them. We do not know the answer; but we do know that these costs are not monitored in any rigorous or systematic way. Moreover, we also know that societal costs, even when they are perceived correctly, are not necessarily internalized evenly or completely by government actors.[148] For all these reasons, then, we should be worried that cooperation's Detection Effect is not quite as robust as we assume it to be.

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[144] *See, e.g.*, Jess D. Mekeel, Note, *Misnamed, Misapplied and Misguided; Clarifying the Status of Sentence Entrapment and Proposing a New Conception of the Doctrine*, 14 Wm. & Mary Bill Rts. J. 1583 (2006).
[145] *See* Flaherty and Sethi, *supra* note 87.
[146] Yaroshefsky's subjects discuss exactly this type of problem. *See* Yaroshefsky, *supra* note 19, at 938-39.
[147] I am grateful to Jennifer Arlen for pointing this out.
[148] Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000).

D. Conclusion

Cooperation improves the government's ability to detect and prosecute crime, but with certain limitations. Agents and prosecutors may elicit incorrect information, or improperly handle information that is otherwise accurate and useful. Cooperators may lie, either about themselves or about others. All of these problems place limitations on the Detection Effect. Certainly, these drawbacks can be mitigated by internal training and monitoring, and stronger efforts to corroborate cooperator claims. Many prosecutors and agents would say that is exactly what they do.[149] Nevertheless, these efforts themselves are costly and therefore reduce the benefits of cooperation. They may become even more important when one considers cooperation's greater problem, the Sanction Effect.

Part III: The Sanction Effect of Cooperation

The Detection Effect describes only one half of cooperation's effect on deterrence. Cooperation also alters the punishment that the defendant reasonably expects in the event he is apprehended.[150] This is the Sanction Effect of cooperation, and it has been ignored for too long.

When the government "pays" the defendant for his assistance by reducing his sentence, cooperation reduces the expected sanction for a given crime, notwithstanding the fact that it also increases the probability of detection. The question, then, is whether and how the reduction in sanction (the Sanction Effect) interacts with the increase in probability of detection (the Detection Effect). The answer to this question will depend, in part, on three factors: (a) how broadly the government extends cooperation agreements; (b) how deeply judges impose cooperation discounts; and (c) how optimistically criminals perceive the likelihood of an agreement or discount. After reviewing the fairly sparse information that the government already collects (and makes public) regarding cooperation, this Part takes up each of these issues in turn.

A. Background on Cooperator Sentencing

Before proceeding to the theoretical account of how overpayment might take place, it is helpful to consider the Sentencing Commission's most recent statistics on cooperation. In 2008, federal prosecutors filed substantial assistance motions in approximately 12% of the cases sentenced that year. A majority of those cooperators were defendants in drug trafficking cases. Fraud defendants made up another 10-12% of the cooperating population. Defendants in firearm cases, previously just 2% of the cooperation workforce, took up another 10%.[151] The remaining cooperators were distributed among a variety of miscellaneous federal criminal offenses.

[149] Yaroshefsky, *supra* note 19, at 932.

[150] By using the term "expected sanction" in this section, I am not referring to the overall expected punishment. Instead, I am referring only to the defendant's expectation as to what sentence the judge will impose on the defendant in the event she is caught and successfully prosecuted.

[151] *See* 2008 Sourcebook of Sentencing Statistics, United States Sentencing Commission, Table 30, *available at* http://www.ussc.gov/ANNRPT/2008/Table30.pdf [hereinafter 2008 Sourcebook].

Figure 1[152]

5K1.1 Sentences as a Percentage of the Overall Sentencing Pool

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
5K1.1 Sentences	8,937	8,921	8,649	9,438	9,742	9,087	9,545	9,483	9,470	9,498
All Reported Sentences	55,408	59,589	59,691	63,973	69,680	69,932	72,408	72,518	72,765	76,428
Cooperator Percentage	16.1%	15.0%	14.5%	14.8%	14.0%	13.0%	13.2%	13.1%	13.0%	12.4%

Although the absolute number of cooperators has remained constant or has slightly risen, cooperators have declined as a percentage of the overall sentencing pool from 16.1% of those sentenced in 1999 to 12.4% in 2008.[153] The reduction in cooperators as a percentage of the overall sentencing pool may have several explanations. For example, the additional convictions that the government has obtained over the last ten years may be attributable primarily to crimes for which cooperation is either unnecessary or a hindrance. Alternately, it may be that the government has become a more efficient consumer of cooperation, learning to convict more defendants with the same number of cooperators. Finally, it may be that the numbers are simply more truthful than they used to be, now that the Guidelines ranges are advisory.[154]

Whereas previously, attorneys might have masked other forms of leniency as "cooperation," they no longer have the incentive or need to do so. The discount that cooperators receive for their assistance has also declined, albeit slightly and in varying amounts according to the charged crime. Whereas fraud defendants have experienced a significant reduction in median discount (from 100% to 70% discounts), drug traffickers receive more or less the same discount as they always did: 50% of the lowest applicable recommended Guideline sentence.

Although the nationwide percentage of cooperators has steadily inched downward over the past decade, the reduction has been distributed across districts quite unevenly. Between 1998 and 2008, the Second Circuit, which includes federal prosecutions brought in New York and Connecticut, experienced a modest drop of cooperators from 23% of all defendants sentenced that year to a little more than 20% in 2008. By contrast, during the same time period, the percentage of Eighth Circuit cooperating defendants dropped by nearly half, and the percentage of D.C. Circuit cooperators nearly doubled.

Figure 2 demonstrates the disparity:

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[152] Figure 1 was compiled using statistics from Table N of the United States Sentencing Guidelines Annual Sourcebook of Statistics (1999, et seq), *available at* www.ussc.gov/ANNRPT/ (hereinafter "Annual Report")

[153] *Compare* Annual Reports, Table N, 1999 through 2008. Caren Myers Morrison contends that these statistics provide an incomplete picture of cooperation. *See* Morrison, *supra* note 103 at 936.

[154] *See* Ilene Nagel & Stephen Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S.Cal. L. Rev. 501, 509 (1992) (arguing that Section 5K1.1 "almost invites prosecutors to treat substantial assistance as a vehicle for discretionary plea benefits"). Schulhofer and Nagel's 1992 article cited evidence that some prosecutors were in fact using Section 5K1.1 as a means of smoothing otherwise rigid Guideline ranges. *Id.* at 522. Since that time, however, a number of sentencing doctrines have evolved (not the least of which is the Supreme Court's decision in *Booker*) that obviate the need to do this.

Figure 2[155]

5K1.1 Motions as a Percentage of Defendants Sentenced

Circuit	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
1	15.5	15.9	14.6	14.4	13.5	14.6	12.2	13.6	10.8	10.5
2	23.1	23.9	21.7	19	17.5	20.1	22.1	21.2	21.6	21.9
3	32.2	30.5	30.6	32.3	28.8	29.4	27.5	27.4	27.1	24.2
4	22.7	20.9	20.2	18.6	18.3	16.7	18.5	17.3	16.8	17.6
5	15.4	13.6	12.3	13.4	12.5	10.1	8.2	7.9	8.4	7.5
6	25.6	24.4	27.2	26	24.6	23.9	24.8	25.4	25.2	25.7
7	20.4	21.7	21.2	21.8	21.2	18.6	17.7	17.4	17.7	18.4
8	26	23.1	22	18.9	17.6	15.0	14.8	15.9	14.7	15.1
9	10.4	11.6	10.7	11.8	10.2	10.3	10.4	10.6	10	9.3
10	12.8	10.9	11	11	9.4	10.5	9.8	8.7	9.1	6.9
11	22.1	21.4	19.9	22.4	19.9	20.5	17.5	18.3	17.8	15.2
DC	19.6	19.3	13.8	31.1	26.4	30.9	26.6	18.4	33.9	34.5

Although the overall percentage of cooperating defendants has declined, it has declined unevenly and the decline has not affected the discount that the government pays cooperators.[156] Despite changes to the law of federal sentencing, the government retains significant power to choose its cooperators. How it compensates its cooperators is an entirely different matter, however, which I discuss below.

B. Three Factors that Increase the Sanction Effect

The Sanction Effect comes about because the government's lenience at sentencing reduces the expected sentence for a given range of crimes. As I suggest later, in Part IV, the Sanction Effect should not necessarily bother us if it is relatively small or modest. When it overcomes the Detection Effect, however, the Sanction Effect threatens deterrence goals. Accordingly, we should be concerned about factors that cause the Sanction Effect to balloon in size. In this section, I theorize three factors that inflate the Sanction Effect. The first is "excessive cooperation" whereby the government signs up more cooperators than it can effectively use. The second, which is connected, is "excessive payment" whereby the government pays the cooperator a greater discount than the cooperator's assistance actually warrants. The third is the cooperator's own over-optimism, which causes her to overestimate the discount she will receive if she cooperates.

[155] Table 2 was compiled using data from Guidelines' Annual Sourcebook of Statistics, Table N-DC, N-1, N-2, et. seq., for years 1999-2008. *See* Annual Reports, Table N-DC, et seq. (1999-2008), *available at* www.ussc.gov/ANNRPT/[date].

[156] As I explain *infra*, although the discount may have remained constant, the government may be paying the same "price" for less value. *See* discussion *infra* pp. 38-39.

1. Excessive Cooperation

Despite the fact that criminals have ample reason to compete for cooperation agreements (as discussed supra in Part II), prosecutors and law enforcement agents have their own incentives to sign up cooperators, which in turn may cause them to purchase more cooperation than they actually need.

Assume both agents and prosecutors seek generally to maximize convictions and avoid embarrassing losses at trial. Agents may push prosecutors to sign up otherwise unreliable defendants as cooperators because the agents have professional interests in investigating and solving cooperation-intensive crimes. Job promotions, after all, often come from dismantling large criminal organizations and from amassing a long record of arrests and convictions.[157] And when the cooperator's information in fact leads to this result, society too benefits from the government's agreement with the cooperator.

However, in some instances, the cooperation agreement may lead to only a few arrests, or the dismantling of a small group that would have disbanded or been apprehended anyway. In those situations, the law enforcement agent's interest diverges from society's. The agent prefers cooperation because it generates arrests and convictions and therefore improves her record. By contrast, society might prefer the agent to work on other investigations, particularly investigations of more intractable and dangerous criminal organizations. Individual law enforcement agents, however, are unlikely to perceive this divergence, and even if they do, they will likely ignore it so long as promotions and prestige are premised on the continuous churning of convictions and arrests. Supervisors are also likely to prefer cooperation, particularly if they are forced to show statistics to legislators who set budgets and allocate limited resources.[158] Most important, it seems highly unlikely that ordinary citizens will be able to monitor these problems, since they too will be lulled by an agency's announcement of "X arrests over the past Y month."

Prosecutors also have strong incentives enter into cooperation agreements, which may or may not diverge from society's interest. To the extent prosecutors have reason to maximize convictions *and* avoid embarrassing losses (and in fewer instances, cement high-profile wins), cooperation serves both of these ends.[159] Moreover, cooperation serves the prosecutor's interest in avoiding needless procedural litigation. Consider a defendant who is the subject of a search whose constitutionality is questionable. Except in those rare cases in which the search promises

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[157] "[T]he Justice Department has become more attuned to 'outputs' pressing U.S. Attorneys for measurable results in terms of numbers of cases processed, either to trumpet the success of an administration crime initiative, or to demonstrate tangible results in crime types that have become the focus of congressional interest." Bowman, *American Buffalo*, *supra* note 76 at 236. *See also* Marc L. Miller & Ronald Wright, *The Black Box*, 94 Iowa L. Rev. 125, 184-85 (2008) (explaining how increasingly cheaper access to technology fuels increase in data-driven law enforcement strategies).

[158] For an interesting discussion of how data-driven approaches can distort criminal justice institutions and policies, see Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 Yale L. & Pol'y Rev. 1 (2007).

[159] *See* Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, *supra* note 57 at 932-33 (observing perception that offices that prosecute more defendants are rewarded with greater resources).

to make new law in the government's favor, the benefits of proceeding with a suppression hearing are minimal. At best, the trial court will find the search constitutional and the defendant subsequently will plead guilty. Even so, his guilty plea will be preceded by a time-consuming hearing, a delay in "closing" his case, lengthy witness preparation for the officers and fewer opportunities to investigate and prosecute more serious crimes.

By contrast, if the defendant becomes a cooperator, the legal implications of the cooperator's investigation largely disappear. The defendant immediately begins "working" with the law enforcement agents by contacting associates, setting up meetings, and taking direction from his new "supervisors." Instead of investing energy and time justifying a prior arrest, law enforcement agents and prosecutors instead get the benefit of a conviction (since the cooperator's guilty plea counts as a one) as well as the expectation of future arrests and possibly more dangerous (and therefore more newsworthy) criminals. Through cooperation, a questionable arrest metamorphoses from a potential cost-center, whereby the prosecutor and agents must "waste time" justifying a prior arrest, to an attractive income stream whereby prosecutor and agents can generate future convictions.

Behavioral economics further suggests that both prosecutors and agents should lean strongly toward cooperation. For example, a recent study by Ehud Guttel and Alon Harel suggests that individuals may be more willing to predict a future event than to guess the results ("postdict") of a past event.[160] Under this framework, prosecutors, defendants, and defense counsel all might prefer cooperation to a trial or evidentiary hearing. Hearings and trials trigger postdictive questions about the strength of evidence already collected. Cooperation, by contrast, encourages the interested parties to indulge in predictive estimations such as future value of the cooperator's assistance on one hand, and the potential size of the cooperator's discount on the other.

Cooperation also appeals to prosecutors' risk aversion. If, as Stephanos Bibas has observed, prosecutors are both risk averse and loss averse, they should prefer the certainty of convictions over the uncertainty of trial losses.[161] No prosecutor will lose her job or reputation for signing up an "extra" defendant to testify against a drug kingpin.[162] Losing the case against the kingpin, however, is far more embarrassing, particularly in a world of diminishing trial opportunities.[163]

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[160] Ehud Guttel & Alon Harel, *Uncertainty Revisited: Legal Prediction and Legal Postdiction*, 107 Mich. L. Rev. 467 (2008).

[161] Bibas, *Shadow*, *supra* note 19 at 2471 (contending that risk aversion causes prosecutors to prefer plea bargains over maximal sentences).

[162] During the last year, federal prosecutors in New York have already signed up nine cooperators in the investigation of insider trading by Raj Rajaratnam and his hedge fund, the Galleon Group. Although the cooperators are reportedly assisting in additional investigations, their sheer number raises the question as to whether risk aversion is playing a role in the distribution of cooperation agreements. *See* Wall Street Journal Law Blog, *Hello Franz! Cooperator No. 9 in Galleon Case Makes Debut*, March 10, 2010; *available at* http://blogs.wsj.com/law/2010/03/10/hello-franz-cooperator-no-9-in-galleon-case-makes-debut/

[163] Moreover, as the number of trials decrease, prosecutors become less adept at determining how many cooperators are necessary to support a case if it goes to trial. *See* Bowman, *American Buffalo*, *supra* note 76 at 237 (arguing that as number of trials decrease, "the attention each trial receives within the [prosecutor's] office increases, as does the potential professional risk to any lawyer involved").

Finally, whereas cooperation's benefits will be quite obvious to the prosecutor and her law enforcement agents, its costs are more abstract and therefore easier to ignore. First, because they accrue in the aggregate and over time, the costs of excessive cooperation are not likely to affect individual government actors. Moreover, these costs are more likely to be ignored because they need not be paid up front. The prosecutor does not pay the defendant when she signs the cooperation agreement. Indeed, since the discount is set by the defendant's sentencing judge, the prosecutor technically does not pay the defendant anything. Thus, cooperators can claim truthfully, when testifying at trial that, so far as they know, the prosecutor lacks the power to set their sentence.[164]

This is, of course, a convenient fiction. Judges do not sanction in a vacuum – and the 5K1.1 "substantial assistance" letters that prosecutors write and file with the court are not mere formalities. The content of the prosecutors' letter clearly can influence the sentencing court's degree of discount. Accordingly, although they do so indirectly, prosecutors do in fact "pay" for cooperation. Nevertheless, the indirect means of doing so, combined with the time delay in imposing sentence all create a recipe whereby prosecutors are more likely to ignore or downplay the costs of cooperation agreements. As a result, they will use less restraint when they decide whether to enter into such agreements in the first place.[165]

2. Excessive Discounts

The foregoing section suggests that legal actors have individual, institutional and behavioral incentives to enter into too many cooperation agreements. Law enforcement actors also may increase the Sanction Effect by overcompensating cooperators for their service. As I suggest in this section, these two factors may be linked.

Any number of factors may produce "overpayment" in some, but not all, cases. The Guidelines provide no insights on how judges should calculate discounts, and judges likely prefer differing sentencing philosophies.[166] Nevertheless, one should expect judges to sentence cooperators relative to *some* baseline, assuming that is how they sentence defendants generally.[167] Discounts will differ depending on whether a judge compares a given cooperator to other cooperators who he has sentenced recently, or by comparing the cooperator to the non-cooperating defendants in the case. Finally, discounts may differ depending on whether the court believes *any* defendant (much less a cooperator) deserves the prescribed baseline sentence.

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[164] Jeffries and Gleeson contend that one of the federal criminal justice system's strengths is that it "allows the prosecutor to delegate to the court the task of determining the degree of leniency. The distinction is critical to the credibility of the accomplice witnesses on whom most organized crime prosecutions depend." Jeffries & Gleeson, *supra* note 10 at 1121. *See* R. Michael Cassidy, *"Soft Words of Hope": Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129, 1132 (2004) (explaining that prosecutors purposely leave promise of discounts "vague and open ended" to preserve cooperator's credibility as testifying witness).

[165] One might argue that over time, repeat players should learn from their mistakes. In some of the most popular prosecutors' offices, however, the turnover rate is quite high. Moreover, even repeat players may fail to grasp the system-wide costs imposed by excessive cooperation.

[166] Stephanos Bibas, Max M. Schanzenbach & Emerson H. Tiller, *Policing Politics at Sentencing*, 103 Nw. U. L. Rev. 1371, 1377 n. 24 (2009) (citing studies).

[167] Gerard E. Lynch, *Sentencing Eddie*, 91 J. Crim. and Criminology 547, 555-56 (2001)(Dist. J) (asserting that sentencing is "intrinsically a relative [question]" for which the answer should "be worked out by reference to what punishment is … imposed on a range of other offenders").

All of the above factors introduce noise into cooperator sentencing. But it is not clear that these factors, by themselves, would create a systematic bias in favor of overpayment. Presumably, some factors – how the cooperator compares with the non-cooperating defendant, how heavily a judge leans on potentially meaningless numerical data -- could cancel each other out. One cooperator's stingy discount theoretically could be matched by another's comparative windfall.[168]

That being said, there may be some instances in which legal actors systematically overpay cooperators. For example, prosecutors may (somewhat surprisingly) trend toward overpayment. If government prosecutors sign up 100 cooperators, but only 80 were truly "necessary" to increase the rate of conviction and detection, government prosecutors nevertheless may convince themselves that all 100 were necessary. Prosecutors' offices will do this because: (a) a valuation of the cooperator is in essence a valuation of the prosecutor's prior decision to "hire" or "purchase" the cooperator's services[169]; (b) over time, the government and its agents come to sympathize with the cooperator, particularly in instances of prolonged contact between government agents and cooperating defendants; and (c) prosecutors feel a greater need to maintain cooperation's attractiveness as a policy to defendants than they do to rein in the overall costs of cooperation.[170]

If prosecutors trend towards overpayment, judges too may trend toward overpayment, albeit for different reasons. First, the inclusion of suboptimal cooperators in the cooperator pool may cause judges to "overpay" *all* of the cooperating defendants. If the typical judge applies a modest sentence discount (30%) for cooperators whose assistance meets the government's minimal definition of substantial assistance, the 30% discount may be the "floor" from which the judge builds increasingly generous discounts. She may apply a more generous discount (50%) for "good" cooperators and a highly generous discount (80%) for "outstanding" cooperators.

Assuming judges sentence cooperators relative to each other, the government's inclusion of minimally helpful cooperators in the court's "cooperating pool" leads judges to excessively remunerate the entire pool. Even worse, this form of "cooperator creep" may create reciprocal effects between judges on one hand, and prosecutors and cooperators on the other. That is, over

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[168] *Compare U.S. v. Torres*, 251 F.3d 138, 152 (3d Cir. 2001) (affirming trial court's 1-month downward departure for defendant who assisted government over five year period and contributed to 30 convictions); *U.S. v. Dalton*, 404 F.3d 1029, 1034 (8th Cir. 2005) (reversing departure that appeared excessive compared to assistance provided).

[169] For similar observations in the corporate context, see Donald Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with the Law*, 2002 Colum. Bus. L. Rev. 71, 72 (2002).

[170] In contrast, Cynthia Lee, *see supra* note 23, worries that prosecutors may deny substantial assistance motions arbitrarily and with little judicial oversight. *See Wade v. U.S.*, 504 U.S. 181 (1992) (holding that prosecutor's decision not to file substantial assistance motion is unreviewable unless defendant alleges unconstitutional motive). Although it is quite possible that some prosecutors will act in bad faith, the reputation costs of doing so (particularly where judges and defense attorneys are repeat players) may render such conduct costly. *Cf.* Rasmusen, *supra* note 7 at 1563 (observing that the government "has a reputation to maintain, and can be better trusted to keep its agreement even if it could benefit in an individual case by a violation"). In any event, now that the Sentencing Guidelines are no longer mandatory, prosecutors have even less incentive to withhold substantial assistance motions arbitrarily, since courts can credit the assistance anyway without regard to Section 5K1.1.

time, prosecutors may demand, and potential cooperators may offer, less useful information and assistance over time.

A further source of overpayment might be the government's publication annually of mean cooperator discounts. If cooperators are aware of the mean discount, then in many instances they (and their attorneys) should rationally seek discounts greater than the mean. (A caveat: this may not be true of defense attorneys who are repeat players in small districts and therefore interested in preserving their long-term credibility before judges). Unless the mean discount translates into *no* term of imprisonment, all criminal cooperators should argue that they have delivered better than average value.

This might not be cause for concern if the government matches defense requests with its own pressure for stingier cooperation discounts. Yet, as discussed *infra*, institutional and behavioral factors may cause prosecutors to decline to counteract the defendants' collective push for ever generous discounts. That is, fundamental attribution error, sympathy and personal bias, and a desire to maintain cooperation's overall attractiveness as a system (particularly if the prosecutor is in the midst of negotiating new cooperation agreements at the time of sentencing), all could restrain prosecutors from seeking discounts below the mean.

Presumably, if "escalating pay" were a problem in cooperator circles, we might expect to see discounts follow a continuous upward trajectory. Happily, that is not the case. As indicated by Figure 3 below, the national discount rate for narcotics, fraud, and robbery offenses either has remained flat or has decreased in recent years.

Figure 3 – Cooperator Discounts (Average Percentage Reduction from Minimum Guideline Sentence)[171]

Offense	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Drugs – Trafficking	48.5	47.8	48.1	46.7	45.2	44.7	45.8	43.5	42.6	44.4
Fraud	100.0	99.7	99.6	99.8	99.9	94.3	97.8	80.0	80.0	70.3
Robbery	33.3	34.5	34.1	35.1	33.3	29.1	35.6	34.6	31.2	33.3
TOTAL	50.0	50.3	50.0	50.0	49.9	48.9	50.0	47.8	47.4	47.8

The discount rate, however, says nothing about the value of assistance that the government has received in exchange. Thus, it could be the case that over the years, the government has receives less and less value for the same discount.

In sum, there remains the possibility that courts will overpay cooperating defendants. Do prosecutors and courts take steps to guard against it? There does not appear to be any mechanism in place to test for overpayment. Presumably, some judges keep individual track of the scope and degree of their own cooperator discounts. Similarly, some United States Attorneys' Offices may implement office-wide suggestions on how much of a discount a given

[171] Figure 3 was compiled using data from the Guidelines' Annual Sourcebook of Statistics, Table 30, for years 1999-2008. *See* Annual Reports, Table 30, et seq. (1999-2008), *available at* www.ussc.gov/ANNRPT/[date].

type of assistance merits.[172] But on the whole, there exists no mechanism by which a court or prosecutor can reliably "value" a defendant's assistance.

3. Excessive Optimism

In a 1998 study, 59% of those defendants queried contended that they were wrongfully denied cooperation agreements or 5K1.1 letters.[173] Although one might conclude from this statistic that prosecutors were overly stingy in 1998 with their 5K1.1 letters, it may instead demonstrate that defendants maintain unrealistic expectations regarding their ability to secure cooperation agreements.

As John Jeffries and Judge John Gleeson explained back in 1995, prosecutors select cooperators on a number of factors including "the degree of credibility-damaging baggage [a defendant] would bring to the witness stand."[174] By design, prosecutors possess far more information about their choices of cooperators than do criminal defendants. As a result, it would not be surprising if defendants were overly optimistic about their chances of being chosen as a cooperator. Indeed, skilled prosecutors might attempt to nurture this optimism, since it would result in additional proffers and additional flows of information.[175] The problem, of course, si the very optimism that causes an offender to give up information in search of a cooperation agreement may also cause her to discount the sentence that she would receive if caught.

Finally, excess cooperation and overoptimism create perversely effective synergies. In some circuits, as many as one in four defendants becomes a cooperator.[176] Since some defendants presumably did not seek cooperation agreements, the percentage of defendants that the government is selecting from the cooperation pool is even higher. A relatively high percentage of cooperation renders over-optimism a more serious problem. If a prosecutor's office offers cooperation agreements to one in three defendants, it would not be surprising if most of the offenders in that district assumed that they would be the "one."

Moreover, criminals also may overestimate the potential discount they will receive in exchange for cooperation. One court has observed that cooperating defendants often expect sentences of no incarceration, despite their underlying crimes.[177] Although the source of such expectations are difficult to track, the media's discussion of infamous cooperators may contribute. When the government finally convicted John Gotti, the infamous boss of the Gambino family, for racketeering offenses, the press widely reported not only Gotti's sentence (life imprisonment) but also the five-year sentence the district court judge imposed on the government's star cooperator, Sammy "the Bull" Gravano, despite Gravano's admissions that he had committed nineteen murders while a member of the mob.[178] Gravano's discount was widely

[172] For references to such practices, see Frank O. Bowman and Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1112 n.273 (2001).
[173] Maxfield and Kramer, *supra note* 18.
[174] Jeffries & Gleeson, *supra* note 10 at 1121.
[175] *See* discussion *supra* at Part II.
[176] *See* Figure 2, *supra* at page 34. The DC and Sixth Circuits cooperated with over a quarter of their defendants in 2008. The Second, Third and Seventh Circuits also have fairly high cooperation rates.
[177] *United States v. Losovsky*, 571 F. Supp. 2d 545, 546 (S.D.N.Y. 2008) (Marrero, J.).
[178] *See, e.g.*, David L. Lewis, *Substantial Subversion*, Nov. 28, 1994, Nat'l L. J. A23 col. 3.

reported and criticized in the popular media, particularly after he subsequently set up his own narcotics network in Arizona.[179]

In more recent times, white collar cooperators have received substantial and widely reported discounts for their help, resulting in minimal or sometimes non-existent sentences of imprisonment.[180] Scott Sullivan, Worldcom's former CFO, was arguably the architect of the accounting fraud the company perpetrated on its shareholders.[181] Nevertheless, because he cooperated against Bernard Ebbers, Worldcom's CEO, Sullivan received a prison sentence of just five years' imprisonment while Ebbers received a sentence five times as long.[182] One newspaper report cited legal experts for the conclusion that Ebbers' double-digit sentence "sends a message to Corporate America to clean up its act" while Sullivan's comparatively light sentence "sends another message to wrongdoers: cooperate."[183]

Thus the media's coverage of particularly light cooperator sentences may increase cooperation's perceived value to potential criminals. In some instances, perceptions may well outweigh reality. According to the 2008 Bureau of Sentencing Statistics, the average sentence discount for cooperating narcotics defendants was roughly 40% less than the minimum Guidelines recommended sentence.[184] Although this represents a substantial reduction, many cooperators nevertheless will spend a significant block of time in prison if they commit a crime. Potential criminals may perceive a far higher discount, however, because of the media's focus on celebrated cases of cooperation.[185]

The media's reporting of cooperator discounts also creates important implications for cooperation's reputation costs.[186] Ordinarily, the defendant considering cooperation must also weigh the costs of his community's hatred.[187] Despite what has been called an "anti-snitching norm" in popular culture[188], cooperation nevertheless has flourished in the federal criminal

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[179] John Marzulli, *Sammy Bull to Testify – For Himself*, NY Daily News, March 24, 2002 (reporting that after serving five year sentence, Gravano moved to Arizona and set up large Ecstasy-distribution network). *See also* William K. Rashbaum, *Gotti's Accuser in Phoenix Drug Ring*, New York Times, Feb. 25, 2000 (describing Gravano's role as head of multi-million dollar Ecstasy and white-supremacist ring, including his wife and adult children).

[180] For examples of news articles noting cooperation discounts, see Jim McElhatton, *A Slow Cruel Death, Drug Dealer Avoids Jail in Abuse of His Daughter*, Washington Times, May 31, 2009 (detailing federal cooperator's failure to serve additional time for abuse and killing of two-year old daughter); Guy Sterling, *They're Called Wiseguys for a Reason – Turnabout's Fair Play for a Snitch*, NJ Star-Ledger, August 7, 2001.

[181] Tom Fowler & Mary Flood, *CFO's Are Often the Star Witnesses*, Houston Chronicle, June 28, 2009 at 1.

[182] *Id.*

[183] Laura Smitherman, *Sullivan Given 5-Year Term in WorldCom Case*, Chicago Tribune.Com (August 12, 2005).

[184] *See* 2008 Sourcebook, *supra* note 138.

[185] The overestimation of cooperation discounts from popular accounts of individual cooperators may be an example of the "availability heuristic." See Sunstein, Jolls and Thaler, *supra* note _.

[186] "In movies, on television, in literature, the cooperator embodies all that society holds in contempt: he is disloyal, deceitful, greedy, selfish, and weak." Simons, *supra* note 23 at 2.

[187] With the advent of the Internet and the widespread dissemination of court documents online the cooperator must contend with the possibility that his identity will become widely known. *See generally* Morrison, *supra* note 99 at 922-23.

[188] *Id.* at __.

justice system.[189] Part of this may be due to the fact that federal offenders often face substantial, if not mandatory, sentences of imprisonment. Communal hatred may pale when compared with near-certain ten-year prison sentences with no possibility of parole.

Finally, the media's widespread reporting of cooperation and cooperator discounts may reduce the reputation costs of cooperation.[190] Sara Sun Beale has discussed the manner by which the media's portrayal of crime influences popular attitudes about criminal punishment.[191] Similarly, the media's portrayal of criminal cooperators can shape popular attitudes about criminal cooperation and criminal sentences. For example, widespread reporting of cooperation can reduce the intensity of anti-snitching norms by demonstrating cooperation's popularity among defendants. Regardless of inner-city initiatives to "stop snitching" among offenders, cooperation cannot be so bad if "everyone does it."[192]

Critics might argue that the media's coverage of criminal sentences cuts both ways. After all, the press does not report solely the cooperator's sentence; it also reports, usually with great fanfare, the non-cooperator's conviction and substantial sentence. Accordingly, one might argue that media's coverage sends dual messages that neutralize each other.[193]

The problem with this "wash-out" analysis is that the potential criminal may not weigh both outcomes equally. As noted before, we tend to be overoptimistic individuals; we assume we have greater ability to control future events than is actually the case. Criminals may be particularly prone to over-optimism.[194] Accordingly, a corporate executive contemplating accounting fraud may focus her attention on the "good news" portion of a given account of a criminal prosecution (Scott Sullivan's discount for cooperating in the Worldcom prosecution), and ignore the "bad news" portion of that same report (Bernard Ebbers' 25-year sentence of imprisonment for spearheading the Worldcom accounting fraud).

Part IV: The Sanction and Detection Effect Combined Together

Cooperation creates both Sanction and Detection Effects, which place competing strains on the government's attempt to deter crime by altering the defendant's *ex ante* expected costs of conduct. The Detection Effect increases the defendant's perceived probability of getting caught,

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[189] For an account of how persistent coordinated law enforcement efforts ultimately wore down the Italian mob's code of silence, see James B. Jacobs, Coleen Friel and Robert Radick, Gotham Unbound: How New York City was Liebrated from the Grip of Organized Crime (1999) at 133: "Until [1963], there had never been a Cosa Nostra defector willing to testify about the organization. In the late 1980's and 1990's many high-ranking organized-crime figures were cooperating with federal, state, and local prosecutors in exchange for leniency and placement in the Witness Security Program."

[190] In 1999, Ian Weinstein, a former criminal defense attorney, observed that the prospect of harsh federal sentences had "reduced whatever honor there may have been among thieves." Weinstein, *supra* note 3, at 583.

[191] Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 Wm. & Mary L. Rev. 397 (2006).

[192] For an account of the "stop snitching" movement in Baltimore and the "Who's A Rat" website, see Morrison, *supra* note 103.

[193] For similar analysis of dual messages sent by law enforcement to victims, see Aviram, *supra* note __ at 4 (explaining that conspicuous law enforcement causes victims to perceive more crime, but also more enforcement of said crime).

[194] Bibas, *Shadow*, *supra* note 19 at 2500.

whereas the Sanction Effect decreases his expected sanction if he is in fact caught. What matters most, however, is his expected *punishment*, which in turn relies on how the two effects interact.

The first section of this Part considers the three basic permutations for Sanction and Detection Effects. The first is that the Detection Effect outweighs the Sanction Effect. The second is that the two cancel each other out, which still results in a loss to society since cooperation is itself a costly policy, whose administrative costs I discuss at some length below. Finally, the worst case scenario is that the Sanction Effect overcomes the Detection Effect, in which case society pays for a policy that creates more crime.

Having considered these three scenarios, I then explore the two types of responses a government might take in the event it discerns an imbalance in Sanction and Detection Effects. One set of responses would attempt to cure the problem by tinkering with the cooperation process itself. Thus, the government might purposely reduce the number of cooperation agreements it offers, or reduce the discounts it provides for "substantial assistance." The coordination problems that created the imbalance in the first place, however, may not be so easy to solve.

The alternate means of responding to Detection/Sanction Effect imbalances is to change other aspects of law enforcement, such as increasing law enforcement efforts overall, or increasing the baseline sanction for given offenses. Unfortunately, this strategy too creates additional problems, which I explore below.

A. Measuring the Interaction of Detection and Sanction Effects

This section first considers how psychological factors may or may not elevate changes in detection over changes in sanctions. The remainder of the section considers three permutations for Detection and Sanction Effects.

1. The Presumed Magnitude of Detection

If criminals viewed detection and sanction probabilities equally, one could measure cooperation's overall effect on deterrence by measuring the Detection Effect against the Sanction Effect directly. Such comparisons, however, are greatly hampered by the fact that criminals reportedly *do* pay more attention to the probability of punishment than they do to the severity of punishment.[195] Accordingly, one cannot measure the two effects simply by comparing the two deltas (change in probability of detection and change in sanction) on a one-to-one basis. Instead, the Detection Effect arguably gets the benefit of some unknown multiplier.

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[195] *See, e.g.*, Darley & Robinson, *supra* note 15 at 183-93 (citing psychological studies establishing difference); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 Crime & Justice 1, 21 (1998) (observing tax evasion research that "suggests that people do not perceive that costs are proportional to potential punishment"); Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 Va. L. Rev. 1295, 1306 and n.38 (citing theoretical bases for difference); John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 Law & Soc. Rev. 7, 8 (1991) (citing studies finding certainty of sanction is more reliable deterrence than severity); Robert J. MacCoun, *Testing Drugs Versus Testing for Drug Use: Private Risk Management in the Shadow of Criminal Law*, 56 DePaul L. Rev. 507, 513 (2007) (citing later studies establishing similar variance between certainty and severity of punishment).

I say "arguably" in this context because although detection probability matters more to defendants than a small or even moderate reduction in sanctions, detection's advantage may evaporate when the perceived sentence is one of *no* incarceration. A sentence of no incarceration carries none of the stigma nor the restrictions on liberty that even a six month jail term carries. A cooperation agreement that eliminates prison time alters the social meaning of the sanction.[196] It is a change in kind and not just degree.[197]

For that very reason, we should be concerned that the Sanction Effect is perceived by criminal defendants not as a moderate reduction in sanctions (in which case the Detection Effect will often dwarf it), but rather as a means of reducing the possibility of *any* real punishment, in which case the two competing effects will be judged equally.

Whether potential wrongdoers are justified in assuming a "zero sanction" is beside the point. If criminal offenders perceive them to be zero, they might as well be zero. Even more important, if Sanctions are perceived as zero, criminals may perceive the Sanction Effect as simply another way of avoiding getting caught. In other words, when the expected sanction is zero, criminals may equate the Sanction Effect with the Detection Effect.

In sum, even we presume that defendants value the probability of detection more than they value moderate decreases in sanctions, we would be foolish to ignore the Sanction Effect.

2. Three Possibilities

Detection and Sanction Effects can interact in three ways. The Detection Effect may exceed the Sanction Effect, causing the expected cost of punishment to increase; the two Effects may cancel each other out in which the criminal's expected cost stays the same; and the Sanction Effect may exceed the Detection Effect, causing the criminal's expected cost to decrease.

Even if prosecutors overpay some defendants, the net Detection Effect may well exceed the Sanction Effect, particularly if other defendants are underpaid (or unpaid) for their assistance.[198] The government benefits not just from the defendants who cooperate, but from the overall *incentive* to cooperate, which allows the government to secure other benefits from defendants without having to pay them.[199]

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[196] "Imprisonment unmistakenly expresses moral indignation because of the sacred place of liberty in our culture." Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. Legal Stud. 609, 616 (1998). *See also* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349 (1997).

[197] In that sense, a sentence of "no" incarceration may function very much like the sale of an item for "free." *See* Kristina Shampanier, Nina Mazar and Dan Ariely, *Zero as Special Price: The True Value of Free Products*, 26 Marketing Science 742 (2007)(presenting empirical evidence that individuals behave irrationally when products are dubbed "free").

[198] The fact that cooperation causes defendants to compete and provide information without remuneration (see discussion in Part II, *supra*) therefore might be seen as a salutary means of increasing the overall probability of detection without excessively decreasing the sanction for a given crime.

[199] This benefit, however, may be waning. In the past, prosecutors had nearly total discretion to decide whether or not to file a 5K1.1 motion on behalf of a would-be cooperator. Accordingly, prosecutors could and did "underpay" would-be cooperators who assisted the government but failed to clear the "substantial assistance" hurdle. Now that the Guidelines are advisory, courts may grant defendants partial credit for attempted cooperation. If this becomes

If cooperation's aggregate Detection Effect exceeds its Sanction Effect, then the expected cost of criminal conduct increases and the policy deters some crimes. This is not the end of the inquiry, however, because the avoided harm must be measured against the costs of implementing the policy.[200] Cooperation incurs a number of administrative and transaction costs that, depending on the harms avoided, may or may not outweigh its marginal improvement in deterrence. In other words, even when the Detection Effect exceeds the Sanction Effect, cooperation still may be far more costly to administer than it is worth.

Cooperation creates both transactional and administrative costs. Prior to entering an agreement, the government must arrange multiple proffer sessions, which create administrative headaches insofar as the defendant is incarcerated or speaks another language.[201] Moreover, negotiating and interpreting cooperation agreements, however much boilerplate they may contain, also costs time and money.[202]

More troubling are the costs that accrue after the cooperator has signed her agreement and entered her guilty plea. First, the government must protect the cooperator from other criminals or members of society who would harm the cooperator, either out of spite or a desire to avoid detection.[203] These "protection" costs may increase as technology reduces the costs of identifying cooperators.[204]

In addition, like any other principal who contracts with an agent, the government must monitor the cooperator to make sure she is following orders. These "agency costs" of cooperation can be quite significant. Having already broken the law, cooperators are not exactly the most trustworthy agents. They have incentives and opportunities to "shirk" their responsibilities, either by declining to report on other criminals (especially if the criminals are friends or family), by continuing to engage in criminal activity, or by hiding the proceeds of their prior criminal activity.[205] As noted earlier in Part II, to prevent the harms created by these agency costs, the government therefore must expend substantial resources to monitor cooperators.

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prevalent, the underpayment that offset cooperator overpayments will disappear and the Sanction Effect will increase.

[200] It may also be that the policy's marginal increase in deterrence is less than the deterrence society would achieve if it tried a different combination of policies. Since it is difficult to know which policies the government would use instead, I leave that for future consideration.

[201] *See* Rasmusen, *supra* note 7 at 1553-54 (citing Supreme Court oral argument in which government's attorney cited substantial administrative headaches in setting up proffers).

[202] In addition, the costs of negotiating a cooperation agreement may be no greater than the costs of negotiating a guilty plea. If that is the case, the prosecutor might as well seek the cooperation agreement because it offers a future "income stream" in the form of future prosecutions and convictions.

[203] On the difficulties of protecting cooperators from retaliation, see Morrison, *supra* note 103 at 958 n.213 (citing instances of retaliation). Morrison's examples of retaliation tend to revolve around murder prosecutions, which are relatively rare in the federal system. *See* Annual Guideline Statistics at __.

[204] In response to the increasing accessibility of cooperation information over the Internet, prosecutors have generated a number of methods to mask cooperator identities. *See* Morrison, *supra* note 103 at 941-43.

[205] *See generally* Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 Hastings Const. L.Q. 81, 97-102 (1994).

When prosecutors know in advance that agency costs are likely to be high, prosecutors might choose their cooperators more carefully, pay cooperators a lower premium to reflect higher agency costs, or limit cooperation to those cases in which the underlying crime is particularly serious, harmful, or difficult to combat without cooperation. Accordingly, agency costs may provide a partial explanation for the substantial differences between the average discounts that cooperators receive in narcotics cases (40%) and the discounts they receive in fraud cases (70-100%).[206]

If administrative costs are anything above zero, then the second permutation, whereby the Detection and Sanction Effect equal each other, is surely a negative proposition for society. If deterrence stays exactly the same, cooperation is nothing more than a highly inefficient transfer of wealth from taxpayers to the "entrepreneurs" who benefit from cooperation: defendants, defense attorneys, prosecutors, and the law enforcement agencies that are paid to use and protect cooperators.

The final permutation is the worst one, that the Sanction Effect outweighs the Detection Effect. Recall: the Sanction Effect reduces the defendant's weighted sanction, while the Detection Effect increases her probability of being apprehended and punished. If the Sanction Effect outweighs the Detection Effect, deterrence is *reduced*. The incidence of crime increases because, despite the increased likelihood of getting caught, criminals presume that they will be able to reduce their sanctions substantially by cooperating with the government. Since cooperation is itself costly, society effectively pays for more crime.

B. Reducing the Sanction Effect: A Difficult Endeavor

Assume for a moment that society could easily measure cooperation's Detection and Sanction Effect, and determined that the Sanction Effect outweighed the Detection Effect, at least in some contexts. How could the government remedy the imbalance without eliminating all of cooperation's benefits?

One approach might be to tinker with the cooperation process itself. For example, prosecutors might cooperate with fewer defendants.[207] They might also ask sentencing courts to reduce cooperator discounts, or withdraw more quickly form agreements when cooperators provide insufficient information or violate the terms of the agreement. All of these activities would introduce more uncertainty into the cooperation process and therefore reduce the Sanction Effect.

Unfortunately, if the supply of cooperators is elastic – in other words, if defendants have viable alternate means of achieving reductions in their sentences -- the introduction of such uncertainty will affect the Detection Effect negatively. Some defendants will no longer attempt to become cooperators and proffer sessions will decrease. Moreover, defendants who are already cooperators will feel less pressure to maximize their cooperation. Accordingly, when substitutes

[206] The different discounts reflect additional factors, such as the supply of potential cooperators relative to those willing to take a straight guilty plea or go to trial.

[207] Weinstein suggested as much in his 1999 article, *see* Weinstein *supra* note 3 at 615, but was concerned primarily with disparity's unjust implications for defendants and not with maximizing cooperation's enforcement value.

are available, the government's attempts to reduce the Sanction Effect may also reduce the Detection Effect. In other words, reduce the benefit of cooperation, and you might find yourself with fewer and less helpful cooperators.

Five years ago, one might plausibly have stated that there were no such substitutes and that the government therefore could cut Sanction benefits with little worry of damaging its supply of potential cooperators. Post-*Booker*, the Guidelines are no longer mandatory and, at least where mandatory statutory minimums are not present, judges have far more latitude to sentence defendants below the recommended Guideline range of imprisonment. In such an environment, the government may well be reluctant to test the elasticity of cooperator demand.

More important, even if the demand for cooperation is inelastic, coordination problems will likely interfere with any sustained attempt to reduce the Sanction Effect. Even when cooperator "demand" is high in the aggregate, prosecutors and individual law enforcement agents still may worry that *their* case will suffer should they cut back on the number of cooperators or take measures to reduce cooperator discounts. Larger sub-units to which prosecutors and agents belong – such as an individual United States Attorney's Office or FBI units – will be similarly reluctant to reduce cooperation if those reductions impact all-important conviction and arrest statistics, which are the source of resources and prestige.

Accordingly, the best solution might be a centralized one, whereby the Department of Justice limits either the number or value of benefits extended to cooperators by its United Staets Attorneys' Offices.[208] Such intervention, however, would be a break from the DOJ's current hands-off stance. True, the DOJ has directed its prosecutors to plea bargain "honestly" and to file charges that "reflect the totality and seriousness of the defendant's conduct."[209] It also has directed prosecutors to seek approval from supervisors prior to filing substantial assistance motions on behalf of a criminal defendant.[210] Beyond these bromides, however, the DOJ traditionally has exercised little control over the manner by which individual United States Attorneys' Offices implement cooperation. Absent strong empirical evidence of an excessive Sanction Effect, it seems unlikely that DOJ officials will extensively review (much less intervene in) local prosecutorial decision-making about cooperation.

If the government is disinclined to remedy the Sanction/Detection Effect imbalance by altering its own stance on cooperation, it can instead seek redress outside the cooperation system. That is, it can push for more enforcement resources, higher sanctions, or for an increase in the number and scope of substantive laws that define certain types of behavior.[211] The perverse implications of this spiral should now be clear: When government actors cause the Sanction Effect to exceed the Detection Effect, they have a choice. They can fix the problem from within, and suffer the various transaction and political costs that might accrue when a centralized political body intervenes in the (previously) discretionary decision-making of its local offices

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[208] Stephanos Bibas has advocated for centralized prosecutorial reforms in other contexts. *See* Stephanos Bibas, *Prosecutorial Regulation and Prosecutorial Accountability*, 157 U.Pa.L. Rev. 959, 1000 (2009).

[209] United States Attorneys Manual, 9-27.400, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.400 (setting out general policies for plea bargains).

[210] *Id*.

[211] *See* Buell, *Overbreadth*, *supra* note 11 at 1507-09.

and prosecutors. Or, those same actors can lobby for more resources and harsher criminal sanctions, which they can then dole out to the local officers and prosecutors. One does not have to be a strong adherent of public choice theory to recognize that in most instances, the Department of Justice will choose the latter over the former.

Critics will argue that the doomsday scenario described above is largely hypothetical. We do not know if the Sanction Effect exceeds the Detection Effect because the government has made no (public) effort to measure or compare either of the two effects. Nevertheless, it is interesting to note that over the last two decades, the minimum statutory and Sentencing Guidelines ranges for a number of federal offenses, including mail and wire fraud, have increased.[212]

It may well be that these increases have nothing to do with the deterrent value of cooperation, but instead reflect a preference "to err on the side of harshness."[213] But another rather disquieting explanation for such laws is the one we never consider: that they result from our over-reliance on cooperation as a law enforcement technique. If this suggestion is correct, then cooperation's greatest cost may be the funds that society spends to correct imbalances that legislators fail to perceive, and that law enforcement actors have little incentive to avoid.

V. Conclusion

Cooperation is a complex system that it creates two important and competing effects for potential wrongdoers. When one of those effects, the Sanction Effect, exceeds or equals the other, the Detection Effect, the policy fails to deter. Even when the Detection Effect outweighs the Sanction Effect, cooperation may be more costly than we assume.

Currently, we do not know whether or when the Sanction Effect exceeds the Detection Effect. What we do know, however, is that if the Sanction Effect is too large, it can create great problems for deterrence that are difficult to correct. For all those reasons, we should take a closer look at our use of cooperation. This Article suggests several avenues of further inquiry.

First, to better understand the Sanction Effect's potential scope, behavioral researchers should test how potential criminals perceive the possibility of cooperation. Are defendants overly optimistic about either their ability to cooperate or the degree of their expected sentencing discount? Does the Sanction Effect – particularly the notion that the Sanction will be reduced to "zero" -- in fact "spill over" into the defendant's perceived probability of detection?

Because the Sanction Effect is also a story about "bureaucratic slack," researchers must focus their attention on prosecutors and law enforcement agents. A thorough, timely and transparent review and comparison of the cooperation-based policies that are used throughout United States Attorneys' Offices would go a long way toward identifying the policies that

[212] *See* Frank Bowman, *Sentencing High Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167 (2008) (demonstrating dramatic rise in sentences for same offense).
[213] Stephanos Bibas, Max M. Schanzenbach & Emerson H. Tiller, *Policing Politics at Sentencing*, 103 Nw. U. L. Rev. 1371, 1374 (2009).

maximize and minimize Sanction and Detection Effects.[214] Such analysis would cast further light on the recurrent debate over how much disparity we should tolerate in federal prosecution policies across the nation.[215] Whatever the general arguments for prosecutorial discretion, cooperation's pathologies suggest the need for intervention by a more distant, centralized authority such as the Department of Justice.[216]

Finally, the foregoing analysis should at least serve as a warning for regulators eager to adopt and expand "cooperation-type" policies. Trading leniency for information is neither costless nor guaranteed to reduce wrongdoing. Although no-one would reasonably suggest the wholesale abandonment of this tool, regulators would be equally foolish to ignore cooperation's competing effects on the cost-benefit calculations of putative offenders. It may be impossible to eliminate cooperation's pathologies without imposing additional and undesirable costs. All the more reason, then, for regulators to look before they leap. To do any less is to leave themselves – and the public they serve -- vulnerable to cooperation's most devastating cost.

[214]To be of any use, this review is admittedly more complex. Not only should researchers compare prosecutors' policies (geographically and longitudinally if possible), but they should also compare conviction, arrest rates, and defendant perceptions. In sum, the government should undertake the path of research that Frank Bowman called for back in 1999: Frank Bowman, *Defending Substantial Assistance: An Old Prosecutor's Meditation on Singleton, Sealed Case, and the Maxfield-Kramer Report*, 12 Fed. Sent. R. 45, *7-8 (1999).

[215] *See generally* Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, *supra* note 39.

[216] *See* Kahan, *Chevron*, *supra* note __ at __.