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INFORMANT WITNESSES AND THE RISK OF WRONGFUL CONVICTIONS

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ABSTRACT

Several studies in the last two decades have revealed that false criminal informant testimony is a leading factor in wrongful convictions, along with false confessions, eyewitness misidentification, and faulty forensic science. Although a great deal more remains to be done, many jurisdictions have implemented evidence-based reforms to these last three categories of evidence. Policy about criminal informants, however, seems to be stubbornly stagnant, and relevant social science is virtually nonexistent. This Article questions the relative lack of attention to informant testimony and suggests that the dangers posed by informant testimony are both greater and different than previously thought. Unlike much of the prior literature on the subject, this Article carefully distinguishes between jailhouse informants and other types of informant witnesses, especially accomplices. Although both categories of informants pose some of the same risks to the reliability of proceedings, accomplice witnesses pose additional risks—many enabled by rules of evidence, trial practices, and psychological phenomena—that have not yet been fully appreciated in the literature. After identifying these concerns, this Article concludes with recommendations for reform—and areas requiring further study—with the aim of developing a set of evidence-based best practices for the use of informant testimony.

INTRODUCTION

Since 1989, DNA evidence has been used to exonerate at least 341 individuals, in at least thirty-seven states, of crimes of which they were previously convicted.¹ In many of these cases, the exonerees served decades in prison or were sentenced to death before they were released.² These DNA exonerations “have changed the face of criminal justice in the United States.”³ No longer is the prospect of an

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1. See INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited May 24, 2016).

2. See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 5 (2011) (reporting that, of the first 250 DNA exonerees, eighty were sentenced to life in prison; seventeen were sentenced to death; and the average exoneree served thirteen years in prison).

3. See *id.* at 6.

innocent person being convicted an “unreal dream”⁴—it is instead an undeniable reality. As a consequence of the errors revealed by DNA testing, we are in the midst of what some have called an “innocence revolution,”⁵ with most commentators agreeing that the wrongful convictions revealed through DNA represent only the “tip of the iceberg”⁶ of our system’s accuracy problem.⁷

Numerous studies have identified four categories of evidence that are most frequently associated with wrongful convictions: eyewitness misidentification, flawed forensic science, false informant testimony, and false confessions.⁸ For example, for his 2011 book, *Convicting the Innocent*, Brandon Garrett gathered and examined trial transcripts and other court documents for the first 250 DNA exonerees. Garrett determined that 76% of these cases involved faulty eyewitness identification, 74% involved flawed forensic science, 21% involved false informant testimony,⁹ and 16% involved false confessions.¹⁰ Many cases involved

4. See *id.* (quoting *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923)).

5. See, e.g., Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004); Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our “Evolving Standards of Decency” in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265 (2004).

6. See GARRETT, *supra* note 2, at 11; see also *id.* at 264–65 (most troubling of all are the “vast numbers of cases involving other types of crimes than cannot be examined using DNA and where we just do not know how many have been wrongly convicted”); SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES 1989–2012, REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 5 (2012) (“Many of the exonerated defendants we know about are the beneficiaries of . . . improbable chains of happenstance. For each, there are many other unknown innocence defendants whose convictions remain undisturbed.”).

7. See D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (suggesting a minimum of 3.3% and a likely maximum of 5% rate of factually wrongful convictions in capital rape-murder cases in the 1980s). *But see* Paul G. Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Causes of Wrongful Conviction from False Confessions*, 22 HARV. J. L. & PUB. POL’Y 523 (1999) (questioning whether certain exoneration cases in fact establish actual innocence); Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES (Jan. 26, 2006), http://www.nytimes.com/2006/01/26/opinion/26marquis.html?_r=0 (suggesting that the rate of wrongful convictions is smaller than innocence advocates often suggest).

8. In this Article, I refer to categories of evidence that are prevalent in wrongful convictions as “factors” rather than “causes” in light of the difficulty of establishing causation as an empirical matter. See Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 479–80 (2014) (explaining that referring to factors as “causes” of wrongful convictions is misleading because proof of causation requires a control or comparison group to ensure what is being observed is not merely correlation). The Gould study, which compared 260 wrongful convictions in violent felony cases with 200 “near misses” (i.e., cases against an innocent person resulting in either a dismissal or an acquittal) stands out as one of the few true empirical studies of wrongful convictions. The Gould study found that many of the factors identified by prior innocence scholarship as “causes” of wrongful convictions were in fact present in many “near miss” cases as well. See *id.* at 489–90 (reporting that rates of testimony by jailhouse informants, false confessions, and eyewitness misidentification, as well as other factors, were similar in wrongful conviction and near miss cases, which suggested that “once a factually innocent defendant enters the criminal justice system . . . conviction will not statistically turn on differences in those factors”).

9. Garrett defined “informant” to include jailhouse informants, co-defendants, and all other witnesses who falsely told police that they heard the exonerees admit guilt, including some witnesses who were potential suspects themselves and some who sought reward money. See GARRETT, *supra* note 2, at 123–41.

10. *Id.* app. fig.A.5.

more than one of these categories of “suspect” evidence.¹¹ Garrett’s findings were largely consistent with prior studies of DNA exonerations.¹² Subsequent studies of DNA exonerations have confirmed Garrett’s findings—if not as to the precise percentages, then as to the types of evidence involved.¹³ Other studies of wrongful convictions that include *non*-DNA exonerations also have identified the presence of the same suspect categories of evidence.¹⁴

11. See Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 727 (2013).

12. See, e.g., BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED app.2 (2000) (finding many of the same types of evidence present in the first sixty-two DNA exonerations in the United States); Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543–44 (2005) (same as to first 340 exonerations, including 144 through DNA evidence). See generally EDWIN M. BOARCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (1932) (attributing, in a study of exonerations in the pre-DNA era, many wrongful convictions to eyewitness misidentification, false confessions, flawed forensic science, and informant testimony).

13. In its analysis of the first 325 DNA exonerations, the Innocence Project concluded that 72% involved eyewitness misidentification, 47% involved improper forensic evidence, 27% involved false confessions, and 15% involved false informant testimony. See INNOCENCE PROJECT, THE CAUSES OF WRONGFUL CONVICTION, <http://www.innocenceproject.org/causes-wrongful-conviction> (last visited Jan. 15, 2016) [hereinafter THE CAUSES OF WRONGFUL CONVICTION].

14. See, e.g., GROSS & SHAFFER, *supra* note 6 (reporting that, of 873 exonerations between 1989 and 2012, 43% involved mistaken witness identification; 24% involved false or misleading forensic evidence; 15% involved false confessions; and 51% involved perjury or false accusation); NORTHWESTERN U. SCH. OF LAW, CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW (2005) [hereinafter THE SNITCH SYSTEM] (reporting, in a study limited to death row exonerations, that, of 111 exonerations examined, 45.9% involved false informant testimony, 25.2% involved erroneous eyewitness identification testimony, 14.4% involved false confessions, and 9.9% involved false or misleading scientific evidence). State-specific reports on wrongful convictions similarly have found that these same four categories of evidence are present in many cases of wrongful convictions. See, e.g., PA. JOINT STATE GOV'T COMM'N, REPORT OF THE ADVISORY COMMITTEE ON WRONGFUL CONVICTIONS 13 (2011), <http://www.deathpenaltyinfo.org/documents/PAwrongfulconvictions.pdf> (finding that eyewitness misidentification was present in 82% of wrongful convictions identified in Pennsylvania, invalid science was present in 27%, false confessions were present in 36%, and informants were present in 36%); N.Y. STATE BAR ASS'N, TASK FORCE ON WRONGFUL CONVICTIONS 7 (2009), <http://www.nysba.org/wcreport/> (citing eyewitness misidentification, faulty forensic evidence, false confessions, and jailhouse informants as among leading factors in wrongful conviction cases in New York). The Michigan study defined “exoneration” for purposes of the cases included in the report as a “legal concept,” meaning that “a defendant who was convicted of a crime was later relieved of all legal consequences of that conviction through a decision by a prosecutor, a governor or a court, after new evidence of his or her innocence was discovered.” GROSS & SHAFFER, *supra* note 6, at 7. It did not purport to make a factual representation of the actual guilt or innocence of convicted defendants, positing that “[i]n many cases we just don’t know whether a defendant is guilty or innocent, before trial or after . . . [T]he best we can do is to rely on the actions of those who have the authority to determine a defendant’s legal guilt.” *Id.* at 6; see also *id.* at 12 (“We do not attempt to reach an independent judgment on the factual innocence of each defendant in our data.”); Gross et al., *supra* note 12, at 524 (defining “exoneration” as “an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted”). The Gould study used a more conservative definition of exoneration for purposes of the wrongful convictions included in the study. They included only those cases where “factual innocence” could be established. See Gould et al., *supra* note 8, at 483–84. On the difference because “factual” and “legal” innocence, and its significance for the future of the innocence movement, see generally Richard A. Leo, *Has the Innocence Movement Become an Exoneration Movement? The Risks and*

Numerous social science studies back up the unreliability of the suspect categories of evidence identified in this “innocence scholarship.” For example, it is now well-established that innocent people will falsely confess to crimes under certain conditions.¹⁵ It is also well-documented that eyewitness identification is often unreliable and that how pretrial identification proceedings are conducted has a major impact on the reliability of any subsequent identification.¹⁶ It is also increasingly accepted, especially since the National Academy of Sciences (“NAS”) released its influential 2009 report, that many of the forensic methods that were used for decades to obtain criminal convictions—such as bite-mark identification, ballistics matches, and hair analysis—in fact are not scientifically sound.¹⁷

Although there is a great deal more work to be done with respect to confessions, eyewitness identification, and forensic science—enough to keep innocence advocates busy for years to come¹⁸—needed change is under way in many jurisdictions with respect to these three categories of evidence. Informed by the findings of the

Rewards of Redefining Innocence, in *INNOCENT REFLECTIONS: A QUARTER CENTURY OF DNA EXONERATIONS* (Daniel Medwed ed., 2016).

15. See, e.g., RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* (2008); Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 *AM. PSYCHOL.* 215, 223 (2005); Richard P. Conti, *The Psychology of False Confessions*, 2 *J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL.* 14, 15 (1999); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *DENV. U. L. REV.* 979 (1997); Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 *PSYCHOL. SCI.* 125 (1996). Certain police tactics, such as minimizing the defendant’s level of criminal responsibility or confronting the suspect with false inculpatory evidence, have been found to increase the likelihood of inducing a false confession. Juveniles, individuals with mental impairments, or those who are intoxicated are particularly susceptible. See, e.g., Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, *L. & HUM. BEHAV.* (2009); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 *N.C. L. REV.* 891 (2004).

16. See generally NAT’L RESEARCH COUNCIL, *IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION* (2014); ABA CRIMINAL JUSTICE SECTION, *AD HOC INNOCENCE COMM. TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* (Paul C. Giannelli & Myrna Raeder eds., 2006). The National Research Council is the operating arm of the National Academy of Sciences, a Congressionally-chartered private, non-profit organization dedicated to providing objective evidence-based advice on critical issues affecting the nation. See *About Us*, NAT’L ACAD. OF SCI., <http://www.nasonline.org> (last visited Apr. 8, 2016). Many of the recommendations included in the 2014 NAS Report were also in a 1999 report by the National Institute of Justice. See generally N.Y.U. LAW, CTR. ON THE ADMIN. OF CRIMINAL LAW, *CONVICTION INTEGRITY PROJECT, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS’ OFFICES* (2012) [hereinafter *ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS’ OFFICES*]; U.S. DEP’T OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (1999), <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

17. See NAT’L ACAD. OF SCI., *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009). The 2009 NAS Report urged policymakers to improve standards for forensic laboratories and ideally remove them from the control of law enforcement agencies, see *id.* at 183–91, measures long sought by scholars and advocates in the innocence movement. See Eric S. Lander, *DNA Fingerprinting on Trial*, 339 *NATURE* 501, 505 (1989). See generally, e.g., Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 *UCLA L. REV.* 725 (2011); Paul C. Gianelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 *N.C. L. REV.* 163 (2006).

18. See, e.g., Keith A. Findley, *Implementing the Lessons From Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, *MO. L. REV.* (forthcoming 2016) (surveying progress in implementing eyewitness identification reforms at the ground level).

innocence scholarship and the supporting social science, many police departments and policy makers have introduced substantial changes to the way in which confessions are conducted, such as electronically recording all interrogations.¹⁹ They also have introduced changes to eyewitness identification proceedings, such as by requiring blind or semi-blind administration.²⁰ In some jurisdictions, courts also have been a force for change, providing enhanced pretrial judicial review and, when such evidence is admitted at trial, allowing expert testimony and jury instructions about the fallibility of these categories of evidence.²¹

19. At least twenty states already require the recording of custodial interrogations by statute or court rule, and more than a thousand law enforcement agencies have voluntarily adopted such a policy. See INNOCENCE PROJECT, FALSE CONFESSIONS OR ADMISSIONS, <http://www.innocenceproject.org/causes-wrongful-conviction/false-confessions-or-admissions> (last visited Mar. 17, 2016); THOMAS P. SULLIVAN, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, COMPENDIUM: ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS (2014), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=33287&libID=33256> (describing state statutes and rules relating to recording). Although the U.S. Department of Justice was lagging behind in this area for years, in May 2014, it reversed course and issued guidelines requiring all law enforcement agencies under its purview (e.g., the FBI, DEA, ATF, and U.S. Marshals Service) to record in-custody interviews electronically. See Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to Assoc. Att'y Gen. et al. (May 12, 2014), <http://s3.documentcloud.org/documents/1165406/recording-policy.pdf>. Many law enforcement agencies have embraced the recording of custodial interviews because the practice benefits not just innocent suspects, but also police and prosecutors who will have an easier time defeating motions to suppress. It also frees up interrogators to focus on the conduct of an interview rather than note-taking. See Major Edward W. Berg, *Videotaping Confessions: It's Time*, 207 MIL. L. REV. 253, 268 (2011); ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES, *supra* note 16, at 6 (aside from protecting against the risk of false confessions, "videotaping confessions provides a clear record of the interrogation techniques used," which can "disarm potential defense arguments of coercion or compulsion, as well as protect the police from civil liability"). In another sign of ongoing progress, in 2015, the District Attorneys Association of New York joined forces with the New York State Bar Association and the Innocence Project to advocate changes to New York law to require videotaping of interrogations in major felonies, as well as to eyewitness identification procedures. See Jim Dwyer, *A Plan to Combat Mistaken Identifications and False Confessions*, N.Y. TIMES (June 2, 2015), <http://www.nytimes.com/2015/06/03/nyregion/a-plan-to-combat-mistaken-identifications-and-false-confessions.html>.

20. Already, fourteen states have adopted evidence-based practices for eyewitness identification recommended by the Innocence Project and the NAS Report. See *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification> (last visited Apr. 8, 2016). These include Georgia, Texas, New Jersey, and North Carolina. See *Eyewitness Identification Reform*, INNOCENCE PROJECT, <http://www.innocenceproject.org/eyewitness-identification-reform/> (last visited Apr. 8, 2016). The police departments in nine major cities, including Baltimore, Boston, Dallas, Philadelphia, and San Francisco, also have incorporated recommended eyewitness identification reforms into their standard operating practices. See *Eyewitness Misidentification*, *supra*. A number of police organizations have also endorsed and pushed for eyewitness identification reforms. See generally, e.g., INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT ON WRONGFUL CONVICTIONS: BUILDING A SYSTEMIC APPROACH TO PREVENT WRONGFUL CONVICTIONS (2013). See also POLICE EXEC. RESEARCH FORUM, A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES xiii–xiv (2013) (noting that many law enforcement agencies made changes to their eyewitness identification policies but calling for more progress).

21. See, e.g., *State v. Lawson*, 291 P.3d 673, 690–97 (Or. 2012) (articulating more rigorous state standards for admission of eyewitness identification than those required by the U.S. Supreme Court in *Manson v. Brathwaite* and acknowledging that expert testimony may sometimes be appropriate to "educate the trier of fact concerning variables that can affect the reliability of eyewitness identification"); *State v. Henderson*, 27 A.3d 872, 919–25 (N.J. 2011) (same, and calling for the development of jury instructions on the fallibility of eyewitness testimony). See generally Nicholas A. Kahn-Fogel, *The Promises and Pitfalls of State Eyewitness Identification Reforms*, 104

Forensic science reform lags behind, but the topic is increasingly in public view. The 2009 NAS Report was followed by scandals in numerous states—including New York, Massachusetts and Minnesota—that exposed fraud and incompetence in their crime labs.²² In April 2015, the FBI made national headlines by acknowledging that its forensic examiners had given flawed testimony about hair matches in at least 90% of 500 criminal cases from 1972 to 2000.²³ In February 2016, the Texas Forensic Science Commission called for a moratorium on the use of bite-mark identification evidence in criminal cases.²⁴ A new National Commission on Forensic Science, created in 2013, is continuously preparing recommendations to the United States Attorney General and the Department of Justice on the use of forensic science,²⁵ some of which have already been adopted.²⁶ Meanwhile, the federal government already provides numerous sources of funds to facilitate research and implementation of best practices in the forensic sciences in the states.²⁷ And some courts have started to limit expert testimony about the results of forensic testing, citing concerns about the reliability of such methods.²⁸ Such rulings

KY. L.J. 99 (2016) (reviewing decisions of other state courts that have rejected the federal constitutional test for eyewitness identification).

22. See, e.g., Mark Hansen, *Crime Labs Under the Microscope After a String of Shoddy, Suspect and Fraudulent Results*, ABA J. (Sept. 1, 2013), http://www.abajournal.com/magazine/article/crime_labs_under_the_microscope_after_a_string_of_shoddy_suspect_and_fraud/.

23. See Spencer S. Hsu, *After FBI Admits Overstating Forensic Hair Matches, Focus Turns to Cases*, WASH. POST (Apr. 20, 2015), https://www.washingtonpost.com/local/crime/after-fbi-admits-overstating-forensic-hair-matches-focus-turns-to-cases/2015/04/20/a846aca8-e766-11e4-9a6a-c1ab95a0600b_story.html.

24. See Radley Balko, *Texas Forensic Science Commission to Recommend a Moratorium on Bite Mark Evidence*, WASH. POST (Feb. 12, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/02/12/texas-forensic-science-commission-to-recommend-a-moratorium-on-bite-mark-evidence/>.

25. See Spencer S. Hsu, *U.S. to Commit Scientists and New Commission to Fix Forensic Science*, WASH. POST (Feb. 15, 2013), https://www.washingtonpost.com/local/crime/us-to-commit-scientists-and-new-commission-to-fix-forensic-science/2013/02/15/e11c31f8-77b3-11e2-8f84-3e4b513b1a13_story.html. The Commission is co-chaired by the U.S. Department of Justice and the National Institute of Standards and Technology, a science agency within the U.S. Department of Commerce. See *id.*

26. See Memorandum from Loretta E. Lynch for Heads of Department Components (Nov. 23, 2015), <https://www.justice.gov/opa/file/797541/download> (adopting recommendations of the National Commission on Forensic Science regarding accreditation of forensic testing entities, adoption of uniform terminology within the forensic science community and in the courtroom, and rigorous research, review and testing processes).

27. See, e.g., WHITE HOUSE OFFICE OF SCI. & TECH. POL'Y, *STRENGTHENING FORENSIC SCIENCE: A PROGRESS REPORT* (2014), https://www.whitehouse.gov/sites/default/files/microsites/ostp/forensicscience_progressreport_feb-2014.pdf (describing the various research and funding programs in the forensic sciences available through the U.S. government); *Unvalidated or Improper Forensic Science*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/unvalidated-or-improper-forensic-science> (last visited Mar. 17, 2016) (describing funds available through the Paul Coverdell Forensic Science Improvement Grant Program for state forensic facilities, provided they comply with federal oversight requirements to handle allegations of serious negligence or incompetence).

28. See, e.g., *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008) (limiting testimony of ballistics expert); *United States v. Green*, 405 F. Supp. 2d 104 (D. Mass. 2005) (same). See generally Sarah Lucy Cooper, *The Collision of Law and Science: American Court Responses to Developments in Forensic Science*, 33 PACE L. REV. 234 (2013) (discussing responses by courts to questions raised about the reliability of various forensic disciplines between 2000 and 2011).

provide the “stick,” to complement the federal government’s “carrot” of more funds, to encourage law enforcement agencies to improve their forensic methods.

But when we turn to informant testimony, progress in the realm of both science and policy has been even more stagnant.²⁹ Although courts and commentators have long recognized the inherent unreliability of informant testimony,³⁰ little research has been dedicated to understanding how informant testimony contributes to wrongful convictions,³¹ and practically none to how it might be improved. While the federal government recently has played a more active role with respect to, for example, forensic science,³² it has done nothing to jumpstart research or reform on the use of informants. The United States Government has failed even to assemble an official commission to investigate and make recommendations regarding the use of informants. This is a missed opportunity, since an official report, or even the expectation of one, can be a major catalyst for change.³³

To the extent that there has been any recent policy movement regarding informant testimony, it has been modest and largely has been confined to jailhouse informants, who also have been the focus of recent popular and academic attention.³⁴ A few states now require pretrial reliability hearings for jailhouse informants, at least in capital cases.³⁵ Largely the same states also impose enhanced disclosure requirements on prosecutors with respect to jailhouse infor-

29. See GARRETT, *supra* note 2, at 273 (“Confession, eyewitness identification, forensics, and access to DNA reforms are all slowly gathering momentum across the country.”).

30. See, e.g., *Lee v. United States*, 343 U.S. 747, 757 (1952); *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001); Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1391 (1996).

31. See Jeffrey S. Neuschatz, Nicholaos Jones, Stacy A. Wetmore & Joy McClung, *Unreliable Informant Testimony, in CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH* 213–38 (Brian L. Cutler ed., 2012) (describing research on informant testimony as being “in its infancy”).

32. See *supra* notes 26–28 and accompanying text.

33. See Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 933 (2007) (noting that, because reform commissions can call before them experts and “often consist of members or former members from a broad spectrum of the criminal justice community,” their conclusions “are more likely to be given deference by the creators of evidence rules than the decisions of one or a small number of judges”).

34. See generally, e.g., Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 20 WAKE FOREST L. REV. 101 (2014); Paul C. Giannelli, *Brady and Jailhouse Snitches*, 57 CASE W. RES. L. REV. 593 (2007); JUSTICE PROJECT, *JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW* (2007), http://www.pewtrusts.org//media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf; THE SNITCH SYSTEM, *supra* note 14; JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006); ROB WARDEN, NORTHWESTERN UNIV. SCH. OF LAW, CTR. ON WRONGFUL CONVICTIONS, *THE SNITCH SYSTEM: HOW INCENTIVIZED WITNESSES PUT 38 INNOCENT AMERICANS ON DEATH ROW* (2002); Dahlia Lithwick, *You’re All Out*, SLATE (May 28, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/orange_county_prosecutor_misconduct_judge_goethals_takes_district_attorney.html (recounting recent scandal in Orange County, California, involving prosecutors deliberately placing jailhouse informants in proximity to defendants to elicit evidence); Steve Mills & Ken Armstrong, *The Failure of the Death Penalty in Illinois—Part 3: The Jailhouse Informants*, CHI. TRIBUNE (Nov. 16, 1999), <http://www.chicagotribune.com/news/watchdog/chi-991116deathillinois3-story.html>.

35. See Covey, *supra* note 34, at 137–44; see also ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 189–90 (2009) [hereinafter NATAPOFF, *SNITCHING*].

mants, and a few states have enacted legislation providing that a defendant may not be convicted solely on the basis of a single jailhouse informant's testimony,³⁶ in effect extending to jailhouse informants the corroboration requirement that a number of jurisdictions have long applied to the testimony of accomplices.³⁷ However, these jurisdictions that are actively exploring reform with regard to jailhouse informants are in the minority.³⁸ Indeed, there are no discernible signs of change regarding the use of other kinds of informants, including accomplices.

This relative lack of attention to informant testimony is disturbing for a number of reasons. To begin, according to at least one report, false informant testimony is *the* leading factor associated with wrongful convictions in capital cases.³⁹ False informant testimony is also a major factor contributing to wrongful convictions in noncapital cases.⁴⁰ Moreover, there are good reasons to believe that false informant testimony contributes to significantly more wrongful convictions than ever are discovered.⁴¹ That is because informant testimony is so pervasive in our criminal justice system, and it is most commonly used in the kinds of cases in which subsequent exoneration through DNA testing will be impossible because the cases do not involve biological evidence.⁴²

Informant testimony is also the only one of the four suspect categories of evidence associated with wrongful convictions (i.e., confessions, eyewitness

36. See, e.g., CAL. PENAL CODE § 1111.5 (West 2016).

37. See generally Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 791 n.40 (1990) (collecting statutes in sixteen states that require corroboration of accomplice testimony to convict). As discussed further below *infra* Part I.D.3, these corroboration requirements can be anemic.

38. See Covey, *supra* note 34, at 1396.

39. See THE SNITCH SYSTEM, *supra* note 14, at 3 (reporting that, of 111 death row exonerations examined, 45.9% involved false informant testimony, generally from jailhouse informants; 25.2% involved erroneous eyewitness identification testimony; 14.4% involved false confessions; and 9.9% involved false or misleading scientific evidence).

40. See THE CAUSES OF WRONGFUL CONVICTION, *supra* note 13 (reporting, in a graph, that false informant testimony is present in 15% of DNA exoneration cases).

41. As Daniel Richman has observed, “we lack any hard data as to the extent of . . . perjury” by cooperating witnesses, and “our ignorance on this score is one of the most troubling aspects of cooperation.” Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT'G REP. 292, 293 (1996) [hereinafter Richman, *Cooperating Defendants*].

42. See Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 179–80 (2008) (noting that we know far less about false convictions for crimes other than murder and rape, even though these other crimes represent the vast majority of criminal convictions in the United States, in part because of the lack of biological evidence); see also *infra* note 67 and accompanying text (stating that approximately 74% of all federal downward departures for cooperation were in cases involving drug trafficking and fraud, which typically do not involve biological evidence). According to the Bureau of Justice Statistics, as of December 31, 2013, approximately 26% of state prisoners serving felony sentences were convicted of rape/sexual assault or homicide. See E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014, at 30 app. tbl.4 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>. As of September 30, 2014, approximately 7% of federal prisoners were serving sentences for homicide or other violent crime, with the number serving sentences for rape or sexual assault not specified. See *id.* at 30 app. tbl.5. Approximately half of all federal prisoners were serving sentences for drug offenses. *Id.*

identification, forensic science, and informants) that is not universally subject to any judicial check. Confessions are subject to voluntariness review and compliance with *Miranda v. Arizona*;⁴³ identifications are subject to suggestiveness and reliability review pursuant to *Manson v. Brathwaite*⁴⁴ and, increasingly, more stringent state standards;⁴⁵ and expert forensic testimony is subject to judicial gatekeeping pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁴⁶ or *Frye v. United States*.⁴⁷ As prior innocence scholarship has demonstrated, none of these review procedures is perfect, but at least they provide some pretrial screening before evidence is presented to a jury, thereby lending some accountability and feedback to police and prosecutors. By contrast, the use of informant testimony is virtually unregulated by the courts, except in the minority of jurisdictions that recently have introduced modest reforms—and even those reforms are limited only to jailhouse informants.⁴⁸

Use of informants by law enforcement also raises important normative concerns—e.g., about the propriety of exchanging leniency for information as a matter of retributive and democratic theory⁴⁹ and equity in the distribution of cooperation benefits⁵⁰—that are the subject of a rich and long-standing academic literature. A

43. 384 U.S. 436 (1966). Some states and federal courts also require minimal additional inquiry into the trustworthiness of a confession, requiring “some independent corroborating evidence supporting the confession.” See Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1091 (2010). However, as Garrett notes, “scant evidence satisfies the test,” and “no courts currently conduct a full examination of a confession’s reliability.” *Id.*; see also Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 790–92 (2013) [hereinafter Leo et al., *Promoting Accuracy*] (noting the inadequacy of state and federal trustworthiness doctrine to prevent unreliable confessions from going to the jury).

44. 432 U.S. 98 (1977).

45. See *supra* note 21.

46. 509 U.S. 579 (1993).

47. 293 F. 1013 (D.C. Cir. 1923).

48. See *infra* Section I.

49. See, e.g., Ian Weinstein, *Regulating the Market for Snitches*, 43 BUFF. L. REV. 563, 565, 621–25 (1999) (questioning whether the government should be in business of encouraging disloyalty); Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1093 (1951) (questioning propriety of government’s role in fomenting spying by fellow citizens); see also NATAPOFF, SNITCHING, *supra* note 35, at 116–19; Richard L. Lippke, *Rewarding Cooperation: The Moral Complexities of Procuring Accomplice Testimony*, 13 NEW CRIM. L. REV. 90, 95–96 (2010). See generally Miriam Hechler Baer, *Cooperation’s Cost*, 88 WASH. U. L. REV. 903 (2011) [hereinafter Baer, *Cooperation’s Cost*]; Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 4–5 (2003); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000) [hereinafter Harris, *Testimony for Sale*]; Frank O. Bowman III, *Defending Substantial Assistance: An Old Prosecutor’s Meditation on Singleton, Sealed Case, and the Maxfield-Kramer Report*, 12 FED. SENT’G REP. 45 (1999); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995) [hereinafter Richman, *Cooperating Clients*]; Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 3 (1992).

50. See, e.g., Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 560 (1992) (raising concern that “unfettered prosecutorial discretion [in cooperation decisions] . . . may reproduce unwarranted disparity or, worse, discrimination based on race, gender, and social class”). A number of studies have suggested

full engagement with that literature is beyond the scope of this Article, but the concerns highlighted therein make it doubly important that we get informant testimony right. If we did not allow any informant testimony, many of the most culpable actors in society could not be brought to justice.⁵¹ But regardless of how one feels about the legitimacy of law enforcement's use of informants generally, false informant testimony should not be the vehicle for convicting the innocent. The task, then, in keeping with the new "accuracy imperative,"⁵² is to determine how to make informant testimony more reliable and prevent unreliable informant testimony from resulting in wrongful convictions.

In sum, informant testimony should be the next frontier of the innocence movement. The remainder of this Article proceeds as follows. Section I provides an overview of the prominent role that informants of all types now play in our criminal justice system. Section I describes generally how informants are created, used, and rewarded. It also highlights the extent to which prosecutorial informant practices are opaque, unregulated, and unchecked. Section II then explores some of the reasons why, in addition to the lack of transparency and accountability, we should worry about the reliability of informant testimony. These reasons include the various dispositional, situational, and psychological factors that make informants unreliable as witnesses and make law enforcement agents imperfect as auditors of informant testimony. Section II also explains how certain rules of

that there is racial, ethnic, and gender disparity in the allocation of the benefits of cooperation—both the decision whether to offer a cooperation agreement and the ultimate sentencing benefit received. *See, e.g.*, LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, *SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE* (1998); Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 *CRIMINOLOGY* 813, 827–28 (2009); Brian D. Johnson, Jeffery T. Ulmer & John H. Kramer, *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 *CRIMINOLOGY* 737, 760 (2008); Richard D. Hartley, Sean Maddan & Cassia C. Spohn, *Prosecutorial Discretion: An Examination of Substantial Assistance Departures in Federal Crack-Cocaine and Powder-Cocaine Cases*, 24 *JUST. Q.* 382 (2007); Ronald S. Everett & Roger A. Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 *J. QUANTITATIVE CRIMINOLOGY* 189, 206–07 (2002); Kimberly Kempf-Leonard & Lisa L. Sample, *Have Federal Sentencing Guidelines Reduced Severity? An Examination of One Circuit*, 17 *J. QUANTITATIVE CRIMINOLOGY* 111, 117–20 (2001); Darrel Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who Is Punished More Harshly?*, 65 *AM. SOC. REV.* 705, 722–24 (2000).

51. *See, e.g.*, R. Michael Cassidy, "Soft Words of Hope": Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 *NW. L. REV.* 1129, 1137 (2004) [hereinafter Cassidy, "Soft Words of Hope"] (accomplice testimony "makes possible the detection of crimes that may otherwise go unsolved, allows for the apprehension of more dangerous criminals, and minimizes the risk of acquittal that could adversely affect public safety"); John C. Jeffries, Jr. & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 *HASTINGS L.J.* 1095, 1104 (1995) [hereinafter Jeffries & Gleeson, *The Federalization of Organized Crime*] (without informant witnesses, prosecution of the "culpable and dangerous individuals" in criminal organizations would be impossible because such high-ranking individuals purposefully operate behind the scenes such that "their guilt usually cannot be proved by the testimony of victims or eyewitnesses or by forensic evidence," and they "never confess"); Richman, *Cooperating Defendants*, *supra* note 41, at 293 (without informant testimony "the most culpable players might never get prosecuted").

52. Lisa Kern Griffin, *Silence, Confessions, and the New Accuracy Imperative*, 65 *DUKE L.J.* 697, 725 (2016) (noting that the DNA exonerations of the past two decades have "given rise to a new accuracy imperative").

evidence facilitate the introduction of some particularly untrustworthy or otherwise worrisome types of evidence through informants. Finally, Section II exposes other evidence rules and trial practices that, combined with psychological phenomena, diminish the likelihood that juries will detect false informant testimony when cases go to trial. Section III provides recommendations for informant testimony reform that are responsive to the points made in Section II. Section III also suggests avenues of further research, with the goal of generating a set of evidence-based best practices for the use of informant witnesses to match those that already exist, or that are under development, for the three other main categories of suspect evidence—confessions, eyewitness identifications, and forensic science.

I. INFORMANT WITNESSES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

A. *A Taxonomy of Informant Witnesses*

For purposes of this Article, an “informant witness” is a non-expert witness who is incentivized to provide information and, if needed, testimony to law enforcement agents and prosecutors. The incentives can take a variety of forms. Some informants are paid in money or other pecuniary benefits. Others receive promises of leniency in connection with their own criminal conduct. In some cases, law enforcement agents may commit to apply for the informant either to be admitted to a witness protection program⁵³ or to be relieved from deportation,⁵⁴ programs that are not necessarily under the control of prosecutors’ offices. Benefits for third parties, such as family members, also may be offered.⁵⁵ Some informants may receive a combination of these or other benefits, such as improved conditions of confinement.⁵⁶

Informants, therefore, may be categorized roughly along one axis by the type of benefit they receive. However, informants also may be grouped along another axis: the context in which they gain the information that is of value to law enforcement

53. The Witness Relocation and Protection Act of 1974 authorizes the federal government to create new identities for cooperating witnesses and expend funds for such purposes. *See* 18 U.S.C. §§ 3521–3528 (2012).

54. The Immigration and Naturalization Act provides for so-called “S” visas for persons who have provided valuable assistance to the government and who might be in danger if deported to their home countries. *See* DENNIS G. FITZGERALD, *INFORMANTS AND UNDERCOVER INVESTIGATIONS: A PRACTICAL GUIDE TO LAW, POLICY, AND PROCEDURE* 266–67 (2007). Short of an S-visa, which holds the promise of the ability to remain in the United States indefinitely, the government historically also has sought shorter-term immigration relief for cooperators and their families, including deferred action on any deportation orders. *See id.*

55. *See* NATAPOFF, *SNITCHING*, *supra* note 35, at 22 (discussing third party cooperation, including in case of Andrew Fastow, CFO of Enron); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 730, 730 n.85 (2006) (discussing benefits provided to cooperators’ families); G. Adam Schweickert, III, Note, *Third-Party Cooperation: A Welcome Addition to Substantial Assistance Departure Jurisprudence*, 30 CONN. L. REV. 1445, 1454–64 (1998) (reviewing cases approving the concept of third-party cooperation).

56. *See* Cassidy, “*Soft Words of Hope*,” *supra* note 51, at 1142–43 (describing the range of benefits that may be offered, including favorable prison privileges).

agents. For example, the typical jailhouse informant claims to have overheard a defendant's inculpatory statement while both are in custody pending trial; it is this statement that is of value to prosecutors and agents. But the jailhouse informant usually does not assert any personal, or prior, knowledge of the offense the defendant is charged with having committed. By contrast, non-jailhouse informants—even those who already are in custody when they begin to work with law enforcement—typically offer information about crimes they observed, participated in, or otherwise learned about prior to their custody.⁵⁷ Like the categories based on benefit, these categories sometimes overlap—e.g., a single witness might provide information about crimes that preceded her custody *and* about communications she overheard while in custody.

Non-jailhouse informants can be subcategorized further based on whether they claim to have participated in the crime about which they offer information (and, therefore, may be described as “accomplice witnesses”), or instead claim to have observed the crime or learned about it secondhand prior to their custody (and, therefore, may be described as “cooperating witnesses”). Depending on where an informant falls along both of these axes and within these subcategories, some, but not all, of the analysis and reforms discussed below will be either more or less applicable.⁵⁸

B. *The Prevalence of Informant Witnesses*

Data on the use of all types of informants are scant. For example, we have no idea how many paid informants law enforcement agents utilize each year, in the various states or for the federal government. In the states, we also have no idea how many informants—jailhouse or non-jailhouse—are utilized each year in exchange for other types of incentives.⁵⁹

At the federal level, we do have *one* available indicator of informant use, at least for those informants who are compensated in sentencing leniency: the data reported each year by the United States Sentencing Commission for “substantial assistance” departures. According to that data, approximately 12.4% of criminal

57. For a similar distinction among classes of informants, see Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents*, 6 OHIO ST. J. CRIM. L. 519, 523 n.9 (2009).

58. As a point of reference, in Garrett's study of DNA exonerees' cases, nearly half of the cases involving informant testimony involved testimony from witnesses who would be categorized in this matrix as non-jailhouse accomplice witnesses. See GARRETT, *supra* note 2, at 124, 129 (finding twenty-three of fifty-two exonerees' cases with informant testimony had codefendant testimony). More than half (twenty-eight out of fifty-two exonerees' cases with informant testimony) involved jailhouse informants. See *id.* at 124. Another fifteen cases involved other types of non-jailhouse informants. See *id.*

59. One reason why the issue is so difficult to track at the state level is that, even among those states that have adopted sentencing guidelines, the majority of states do not have a specific provision addressing rewards for informant witnesses analogous to U.S. Sentencing Guidelines § 5K1.1, which authorizes downward departures for cooperation with the government. See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1208 (2005) (observing that most state sentencing guidelines regimes do not seek to regulate leniency in exchange for cooperation).

defendants who were sentenced in fiscal year 2015 received sentencing discounts for providing assistance to the government in the investigation or prosecution of crime.⁶⁰ That rate is roughly consistent with the rate of the prior seven years, which hovered between a high of 12.5% in 2009 and a low of 11.2% in 2011.⁶¹ Of course, the national rate disguises important regional differences, with some districts reporting substantial assistance departures at significantly higher or lower rates than the national average.⁶² In many of the busiest and most populous circuits, substantial assistance rates consistently are over 20%.⁶³ The use of cooperators also varies by crime category.⁶⁴ For example, defendants charged with antitrust and arson offenses had the highest rates of such downward departures in 2015.⁶⁵

60. See U.S. SENTENCING COMM'N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2015) [hereinafter USSC, 2015 SOURCEBOOK]. This figure reflects the percentage of criminal defendants as to whom a sentencing court granted a downward departure from the otherwise applicable sentencing range based on the defendants' having provided the government with "substantial assistance" in the investigation and prosecution of others, pursuant to U.S. Sentencing Guidelines § 5K1.1. However, these figures are underinclusive as to the number of informants who provide information or testimony to law enforcement agents in exchange for sentencing leniency. They do not capture informants who, after already having been sentenced for their crimes, received downward adjustments to their sentences pursuant to Federal Rule of Criminal Procedure 35 for providing useful information to the government. See FED. R. CRIM. P. 35(b) (authorizing trial court to adjust defendant's sentence on account of cooperation provided after initial sentencing). See also U.S. SENTENCING COMM'N, THE USE OF FEDERAL RULE OF CRIMINAL PROCEDURE 35(B) (2016) (reporting on use of 35(b) sentencing reductions). These figures also do not capture either those defendants who pleaded guilty pursuant to a cooperation agreement, with the expectation of providing assistance, but for whom the government did not file the required motion for a downward departure, or those defendants as to whom the government filed the motion, but the court denied it. 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, 936–37 (2009); see also MAXFIELD & KRAMER, *supra* note 50, at 9–10.

61. See U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2014); U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2013); U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2010). In the preceding five-year period (2004–2008), rates of substantial assistance departures were slightly higher, ranging between 13.5% in 2008 and 15.5% in 2004. See U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2008). *United States v. Booker* was decided in the middle of that period. 543 U.S. 220 (2005) (holding the United States Sentencing Guidelines unconstitutional to the extent that they were mandatory and providing that they would henceforth be advisory only). In the early years of the Sentencing Guidelines, substantial assistance departures started low (at approximately 3.5% in 1989) but accelerated quickly to reach just under 20% in 1994. See U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (1996). Between 1994 and 1998, such departures hovered just below 20%. See U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2003).

62. In fiscal year 2015, the Tenth Circuit had the lowest rate of cooperation among the federal circuits, at 5.9%. See USSC, 2015 SOURCEBOOK, *supra* note 60, tbl.26. The D.C. Circuit had the highest with 29.8%, followed by the Third Circuit with 27.7%, and the Second Circuit with 21.9%. See *id.* The federal district with the lowest cooperation rate was New Mexico with 1.4%, while the district with the highest rate of cooperation was Guam with 36.3%. See *id.* Overall, twenty-eight out of the ninety-four federal districts reported cooperation rates of 20% or higher. See *id.*

63. See *id.*

64. See USSC, 2015 SOURCEBOOK, *supra* note 60, tbl.27 (reporting the following as the five crime categories with the highest rates of substantial assistance departures: antitrust (66.7%); arson (35.6%); bribery (31%); national defense (27.3%); and drug trafficking (24.6%)). See *id.*

65. See *id.*

However, those charged with drug trafficking and fraud accounted for the largest number of departures in the aggregate, representing approximately 74% of all downward departures for cooperation.⁶⁶

The federal Sentencing Commission data, therefore, give us a rough sense of the percentage of federal defendants who serve as informants in exchange for sentencing leniency. And, if one assumes that most cooperators provide information about the same kinds of crimes for which they are convicted, then these data also give us a rough picture of the kinds of cases that involve cooperators—i.e., that most are drug trafficking or fraud offenses. But those data do not tell us the percentage of defendants *against* whom agents and prosecutors utilize informants at the investigation stage, prosecution stage, or both. Thus, while we may know that approximately 88% of federal criminal defendants nationally did *not* receive a downward departure for substantial assistance in 2014, we do not know what percentage of their cases involved informants. Nor do we know how often informants were used in building cases against those defendants who subsequently became informants themselves. Despite the lack of data on these points, most participants and observers of the federal criminal justice system agree that a very substantial portion of all federal cases involves informants.⁶⁷ While data again are lacking, reported cases, press accounts, and the scholarly literature (as well as the author's own experience as a federal prosecutor) suggest that the majority of informant witnesses used in federal prosecutions are non-jailhouse informants, who are compensated primarily in sentencing leniency. Similarly, reported decisions, legal scholarship, and media accounts make clear that informant witnesses, especially those who are incentivized by sentencing leniency, play a significant role in state investigations and prosecutions of all manner of offenses nationwide.⁶⁸ As with federal prosecutions, the majority of these informants appear to be

66. See *id.* (reporting that of a total of 8470 downward departures for substantial assistance in 2015, more than half (4931) were in drug trafficking cases, and another 1337 were in fraud cases). These were the two crime categories with the largest numbers of departures for substantial assistance. The next largest group was firearms cases, which accounted for 763 of substantial assistance departures. See *id.* Drug and fraud offenses have consistently accounted for the lions' share of substantial assistance departures in prior years. See U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.27 (2014) (drug and fraud offenses accounted for approximately 74% of substantial assistance departures in FY 2014); U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.27 (2013) (approximately 75% of substantial assistance departures in FY 2013 were for drug or fraud offenses).

67. See, e.g., Steven M. Cohen, *What Is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 817 (2002) [hereinafter Cohen, *What Is True?*] (“[A]t the core of almost every complex criminal case sits an accomplice (or cooperating) witness”); Ann C. Rowland, *Effective Use of Informants and Accomplice Witnesses*, 50 S.C. L. REV. 679, 697 (1999) (reporting the observation of a former Assistant United States Attorney that “[i]t is a rare federal case that does not require the use of criminal witnesses—those who have pleaded guilty to an offense and are testifying under a plea agreement, or those who are testifying under a grant of immunity”); Dennis G. Fitzgerald, *Inside the Informant File*, THE CHAMPION (May 1998) (“It is an unusual organized crime and/or drug case that does not involve informants.”).

68. To give just a few high-profile examples, the Baltimore murder trial that was the subject of the first season of the *Serial* podcast—which captivated a national audience—turned on the testimony of an informant witness

non-jailhouse informants, who help prosecutors build and make cases based on information they obtained prior to their custody.

C. *The Making of Informant Witnesses*

The following Part provides a brief overview of how an individual may become each type of informant witness. It is subject to the limitation, alluded to above and discussed at greater length below, that informant use in this country is largely unregulated and opaque, and is practiced differently depending not just on the jurisdiction but also on the particular law enforcement office involved (and sometimes on the individual prosecutor, agent, or judge).

1. *Timing*

There are a number of junctures in the life of a criminal case, at which an individual may become an informant witness. First, government agents may approach a person believed to be engaged in criminal activity—or otherwise believed to have access to suspected criminals—to seek his or her assistance in building a case without charging that person with any crime. Such an approach occurs typically when the agents hope to keep the person “on the street” and utilize him or her in an ongoing investigation before any other targets are aware of the investigation.⁶⁹ If the person is willing to cooperate, he or she may be paid in cash or with another pecuniary benefit. Alternatively, or in addition to being compensated financially, the informant who has criminal exposure may be charged

who was (at the very least) an accomplice after the fact to the murder. See *Serial*, CHI. PUBLIC RADIO (2014), <http://serialpodcast.org/season-one>. Recently, the Manhattan District Attorney’s Office called numerous former members of the now-defunct Dewey & LeBoeuf law firm as accomplice witnesses in its ultimately unsuccessful prosecution of the former leaders of that firm for fraud. See, e.g., Matthew Goldstein, *A Mystery: Who Are the Dewey Secret Seven?*, N.Y. TIMES (Mar. 19, 2014, 9:08 PM), <http://dealbook.nytimes.com/2014/03/19/a-mystery-who-are-the-dewey-secret-seven> (reporting that prosecutors had secured guilty pleas and cooperation of seven former employees of Dewey & LeBoeuf); Julie Tiedman, *Dewey Defense Lawyers Drill Down on Cooperator*, AM. LAWYER (June 11, 2015); see also Lippke, *supra* note 49, at 90 (discussing testimony of cooperating witnesses at the trial of NFL football star Michael Vick). Informants also are a regular feature of lower-profile cases. See Baer, *Cooperation’s Cost*, *supra* note 49, at 915–16 (observing that use of informants is not reserved for the prosecution of “blockbuster” cases that make it into the media). For judicial decisions recognizing the entrenched status of informant witnesses in our criminal justice system, see, e.g., *Hoffa v. United States*, 385 U.S. 293, 311 (1966) (reviewing history of government use of informant testimony); *United States v. Ford*, 99 U.S. 594 (1878); *United States v. Flemmi*, 225 F.3d 78, 86 (1st Cir. 2000) (describing informant use as “part of the warp and woof of the prosecutorial process”); *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (“No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.”).

69. For example, agents may have the person place recorded telephone calls to a target, or attend meetings with a target (such as to make a “controlled buy” of contraband) while wearing a recording device or while subject to surveillance. See Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421, 425 (2003) (describing various activities a drug courier may engage in after arrest at the behest of law enforcement agents, including making a controlled delivery of drugs, recording telephone conversations, and tape-recording meetings via a body recorder and microphone).

eventually with one or more offenses. He or she then typically will be offered the opportunity to obtain sentencing leniency pursuant to an agreement with the prosecutor.⁷⁰ Depending on the nature of the crimes involved, and the extent to which the informant's ongoing proactive cooperation is needed, that informant may remain out on bail pending sentencing or be remanded into custody.⁷¹

An individual also may be approached first by law enforcement agents about becoming an informant only *after* being charged with a crime. Such a person may then be offered the opportunity to become a paid informant or to obtain sentencing leniency (or other benefits, such as immigration relief or forbearance with respect to a third party) pursuant to an agreement with the prosecutor. In that circumstance, it still may be possible for the individual to engage in prospective cooperation if targets are not yet aware of the informant's contact with law enforcement.

Alternatively, persons in this situation provide law enforcement agents with historical information about crimes and other events that have already occurred. Jailhouse informants tend to fall into this group, in that they are already in custody facing charges when they approach law enforcement agents about statements they claim to have overheard regarding criminal conduct unrelated to their own. Many accomplice and other cooperating witnesses also fall into this group.

Typically, an informant who is compensated primarily in sentencing leniency pleads guilty rather than standing trial, although occasionally a defendant who was convicted at trial subsequently becomes an informant.⁷² Whether the informant pleads guilty or is sentenced before completing the terms of his or her agreement with the prosecutor depends on the jurisdiction and sometimes on the practice of individual judges. In federal court, the dominant practice is for informants to plead guilty pursuant to a cooperation agreement with prosecutors and to be sentenced only upon completion of his or her end of that agreement (e.g., after testifying in all trials where his or her testimony is needed).⁷³ That is not, however, the order of things everywhere in the federal system—occasionally, a witness first may agree to cooperate only after having been convicted and sentenced, or a judge may insist on sentencing the informant before his or her cooperation is complete. Federal law provides a mechanism for adjusting an informant's sentence after the fact.⁷⁴ Most

70. In some circumstances, in exchange for a person's cooperation, the prosecutor may agree not to charge him or her with any crime or to hold charges in abeyance. See Hughes, *supra* note 49, at 3. As Daniel Richman has observed, these "nonprosecution arrangements" are, in effect, "simply an extreme variant of the sentencing concessions in plea agreements." See Richman, *Cooperating Clients*, *supra* note 49, at 72 n.14.

71. See, e.g., *United States v. Brechner*, 99 F.3d 96, 98 (2d Cir. 1996) (cooperating defendant remained out on bail to engage in ongoing undercover operation); NATAPOFF, SNITCHING, *supra* note 35, at 22 (describing how informants released from custody to engage in ongoing operations are generally handled by agents who then report periodically to the prosecutor).

72. See NATAPOFF, SNITCHING, *supra* note 35, at 50.

73. See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 930 (1999) [hereinafter Yaroshefsky, *Cooperation with Federal Prosecutors*].

74. See *FED. R. CRIM. P.* 35(b) (authorizing trial court to adjust defendant's sentence on account of cooperation).

states lack such a mechanism for adjusting a sentence based on subsequent cooperation.⁷⁵

2. *The Debriefing Process*

The process for debriefing and “signing up” an informant also varies depending on the type of informant, the jurisdiction, and the law enforcement agencies involved. Informants who are paid primarily in cash commonly have no contact with prosecutors or courts.⁷⁶ Instead, they are selected, debriefed, and monitored exclusively by the law enforcement agents who are on the front line of the investigation—almost universally without the presence of defense counsel.⁷⁷

However, informants who are compensated primarily in sentencing leniency will have contact with prosecutors, generally with an agent and defense counsel present.⁷⁸ Those interactions often are subject to a written agreement setting forth the terms of the discussion before any substantive discussions commence.⁷⁹ In federal prosecutions, such a “proffer agreement” provides that any statements made by the defendant in the course of the discussions cannot be used against the defendant if he or she elects to go to trial,⁸⁰ but may be used to further the government’s investigation and to impeach the defendant should he or she go to trial and testify.⁸¹ How many sessions it takes to debrief a cooperator depends on the extent of his or her information and criminal background and the practices of the prosecutor’s office. Historically, many communications that occurred during these proffer sessions were *not* memorialized by government agents,⁸² especially preliminary sessions when prosecutors anticipated that the informant would be less

75. See Cecelia Klingele, *Changing the Sentence without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 498 (2010) (describing limited authority of state court judges to modify a sentence after it has been imposed).

76. See Daniel C. Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 789 (2003).

77. See NATAPOFF, SNITCHING, *supra* note 35, at 46.

78. See Yaroshefsky, *Cooperation with Federal Prosecutors*, *supra* note 73, at 930.

79. Other commentators have provided excellent summaries of the federal process of “proffering” a would-be cooperator. See, e.g., Morrison, *supra* note 60, at 931–33; Yaroshefsky, *Cooperation with Federal Prosecutors*, *supra* note 73, at 930; Hon. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL’Y 423, 447–55 (1997) [hereinafter Gleeson, *Supervising Criminal Investigations*]; see also NATAPOFF, SNITCHING, *supra* note 35, at 21–22.

80. See NATAPOFF, SNITCHING, *supra* note 35, at 21; Gleeson, *Supervising Criminal Investigations*, *supra* note 79, at 448–49, 448–49 n.107.

81. See *United States v. Mezzanatto*, 513 U.S. 196, 199–203, 210–11 (1995) (upholding just such a provision in a proffer agreement as a partial waiver of the evidence rule, codified in Federal Rule of Evidence 410, which ordinarily precludes admission of statements made during plea discussions); see also Christopher Slobogin, *The Story of Rule 410 and United States v. Mezzanatto: Using Plea Statements at Trial*, in EVIDENCE STORIES 103, 121–22 (Richard Lempert ed., 2006) (discussing court decisions upholding proffer agreements containing even more expansive waiver provisions).

82. See Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 851–53 (2002) (discussing variation in prosecutors’ approaches to note-taking during proffer and trial preparation sessions, noting that some prosecutors actively discourage note-taking).

than fully forthcoming. More recently, some prosecutors' offices (notably the U.S. Department of Justice) have changed that practice and now strongly recommend that notes be taken during all proffer sessions so that, among other reasons, they will be available to the defense at any trial at which the cooperator testifies.⁸³ Most prosecutors' offices and law enforcement agencies, however, do not electronically record proffer sessions with potential informants.⁸⁴

The chief aim of the debriefing process, from the prosecutor's perspective, is to determine the potential informant's utility and reliability. In some cases, where the prosecutor is already persuaded that the informant would be valuable, the prosecutor also may seek to "flip" a reluctant witness or to persuade a witness, who has been less than fully forthcoming, to come entirely clean.⁸⁵ As discussed at greater length below,⁸⁶ prosecutors generally receive little guidance or training on how to do any of these things. Nevertheless, regardless of the criteria and methods employed, whenever the prosecutor is satisfied that a potential informant meets all of her requirements, a written agreement typically ensues. This agreement, commonly referred to as a "cooperation agreement," sets forth the terms of the understanding between the prosecutor and the informant.⁸⁷

3. *Content of the Bargain*

Although prosecutors' offices frequently use standardized cooperation agreements that remain unchanged across cases handled by that office, the content of

83. See, e.g., Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Department Prosecutors (Jan. 4, 2010), <https://www.justice.gov/dag/memorandum-department-prosecutors> ("Although not required by law, generally speaking, witness interviews should be memorialized by the agent.").

84. For example, a 2014 memorandum requiring that federal officials electronically record interrogations of individuals in federal custody does not appear to apply to most proffer sessions with cooperators, since it applies only to the time-period between arrest and presentment. See Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to Assoc. Att'y Gen. et al. (May 12, 2014), <http://s3.documentcloud.org/documents/165406/recording-policy.pdf>; see also Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1131–33 (2005) (describing practices in various U.S. jurisdictions regarding the videotaping of interviews).

85. For many years, the availability of mandatory minimum sentences and mandatory sentencing guidelines were an enormous help to prosecutors in such efforts. See Cohen, *What Is True?*, *supra* note 67, at 818–19. Although the federal guidelines are no longer mandatory, statutory mandatory minimum sentences are still available in many cases, especially those involving drugs, guns, and violence. See, e.g., 21 U.S.C. § 841(b)(1)(A)–(B) (2012) (providing mandatory minimum penalties of ten and five years respectively, for controlled substance offenses depending on the type and quantity of the substance involved); 18 U.S.C. § 924(c)(1)(A) (2012) (providing for mandatory minimum sentences of five, seven, or ten years, to be served consecutively to the sentence for any other offense, for the use, brandishing, or discharge of a firearm in relation to, or in furtherance of, a crime of violence or drug trafficking offense); 18 U.S.C. § 1959(a)(1) (2012) (providing for a mandatory minimum sentence of life imprisonment for murder in aid of racketeering activity).

86. See *infra* note 206 and accompanying text.

87. See, e.g., Cassidy, "Soft Words of Hope," *supra* note 51, at 1147–48 (noting that most federal cooperation agreements are reduced to writing).

such agreements varies a great deal between prosecutors' offices.⁸⁸ Some offices require informants who are compensated primarily in sentencing leniency to plead guilty only to the offenses with which they were initially charged; others require that such informants also plead guilty to other crimes, including crimes that the informants bring to the government's attention during proffer sessions.⁸⁹

The distinguishing feature of a cooperation agreement, as contrasted with a regular plea agreement, is that, in addition to pleading guilty, the informant agrees to assist the government in its effort to investigate and prosecute others for criminal conduct, including testifying truthfully at any trials or hearings if necessary.⁹⁰ The way this commitment is characterized depends on the prosecutorial office. For example, the agreements utilized by United States Attorney's Offices require that the informant render "substantial assistance" in the prosecution of others, with "substantial assistance" being the operative phrase in the statute and sentencing guidelines authorizing sentencing departures for cooperation upon a motion by the prosecutor.⁹¹ These cooperation agreements usually make clear that, if a defendant fails to hold up his or her end of the bargain, the government will be relieved of its obligations pursuant to the agreement.⁹² However, the informant will not then be permitted to withdraw his or her guilty plea.⁹³ Cooperation agreements typically also provide that the government, in its sole discretion, will determine whether a defendant has provided substantial

88. This is true even among federal prosecutors' offices within the same federal judicial circuit. *See, e.g.*, Alan Vinegrad, *Proffer, Plea and Cooperation Agreements in the Second Circuit*, N.Y. L.J. 2 (Aug. 7, 2003), <https://www.cov.com/media/files/corporate/publications/2003/08/oid11048.pdf> ("[A]mong the six districts that comprise the Second Circuit, there are substantial differences between many of the 'form' agreements utilized by the U.S. Attorney's offices in those districts.")

89. *See, e.g.*, Joel Cohen, *Polishing a Cooperator's 'Truthfulness,'* 235 N.Y. L.J. 36 (Feb. 23, 2006) (describing the practice of some United States Attorneys Offices of requiring accomplice witnesses to plead guilty to crimes disclosed during proffer sessions); Yaroshefsky, *Cooperation with Federal Prosecutors*, *supra* note 73, at 928; Cassidy, *"Soft Words of Hope,"* *supra* note 51, at 1142–47 (describing different models of cooperation).

90. *See* Yaroshefsky, *Cooperation with Federal Prosecutors*, *supra* note 73, at 930.

91. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2014). Although the Sentencing Guidelines are no longer binding since the U.S. Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), district courts still must calculate the applicable Guidelines range, including any applicable Guidelines departures, before imposing a sentence. *See* Peugh v. United States, 133 S. Ct. 2072, 2087 (2013) ("District courts must begin their sentencing analysis with the Guidelines . . . and use them to calculate the sentencing range correctly; and those Guidelines will anchor both the district court's discretion and the appellate review process . . ."); *Rita v. United States*, 551 U.S. 338, 347–48 (2007). When a defendant would otherwise be facing a statutory mandatory minimum sentence, a motion also must be filed by the government pursuant to 18 U.S.C. § 3553(e), which authorizes a court to impose a sentence below a mandatory minimum based on the defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." *See* 18 U.S.C. § 3553(e) (2012).

92. *See* Morrison, *supra* note 60, at 931–33 (describing the "contingent nature of the bargain" struck in most cooperation agreements).

93. *See, e.g.*, *United States v. Brechner*, 99 F.3d 96, 98 (2d Cir. 1996) (quoting from a cooperation agreement which specified that the defendant would not be released from his guilty plea unless the government chose to file a motion for downward departure).

assistance or otherwise complied with the terms of the bargain.⁹⁴

In exchange for the defendant's guilty plea and assistance in the investigation and prosecution of others, the prosecutor undertakes certain commitments. Chief among these is a promise to bring the cooperator's assistance (in the federal system, if it is deemed "substantial") to the attention of the sentencing judge.⁹⁵ Other benefits that are not directly related to sentencing or charge leniency may be promised. Again, different prosecutors' offices have different policies for determining whether a cooperator has provided sufficient assistance to merit a leniency recommendation.⁹⁶ They also have different policies about the content of the recommendation. Some offices recommend a particular sentence or percentage discount; others do not.⁹⁷ Some prosecutors provide even more vague assurances of favorable treatment.⁹⁸

How informants ultimately fare in sentencing depends on many factors, including the policies and practices of the prosecutor's office, the local courthouse, and the particular sentencing judge. Also, every case is unique and depends in large part on the defendant's own criminal conduct and the extent of his or her assistance to law enforcement. Nevertheless, in some jurisdictions and before some individual judges, cooperators reliably receive significant sentencing discounts.⁹⁹ In other jurisdictions and courtrooms, the discount generally is lower.

D. *The Black Box Aspect of Informant Use*

One of the most defining features of the use of informants is the extent to which it is unregulated and insulated from internal and external review. Of course, the same is true of plea bargaining in general, which is an integral aspect of most cooperation agreements. But compared to the other suspect categories of evidence shown to be a significant factor in wrongful convictions, other evidence thought to be particularly unreliable, and other evidence-gathering techniques that implicate important personal or societal interests, the extent to which informant testimony is

94. See Yaroshesky, *Cooperation with Federal Prosecutors*, *supra* note 73, at 930; Harris, *Testimony for Sale*, *supra* note 49, at 17.

95. See Yaroshesky, *Cooperation with Federal Prosecutors*, *supra* note 73, at 930.

96. See Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994); MAXFIELD & KRAMER, *supra* note 50 (reporting differing policies among U.S. Attorneys' Offices); Simons, *supra* note 49, at 19 ("Whether assistance will be considered 'substantial' varies from district to district and even from prosecutor to prosecutor.").

97. See Nagel & Schulhofer, *supra* note 50, at 532 (finding that two federal districts in the survey did not specify a particular sentence as a reward for cooperation, but one did); see also Richman, *Cooperating Clients*, *supra* note 49, at 100 n.109 (collecting cases where the agreement specified that the government would request a particular percentage discount on the cooperator's otherwise applicable sentence).

98. See Cassidy, "Soft Words of Hope," *supra* note 51, at 1132; ROBERT M. BLOOM, *RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM* 66 (2002).

99. See, e.g., Jeffries & Gleeson, *The Federalization of Organized Crime*, *supra* note 51, at 1123 (noting that "judges do reward cooperation, sometimes very generously").

not subject to review—either before it is “gathered” (*ex ante*) or before it is introduced at trial (*ex post*)—stands out.

1. Lack of Ex Ante Judicial Review

There is no *ex ante* judicial supervision of the decision to use an informant. This stands in contrast to investigative techniques thought to raise significant liberty concerns like searches and wiretaps. The Fourth Amendment’s protection against “unreasonable searches and seizures”¹⁰⁰ requires agents in most circumstances to obtain a warrant from a neutral magistrate before searching a defendant’s residence or personal effects.¹⁰¹ A warrant may be obtained only upon a showing of probable cause to believe that a search will reveal evidence of a crime, and it must be particular in describing the locations and things to be searched.¹⁰² If granted, a warrant must be executed promptly¹⁰³ and then be returned to the court with an inventory of the evidence recovered.¹⁰⁴ Although it has been watered down considerably in recent years,¹⁰⁵ the Supreme Court’s exclusionary rule jurisprudence still provides that agents’ willful failure to comply with the warrant requirement generally will result in the exclusion of any evidence thereby obtained.¹⁰⁶

Federal and state law also makes it cumbersome for agents to install wiretaps (another form of search) or other types of recording devices to intercept private conversations.¹⁰⁷ These search methods require a court order supported by an application setting forth the basis for believing that the intercepted communications will reveal evidence of a crime.¹⁰⁸ Such applications also must demonstrate that other investigative methods have been exhausted.¹⁰⁹ Once granted, orders

100. U.S. Const. amend. IV.

101. See WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.1, 4.1(b) (5th ed. 2015).

102. See *id.* § 4.5.

103. See, e.g., *United States v. Jones*, 132 S. Ct. 945, 947 n.1 (2012) (stating that where government agents failed to install GPS device within the 10-day period authorized by warrant, the government was left to argue that no warrant was required).

104. See, e.g., FED. R. CRIM. P. 41.

105. See, e.g., Jennifer E. Laurin, *Trawling For Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 671 (2011) (describing how a “steady stream of decisions has beaten back” exclusionary rule doctrine).

106. See *Weeks v. United States*, 232 U.S. 383 (1914) (establishing exclusionary rule for searches by federal agents), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule from *Weeks* to searches by state agents).

107. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, § 802, 82 Stat. 212 (codified as amended at 18 U.S.C. §§ 2510–20 (2012)) (governing electronic interceptions federally); see also *State v. Mullens*, 650 S.E.2d 169, 178–85 (W. Va. 2007) (describing state statutory schemes).

108. See 18 U.S.C. § 2518(3)(b) (2012).

109. See *id.* § 2518(1)(c) (requiring applications to include “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous”).

permitting electronic interception require that agents “minimize” their interception, meaning they must actively monitor the recording equipment and turn it off—ceasing to listen—when the interceptee engages in personal communications.¹¹⁰ These court orders also require periodic reporting to the court about whether the intercepted communications have revealed evidence of criminal activity.¹¹¹ Although they may be extended, electronic surveillance orders are of limited duration.¹¹² Failure to comply with the statutory requirements regarding wiretaps can result in the suppression of any evidence gathered via wiretap.¹¹³ Even intermediary forms of electronic surveillance and evidence collection, such as cell-site information, and GPS devices, which were once believed to fall outside the warrant requirement, have been subjected to greater court supervision.¹¹⁴

By contrast, there are no early points of contact with the judiciary when the government seeks to utilize an informant.¹¹⁵ Later on, judicial action may be required to accept an informant’s guilty plea pursuant to a cooperation agreement, and to give the informant the full benefit of his or her bargain in the form of sentencing leniency. However, as discussed further below, these encounters typically come too late, and are too fleeting, to serve as a meaningful check on the government’s use of an informant against another defendant.

2. *Lack of Ex Post, Pretrial Judicial Review*

Once the government has enlisted the assistance of informants, there is no meaningful *ex post* review. Unlike how the government must file an inventory of

110. *See id.* § 2518(5) (requiring that interception must be “conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter”).

111. *See id.* § 2518(6).

112. *See id.* § 2518(5) (limiting interceptions to thirty days, subject to extension).

113. *See id.* § 2518(9), (10)(a).

114. *See, e.g.,* United States v. Jones, 132 S. Ct. 945, 949 (2012) (holding that the installation of a GPS device on a car in a private driveway and a subsequent month-long recording and aggregation of location information via GPS constituted a “search” under the Fourth Amendment); United States v. Davis, 754 F.3d 1205, 1217 (11th Cir. 2014) (holding that government agents must obtain a warrant before acquiring historical cell site location information), *rev’d* 785 F.3d 498 (11th Cir. 2015) (en banc); United States v. Katzin, 732 F.3d 187 (3d Cir. 2013), *rev’d* 769 F.3d 163, 163 (3d Cir. 2014) (en banc) (reversing on basis of good-faith exception to exclusionary rule panel’s decision holding that police must obtain warrant before installing GPS device on automobile); *In re* U.S. for an Order Authorizing the Release of Historical Cell-Site Info., 809 F. Supp. 2d 113, 127 (E.D.N.Y. 2011) (holding that government must obtain a warrant, upon a showing of probable cause, to collect historical cell site information for a period of at least 113 days); *see also* Riley v. California, 134 S. Ct. 2473, 2495 (2014) (holding that police generally must obtain warrant before searching data in cell phone); Jason M. Weinstein, William L. Drake & Nicholas P. Silverman, *Privacy vs. Public Safety: Prosecuting and Defending Criminal Cases in the Post-Snowden Era*, 52 AM. CRIM. L. REV. 729, 738–43 (2015) (describing current debate).

115. This lack of judicial supervision of testimony by informants is attributable to decisions by the Supreme Court holding that the Fourth Amendment generally does not protect against disclosure of information willingly disclosed to a third party—even when that third party turns out to be an informant. *See, e.g.,* United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); *see also* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 567–70 (2009) (reviewing the history of the third-party doctrine and government informants).

items seized in a search,¹¹⁶ there is no requirement that the government apprise a court of information obtained from an informant. Nor is there any requirement that prosecutors or agents disclose such information in the aggregate. This stands in contrast to the statutory requirement that federal and state courts and prosecutors tally and report, on an annual basis to the Administrative Office of the U.S. Courts, their total use of wiretaps in the prior two years and the results thereof, including the number of arrests attributable to the wiretaps.¹¹⁷

At the retail level, those who have the greatest incentive to challenge the reliability of informants—i.e., criminal defendants against whom informants have been or will be used—rarely have the opportunity to do so before trial. Partly, that is because of disclosure rules, which allow prosecutors to withhold information about informants until trial—and sometimes forever. Unlike evidence obtained pursuant to a search warrant, wiretap,¹¹⁸ expert testimony, eyewitness identifications, or defendant confessions to the police, the identities or prior statements of witnesses generally need not be disclosed until the witnesses testify at a trial.¹¹⁹ Even then, the content of prosecutors' disclosure obligations with respect to informants are notoriously vague.¹²⁰ In general, prosecutors need not ever disclose the existence or testimony of an informant whose information was used during an investigation or in the grand jury, if that informant is not expected to testify at the defendant's trial.¹²¹ As a practical matter, some defendants may discern the identities of those informants who have been used against them, either because some of their original co-defendants have ceased to appear in the case, or because of details provided in a complaint, search warrant application, or notice provided pursuant to Federal Rule of Evidence 404(b) and similar state evidence rules.¹²²

116. See, e.g., FED. R. CRIM. P. 41(f)(1)(B)–(D).

117. See 18 U.S.C. § 2519(2) (2012). The Administrative Office of the U.S. Courts, in turn, provides this information to Congress. It also makes the aggregate information available to the public on its website. See ADMIN. OFFICE OF THE U.S. COURTS, WIRETAP REPORTS, <http://www.uscourts.gov/statistics-reports/analysis-reports/wiretap-reports> (last visited Mar. 17, 2016).

118. See 18 U.S.C. § 2518(8)(d) (providing that notice generally must be provided to a party whose communications were intercepted not less than 90 days after the wiretap was terminated); *id.* § 2518(9) (providing that the contents of any intercepted communications generally may not be introduced in a trial unless the party against whom they are offered was provided with the court order and accompanying application under which the interception was authorized or approved).

119. See, e.g., 18 U.S.C. § 3500; FED. R. CRIM. P. 16(a)(1)–(2) (listing matters that must be disclosed to the defense upon request). In most state jurisdictions, criminal defendants face similar “information deficits.” See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2493–96 (2004).

120. See, e.g., Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1150 (2005) (noting that “[t]here is ample room for mischief” in the *Brady* and *Giglio* standards and that “the discovery of violations often turns on extraordinary defense efforts and dumb luck”).

121. See, e.g., *McCray v. Illinois*, 386 U.S. 300, 305 (1967) (holding that due process does not require disclosure of the identity of the informant used to obtain warrant).

122. See *infra* Part II.B.2.

However, the government is not required to confirm the identities of informants unless and until they testify at trial.

But the problem is not simply one of a lack of knowledge based on a lack of disclosure. Even when defendants learn the identities of informant witnesses, there is rarely a cognizable motion that they could file to exclude the witnesses' testimony at trial.¹²³ That stands in stark contrast to the status quo with respect to the other suspect categories of evidence shown to be leading factors in wrongful convictions—i.e., confessions, eyewitness identifications, and forensic testimony—and to other forms of evidence thought to raise heightened concerns about reliability, such as certain types of hearsay.¹²⁴

For informants compensated with sentence leniency, the guilty plea and sentence provide opportunities for judicial review of reliability. But as a practical matter, these events (especially sentencing) often occur after an informant testifies at a trial against another defendant—and, thus, come too late to exclude the unreliable informant testimony at the trial. Even when they predate the informant's testimony, these events are not set up to provide a court with a well-developed basis on which to consider the reliability of an informant. For example, at a guilty plea, the judicial inquiry is quite limited, with the court inquiring only into whether the plea is entered knowingly and voluntarily, as with other pleas. There is also no party before the court in a position adversarial to the government.

3. *Anemic Corroboration Requirements*

Once a trial is under way, there are insufficient judicial checks to prevent false informant testimony from going to the jury. Some states have adopted corroboration rules to the effect that uncorroborated accomplice testimony is not sufficient to support a conviction as a matter of law.¹²⁵ The federal courts have not adopted any such rule, and none is required by federal statute.¹²⁶ In theory, such rules enable judges to direct an acquittal when the requisite corroboration has not been established. However, in reality, such corroboration rules serve as a weak constraint. Although they vary, such statutes typically require only some additional

123. One exception would be a motion pursuant to *Massiah v. United States*, 377 U.S. 201 (1964), to exclude testimony on the grounds that the government deliberately elicited statements from a represented defendant in the absence of counsel. Such motions are most likely to be available in the case of jailhouse informants.

124. See *infra* Part III.B.1 (discussing hearsay exceptions that require reliability inquiry).

125. See Saverda, *supra* note 37, at 791 n.40 (collecting statutes in sixteen states requiring corroboration of accomplice testimony to convict).

126. See *id.* at 793–95 (discussing federal courts' approach); Gleeson, *Supervising Criminal Investigations*, *supra* note 79, at 425. In *Caminetti v. United States*, the Supreme Court held that that “there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them,” although it did state that it was “the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence.” 242 U.S. 470, 495 (1917).

evidence “tending” to connect the defendant to the crime.¹²⁷ As applied, the evidence that is deemed sufficient to provide the requisite corroboration can be minimal and frequently suffers from indicia of unreliability. For example, a number of the DNA exoneration cases involved informant testimony that was corroborated by another type of suspect evidence, such as a false confession,¹²⁸ eyewitness misidentification,¹²⁹ or faulty forensic science.¹³⁰ In other cases, the corroboration came from another informant¹³¹ or consisted of hearsay that was particularly suspect—such as a coconspirator statement or a defendant’s “adoption by silence” of an inculpatory statement.¹³² Thus, in practice, most states’ corroboration rules have been insufficient to prevent wrongful convictions.

4. No Other External Review

Looking beyond the role that may be played by state and federal judges, there are no other sources of external review of informants. The public at large, crime victims, the media, and even interested advocacy groups cannot provide a meaningful check on informant use because so little information is publicly available. As noted *supra* Part I.D.2, there are no general public reporting requirements for the use of informants. There appears to be no tracking of

127. See, e.g., CAL. PENAL CODE § 1111 (West 2016); N.Y. CRIM. PROC. LAW § 60.22 (McKinney 2016); see also Cassidy, “Soft Words of Hope,” *supra* note 51, at 1164–66 (discussing the insufficiency of corroboration rules to prevent false convictions attributable to informant lies).

128. For example, the case against Derek Tice, who was convicted of rape and murder in Virginia as part of the “Norfolk Four” case that garnered national attention when retired FBI agents and judges openly championed the defendants’ release, consisted largely of the testimony of an alleged accomplice, corroborated by Tice’s own confession. DNA evidence later showed that another man committed the crime and Tice was released. See Jeanne A. Burke & Scott Mertz, *A Uniquely Dispositive Power: How Postconviction DNA Testing Impeached Accomplice Testimony, Implicated a Lone Killer, and Exonerated the Beatrice Six*, 42 CREIGHTON L. REV. 549, 570–73 (2009) (recounting case of Norfolk Four); Ian Urbina, *Virginia Governor Sets Free 3 Sailors Convicted in Rape and Murder*, N.Y. TIMES (Aug. 6, 2009), <http://www.nytimes.com/2009/08/07/us/07norfolk.html>.

129. For example, the evidence against David Gray, who was convicted of rape in Illinois, consisted almost exclusively of the victim’s identification and the testimony of a jailhouse informant to whom Gray allegedly made a detailed confession to the crime. Gray was later exonerated by DNA evidence. See GARRETT, *supra* note 2, at 118–23.

130. For example, the evidence against Larry Ollins, who was convicted of rape in Illinois, centered around the testimony of an alleged accomplice, which was corroborated by testimony by a forensic expert who was subsequently discredited. Both Ollins and the accomplice were later exonerated through DNA evidence. See Steve Mills & Maurice Possley, *DNA Again Excludes 4 in Murder of Roscetti*, CHI. TRIB. (Nov. 22, 2001), <http://www.chicagotribune.com/news/watchdog/chi-011122roscetti-story.html>; see also Larry Ollins, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment/larry-ollins> (last visited Mar. 17, 2016).

131. For example, the evidence against Joseph White, the sole defendant who went to trial in the Nebraska “Beatrice Six” case consisted almost exclusively of the testimony of three individuals who were alleged accomplices and pleaded guilty in exchange for reduced sentences. All three of those individuals, and White, were later exonerated by DNA evidence. See GARRETT, *supra* note 2, at 26–27.

132. For example, Arthur Mumphrey was convicted of rape in Texas, based mainly on the testimony of an accomplice whose testimony regarding Mumphrey’s involvement was corroborated largely by Mumphrey’s alleged adoption by silence of a prior account of the crime by the accomplice. Mumphrey was later exonerated by DNA evidence. See *Mumphrey v. State*, 774 S.W.2d 75 (Tex. App. 1989).

cooperation at the state level.¹³³ At the federal level, the data reported by individual United States Attorneys' offices allow the U.S. Sentencing Commission to track aggregate cooperation rates by United States Attorneys' offices and by type of offense. These data do not, however, provide enough information for any in-depth analysis of what criteria individual prosecutors or offices are using to determine whether to offer a cooperation agreement (including the criteria used to determine an informant's reliability), nor of what constitutes sufficient cooperation to warrant a motion for leniency.¹³⁴ Prosecutors also do not disclose any number of other variables that would allow for more searching external evaluation of the value of prosecutors' use of informants, such as the extent to which it contributed to an identifiable number of arrests or otherwise prevented crime. This stands in contrast, for example, to material regarding wiretaps, which prosecutors are required to submit to the Administrative Office of the U.S. Courts.¹³⁵

At the local level, the fact that a particular individual has served as an informant rarely will become public, since that fact typically becomes public only when that informant testifies at a trial. But few criminal defendants go to trial. In theory, the public could learn that a particular individual is working as an informant when that individual enters his or her guilty plea, if it is subject to a cooperation agreement, or at sentencing. But cooperation agreements and government motions for sentencing leniency often are not placed into the publicly available court file,¹³⁶ and courts frequently do not reference them as such in public proceedings. And, although guilty pleas and sentencing are presumptively open to the public, courts frequently seal them for cooperators on the grounds that the cooperators' safety or the secrecy of ongoing law enforcement investigations otherwise would be jeopardized.¹³⁷ For the same reasons, the victims of an informant's crimes, who have a

133. See Frase, *supra* note 59, at 1208.

134. For example, the U.S. Sentencing Commission does not collect the internal memoranda that prosecutors write to obtain supervisory approval of a cooperation agreement, which would provide the clearest statement of the reasons for signing up a cooperator, nor does it collect the letters that prosecutors file pursuant to U.S. Sentencing Guidelines Manual § 5K1.1, setting forth the extent of the cooperator's assistance.

135. See 18 U.S.C. § 2519(2) (2012).

136. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL CONFERENCE POLICY ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (2008), <http://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files> (providing that sealed documents, such as motions for downward departures for substantial assistance and plea agreements indicating cooperation, should not be included in the public case file or made available to the public at the courthouse or through remote electronic access); see also Morrison, *supra* note 60, at 942–43 (discussing devices that various courts have adopted to camouflage cooperation agreements, where the district generally includes plea agreements in the publicly available court file); Hon. Steven Merryday et al., *Panel Four: Cooperation and Plea Agreements—Professors & Practitioners*, 79 FORDHAM L. REV. 65, 79–80 (2010) (same).

137. See, e.g., *United States v. Haller*, 837 F.2d 84, 88 (2d Cir. 1988) (sealing portion of plea agreement detailing defendant's cooperation to protect defendant and ongoing investigation); *United States v. Ketner*, 566 F. Supp. 2d 568 (W.D. Tex. 2008) (sealing portion of plea minutes and cooperation agreements to protect cooperating defendants from intimidation and ongoing government investigations).

statutory right to be notified of all significant judicial events in their cases,¹³⁸ often are not notified of an informant's guilty plea or sentencing. Thus, there is little opportunity for members of the public, even those most directly affected by an informant's crimes, to scrutinize the government's use of informants.¹³⁹

Finally, defense lawyers for informants, who might be thought to provide an independent check on unreliable informant testimony, in fact do not. As some commentators have bemoaned, defense lawyers are effectively sidelined in the cooperation process.¹⁴⁰ Even those who stay involved often admit that they generally will have no basis for determining with any certainty whether their clients have told the truth. Moreover, defense lawyers for informants have reason to avoid too much investigation: should a lawyer become convinced that his or her client has *not* been truthful, that lawyer would be faced with an uncomfortable ethical dilemma,¹⁴¹ torn between his or her duties as an officer of the court and his or her duty of loyalty to the client.

5. *Minimal Internal Regulation*

The lack of external review of informants would seem to make it all the more important that prosecutors' offices police themselves carefully. But self-regulation of cooperation within prosecutors' offices is slim. *Ex ante* guidelines about the use of informant witnesses are generally non-existent; where they do exist, they are often vague¹⁴² and always unenforceable. For example, although the FBI has internal rules about the use of paid informants, it does not have guidelines for the use of other types of informant witnesses.¹⁴³ Prosecutorial "front offices" also generally do not exercise much supervision over retail decisions regarding

138. See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 150 (2012) ("While most states have some form of victims' rights law on the books, enforcement is uneven and many victims fail to receive notice."); see also Paul G. Cassell et al., *Crime Victims' Rights During Criminal Investigations?: Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 61 (2014) ("In recent years, federal and state enactments have given crime victims extensive rights to participate in criminal cases.").

139. Sentencing proceedings for cooperators are more likely than guilty pleas to be conducted in open court, but courts have become adept at alluding only in the barest way to the defendant's cooperation. To understand the extent of a defendant's cooperation, an observer would need access to the parties' sentencing submissions, including the government's motion for a downward departure. However, these materials typically are filed under seal.

140. See, e.g., Weinstein, *supra* note 49, at 618–21 ("[C]ooperation strips away what little is left of the adversarial process . . . by simply cutting the defense lawyer out of the process and putting the prosecutor and the defendant on the same team.").

141. See generally Bruce A. Green, *Ethically Representing a Lying Cooperator: Disclosure as the Nuclear Deterrent*, 7 OHIO ST. J. CRIM. L. 639 (2010); Ellen Yaroshesky, *My Client, the Cooperator, Lied: Now What?*, 7 OHIO ST. J. CRIM. L. 659 (2010).

142. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.600 (last updated Dec. 2014), <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.600> (discussing considerations to be weighed in determining whether to pursue cooperation).

143. See Cassidy, "*Soft Words of Hope*," *supra* note 51, at 1134 n.25; U.S. DEP'T OF JUSTICE, *THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS* (2001), <https://www.justice.gov/ag/attorney-general-renos-confidential-informant-guidelines-january-8-2001> (providing that the guidelines do not

cooperators.¹⁴⁴

In contrast, other prosecutorial decisions are subject to more layers of administrative review. For example, prior to applying to the court for a wiretap, federal prosecutors must seek the approval of a special office within the Department of Justice in Washington, D.C., which oversees all wiretap applications filed by the Department's line prosecutors around the country.¹⁴⁵ Similar centralized structures exist for the approval of other prosecutorial decisions that the Department of Justice considers similarly weighty, like the issuance of a subpoena to a member of the media, an application to search a lawyer's office, a request for extradition, or the filing of charges pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO") or of any capital charges.¹⁴⁶

Requests that a court issue an immunity order also are subject to prior approval within the central office of the Department of Justice.¹⁴⁷ In contrast, the decision to utilize an informant generally requires no centralized approval.¹⁴⁸ Although there are good reasons to defer to the judgment of the line prosecutors who interact most closely with an informant, the lack of extensive internal scrutiny means there are fewer opportunities to catch error. It also can invite sloppiness by the prosecutor, who need not justify his or her decision, and who knows that his or her assessment of the cooperator's reliability will not be subject to multiple levels of scrutiny.¹⁴⁹

apply to witnesses who are compensated in sentencing leniency subject to an agreement with a prosecutor's office).

144. See Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 80–81 (2008) (discussing the lack of centralization and guidance within the Department of Justice regarding cooperation); H. Richard Uviller, *No Sauce for the Gander: Valuable Consideration for Helpful Testimony from Tainted Witnesses in Criminal Cases*, 23 CARDOZO L. REV. 771, 789 (2002) (observing that in the federal system, although cooperation is "nominally under the supervision of the United States Attorney who signs off on it, in daily operation the decision results largely from individual discretion," with the exception of leniency of tax prosecutions, which require approval by the Department of Justice's tax division).

145. See 18 U.S.C. § 2516(1) (2012) (designating high-ranking officials within the Department of Justice who may authorize an application to a federal judge for a wiretap); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-7.100 (last updated July 2012), <https://www.justice.gov/usam/usam-9-7000-electronic-surveillance#9-7.100> (explaining procedures required to obtain a wiretap, including submission to the "limited number of high-level Justice Department officials" authorized to review applications).

146. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 407–28 (1999) (providing an account of DOJ procedures with respect to the filing of federal capital charges).

147. See 18 U.S.C. § 6003(b) (requiring approval of requests for judicial immunity orders by the Attorney General of the United States or certain high-ranking designees); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-23.130, <https://www.justice.gov/usam/usam-9-23000-witness-immunity#9-23.130> (last visited May 9, 2016) (describing authorized officials).

148. See *supra* notes 144–45 and sources cited therein.

149. See Andrew E. Taslitz, *The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press*, 62 HASTINGS L.J. 1285, 1318–19 (2011) ("Ample social science suggests that the mere need to justify your actions to others acts as a restraint on inaccurate and excessive behavior.").

E. Conclusion

In sum, the use of informant witnesses is pervasive in our criminal justice system but is highly variable. Prosecutors enjoy wide latitude in their choice of informants and in how they debrief and reward such witnesses. These choices—and the actual testimony of informants—are subject to little external or internal review. As a consequence, much informant testimony is presented to juries (or may influence a defendant's decision to plead guilty) without having been evaluated by anyone other than the prosecutor and the agents involved in the case. For the reasons set forth below, this scenario is particularly troubling in light of the dangers inherent in informant testimony. It is disturbing also given the limitations on the abilities of both prosecutors and juries to detect false informant testimony.

II. THE SPECIAL RISKS POSED BY INFORMANT WITNESS TESTIMONY

A. Informants Are Inherently Untrustworthy

Although informants' motivations in some cases may be complex,¹⁵⁰ the very nature of the cooperation transaction requires a presumption that an informant's primary incentive is to obtain a benefit¹⁵¹ and that this incentive creates a strong bias that colors his or her testimony.¹⁵² An informant's prior criminal history and antisocial acts also may indicate a particular facility for deception or disregard for legal authority.¹⁵³

Informant lies come in several forms. A jailhouse informant may fabricate a fellow prisoner's admission. Accomplices may admit to participating in a crime

150. See, e.g., Cassidy, "Soft Words of Hope," *supra* note 51, at 1135–36 (noting the variety of factors that may influence the decision to cooperate, including "the thrill of playing detective"). Some informants may be motivated not only by the promise of leniency or other benefit, but also at least in part because they feel remorse and seek atonement. See Simons, *supra* note 49, at 43 (arguing that, for some witnesses, cooperation against others is in part a vehicle for atonement). Others may seek revenge against associates by whom they feel wronged, or view cooperation against higher-ups in an organization as an opportunity "to reorder a previously hierarchical relationship." Cassidy, "Soft Words of Hope," *supra* note 51, at 1136. However, in many instances, informants must overcome strong personal ties of loyalty to friends and associates against whom they cooperate, broad cultural norms against "snitching," and fears of retaliation or deportation, before deciding to cooperate.

151. Because of the quid-pro-quo nature of the cooperation transaction, a panel of the Tenth Circuit at one time held that cooperation agreements violated the federal law against bribing witnesses. See *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *vacated* 165 F.3d 1297 (10th Cir. 1999) (en banc).

152. See, e.g., Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 107–08 (2006) [hereinafter Natapoff, *Beyond Unreliable*] (stating that informants are inherently unreliable because of their strong motivations to lie). Psychological experiments also support the connection between incentives and false reports of another's guilt. See, e.g., Jessica K. Swanner et al., *Snitching, Lies, and Computer Crashes: An Experimental Investigation of Secondary Confessions*, 34 L. & HUM. BEHAV. 53 (2009).

153. See Cassidy, "Soft Words of Hope," *supra* note 51, at 1141, 1141 n.66 (the "psychological profile of accomplice witnesses suggests that they may be more likely than ordinary witnesses to perjure themselves" because, by their own admission, most have committed crimes, thereby demonstrating "a tendency to disregard legal norms").

but minimize their own involvement while inflating the roles played by others. Some may admit guilt but fabricate the involvement of others.¹⁵⁴ Others may lie about the identity of participants out of loyalty or fear or to conform their stories to the narratives law enforcement already constructed.

Most surprisingly to many observers, some informants may admit to crimes of which they themselves are innocent because they believe that law enforcement agents will never believe them and, thus, that admitting to their involvement is their only hope for leniency, whether they are guilty of some other crime or not.¹⁵⁵ Indeed, the majority of accomplice informants who testified in the wrongful conviction cases included in Garrett's study were shown to be innocent themselves through DNA testing.¹⁵⁶ In telling the story of the crimes of which they themselves are innocent, these false accomplices may draw upon facts that law enforcement agents have disclosed in the course of meetings or in charging documents.¹⁵⁷ Some also may have learned details about the crime from their criminal associates who actually committed the crime, or from other sources.

The prolonged context in which certain types of informants—particularly accomplices—interact with law enforcement agents exacerbates the risk of false testimony. That is because, in the course of attempting to evaluate a witness's credibility and utility and then to prepare for trial, even prosecutors and agents acting in good faith may disclose details of the crime and the names of those suspected of having participated.¹⁵⁸ Of course, such contamination also can occur with respect to jailhouse informants. But a jailhouse informant is likely to spend far less time with law enforcement agents than, for example, an accomplice who is on the path toward cooperation. If a jailhouse informant initially offers information that is contradicted by the evidence, law enforcement agents (except for those

154. See, e.g., GARRETT, *supra* note 2, at 139 (in three of the trials examined, the codefendants who testified were guilty but “successfully shifted some of the blame to an innocent man”). For a number of reasons, partially true accomplice testimony is likely more common than accomplice testimony that is wholly true or false. See generally Yaroshesky, *Cooperation with Federal Prosecutors*, *supra* note 73 (discussing phenomenon of “embellishment”).

155. For example, Steven Cohen, a former gangs prosecutor in the U.S. Attorney's Office for the Southern District of New York, has described how two witnesses with extensive criminal records falsely admitted to having participated in crimes in order to obtain cooperation agreements. See Cohen, *What Is True?*, *supra* note 67, at 823–24. When the lies were discovered and the witnesses confronted, one explained that he figured that the prosecutors would never believe he was innocent of that crime—which others had committed—so he might as well admit to his participation in it. See *id.* The other believed he did not have enough information to offer, so he fabricated several crimes outright. See *id.* at 824.

156. See GARRETT, *supra* note 2, at 140 (“[S]eventeen exonerees who confessed and testified against codefendants were subsequently exonerated by DNA testing.”).

157. See generally Gershman, *supra* note 82 (describing the various ways that prosecutors and investigating agents may influence a cooperator's testimony).

158. See Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2577 (2008) (“[S]tudies on the practices of law enforcement interrogation show that evidence is frequently disclosed to defendants.”). Some of this information also may be disclosed through charging instruments and other public documents or filings in the case available to the accomplice witness.

deliberately engaged in malfeasance) are unlikely to schedule further meetings to allow the informant to change his or her story. Conversely, if a jailhouse informant is deemed credible, his or her testimony is likely to be quite circumscribed and, therefore, to require few meetings.

By contrast, an accomplice who is on the path to cooperation will often be provided multiple opportunities to change his or her story, on the view that most cooperators do not provide the full truth at the outset.¹⁵⁹ This is true particularly in cases where the evidence against a particular defendant is weak, and the accomplice's anticipated testimony, therefore, is deemed most valuable to the prosecution's case.¹⁶⁰ The frequency of the meetings that can follow—and the types of questions typically asked during such meetings—increase the chances that contamination will occur.

Once it occurs, such contamination is not likely to be detected. This is due largely to the operation of tunnel vision,¹⁶¹ which kicks in when the witness' account generally meshes with a pre-existing view of a defendant's guilt. Once they have made a threshold decision that a witness is telling the truth about a defendant's guilt, agents and prosecutors may let go their usual skepticism and stop investigating the case to look for contrary facts.¹⁶² In cases with weak evidence, the situational incentives of law enforcement agents and accomplices align to create the greatest opportunity for false testimony.¹⁶³ Moreover, the meetings that can follow once an accomplice is cooperating—to prepare further charges or for trial—can make detection of the false testimony more difficult down the line. Some studies suggest that prepared lies are “somewhat harder to detect than unprepared” lies.¹⁶⁴ Alternatively, in the course of repeating the account that the prosecution seeks, the accomplice cognitively may come to adopt it as true.¹⁶⁵

159. See Yaroshefsky, *Cooperation with Federal Prosecutors*, *supra* note 73, at 932 (stating most federal prosecutors who responded to the survey indicated that they generally believed that cooperators minimized their own involvement in crimes and the number of crimes in which they participated, but rarely falsely implicated others).

160. See, e.g., Daniel C. Richman, *Cooperating Defendants*, *supra* note 41, at 293 (noting that prosecutors will procure accomplice testimony when they are unable to get evidence from other sources, but that this very situation makes it difficult to assess reliability).

161. See Gould et al., *supra* note 8, at 504 (defining tunnel vision as “the social, organizational, and psychological tendencies that lead actors in the criminal justice system to focus on a suspect, select and filter the evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt”) (internal quotation marks and citations omitted).

162. See Yaroshefsky, *Cooperation with Federal Prosecutors*, *supra* note 73, at 946.

163. See Gould et al., *supra* note 8, at 502 (finding that false testimony by witnesses, including jailhouse informants, is particularly dangerous in cases with weak evidence because those are precisely the cases when the testimony is likely to be “specifically elicited by the prosecution” and when “the state may not be inclined to rigorously vet it in the same way as it would for other types of evidence”).

164. See Minzner, *supra* note 158, at 2566, 2566 n.49 (citing Charles F. Bond Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERS. & SOC. PSYCHOL. REV. 214, 226 (2006)).

165. See Alan S. Brown et al., *Borrowing Personal Memories*, 29 APPLIED COGNITIVE PSYCHOL. 471, 476 (2015) (“As one repeats a particular story, each telling enhances its familiarity, making it feel more like a personal experience.”).

If that happens, it is unlikely that the falsity will be exposed in cross-examination or that the witness will recant—increasing the odds of a wrongful conviction that never will be corrected.

B. Informant Witnesses Frequently Offer Troubling Categories of Evidence

In addition to being inherently untrustworthy because of the above-described dispositional and situational factors, informant witnesses frequently offer some categories of evidence that are particularly troubling as a substantive matter.

1. Defendant and Coconspirator Admissions

The first such category consists of oral communications by a defendant or a coconspirator. Although jailhouse informants are often associated with defendant admissions, accomplice witnesses frequently testify regarding inculpatory statements made by defendants.¹⁶⁶ Some of these admissions are alleged to have occurred months or years before, long before the defendant was in custody (in contrast to the typical confession related by a jailhouse informant). Testimony about such admissions is suspect not only because of the accomplice witness' bias and the opportunity for contamination, as discussed *supra* Part II.A, but also because of the nature of the testimony itself, which relies on the cooperator's memory of what the defendant said.¹⁶⁷ Experimental research has demonstrated that all human memory is far more fragile than previously was thought, providing cause for skepticism about all witness testimony about past events.¹⁶⁸ But studies have shown that memory of oral communications is particularly bad.¹⁶⁹ In addition, conversational memory is "extremely malleable" and "strongly influenced by motivational biases."¹⁷⁰ This suggests that we should be particularly concerned about informant testimony, developed during proffer sessions with

166. See GARRETT, *supra* note 2, at 124 (observing that in most of the DNA exoneration cases in his study that involved some kind of informant—i.e., jailhouse informant, codefendants, or other types of cooperating witnesses—"the informant reported incriminating statements allegedly made by the defendant"). Out-of-court statements by a defendant, offered by the prosecution, have long been admissible as the statements of a party opponent under common law principles and are defined as "not hearsay" under the Federal Rules of Evidence and most state evidence codes. See FED. R. EVID. 801(d)(2)(A).

167. See Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Payer, *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 14 (2007). As Steven Duke wrote in 2007 after comprehensively surveying the scientific literature on human memory for conversation, conversational memory is "astoundingly poor." See *id.*

168. See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 56 (2012) (discussing general weaknesses in human memory); *id.* at 58 ("[P]eople are generally incapable of recognizing mistakes in their memory, and are likely to experience incorrect memories as being true."). Simon said, further, that "research shows that not unlike eyewitness identification, event memory ranges widely from flatly inaccurate to highly accurate, depending on [a] myriad of incident and system factors." *Id.* at 92. For further discussion on the danger of memory contamination through investigation techniques, see *id.* at 94–116.

169. See Duke et al., *supra* note 167, at 14.

170. *Id.*

government agents, about the specifics of what a defendant said—where meaning and guilt may turn on the precise words used.¹⁷¹ Jurors, however, tend to be unaware of these weaknesses of human memory of conversation.¹⁷²

Accomplice witnesses frequently testify not only about a defendant's own statements, but also about those made by others. Although meeting the classic definition of hearsay, these statements frequently are admitted for the truth of any matter asserted therein under the hearsay exception for coconspirator statements.¹⁷³ Woven into the cooperator's testimony describing the background of an organization or events transpiring after a crime was completed, such statements can be highly incriminating, including attributing past criminal acts to a defendant. This hearsay exception often provides the basis for admitting statements recorded on wiretaps or consensual recordings, about which cooperators offer explanatory testimony.¹⁷⁴ However, this exception is also frequently used to admit cooperator testimony about statements that were never recorded, the making of which cannot be independently verified.¹⁷⁵ Such coconspirator statements raise the same concerns based on the weakness of human memory that unrecorded defendant

171. See *id.* (noting that people remember the “gist” of conversations much better than the specific words used).

172. See *id.* at 35–37 (describing some of the reasons why jurors have an inaccurate perception of the weaknesses of conversational memory, and how hard it is to discredit a witness's testimony regarding a conversation).

173. See FED. R. EVID. 801(d)(2)(E). The exception requires a showing that the person who made the statement was a member of a conspiracy that included the defendant, that the statement was made during the existence of the conspiracy, and that it was intended to further the aims of conspiracy. See *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). A court may consider the statement itself in deciding whether these criteria are met, but, per amendment to the Rule following *Bourjaily*, some additional independent evidence is required to establish the existence of the conspiracy, the declarant's participation, and the defendant's participation. See FED. R. EVID. 801(d)(2) (providing that an alleged statement “does not by itself establish . . . the existence of the conspiracy or [the declarant's] participation in it”). The coconspirator exception can be invoked even when the government has not charged the defendant with conspiracy. See *Dutton v. Evans*, 400 U.S. 74, 83 (1970); *United States v. DiRosa*, 761 F.3d 144, 155 (1st Cir. 2014) (“[T]he applicability of the coconspirator exception is not conditioned on a conspiracy being charged in the indictment”); *United States v. Stratton*, 779 F.2d 820, 829 (2d Cir. 1985) (same). For more on the history of the coconspirator exception to the hearsay rule, see Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323 (1984). For a discussion of recent attempts by prosecutors in some cases to expand the exception to cover “coventurers” in lawful activities, see Richard D. Friedman, *The Mold that Shapes Hearsay Law*, 66 FLA. L. REV. 433, 463 (2014); Ben Trachtenberg, *Coconspirators, “Coventurers,” and the Exception Swallowing the Hearsay Rule*, 61 HASTINGS L.J. 581 (2010).

174. See *infra* Part II.D.3.

175. For example, in the Ted Stevens case, one of the government's critical pieces of evidence was testimony by the main accomplice witness regarding hearsay statements by another individual to the effect that Stevens was only “covering his ass” when he sent a note requesting a bill for work performed on his house, and did not actually intend to pay for the work. See Robert M. Cary, *Exculpatory Evidence: A Call for Reform After the Unlawful Prosecution of Senator Ted Stevens*, 36 LITIGATION 34, 34 (2010); see also Transcript of Proceedings—Day 8—Morning Session at 52, *United States v. Stevens*, No. 1:08-cr-231 (D.D.C. Oct. 1, 2008), ECF No. 334; see also *United States v. Aviles-Colon*, 536 F.3d 1, 14–17 (1st Cir. 2008) (recounting numerous unrecorded coconspirator statements that were admitted under coconspirator exception to hearsay rule); *United States v. Roldan-Zapata*, 916 F.2d 795, 803–04 (2d Cir. 1990) (same).

admissions do.¹⁷⁶

Unrecorded coconspirator statements, however, are even more troubling than defendant admissions because it is even harder for a defendant to challenge them. Generally, a defendant will know whether he or she made an admission and, if so, what he or she meant by it. It may be an imperfect solution, but the defendant could take the witness stand to deny or explain the statement—or, more likely, to suggest to his or her attorney lines of cross-examination for the informant who testified to the statement. But coconspirator statements are admissible even if a defendant was not present when they were allegedly made, sometimes even without identifying the coconspirator who made the statement.¹⁷⁷ This makes the defendant's opportunity to challenge the statement much more limited. For this reason, among others, the rationale for the exception long has been contested.¹⁷⁸ Historically, the coconspirator exception was justified on the basis that coconspirator statements, as a species of agent admissions, should be admitted on the grounds of adversarial fairness.¹⁷⁹ The more modern (and honest) trend has been to justify the exception by an appeal to necessity.¹⁸⁰

Besides the difficulty of challenging coconspirator statements, there are good reasons to be concerned about the inherent reliability of the "truth" of any matter asserted in such statements. First, unlike with respect to most other hearsay exceptions, the proponent of a coconspirator statement (which always is the government)¹⁸¹ need not demonstrate that the declarant had personal knowledge of the matters asserted in the statement.¹⁸² Second, whereas the vast majority of hearsay exceptions are justified by claims (albeit disputed) of greater reliability than the average hearsay,¹⁸³ no such claim is made today on behalf of the exception

176. See Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1361 (stating the coconspirator exception "opens the floodgates to a host of oral statements" that pose reliability concerns).

177. See, e.g., *United States v. Paredes*, 176 F. Supp. 2d 183, 191 (S.D.N.Y. 2001); see also *United States v. Breitkreutz*, 977 F.2d 214, 219 (6th Cir. 1992).

178. See, e.g., David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972); Patrick J. Sullivan, *Bootstrapping of Hearsay Under Federal Rule of Evidence 801(d)(2)(E): Further Erosion of the Coconspirator Exemption*, 74 IOWA L. REV. 467, 474 (1989) ("There has always been uncertainty about why out of court statements by coconspirators are not prohibited by the hearsay rule.").

179. See FED. R. EVID. 801(d)(2)(E) advisory committee's note.

180. See *id.* (calling the agency theory of conspiracy "at best a fiction"); Joseph H. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1161-66 (1954).

181. See, e.g., Randolph N. Jonakait, *Biased Evidence Rules: A Framework for Judicial Analysis and Reform*, 1992 UTAH L. REV. 67 (1992) (criticizing coconspirator exception as unfairly biased against criminal defendants).

182. See, e.g., *United States v. Saccoccia*, 58 F.3d 754, 782 (1st Cir. 1995); *United States v. Goins*, 11 F.3d 441, 443-44 (4th Cir. 1993); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984); *United States v. Ammar*, 714 F.2d 238, 254 (3d Cir. 1983).

183. See, e.g., FED. R. EVID. 803(1) ("Present Sense Impression"), 803(2) ("Excited Utterance"), 803(4) ("Statement Made for Medical Diagnosis or Treatment").

for coconspirator statements.¹⁸⁴ And third, unlike other hearsay exceptions that have diminished categorical claims of reliability, the coconspirator exception does not require a showing that the circumstances under which a particular statement was made bear sufficient indicia of reliability.¹⁸⁵

2. “Other Act” Evidence

The second category of particularly troubling evidence that accomplice witnesses frequently offer is background “other act” evidence. Although, under the common law rules of evidence,¹⁸⁶ Federal Rule of Evidence 404,¹⁸⁷ and most state evidence codes,¹⁸⁸ evidence about a defendant’s character or other crimes is not admissible to prove that a defendant had a propensity to engage in criminal acts and acted in conformity therewith, the rules provide that evidence of other criminal or bad acts may be admitted for any other purpose.¹⁸⁹ The circumstances warranting admission of other acts are one of the most frequently litigated issues in the law of evidence.¹⁹⁰ Like the coconspirator exception to the rule against hearsay, the rules about character and other act evidence nominally apply in civil as well as criminal cases,¹⁹¹ but they rarely are invoked in civil cases.

184. See, e.g., *Park v. Huff*, 506 F.2d 849, 863 (5th Cir. 1975) (Wisdom, J., dissenting) (deploring the admission of coconspirator statements, describing their reliability as “shaky at best” and a conviction for murder based in part upon such statements as “shock[ing]”); Hon. Arthur L. Alarcon, *Suspect Evidence: Admissibility of Co-Conspirator Statements and Uncorroborated Accomplice Testimony*, 25 LOY. L.A. L. REV. 953 (1992) (setting forth the views of a judge of the U.S. Court of Appeals for the Ninth Circuit that coconspirator statements and accomplice testimony are inherently suspect); Levie, *supra* note 180, at 1163–64 (rejecting notion that coconspirator statements are more reliable than the average hearsay).

185. See, e.g., FED. R. EVID. 803(6) (“Records of a Regularly Conducted Activity”), 803(8) (“Public Records”), 804(b)(3) (“Statement Against Interest”), 807 (“Residual Exception”).

186. See *Michelson v. United States*, 335 U.S. 469, 475–76 (1948); *People v. Zackowitz*, 172 N.E. 466 (N.Y. 1930); *People v. Molineux*, 61 N.E. 286, 293 (N.Y. 1901) (“The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged.”); see also *GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE* 742–44 (Kenneth S. Broun ed., 6th ed. 2006).

187. See FED. R. EVID. 404(a)(1), 404(b).

188. See Edward J. Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 575 (1990) (noting that over thirty states have adopted a rule similar to Federal Rule of Evidence 404(b)).

189. FED. R. EVID. 404(b)(2).

190. See Thomas J. Reed, *Admitting the Accused’s Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 211 (2005) (citations omitted) (observing that Federal Rule of Evidence 404(b), authorizing admission of other crimes, has been “the most contested Federal Rule of Evidence. It has been cited in 5,603 federal trial and appellate decisions since adoption. No other evidentiary rule comes close to this rule as a breeder of issues for appeals”); see also FED. R. EVID. 404(b) advisory committee’s notes to 1991 amendment (characterizing the Rule as “one of the most cited Rules in the Rules of Evidence”); JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S FEDERAL EVIDENCE* 404–47 (Mark S. Brodin ed., 2015) (noting that Rule 404(b) has generated more reported decisions than any other federal rule of evidence).

191. The only difference is that, in criminal cases, pursuant to a 1991 amendment, the government must provide advance notice to the defense of the government’s intention to offer evidence of other acts pursuant to Rule 404(b). The notice requirement does not apply in civil cases.

Federal Rule of Evidence 404(b) and its state analogues—which allow evidence of “a crime, wrong, or other act” for any non-propensity purpose—are notoriously permissive. But, to offer evidence pursuant to such rules, prosecutors generally must provide pre-trial notice, thus giving a defendant the opportunity to investigate the other acts and file a pretrial motion to exclude.¹⁹² Before admitting such evidence, a court also must consider whether the probative value of the evidence for the proffered permissible purpose is substantially outweighed by the danger of unfair prejudice,¹⁹³ including the chance that the jury will be unable to avoid making an impermissible character inference. Yet, a good deal of other act evidence is admitted through cooperators who are a defendant’s accomplices without meeting even these requirements, because it is deemed not “other.” Instead, it frequently is characterized as “background” evidence necessary to explain the story of the crime on trial;¹⁹⁴ the development of the relationship of trust between the various players,¹⁹⁵ including the cooperator and the defendant on trial;¹⁹⁶ or the history of the criminal organization of which they were a part.¹⁹⁷ When evidence is admitted on one of these theories, it frequently is viewed as falling outside Rule 404(b) and, therefore, not being subject to the rule’s notice requirement (although some prosecutors will provide the notice anyway). Such evidence also is less likely to be excluded under Rule 403 because a defendant has a far less powerful argument of unfair prejudice when a criminal act is viewed as essential to the narrative of the crime on trial than when it is viewed as exogenous. Some of this evidence also may be admitted in the context of impeachment of a cooperator—by a prosecutor drawing the sting on direct examination or a defense attorney on cross-examination—regarding prior bad acts that the cooperator

192. See FED. R. EVID. 404(b)(2).

193. See FED. R. EVID. 403.

194. See DIX ET AL., *supra* note 186, at 752–68; see also Thomas M. DiBiagio, *Intrinsic and Extrinsic Evidence in Federal Criminal Trials: Is the Admission of Collateral Other-Crimes Evidence Disconnected to the Fundamental Right to a Fair Trial*, 47 SYRACUSE L. REV. 1229, 1250–53 (1997); *United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009) (cooperating witness permitted to testify about two prior gun purchases involving the defendant); *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990) (finding evidence of a pre-existing drug trafficking relationship between the defendant and a coconspirator admissible to help the jury understand the charged drug transaction and defendant’s role in it); *United States v. Serrano*, No. 13 CR. 58(KBF), 2014 WL 2696569, at *8–9 (S.D.N.Y. June 10, 2014) (admitting cooperator testimony about other robberies committed by defendant); *United States v. Basciano*, No. 03-CR-929(S-5)NGG, 2006 WL 544465, at *1–3 (E.D.N.Y. Mar. 6, 2006) (admitting evidence of other acts of violence in racketeering case).

195. See, e.g., *United States v. Rosa*, 11 F.3d 315, 334 (2d Cir. 1993) (finding evidence of prior crimes admissible to inform jury of background of the conspiracy, illegal relationship among coconspirators, and relationship of trust); see also DiBiagio, *supra* note 194, at 1250–53 (discussing cases where evidence of other crimes was admitted as intrinsic to conspiracy charges).

196. Such evidence also can be admitted for the more classic Rule 404(b) purpose of proving knowledge or intent. See, e.g., *United States v. Tse*, 375 F.3d 148, 155–56 (1st Cir. 2004); *United States v. Pitre*, 960 F.2d 1112, 1119–20 (2d Cir. 1992).

197. This is particularly true when the case on trial includes a conspiracy charge. Given how broadly a conspiracy charge can be drawn, to include multiple criminal objects, there is little that cannot be characterized as either part of, or background to, the conspiratorial plan.

committed, which suggest that the cooperator either has a character for untruthfulness or has so much criminal exposure that he or she would say anything to receive a sentencing benefit.

There are valid reasons to allow accomplices to testify about such acts. After all, a particular criminal act, considered in isolation, may seem bizarre, so the cooperator's account may be less credible if the backstory is not permitted. It also is true that people generally do not commit crimes with people they do not know and trust. But, of course, allowing testimony about these other acts raises the very concerns that the character evidence rules worry about—i.e., the risk either that the jury will infer that the defendant has a criminal personality and propensities and, therefore, must have committed the crime on trial, or that the jury will be so inflamed or desensitized by hearing about the other acts that it will be unable to analyze critically the evidence about the crime on trial and to determine fairly whether that evidence is sufficient to prove the defendant's guilt.¹⁹⁸ Even when an informant testifies for impeachment or background purposes about acts that he or she has committed that did not involve the defendant, there is a risk of unfair spillover prejudice because the jury may not absorb the distinction (i.e., that the defendant was not involved in *that* act). Alternatively, the defendant may be prejudiced if the jurors come to view the defendant less favorably because of his or her association with the informant and others who committed such heinous acts.

Experimental research suggests that these are real concerns. Although evidence of character tends to be of limited value in determining whether a person committed a given act,¹⁹⁹ jurors tend to overvalue the evidence,²⁰⁰ inferring from evidence bearing on character that the defendant is a bad person and, therefore, is likely to have committed the act on trial. This effect may be aggravated by the reality that it often is impossible for the defense to investigate the underlying facts of such past events so as to challenge the informant's account, especially when no prior notice is given. Left with the choice of cross-examining "blind" an informant about these events—thereby risking accomplishing very little, while affording the witness the opportunity to reinforce the damaging testimony by repeating it—and doing nothing, many defense attorneys strategically choose to leave this portion of a witness' testimony untouched. This constellation of factors increases the risk of a wrongful conviction where an informant's testimony includes other act evidence,

198. See *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (“[T]he risk [is] that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment . . .”).

199. See *Imwinkelried*, *supra* note 188, at 582.

200. See *id.* at 581 (“[T]he available psychological studies indicate that once they have characterized the accused's general character, the jurors are likely to attach great weight to that characterization in determining whether the accused acted ‘in character’ on the occasion of the charged offense.”); see also David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 416 (2013) (“[R]esearch on the ‘fundamental attribution error’ may suggest that the legal system has been right to worry that juries will rely too heavily on character evidence.”).

because the jury—influenced by the other act evidence—may be less able to evaluate carefully the witness’ essential testimony and the other evidence in the case. Yet such testimony frequently is admitted without serious scrutiny,²⁰¹ especially when the prior act evidence is folded into the testimony of an informant witness who may be on the stand for several hours or days. The consequence of an informant’s testimony about such events may be the creation of a powerful narrative of a defendant’s criminality that it is difficult to overcome.

C. Prosecutors Are Imperfect Gatekeepers

The inherent unreliability of much informant testimony and the lack of external checks on informants make it all the more important that individual prosecutors, working with law enforcement agents, do an effective job in determining whether their informant witnesses are telling the truth. But, as set forth below, there are good reasons to believe that prosecutors and agents are imperfect gatekeepers.

1. Prosecutors Are Not Necessarily Able to Detect Lies

To begin, relying on individual prosecutors to determine reliability is dangerous because prosecutors are not reliably able to detect lies or falsehoods. Prosecutors, like all other people, cannot necessarily tell whether someone is being truthful. Experimental research suggests that even trained and experienced investigators are only slightly better than the average person at detecting lies,²⁰² and the average person is not particularly good at doing so. Moreover, many prosecutors are young and relatively inexperienced.²⁰³ The linguistic and cultural barriers between prosecutors and cooperators often make evaluations of credibility based on careful

201. See *United States v. Green*, 617 F.3d 233, 246 (3d Cir. 2010) (quoting various authorities as describing the tests that courts use to admit other acts evidence as “elastic and invit[ing] abuse,” and “substitut[ing] a careful analysis with boilerplate jargon” (citations omitted)); see also DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE—SELECTED RULES OF LIMITED ADMISSIBILITY* 327 (Richard D. Friedman ed., 2009) (suggesting that some of the doctrines used by courts to admit other act evidence as inviting “sloppy, non-analytical decision-making”); Edward J. Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the “Inextricably Intertwined” Theory for Admitting Evidence of an Accused’s Uncharged Misconduct*, 59 CATH. U. L. REV. 719, 731–34 (2010) (explaining how judges frequently are required to rule on the admissibility of such evidence under severe time constraints, in front of the jury).

202. See Saul M. Kassir, *Human Judges of Truth, Deception, and Credibility: Confident But Erroneous*, 23 CARDOZO L. REV. 809, 811 (2002) (reporting on studies performed on college students, police detectives, CIA and FBI agents, and trial judges, among others, and finding that professional law enforcement agents and trial judges are slightly better than college students at detecting lies in controlled experiments, but still less than 57% correct); see also Christian A. Meissner & Saul M. Kassir, “*He’s Guilty!*”: Investigator Bias in Judgments of Truth and Deception, 26 L. & HUM. BEHAV. 469, 470 (2002).

203. See, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 295 (3d ed. 2001) (describing many prosecutors as “relatively young” and “inexperienced”); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 569 (2006); Gleeson, *Supervising Criminal Investigations*, *supra* note 79, at 426 (noting that new federal prosecutors in New York and other large cities “tend to be only two or three years out of law school, and frequently have no prior experience with criminal cases,” and that “[m]id-level supervisors are generally only four or five years further along”).

attention to demeanor and language even more challenging. Like other people, prosecutors may fall prey to the assumption that a witness' self-incriminating account of events is inherently trustworthy.²⁰⁴ Despite the foregoing limitations, prosecutors generally receive very little training on how to evaluate a witness' reliability.²⁰⁵

The most reliable way to determine whether a witness is being truthful is to maintain an informational advantage so as to be able to check the witness's version of events against known facts.²⁰⁶ But in some circumstances, that is not possible because information from other sources is not available (one of the factors driving the prosecutor to seek the assistance of the informant).²⁰⁷ In other circumstances, the prosecutor and the investigative agents have not done the investigative work necessary to obtain that advantage. Worse, in some cases the prosecutor and agents undermine their advantage by disclosing information to the informant. Because record-keeping requirements with respect to informants historically have been very lax, many prosecutors will be unaware of the fact that information has been disclosed—all the more so when multiple agents and prosecutors meet with an informant over time, which often is the case.²⁰⁸

Cognitive and cultural barriers also prevent prosecutors from being fully effective gatekeepers. Prosecutors (like all other people) are prone to confirmation bias, such that if the informant's version of events is consistent with the prosecutor's pre-existing view of the case, the prosecutor tends to become more certain of the veracity of that account and, hence, less skeptical of the informant. Because of their professional acculturation, prosecutors also may have an inflated sense of the power of the incentives outlined in their cooperation agreements to ensure that informants tell the truth. Prosecutors tend to believe that such provisions are an effective deterrent to informants' telling lies.²⁰⁹ In fact, to someone in the typical informant's position, such provisions may mean little. Moreover, to the informant who has already told a lie to the prosecutor and not been caught, such provisions may be understood as a requirement that the witness hew to the same false story.²¹⁰

204. See Cohen, *What Is True?*, *supra* note 67, at 824 (“[W]ho would believe that a defendant would implicate himself in a violent criminal act that he did not commit?”).

205. See *id.* at 817.

206. See Cohen, *What Is True?*, *supra* note 67, at 817, 822; Minzner, *supra* note 158, at 2568–69.

207. See Cohen, *What Is True?*, *supra* note 67, at 822 (“[A] cooperator's value increases in inverse proportion to the information in possession of the prosecutor.”); Richman, *Cooperating Defendants*, *supra* note 41, at 293.

208. Cf. Yaroshefky, *Cooperation with Federal Prosecutors*, *supra* note 73, at 940 (describing problems that arise with a lack of “continuity of personnel” in cases involving informants).

209. See Minzner, *supra* note 158, at 2573 (“Prosecutors are generally confident that the truth-telling provisions work . . .”).

210. See Cassidy, “*Soft Words of Hope*,” *supra* note 51, at 1147 (“The cooperating witness's obligation is to tell the truth, but from his perspective ‘truthful cooperation’ of course means cooperation that satisfies the prosecutor and is thereby consistent with the prosecutor's theory of the case.”).

2. Prosecutors' Incentives Are Not Optimally Aligned with Screening

Prosecutors' incentives also are not optimally aligned with screening out false informant testimony. Prosecutors operate within a culture—both popular and professional—that evaluates their performance based on their rates and numbers of convictions, with convictions of “big fish” valued the most highly. A prosecutor who does not obtain convictions regularly, or who does not prosecute those who are viewed as the most culpable, will be not be popular among constituents or rewarded by professional colleagues. But to obtain those convictions, a prosecutor first must identify perpetrators and then meet the high procedural and evidentiary burdens imposed by our Constitution and rules of criminal procedure. Informants often are the least expensive way to meet these requirements.²¹¹ In some cases, especially those against the most sophisticated criminals, sufficient evidence simply may be unavailable from other sources.²¹²

Even where other evidence may be available, prosecutors are well aware of the narrative and other incidental benefits of calling a cooperating witness at trial, as discussed in Part II.D, *infra*, which make conviction more likely. Moreover, the closer one gets to trial, the more indispensable an informant witness may seem. The prosecutor's theory of the case likely will have been shaped by the informant's version of events by that point, making the discovery of deception by the informant extremely costly both cognitively and practically. Cognitively, the prosecutor may be unable at that point to objectively assess information indicating that the informant has lied or to assess the severity of the lie.²¹³ Practically, the prosecutor may not have sufficient time to obtain other evidence and may face resistance from the court to a shifting theory of the case and late disclosure of evidence.

Moreover, the prosecutor faces high reputational and professional costs to recognizing on the eve of trial that an informant has lied.²¹⁴ Although the rewards for obtaining a conviction are high, there rarely are any rewards for acknowledging error, let alone error reflecting that the informant duped the prosecutor. Thus, like the informants' own lawyers,²¹⁵ prosecutors may not press informants or continue their investigations to the point that definitively will reveal lies.

When a lie is discovered, prosecutors are pressured to rehabilitate the informant so the case can continue, especially in cases lacking other evidence. Hence, the

211. See *supra* Part I.D (discussing administrative and judicial hurdles to obtaining other forms of evidence such as search warrants and wiretaps).

212. See Jeffries & Gleeson, *The Federalization of Organized Crime*, *supra* note 51, at 1104.

213. Indeed, the recent Gould study comparing cases of wrongful conviction to “near misses” found that, although false witness testimony was a factor in both sets of cases, prosecutors were less likely to “discover” false witness testimony in cases involving weaker evidence than in those involving stronger evidence. See Gould et al., *supra* note 8, at 501–02.

214. See Miriam Hechler Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 35–39 (2015) [hereinafter Baer, *Timing Brady*].

215. See Green, *supra* note 141.

prosecutor may allow an informant to plead guilty to an additional count of making a false statement to a government official, perjury, or some additional crime that the informant previously failed to disclose,²¹⁶ rather than end the cooperation arrangement outright. By engaging in such practices, however, the prosecutor unwittingly sends a message to the informant that previous exhortations to tell the truth—or *else lose the cooperation agreement*—were not serious. Once that bridge has been crossed, any further threat to end the cooperation arrangement if the witness lies is not credible.

If it is discovered after a trial that an informant lied on the stand, there are few costs for the prosecutor. If it can be established that a prosecutor knowingly suborned perjury, the conviction resulting from it would almost certainly be reversed.²¹⁷ The prosecutor also could be criminally prosecuted or subject to professional sanction. But such intentional misconduct is rare²¹⁸ and can be proven even more rarely. In the far more common situation of reckless or negligent conduct with respect to the falsity of cooperator testimony, there generally will be no penal or professional consequence for the prosecutor. Thus, there are incentives that align to push prosecutors toward use of cooperators, often without sufficient scrutiny, but there is no significant accountability when prosecutors' reliability assessments are wrong.

D. Juries Are Unlikely to Detect False Informant Testimony

When prosecutors fail to screen out false informant testimony, it is not likely that juries will detect it. To the contrary, there are a number of reasons to believe that jurors are likely to credit informant testimony, even when they should not, and to give it undue weight.

1. The Fallacy of the Jury as the Lie Detector

The fact is that jurors—like all people—are not that good at detecting lies. Although the jury long has been hailed as the “lie detector” of our judicial system, experimental research suggests that this characterization is misplaced and that

216. See Cohen, *What Is True?*, *supra* note 67, at 826–27, 827 n.21 (describing options available to a prosecutor who discovers that a cooperator has lied or failed to disclose information after entering into a cooperation agreement but before his or her case is closed). In one extreme example of prosecutors calling an informant as a witness at trial notwithstanding her having given what they considered to be false testimony under oath on several occasions, the Illinois prosecutors in the so-called “Ford Heights Four” case called Paula Gray as an accomplice witness even though she had previously testified under oath at a preliminary hearing, and at her subsequent trial, that she and her co-defendants had nothing to do with the murders. See GARRETT, *supra* note 2, at 140 (describing “Ford Heights Four” case); *People v. Williams*, 588 N.E.2d 983, 990, 993–94 (Ill. 1991) (describing Gray’s testimony); *People v. Jimerson*, 535 N.E.2d 889, 893 (Ill. 1989) (same).

217. See *Napue v. Illinois*, 360 U.S. 264 (1959); *N. Mariana Islands v. Bowie*, 243 F.3d 1109 (9th Cir. 2001); *United States v. LaPage*, 231 F.3d 488 (9th Cir. 2000); *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991).

218. See, e.g., Cassidy, “*Soft Words of Hope*,” *supra* note 51, at 1163 (observing that a prosecutor “infrequently ‘knows’ that the testimony an accomplice gives about his motivations if false”).

mock jurors accurately determine whether a witness is lying only about half the time.²¹⁹ Demeanor simply is not the “tell” that it long has been believed to be.²²⁰ Instead, lies generally are revealed when contrary information exposes the lie.²²¹ Jurors, however, often do not have information available to them to expose informant witness lies. Defense attorneys often lack the resources to track down contrary evidence. Witnesses who might offer contrary information, if they can be located, frequently can avoid testifying by invoking the Fifth Amendment privilege against self-incrimination, a privilege that defense counsel, unlike prosecutors, will not be able to overcome by an offer of immunity.

2. *The Fundamental Attribution Error*

Even where contrary evidence may be available, jurors may fail to detect informant witness lies due to the same mechanism that causes them to overvalue character and other act evidence about a defendant.²²² That is, by operation of the “fundamental attribution error”—i.e., the tendency of individuals to attribute the behavior of others to dispositional factors rather than situational or contextual factors. A classic example of the fundamental attribution error is the belief, formed by a person who is stuck in traffic behind another car, that the car in front is not moving because the driver is a bad driver, not because there is traffic or another impediment. In the context of a trial, jurors tend to assume that a witness is motivated by dispositional factors, such as honesty or good citizenship, rather than situational factors, such as a promise of leniency. Thus, jurors who form a good view of an informant witness’ honesty will tend to believe his or her testimony, even when presented with evidence of bias.

A series of experiments led by Jeffrey Neuschatz demonstrated this phenomenon.²²³ In the first variation of the study, participants (college students and community members) were asked to read the transcript of a murder trial consisting largely of circumstantial evidence. Some of the study participants were given transcripts that also included what the researchers called a secondary confes-

219. See Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 687–88 (1990); see also Amy-May Leach, *Detecting Deception*, in CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH 43 (Brian L. Cutler ed., 2012) (reporting that the average lie-detection accuracy for laypersons is 54%, which is near chance levels).

220. See Bennett, *supra* note 176, at 1364–66.

221. See Minzner, *supra* note 158, at 2567–68; see also Hee Sun Park et al., *How People Really Detect Lies*, 69 COMM. MONOGRAPHS 144, 152–53 (2002) (suggesting, based on preliminary study, that people most often rely on information from third parties and physical evidence to detect a lie, a process that can take days, weeks, months, or longer).

222. See *supra* Part II.B.2.

223. See Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 L. & HUM. BEHAV. 137, 146–47 (2008) (finding that secondary confessions—i.e., reports by a person to the effect that he or she heard another person (the suspect) confess to a crime—were very persuasive; study participants who were exposed to a secondary confession voted guilty significantly more often than those not so exposed).

sion.²²⁴ The transcripts were manipulated such that the identity of the witness who related the secondary confession changed: in some of the transcripts, it was an accomplice; in others, it was a jailhouse informant; and in yet others, it was the defendant's uninvolved friend.²²⁵ In some variations, the accomplice witness or jailhouse informant testified that he received a reduced sentence in exchange for testifying, while the uninvolved friend testified that he received a monetary reward.²²⁶ Although conviction rates were highest when the witness was the defendant's uninvolved friend,²²⁷ study participants who were exposed to *any* form of secondary confession voted guilty significantly more often than those who were not so exposed.²²⁸ But whether the witness received any incentives had no significant effect on juror verdicts—study participants voted guilty just as often when the witnesses testified to an incentive as when the witnesses did not.²²⁹ The study's authors hypothesized that this result could be attributable to the fundamental attribution error.²³⁰ Alternatively, they hypothesized that jurors could have failed to notice the testimony about the incentive or assumed that witnesses received an incentive even when there was no testimony about one.²³¹

To test these hypotheses, the same researchers then introduced a new variation, with one additional permutation of the transcripts. In this new variation, the witness who recounted the secondary confession explicitly testified that he had *not* received any benefit in exchange for his testimony.²³² After reading the transcripts, study participants were asked whether the witness received an incentive and, if so, what it was.²³³ They also were asked why the witness would have come forward to offer his testimony.²³⁴ The results of the follow-up study were consistent with the first study, in that participants voted guilty significantly more often when a secondary confession was included in the trial transcript than when one was not.²³⁵ The results also showed that conviction rates were not affected by jurors' awareness of the witnesses' incentives.²³⁶ Further, based on participants' responses to the questions about the witnesses' motivations, the researchers concluded that the jurors engaged in the fundamental attribution error because most attributed the witnesses' testimonies to intrinsic characteristics such as trustworthiness rather

224. *See id.* at 140.

225. *See id.*

226. *See id.*

227. *See id.* at 142.

228. *See id.*

229. *See id.*

230. *See id.*

231. *See id.*

232. *See id.* at 143–44.

233. *See id.* at 144.

234. *See id.*

235. *See id.* at 146.

236. *See id.*

than to situational factors such as rewards.²³⁷

Several years later, the researchers conducted a follow-up study in which they used the same crime from the prior studies but introduced into some of the transcripts two measures that some reformers have advocated: testimony about the informant's history of providing secondary confession testimony in other cases in exchange for sentencing benefits, and expert testimony about the inherent unreliability of informant testimony.²³⁸ The testimony about the informant's history was brought out during the informant's testimony. The expert was a self-professed former jailhouse informant, who explained how easily aspiring jailhouse informants could gather details about a crime and a suspect to generate a persuasive and false secondary confession.²³⁹ Once again, the mock jurors voted guilty significantly more often whenever a secondary confession was included in the transcript, and their guilty verdict rate was *not* affected by the new information about the informant's history of testifying in other cases or by the expert testimony.

These studies suggest that the persuasive power of informant testimony—especially in the form of secondary confessions—is sticky indeed, although much more research needs to be done on this subject.²⁴⁰ For example, it would be useful to test whether observing the witness at a live trial, rather than reading a transcript, would change jurors' perceptions of the witness's credibility; and, relatedly, whether jurors' experience of a thorough cross-examination by a capable defense lawyer—which presumably would explore the witness's criminal record and any prior inconsistent statements, in addition to incentives—would undermine the informant's credibility more than would a simple alert to the existence of the informant's incentives or testimonial history.²⁴¹ It also is possible that engaging in

237. *See id.*

238. *See* Jeffrey S. Neuschatz et al., *Secondary Confessions, Expert Testimony, and Unreliable Testimony*, 27 J. POLICE & CRIM. PSYCHOL. 179 (2012) [hereinafter Neuschatz et al., *Secondary Confessions*].

239. The jailhouse informant expert used in the study was based on Leslie Vernon White, a real person who testified during the 1980s to secondary jailhouse confessions in numerous cases in exchange for sentencing leniency. White eventually went public in a 1989 interview with the television program *60 Minutes*, in which he explained the methods that he used to obtain information about other inmates' cases, including calling the morgue or police precincts from jail to obtain non-public information about the crimes. *See* NATAPOFF, *SNITCHING*, *supra* note 35, at 71; BLOOM, *supra* note 98, at 64–65. The White disclosures led to a grand jury investigation in Los Angeles about the use of jailhouse informants. *See* REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY.

240. A recent study found that mock jurors' verdicts and evaluations of informant witness credibility are affected when the jurors learn about the witness' incentives, although information about the size of the incentive and expert testimony about the fundamental attribution error did not have an impact. *See* Evelyn M. Maeder & Emily Pica, *Secondary Confessions: The Influence (or Lack Thereof) of Incentive Size and Scientific Expert Testimony on Jurors' Perceptions of Informant Testimony*, 38 L. & HUM. BEHAV. 560 (2014). The authors hypothesized that jury-eligible community members may be becoming more aware of the unreliability of informant witnesses.

241. *But see* Sarah Michal Greathouse, *Does Cross-Examination Help Jurors Detect Deception?* (2009) (unpublished Ph.D. dissertation, City University of New York) (finding that traditional forms of cross-examination do not assist jurors in detecting witness deception).

jury deliberations would affect jurors' verdicts.²⁴² Nevertheless, these few existing studies are consistent with the experience of many practitioners that cooperating witnesses generally are very persuasive with juries, even when they are deeply flawed as individuals and witnesses.

3. *Existing Trial Practices and Psychological Effects May Cause Jurors to Overvalue Informant Testimony*

Rather than cause jurors to scrutinize carefully the testimony of informant witnesses, a number of common trial practices may exacerbate jurors' tendency to overvalue informant testimony in many circumstances. The first of these is the practice of implicit prosecutorial vouching for informant witnesses. While explicit prosecutorial vouching (i.e., making statements to the effect of "I believe the witness") is not permitted,²⁴³ prosecutors implicitly vouch for the credibility of their informants when they call those informants to the stand. Although most jurors presumably are not familiar with all of the legal and ethical rules applicable to lawyers in general and prosecutors in particular, it is highly likely that most intuit that lawyers, and especially prosecutors, may not knowingly elicit false testimony. Further, many courts permit prosecutors to introduce cooperation agreements into evidence, either on direct examination of an informant or on redirect, and to point to provisions therein that require the witness to "tell the truth" in his or her jury addresses.²⁴⁴ Thus, without the prosecutor's or anyone else's saying so directly, jurors understand that the prosecutor believes that the witness is telling the truth—otherwise, the prosecutor would not have called the witness or offered the witness a cooperation agreement. Because the jury understands that the prosecutor

242. Neuschatz et al. acknowledge the need for further research, including on the effect of jurors' learning about the informants' criminal records and of jury deliberations. See Neuschatz et al., *Secondary Confessions*, *supra* note 238, at 190. The authors hypothesize that deliberations are unlikely to affect jurors' credibility determinations because of prior research suggesting that "groups tend to strengthen an individuals [sic] initial belief." See *id.* However, they also cite studies suggesting that "giving people time to think about situational factors that might affect behavior [such as incentives] should reduce the fundamental attribution error." *Id.* Since jury deliberations provide the time and opportunity for jurors to discuss such situational factors, it seems plausible that deliberations could affect trial outcomes (especially when defense counsel emphasizes such factors in cross-examination and summation). For further support of the idea that requiring subjects to engage in collective deliberations might reduce the fundamental attribution error, see Adam L. Alter et al., *Overcoming Intuition: Metacognitive Difficulty Activates Analytic Reasoning*, 136 J. EXPERIMENTAL PSYCHOL. 569, 569, 575 (2007) (citing literature demonstrating that people make qualitatively different decisions depending on whether they employ intuitive, heuristic reasoning, or deliberate, analytical reasoning, and finding that difficulty of task may cause subjects to switch from the former to the latter); see also DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

243. See Daniel Richman, *Expanding the Evidentiary Frame for Cooperating Witnesses*, 23 CARDOZO L. REV. 893, 894 (2002).

244. See Rajan S. Trehan, *An "Unfortunate Bit of Legal Jargon": Prosecutorial Vouching Applied to Cooperating Witnesses*, 114 COLUM. L. REV. 997 (2014) (reviewing practices of various federal circuits regarding introduction of cooperation agreements).

believes in the witness' veracity, it is more likely to make the fundamental attribution error in evaluating the witness' testimony.

The second trial practice that increases the weight that jurors are likely to accord to informant testimony is that of allowing an informant to interpret other prosecution evidence in a way that is not permitted of other witnesses. For example, if a case includes recorded communications, an informant (particularly an accomplice) may not only identify the voices of the speakers (something that an agent may be permitted to do in some circumstances),²⁴⁵ but also explain what the communications meant.²⁴⁶ The same is true of drug ledgers, other written materials, and even tattoos.²⁴⁷ This latitude has become more important as courts have limited the ability of case agents and other law enforcement witnesses to interpret coded communications in which they did not participate²⁴⁸ and to summarize the results of an investigation,²⁴⁹ on the view that such testimony is neither proper lay nor expert opinion evidence. Thus, informant witnesses, especially accomplices, frequently occupy a unique space as quasi-experts, privileged to provide overview testimony, summarize events, and place other evidence and various individuals' roles into context.²⁵⁰

The signaling effect of this special status likely is not lost on jurors.²⁵¹ Moreover, by offering an interpretation of other evidence that comports with his or her essential story of the crime, an informant is able to reinforce that narrative, increasing the chances a jury will be persuaded of that story even if it happens to be false. Indeed, it is precisely in weaving such details together to tell a compelling story that accomplice witnesses in particular provide their greatest value to

245. See FED. R. EVID. 901(b)(5); *United States v. Sautler*, 60 F.3d 270, 275 (7th Cir. 1995); *United States v. Smith*, 692 F.2d 693, 688 (10th Cir. 1982).

246. See, e.g., *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir. 2008) (cooperating witness permitted to interpret recorded coded conversations); *Sautler*, 60 F.3d at 276 (same); *United States v. Flores*, 63 F.3d 1342, 1359–60 (5th Cir. 1995) (accomplice witnesses permitted to interpret coded phrases and “oblique references” on tapes of coconspirators).

247. See, e.g., *United States v. Pierce*, 785 F.3d 832, 840 (2d Cir. 2015) (cooperating witness “served as a guide” through lyrics of a rap video introduced in racketeering trial, which helped establish the defendant’s association with members of the enterprise and his motive to engage in the charged conduct).

248. See, e.g., *United States v. Johnson*, 617 F.3d 286, 291–95 (4th Cir. 2010); *United States v. Peoples*, 250 F.3d 630, 640–42 (8th Cir. 2001); see also *United States v. Garcia*, 413 F.3d 201, 213–14 (2d Cir. 2005); *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997); *People v. Stewart*, 55 P.3d 107, 123–24 (Colo. 2002) (en banc).

249. See, e.g., *Garcia*, 413 F.3d at 213–15 (finding it error to permit a case agent to summarize investigations and the roles of various players in a criminal enterprise).

250. See, e.g., *United States v. D’Angelo*, No. 02 CR 399(JG), 2004 WL 315237, at *1, *3, *10 (E.D.N.Y. Feb. 18, 2004) (summarizing testimony by accomplices as to history and practices of a racketeering organization, in an opinion by the district court ultimately setting aside a racketeering conviction based in part on “rampant perjury at trial by the government’s accomplice witnesses”).

251. See Natapoff, *Beyond Unreliable*, *supra* note 152, at 113 (“[L]ike experts, informants may have an air of ‘inside knowledge’ about the crime that may sway the jury.”); Harris, *supra* note 49, at 4.

prosecutors. The importance of “descriptive richness”²⁵² to jury decision-making has been well-documented by experimental research, which has shown that “jurors do not, by and large, estimate probabilities when determining the events that transpired in a case; rather, they draw conclusions based on whether information assembles into plausible narratives.”²⁵³ The easier it is for the jurors to assemble the narrative, “the more likely they are to render a verdict consistent with that story.”²⁵⁴ An accomplice witness often presents the prosecution’s narrative in a complete, ready-made package that no other witness offers.²⁵⁵ The only witness who typically can offer a similar package for the defense—with a competing narrative is the defendant, who assumes considerable risk in testifying, especially if he or she has a criminal record.²⁵⁶

Knowing that an accomplice will take the stand, a prosecutor can take advantage of other trial practices to leverage other phenomena documented in experimental research—including primacy, framing, and repetition effects—by introducing the accomplice’s narrative in his or her opening statement²⁵⁷ and then reinforcing it in his or her summation. Numerous studies show that information presented first is most salient with listeners; that listeners tend to view subsequent evidence through the frame or lens of the information that came first; and that repetition of information generally increases listeners’ belief in its truth.²⁵⁸ Since the usual trial

252. See *Old Chief v. United States*, 519 U.S. 172, 187, 189 (1997); see also Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 265, 270 (2014) (“[P]rosecutors are well aware that if they can’t present a clear narrative of moral wrongdoing, a felony case against an individual defendant isn’t likely to go anywhere.”); Morrison, *supra* note 60, at 931 (cooperators can “help tell a coherent story to the jury”); Weinstein, *supra* note 49, at 595 (explaining narrative benefits of cooperator testimony).

253. Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 293 (2013); see also Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JURY DECISION MAKING* 192, 194, 196 (Reid Hastie ed., 1993) (discussing the significance of narrative to jury decision-making); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) (same); Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 120 (1987) (describing American criminal trials as regulated storytelling contests in which the parties tell competing stories “composed under significant restraints”).

254. See Ryan J. Winter & Edith Greene, *Juror Decision-Making*, in *HANDBOOK OF APPLIED COGNITION* 743 (Francis Durso ed., 2d ed. 2007).

255. Although a victim or other eyewitness sometimes can provide a similarly compelling narrative, the story that he or she is able to tell often will not be as complete as that offered by the cooperator, who can speak to the events leading up to the crime, preparations, motive, and events afterwards. For more on background evidence, see *infra* Part III.B.2. Some victims also may not be able to identify the defendant, whereas a cooperator typically is clear as to the identity of the perpetrators of the crime.

256. See, e.g., Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1386 (2009) (jurors who learn about a defendant’s prior conviction are more likely to convict in close cases); see also *id.* at 1379 (“[J]uries rarely learn of criminal records unless defendants testify.”); FED. R. EVID. 608, 609 (providing for use of criminal records to impeach a defendant’s credibility as a witness).

257. See Hyatt Browning Shirkey, *Last Attorney to the Jury Box Is a Rotten Egg: Overcoming Psychological Hurdles in the Order of Presentation at Trial*, 8 OHIO ST. J. CRIM. L. 581, 598–99 (2011).

258. See, e.g., Linda A. Henkel & Mark E. Mattson, *Reading is Believing: The Truth Effect and Source Credibility*, 20 CONSCIOUSNESS & COGNITION 1705 (2011); Wesley G. Moons et al., *The Impact of Repetition-*

practice is for the government to present its opening statement first, the prosecutor gets to present his or her narrative first, in the authoritative voice of the prosecutor—frequently without mentioning that the accomplice is its source—which primes the jury to view the cooperator’s account as true. The defense never will have the opportunity to benefit from the same primacy and framing effects. Nor, in general, will it have the same opportunity to leverage the repetition effect since, to do so, the defense would have to pre-commit to the defendant’s taking the stand, a choice that most defense counsel wisely avoid.

III. RECOMMENDATIONS FOR REFORM

This Part suggests reforms that are responsive to the particular concerns identified in the preceding Part. It also calls for research to test the effectiveness of the suggested reforms and to generate an even more specific set of evidence-based best practices for the use of informants.

A. Pretrial Reforms

1. Better Disclosure

The first recommended reform is to expand prosecutors’ disclosure requirements so that defendants obtain earlier and more fulsome disclosure whenever prosecutors intend to use informants at trial.²⁵⁹ Already, defendants generally receive such pretrial notice when a prosecutor intends to use any of the other three categories of suspect evidence associated with wrongful convictions—confessions, eyewitness identifications, and expert testimony. Concerns about informants’ safety²⁶⁰ and the integrity of ongoing investigations must be taken into

Induced Familiarity on Agreement with Weak and Strong Arguments, 96 J. PERSONALITY & SOC. PSYCHOL. 32 (2009); Frederick T. Bacon, *Credibility of Repeated Statements: Memory for Trivia*, 5 J. EXPERIMENTAL PSYCHOL. 241 (1979).

259. There are a number of mechanisms that could be enlisted in the service of disclosure reform. First, Congress and state legislatures could require by statute that prosecutors adopt more generous disclosure policies. Second, the U.S. Department of Justice could require all United States Attorneys’ Offices to adopt such programs and provide financial incentives for state and local prosecutorial offices to do so. The Department of Justice took a step in this direction when it issued new guidance to all federal prosecutors in the aftermath of the revelations of misconduct in the Ted Stevens case. See *Hearing on S. 2197 Ensuring that Federal Prosecutors Meet Discovery Obligations Before the S. Comm. on the Judiciary*, 112th Cong. 1, 3 (2012) (statement of James M. Cole, U.S. Dep’t of Justice, Deputy Att’y Gen.) (describing so-called “Blue Book” issued to federal prosecutors and paralegals in 2011 which “comprehensively covers the law, policy, and practice of prosecutors’ disclosure obligations”). Finally, courts could adopt local rules requiring that the prosecutorial offices within their supervisory jurisdiction have policies in effect. See, e.g., Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 105 J. CRIM. L. & CRIMINOLOGY (forthcoming 2016) (discussing discovery rules promulgated by some federal district courts).

260. In a recent survey conducted for the Federal Judicial Center, federal district court judges, prosecutors, and defense lawyers generally agreed that “harm to cooperators was a significant problem and that more needed to be done, by the judiciary and/or the Bureau of Prisons, to protect cooperators from harm.” MARGARET S. WILLIAMS, DONNA STIENSTRA & MARVIN ASTRADA, FED. JUDICIAL CTR., SURVEY OF HARM TO COOPERATORS: FINAL REPORT 1

account. However, given the numerous studies showing the relationship between informant testimony and wrongful convictions, and the other reasons for concerns about informants' reliability discussed *supra* Section II, it no longer seems tenable for prosecutors to maintain, as a blanket matter, that disclosure of informant use always poses such grave dangers to witness security and ongoing investigations that greater and earlier disclosure cannot be made safely to defense counsel.

The disclosure ought to include the type of informants involved, along the axes detailed *supra* Part I.A (i.e., the form of compensation provided to the informant and the context in which the informant obtained his or her information). It also should include information such as the informant's criminal history, prior record of cooperation with authorities, the terms of any cooperation agreement, and statements made by the informant during the debriefing process.

Such disclosures (which ultimately are required in any event by *Brady, Giglio*, the Jenks Act,²⁶¹ and similar state rules) would advance the cause of reliability along a number of vectors. First, the process of preparing the disclosures will focus the prosecutor on issues related to the informant's reliability and to the completeness of disclosures to the defense, at a time when the prosecutor still has the opportunity to investigate and correct any deficiencies before the cost of doing so seems prohibitive.²⁶² Second, those disclosures would help defense counsel decide whether to accept any plea offer that is made, taking into account the significance and credibility of the informant's anticipated testimony. Third, defense counsel would be in a better position to evaluate whether there is any particularized basis for doubting an informant's reliability and whether any required disclosures appear to be missing, at a time when there is still an opportunity to raise these issues with the prosecutor (and the court, if necessary). Finally, if a defendant opted to proceed to trial, his or her defense attorney would be better able to prepare an effective cross-examination of the informant witness.

Whether such enhanced disclosure in fact yields "reliability gains" should be the subject of ongoing study. For example, as jurisdictions experiment with different disclosure regimes, it should be possible to study the relationship between discovery practices and the likelihood that unreliable informant witnesses are detected by counsel (defense attorneys, prosecutors, or both in combination) *before* trial such that an informant, once deemed reliable but subsequently called into doubt, is not called as a witness at trial. Similarly, it would be valuable (although likely harder) to study the relationship between informant disclosure practices and the incidence of innocent defendants' pleading guilty. It also would be useful to study in an experimental setting the impact of a robust and tailored cross-examination of an informant, as contrasted to a relatively weaker and generic

(2016), [http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/\\$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf).

261. 18 U.S.C. § 3500 (2012) (requiring disclosure of witnesses' prior statements).

262. See Baer, *Timing Brady*, *supra* note 214.

one, on jurors' ability to detect false informant testimony.²⁶³ To the extent that research supports a connection between enhanced disclosure and any of these hypothesized reliability gains, the cause for insisting on such reforms more broadly would be strengthened. Such an outcome might even persuade law enforcement agencies to adopt reforms voluntarily, as many have adopted evidence-based practices for eyewitness identification and confessions.

2. Pretrial Reliability Hearings

The second recommended reform—which builds on the first—is to create the space for pretrial judicial review of informants before a judge. We already have the mechanisms for pretrial hearings on the other three suspect categories of evidence associated with wrongful convictions, as well as on searches and wiretaps. A few state jurisdictions already require pretrial judicial hearings for jailhouse informant testimony.²⁶⁴ Such hearings should be available for all informant witnesses upon a threshold showing of grounds to believe the informant is unreliable.²⁶⁵

Reliability hearings would provide a number of benefits. First, they would provide an external check on prosecutorial decisions regarding informant witnesses. Although not all cases involving informants would proceed to that stage, the possibility of such hearings would operate as a powerful incentive to prosecutors and agents to think more carefully about their choice of informants, since it is not always possible to tell *ex ante* which case will result in a reliability hearing. Thus, hearings would pry open the “black box” of informant use, to a far greater extent than does current practice, providing greater accountability for prosecutorial use of informants.

Second, reliability hearings would provide courts with the opportunity to develop a common law regarding the factors and practices associated with greater informant reliability. Initially, courts likely would employ factors familiar from other evidence contexts—such as the extent to which government agents engaged in suggestive behavior, the prior basis for an informant's claim of knowledge, the existence of any corroborating evidence of an informant's testimony, and any other

263. For example, a recent study found that providing evaluators with information about witnesses' incentives increased evaluators' ability to detect whether the witnesses were telling the truth. See Charles F. Bond Jr. et al., *Overlooking the Obvious: Incentives to Lie*, 35 CLASSIC & APPLIED SOC. PSYCHOL. 212, 216, 219 (2013). See also Maeder & Pica, *supra* note 240 (finding that mock juror assessment of informant credibility is affected by the disclosure of incentives).

264. See *supra* notes 35–37 and accompanying text.

265. A number of scholars have previously proposed such reliability hearings for informants and other categories of suspect evidence with a doctrinal basis in evidence law. See, e.g., NATAPOFF, SNITCHING, *supra* note 35, at 194; Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 763 (2013); Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 531–52 (2006) [hereinafter Leo et al., *Bringing Reliability Back*]; Leo et al., *Promoting Accuracy*, *supra* note 43; Natapoff, *Beyond Unreliable*, *supra* note 152, at 108–09, 112–15 (suggesting pretrial reliability hearing modeled on *Daubert* hearing, at least for jailhouse informants in capital cases); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 378 (2012).

circumstance suggesting trustworthiness or lack thereof.²⁶⁶ On the last point, courts might consider as bearing on trustworthiness whether the particular law enforcement agencies involved had policies regarding informant use and, if so, whether those policies were followed in the particular case. Courts also could consider the content of such policies and whether they were reasonably calculated to ensure informant reliability.

This is an area where additional research is critical so that courts are not compelled to rely solely on their own intuitions and personal experience in evaluating the adequacy of informant policies. For example, it would be very useful to study the impact of variables related to the informant debriefing process, such as the manner of recording witness interviews. As is the case with confessions, electronic recording holds great promise in terms of preventing suggestive law enforcement behavior and documenting prior inconsistent statements or deception by the witness.²⁶⁷ But it also may help the cause of reliability by conveying an important message to prospective informants about the government's expectations. That is, witnesses who see *no* evidence of being recorded may perceive an invitation to be less careful, inferring that there will be no consequence for lying because there will be no proof of it. They also may infer that law enforcement agents do not expect them to be fully truthful or do not care if they are not—even if the prosecutors' express words are to the contrary. Whether different types of recording—e.g., note-taking versus different types of electronic recording (audio alone or audio-visual)—have differential impacts on witnesses should be evaluated carefully.²⁶⁸

It also would be useful to evaluate the impact of defense counsel's role in the debriefing process and of prosecutors' communicated attitudes toward the role of defense counsel. There already is a considerable body of research showing that people make better decisions when they are forced to think more carefully before

266. Cf. Leo et al., *Bringing Reliability Back*, *supra* note 265 (proposing a framework for evaluating reliability of confessions).

267. A number of commentators have argued in favor of electronic recording of all interviews of informant witnesses. See, e.g., SIMON, *supra* note 168, at 118 (recommending electronic recording of all sessions with all witnesses); Gershman, *supra* note 82, at 861 (recommending recording of all sessions with informant witnesses). But see Joel Cohen, *When Prosecutors Prepare Cooperators*, 23 CARDOZO L. REV. 865, 871–72 (2002) [hereinafter Cohen, *When Prosecutors Prepare Cooperators*] (arguing against electronic recording on grounds that it is impractical and witnesses may be more likely to lie because of fear that the recording will wind up in the wrong hands); see also Mosteller, *supra* note 57, at 565–67 (acknowledging that some witnesses may be reluctant to speak if recorded, but suggesting that, at a minimum, informants' first account of the events about which they later may testify be recorded). Recording plainly does not prevent witness contamination entirely, as recordings can miss some verbal or physical cues, which also can occur outside of the interview room, for example during transport. However, as with respect to confessions, recording likely will detect at least some contamination and deter even more.

268. Some studies suggest that reviewers are better able to make credibility determinations when they listen to a witness' words rather than focusing on body language and facial expression. See, e.g., Olin Guy Wellborn, III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991).

giving an answer.²⁶⁹ In the context of informant use, an experienced defense attorney can educate his or her client, before ever entering the interview room, about what is expected in terms of full disclosure and truth-telling. By carefully debriefing the client in advance, the lawyer also can prevent the client from making some common mistakes that could derail the cooperation process or could lock the client into a false story—e.g., by confronting the client about apparent minimization or patently implausible aspects of his or her account. This dynamic should be tested in an experimental setting modeled on the informant paradigm. Similarly, it would be useful to study the impact of a prosecutor's insistence upon the presence of counsel at all informant interviews. By making sure that informants have the opportunity to confer with defense counsel before and throughout the cooperation process, prosecutors could increase informants' perception that they are being treated fairly²⁷⁰ and that prosecutors are not afraid of being held accountable for their conduct during the debriefing sessions.

Additional research also is needed on the relationship between informant reliability and various incentives structures. As noted *supra* Section I, different prosecutors' offices employ dramatically different types of agreements with informants to secure their testimony. Some offices require that informants plead guilty to every criminal act they have ever committed; others require that they plead guilty only to the initial charges filed against them. Some promise specific sentencing caps or recommendations, while others promise only to bring the witness' assistance to the attention of the sentencing court.²⁷¹ While the practices of each prosecutorial office presumably were adopted (at some point in the office's history) based at least in part on a belief that such practices were most conducive to producing reliable cooperator testimony,²⁷² to my knowledge, there have been no studies of the relationship between these different types of rewards or agreements and truth telling.

Yet there are reasons to think that the type of incentive, and the extent to which it is specified or left undefined, may matter. Studies have shown that people respond to various types of incentives differently—and not necessarily as one might expect. In one well-documented phenomenon, when people are motivated to perform certain tasks through extrinsic rather than intrinsic rewards, it can change

269. See KAHNEMAN, *supra* note 242, at 19–30 (introducing “System 1” and “System 2” as two modes of thinking, with the former being intuitive or automatic, and the latter more deliberate); Alter et al., *supra* note 242, at 570–71.

270. As the work of Tom Tyler and others on procedural justice has demonstrated, people are far more likely to comply with the law, and the directives of law enforcement agents, when they feel that they are treated fairly and that law enforcement agents apply rules consistently. See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003).

271. See *supra* note 98–99 and accompanying text.

272. As Dan Richman has observed, some aspects of the process plainly are designed with jury appeal in mind as well. See Richman, *Cooperating Clients*, *supra* note 49, at 97 (noting that prosecutors often believe that jurors are “less likely to be put off by the ‘deal’” if the promise of leniency does not “set out a precise discount”).

their view of the task and their behavior.²⁷³ These studies suggest that the commoditization of testimony that cooperation agreements represent, which may be exacerbated when specific sentencing discounts are specified or promises are made to drop specific charges, may undermine any existing intrinsic motivation informants have to tell the truth and, therefore, that agreements that are less-explicitly transactional—striving instead for a tone of absolution—may be preferable.²⁷⁴

The magnitude of the incentive, or the possible range of sentencing discount if left undefined, also may affect informants' attitudes and performance. Some studies suggest that people "choke" in stressful situations when too much is on the line, executing the task less than optimally.²⁷⁵ This may caution, for example, against requiring informants to plead guilty to so many crimes that they are, in effect, facing life imprisonment if they do not receive the benefit of the agreement. On the other hand, discounts that are very large (like dropping a murder charge or agreeing to recommend a very low sentence for a very serious crime) may have the negative consequence of breeding contempt for the prosecutors who are willing to cut such deals and for the courts that are willing to enforce them. If an informant does not believe in the moral authority and legitimacy of these actors, he or she is less likely to comply with directives to tell the truth, including those contained in cooperation agreements.²⁷⁶

Whether benefits are structured as immunity from charges or recommendations for leniency at sentencing after the informant has pleaded guilty also may be

273. See, e.g., Emir Kamenica, *Behavioral Economics and Psychology of Incentives*, 4 ANN. REV. ECON. 427, 430–31 (2012). For example, people who previously enjoyed doing crossword puzzles started doing them more when they were offered payment for each puzzle they completed, but then did less than they had originally when the financial incentive was removed. See *id.* at 428. In another well-known example, parents of children at day care centers, who were told that they must pay a fine if they were late picking up their children, were late more often than they had been previously, when the consequence of being late was left unspecified. See Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 1 (2000).

274. For example, in England, cooperators are encouraged to go through a "cleansing" process with prosecutors, whereby they admit all of their past criminal conduct. See CROWN PROSECUTION SERV., QUEEN'S EVIDENCE—IMMUNITIES, UNDERTAKINGS AND AGREEMENTS UNDER THE SERIOUS ORGANISED CRIME AND POLICE ACT 2005 ¶ 26, http://www.cps.gov.uk/legal/p_to_r/queen_s_evidence_-_immunities_undertakings_and_agreements_under_the_serious_organised_crime_and_police_act_2005/index.html (last visited Mar. 17, 2016) [hereinafter CROWN PROSECUTION SERV., QUEEN'S EVIDENCE]. Although the Crown Prosecution Service Guidance acknowledges the tactical benefits of engaging in this process (so as not to be surprised when the witness is cross-examined at trial about acts known to his or her former criminal associates) it also promotes it as protective of "the integrity of the informer system, countering the suggestion that unscrupulous 'deals' have been struck between the offender and the prosecution, just to obtain testimony against others." See *id.* Some American prosecutorial offices, including the Southern District of New York, historically have followed a similar practice.

275. See Kamenica, *supra* note 273, at 432–33 (reviewing studies but determining that they were inconclusive, at least as applied to real-world labor markets).

276. See Tyler, *supra* note 270, at 286 ("People are more likely to adhere to agreements and follow rules over time" when they perceive the legal authorities with whom they are dealing as legitimate, a feeling that can be rooted in features specific to "particular settings and particular legal authorities").

significant. For example, research on the endowment effect and loss aversion²⁷⁷ suggests that informants may value more highly those benefits they perceive as current (as in the case where no charges have been filed pursuant to a promise of immunity or some more serious charged were dismissed) than those benefits that require a change in the status quo (as when informants have pleaded guilty to charges carrying stiff sentences and will reap the benefit of their cooperation only if a judge exercises leniency at sentencing). Whether witnesses in fact experience a difference between these two types of agreements, and whether there is any effect on the reliability of their testimony, would be worthy of study. Similarly, it would be useful to study whether the sequencing of non-immunized informants' testimony and their sentencing—i.e., whether they testify before or after being sentenced²⁷⁸—has any effect on how informants value sentencing benefits and on the quality of their testimony.

B. Evidence Rule Reforms

The next Section discusses changes to evidence rules, or courts' application thereof, to improve the accuracy of trial outcomes. These changes could supplement general pretrial reliability hearings for informants.²⁷⁹

1. Inquire into the Reliability of Coconspirator Statements

First, courts should be more careful about admitting informant testimony about oral communications, especially coconspirator statements that are not electronically recorded. One possible fix would be to provide the defendant against whom the statements are offered the opportunity to show that the declarant, or the circumstances in which the statement was made, indicate a lack of trustworthiness. The rules of evidence explicitly provide such an opportunity for many other types of evidence deemed potentially unreliable.²⁸⁰ Even absent a formal amendment to the rules, courts could, in their discretion, make such an inquiry.²⁸¹

277. See, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

278. For example, in Europe, where informant witnesses are a recent development and are still used sparingly, they generally testify only after having already been sentenced to a discounted sentence that reflects their agreement to provide testimony. A few judges in the United States also sometimes employ this procedure, which is designed to reduce the risk that the informant will color his or her testimony to please the prosecutor and the appearance of the testimony being "bought." Most European prosecutors are unhappy with this procedure, viewing it as insufficient to secure the witness' ongoing cooperation and candor, especially when combined with other rules that make it difficult to prosecute such witnesses for perjury. American prosecutors also typically distrust such arrangements. See Richman, *Cooperating Clients*, *supra* note 49, at 95–96.

279. See *supra* Part III.A.2.

280. See *supra* note 186 and accompanying text.

281. See Findley, *supra* note 265, at 763–66 (showing how existing rules of evidence, especially Federal Rules 602 (requiring personal knowledge), 701 (regarding that lay opinion be rationally based on the witness's perceptions), and 403 (requiring a balancing of unfair prejudice against probative value), as well as their state equivalents, can be used to ensure greater reliability); Thompson, *supra* note 265, at 379–82 (same).

Since the Federal Rules of Evidence were first promulgated, the Advisory Committee and Congress have already once addressed the showing required to admit evidence pursuant to the coconspirator exception. In 1997, the rules were amended in response to the Supreme Court's decision in *United States v. Bourjaily*.²⁸² In addition to codifying the Court's holding that a court may consider the statement itself in determining whether it qualifies as a coconspirator statement, the amendment added a requirement that there be independent corroborating evidence of the conspiracy's existence and the defendant's participation in it, an issue that the Court left open in *Bourjaily*.²⁸³ The amendment also applied this corroboration requirement to statements admitted pursuant to the hearsay exceptions for agent and employee admissions.²⁸⁴ Although the 1997 amendment arguably narrowed the group of defendants against whom coconspirator statements could be offered, it did nothing to narrow the scope of the statements that could be offered pursuant to the exception once the conspiratorial relationship between the declarant and defendant is established by the requisite proof. As noted *supra* Part II.B.1, the prevailing justification for the coconspirator exception is presently one of necessity.

Certainly, necessity has been invoked as a justification for other hearsay exceptions, like business records, public records, dying declarations, and the residual exception. But none of those exceptions relies *solely* on necessity; all but dying declarations explicitly require a showing of reliability (or an absence of any circumstances suggesting unreliability), and all, including dying declarations, historically have been thought inherently to offer features of reliability. For example, businesses have a pecuniary interest in maintaining accurate records;²⁸⁵ public agencies have a duty to maintain accurate records;²⁸⁶ and those who believed themselves to be on death's doorstep were thought to have a self-interest, based on religious beliefs, in uttering only the truth.²⁸⁷ In recognition of the

282. See FED. R. EVID. 801(d)(2) advisory committee's note to 1997 amendment (explaining that Rule 801(d)(2) was amended to respond to issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987)).

283. See *id.*

284. See FED. R. EVID. 801(d)(2) (requiring corroboration of relationship for statements admitted as those of a defendant's authorized representative, agent or employee, or coconspirator).

285. The Advisory Committee's note to Federal Rule of Evidence 803(6) states that:

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits or precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

FED. R. EVID. 803(6) advisory committee's note.

286. See FED. R. EVID. 803(8) advisory committee's note ("Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.").

287. See FED. R. EVID. 804(b)(2) advisory committee's note ("While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present.").

modern, skeptical view of the reliability of dying declarations, the Federal Rules of Evidence limit this exception to statements about the cause or circumstances of the victim's death and, in criminal cases, only to homicide prosecutions.²⁸⁸

Thus, the coconspirator exception stands out for the breadth of the hearsay that it admits with no requirement that there be any particularized showing of reliability. Adding a reliability inquiry to the coconspirator exception would eliminate this discrepancy.

2. Admit "Other Act" Evidence More Sparingly

Another evidence tweak that would enhance the reliability of convictions obtained using cooperator testimony would be to reconsider the current approach to the admission of evidence of a defendant's character and other acts. As set forth *supra* Part II.B.2, the rules and doctrine applied in many courts result in the admission, through cooperator testimony, of considerable other act evidence, on the theory that it is intrinsic to the crime on trial (especially in conspiracy cases) or explains the formation of the relationship between the defendant and the cooperator. In many cases, it is appropriate to admit such evidence on one or both bases. But there is tension between the current approach, which has become quite liberal in admitting such evidence, and our jurisprudential commitment to limiting evidence about character, which runs deep for good reason.

In recognition of this potentially unfairly prejudicial effect, courts should rigorously examine the probative value of such evidence in the context of the case. If a court would be reluctant to admit evidence about the same acts through other types of proof, then cooperator testimony about those same subjects should also be approached with caution. If offered primarily to explain the background of the conspiracy and the development of a trusting relationship, each act discussed actually should be probative of those issues, and the balance of probative value versus unfair prejudice should take into account the extent to which those issues are contested.²⁸⁹ Courts also should think more carefully about the instructions they give juries about such testimony, including the rationales for any limitations on the use of such evidence, to ensure they make sense and actually are responsive to the concerns such testimony raises.²⁹⁰ Prosecutors also should provide advance notice of their intention to offer such evidence, as they do for evidence falling more squarely within Rule 404(b), so that the defense has the opportunity to investigate and prepare a motion *in limine* to exclude the evidence.

288. See FED. R. EVID. 804(b)(2).

289. See *Old Chief v. United States*, 519 U.S. 172, 179 (1997) (holding that a defendant's willingness to concede a point should be taken into consideration when determining whether evidence should be admitted under Federal Rule of Evidence 403's balancing test).

290. See *Griffin*, *supra* note 253, at 325–33 (arguing for greater attention to “candor, content, and timing” in the use of jury instructions to “capitalize on [their] potential de-biasing effects”).

3. *Rethink Corroboration Requirements*

Third, courts should rethink the corroboration rules, if any, that constrain when cases based primarily on informant testimony may be submitted to the jury. As discussed *supra* Part I.D.3, such rules formally protect against conviction based solely on the testimony of an informant as to a defendant's involvement in a crime. However, in practice, they often provide cover for cases to be submitted to a jury when the corroboration is weak or is itself suspect. They also do not account for the possibility that law enforcement witnesses have disclosed the corroborating facts to the informant.

Rather than a formal requirement of corroboration, a more substantive inquiry into the reliability of the evidence of a defendant's guilt—as would be required by a pretrial reliability hearing on an informant—might be more protective of innocence. In reality, it would be a rare case where an informant's account of a defendant's guilt would be deemed reliable absent any independent corroboration. The ultimate inquiry, however, should be the reliability of the informant's evidence, with emphasis on the procedures used to debrief and incentivize the informant and on the quality of the record of that process.²⁹¹ Moreover, when evaluating the extent of corroboration, courts should take into account the nature of the corroborating evidence and whether it, too, requires greater scrutiny.

C. *Trial Practice Reforms*

In addition to the foregoing tweaks to the evidence rules and their application, courts also should consider the following additional reforms to existing trial practices in an effort to improve the reliability of proceedings involving informants.

1. *Limit Implicit Prosecutorial Vouching*

First, courts should consider limiting the implicit prosecutorial vouching that occurs when prosecutors introduce cooperation agreements and reference their truth-telling incentives in their jury addresses. At a minimum, when an informant witness lies *after* entering into a cooperation agreement, or after progressing substantially in the cooperation process, the prosecutor should not be permitted to make arguments premised on these provisions. In those circumstances, these incentives plainly have not been sufficient to assure full candor. I suspect that prosecutors would be more reluctant to call some informant witnesses at trial if they knew that they would be prohibited from making such arguments. In the meantime, it would be very useful to study whether such provisions in fact result in more reliable testimony and the effect that prosecutorial vouching has on jurors' appraisal of informant witnesses' credibility.

291. Cf. Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673, 695–98 (suggesting that judges consider “investigative adequacy”—and allow juries to as well—in assessing whether there is reasonable doubt).

2. *Improve the Substance and Timing of Jury Instructions About Informants*

Second, courts should give juries instructions about informant witnesses at various stages during the trial that are tailored to address some of the most salient risks associated with them, as identified in Section II, *supra*. Currently, many judges instruct juries to scrutinize the testimony of informant witnesses carefully because of their incentives to curry favor with the government.²⁹² Such instructions are substantively insufficient and likely are given too late—at the end of the trial along with the other instructions of law.

Although more study is needed, at a minimum, judges should instruct juries about some of the other specific reasons why informant testimony may be unreliable, and such instructions should be given closer in time to the informant's testimony. Judges also should give well-timed instructions to counter some of the psychological effects that otherwise may cause juries to overvalue informant testimony. For example, while courts routinely tell juries that what the lawyers say in their jury addresses are not evidence, a specific instruction about framing and repetition effects, given after the prosecutor gives an opening statement, or after an informant is permitted to offer an interpretation of other evidence, would be an entirely different kind of experience.²⁹³ It therefore would be worthwhile to study the impact of variations of instructions on the unreliability of informant testimony, the effect of giving those instructions at different times, and whether instructions that call jurors' attention to the effects of framing, primacy, and repetition are effective in countering them.

D. *Reforms in Prosecutor Offices*

The foregoing reforms, which center around the pretrial and trial processes, hold considerable promise for reliability gains. However, the most important reforms likely would be those that occur within prosecutors' offices.²⁹⁴ As other commentators have called for,²⁹⁵ offices should adopt formal policies—in the place of mere custom and practice—addressing directly the criteria for selecting and developing informant wit-

292. See Jeffries & Gleeson, *The Federalization of Organized Crime*, *supra* note 51, at 1103; Saverda, *supra* note 37, at 791.

293. See Griffin, *supra* note 253, at 326.

294. See Findley, *supra* note 265, at 759–60 (observing that, because the trial process has proven to be ineffective “at sorting true from false evidence in these suspect categories, the most efficacious approach might be to improve the quality of the evidence upstream”).

295. See, e.g., NATAPOFF, *SNITCHING*, *supra* note 35, at 188 (recommending that “[a]ll prosecutorial offices should establish internal guidelines that control the creation, deployment, reward, protection, and documentation of informants,” which Natapoff defines as including cooperating defendants); see also MAXFIELD & KRAMER, *supra* note 50, at 20 (calling for a more uniform definition of “substantial assistance” across the federal districts); Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 247–51 (1997) (suggesting that the Department of Justice adopt nationwide guidelines specifying “in detail what types of assistance will generally be considered ‘substantial’ enough to warrant the filing of a substantial assistance motion”); Mosteller, *supra* note 57, at 565–67 (calling for more detailed policies on informants, as well as review of informants' reliability in some cases by prosecutors not directly involved in the case).

nesses and should train their prosecutors around those policies. These criteria should include not only the value of the information that a witness offers, but also criteria tied to markers of reliability, informed by the most recent social science and the wrongful conviction literature.²⁹⁶ Policies also should provide guidance on the conduct of the debriefing and trial preparation process, requiring that prosecutors not disclose information to the witness (with examples of how disclosure can occur inadvertently) and that they conduct more investigation as needed to evaluate the witness' reliability. Policies also should address the kinds of benefits that may be provided to an informant witness and the permissible terms of cooperation agreements and should require that all benefits and cooperation agreements be reduced to writing.²⁹⁷

Policies also should require that prosecutors and agents keep careful records of all their communications with informant witnesses from the beginning until the end of the cooperation process, as well as of the investigative efforts to corroborate the witnesses' accounts and the results thereof. Such policies should address the form those records should take (i.e., whether sessions should be recorded electronically), who should maintain the records, the extent to which they should be disclosed to defense counsel, and when such disclosure should occur. Each office should maintain a central file containing the office's cooperation policies, memoranda explaining the prosecutor's decision to offer a cooperation agreement to a particular witness, all cooperation agreements, and a record reflecting the results of each witness' cooperation.

Further, prosecutors should be required to report errors or "near misses" that are discovered regarding cooperating witnesses—i.e., when it is discovered that the cooperator provided false testimony or lied at a late stage in the cooperation process—to the highest levels in the office, so that they can be examined in consultation with the line prosecutors to understand what went wrong, and so the lessons learned can be incorporated into the office's ongoing training.²⁹⁸ These reports, and a written analysis of them, also should be included in the central file. Policies also should address when a cooperation agreement must be rescinded in light of new information suggesting that a witness once deemed reliable lied or withheld information. Finally, policies should provide mechanisms for holding

296. Educating prosecutors about the most recent studies on deception detection would be extremely useful. Although some techniques shown to hold promise may not be feasibly applied in most circumstances, *see, e.g.*, Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427 (2008) (reviewing advances in brain-imaging lie-detection techniques), a familiarity with the literature would sensitize prosecutors to the fact that even experienced investigators cannot reliably detect deception—which, in turn, should caution humility and skepticism when dealing with informants, even when accompanied by highly experienced agents.

297. An example of such a detailed policy can be found in the guidance provided to U.K. prosecutors by the Crown Prosecution Service. *See* CROWN PROSECUTION SERVICE, QUEEN'S EVIDENCE, *supra* note 274.

298. *See* Cohen, *What Is True?*, *supra* note 67, at 826 (calling for such reporting and analysis); Yaroshefsky, *Cooperation with Federal Prosecutors*, *supra* note 73, at 964 (concluding, after interviews with numerous former federal prosecutors, that, at a minimum, prosecutors should receive greater training on the conduct of proffer sessions and "prosecutors should be exposed to the experiences of former assistants who believed the false statements of cooperating witnesses").

prosecutors accountable when they repeatedly, or intentionally, fail to comply with office policies regarding informants.

The foregoing policies would help prosecutors on a number of vectors. First, they would facilitate compliance with existing *Brady* obligations, which has consistently proven challenging,²⁹⁹ and any more demanding disclosure regime that might be adopted, as recommended *supra* Part III.A.1. Second, they would help prosecutorial offices evaluate their use of cooperating witnesses, including for the value they are getting (in terms of crimes solved and culpable offenders brought to justice) and the extent to which they are succeeding in propounding only reliable cooperator testimony. Third, such requirements would enable cross-jurisdictional research comparing the experiences of different offices to determine whether certain policies and practices are associated with better outcomes than others.³⁰⁰ Fourth, they would provide prosecutors the material they will need at pretrial reliability hearings³⁰¹ and potentially at trial to respond to attacks on a cooperator's reliability. Fifth, they would help send an important signal to line prosecutors regarding the importance of cooperator reliability to the office's culture³⁰²—and would help weed out those prosecutors whose conduct is inconsistent with that culture.

Until more is known about what constitutes “best practices” for informants, the precise content of some aspects of these policies, like rules about the permissible benefits and structure of cooperation agreements, should be left to the individual prosecutors' offices. At least initially, the priority should be that offices have policies in effect and that the policies be followed. Locally developed rules often are better suited to local conditions, and—as much of the new governance literature suggests—organizations may be more likely to comply with rules that

299. There has been much attention paid in recent years, including by the courts, to prosecutors' failures to comply with their *Brady* obligations. *See, e.g.*, *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting) (decrying that “[t]here is an epidemic of *Brady* violations abroad in the land”); *Wolfe v. Clarke*, 691 F.3d 410, 415 (4th Cir. 2012); *United States v. Kohring*, 637 F.3d 895, 901 (9th Cir. 2011); *Simmons v. Beard*, 590 F.3d 223, 234 (3d Cir. 2009); *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149, 161 (2d Cir. 2008); *United States v. Zomber*, Nos. 06–1287, 06–2230, 07–1933, 2008 WL 4874509, at *4–5 (3d Cir. Nov. 12, 2008); *United States v. Lyons*, 352 F. Supp. 2d 1231, 1244–45 (M.D. Fla. 2004); *see also* *United States v. Jones*, 609 F. Supp. 2d 113, 131–32 (D. Mass. 2009) (compiling cases where *Brady* violations were found).

300. *See supra* Section IV.

301. *See supra* Part III.A.2.

302. The importance of office culture to the behavior and attitudes of employees is now well-documented in a range of fields, including prosecutorial offices. *See, e.g.*, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 996–1000 (2009) (reviewing literature). Prosecutors who believe that they work for an office that values integrity over outcomes are more likely to act in a way that is consistent with that ethic. *See* Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office*, 84 WASH. L. REV. 11, 14–15 (2009); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 351–53 (2001). Training prosecutors on the causes of wrongful convictions, and making clear through specific policies what is expected with regard to the use of informants and the consequences for failing to comply, would go a long way toward countering some of the “win at all costs” tendencies that can overcome even well-intentioned prosecutors in some situations. *See supra* Part II.C.2.

they played a role in developing than those imposed upon them.³⁰³ Moreover, simply requiring that offices adopt policies may have the salutary effect of prompting high-ranking individuals within prosecutorial offices to educate themselves about the relevant literature on wrongful convictions to better inform their policies.

CONCLUSION

Numerous studies have identified false informant testimony as one of the four categories of evidence most commonly associated with wrongful convictions, along with false confessions, eyewitness misidentification, and faulty forensic science. Yet, of these four categories of suspect evidence identified in prior innocence scholarship, informant testimony is the one with regard to which there are the fewest discernible signs of progress. This is a troubling state of affairs, because informant testimony likely is used in more cases overall than any other category of suspect evidence. Moreover, because informants are used in so many cases that do not involve biological evidence, false informant testimony is particularly unlikely to be discovered through later DNA testing. In light of the factors that make informant testimony inherently unreliable and yet persuasive with juries, it is likely that the rate of wrongful convictions attributable to false informant testimony is higher than the studies suggest.

To the extent that there has been any significant recent engagement among officials with the dangers of informant testimony, it generally has been limited to jailhouse informants or has been subsumed within a larger discussion about prosecutors' compliance with their *Brady* obligations. Both of these are important discussions, but they reflect incomplete paradigms for thinking about the dangers of false informant testimony. Jailhouse informants may well be the most unreliable type of informant, but most informants are not of this type. Moreover, disclosure regarding informants is critical, but it is not sufficient to address all of the dangers associated with informant testimony—just as disclosure has not proven sufficient to prevent wrongful convictions based on flawed eyewitness identifications, confessions, or flawed forensic science. Rather, we need a more comprehensive approach to the regulation of informants, based on a richer and more holistic account of the dangers posed by false informant testimony. This Article has attempted to provide that account. In the near term, there are numerous reforms that prosecutors and courts could implement to make informant testimony, and the verdicts based upon them, more reliable. Looking ahead into the future, more research is needed to determine an even more precise set of best practices for the development and use of informants.

303. See, e.g., Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645 (2006); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLAL. REV. 1 (1997).