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Agreements for Cooperation in Criminal Cases

Graham Hughes

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Agreements for Cooperation in Criminal Cases

*Graham Hughes**

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I. INTRODUCTION

In criminal prosecutions, both state and federal, closely negotiated agreements for immunity and lenient plea bargaining in return for cooperation have acquired considerable importance. These agreements are an ancient practice now wearing sophisticated modern dress. They may arise in complex white-collar crime cases, organized crime cases, narcotics prosecutions, and, from time to time, in other prominent major felony cases. They constitute a phenomenon that differs in important ways from the run-of-the-mill guilty pleas that characterize our metropolitan courts and recently have preoccupied students of the criminal system. Unlike the ordinary guilty plea, the suspect or defendant in cooperation agreements offers more than just a quick result that saves public resources; in this kind of case that limited consideration often would not be attractive enough to induce leniency since the government may be quite willing to spend time and money in prosecuting. In cooperation agreements the defendant trades information¹ and testimony, with the promise of enabling the State² to make a case against other defendants who, for one reason or another, are regarded as most deserving of the severest form of prosecution.³

Again, unlike the great run of guilty pleas, the deal made in more complex criminal cases cannot be sealed with a chat in the hall just before entering the courtroom. Compacts for cooperation may involve contested issues that must be negotiated, sometimes for months, and that eventually are embodied in letter agreements that range from the fairly straightforward to the extremely complicated.⁴ Most important, in these cases the State cannot speedily conclude the deal with a plea

1. See the discussion in KENNETH MANN, *DEFENDING WHITE COLLAR CRIME* 14-18 (1985), in which the author represents the struggle to obtain and control information as the principal issue in defense trial preparation or plea negotiation in complex white-collar crime cases.

2. The terms "state" and "government" in this Article refer to the prosecution in a general sense and are not meant to imply a distinction between state and federal prosecutions.

3. As the Seventh Circuit Court of Appeals has suggested, "Promises of immunity are important weapons in the fight against large-scale criminal enterprises; the government often snares big fish with information gained from little fish. In return, the little fish are granted immunity from prosecution based upon the information they provide to the government." *United States v. Palumbo*, 897 F.2d 245, 246 (7th Cir. 1990). Sometimes the fish are all one size and the one who receives immunity may be simply the one who first shows a convincing readiness to cooperate. A defendant who elects to go to trial may be found especially deserving of rigorous prosecution as compared with one who early shows a desire to plead and cooperate.

4. The complexity may arise from the need to define in detail and with precision: (1) the nature of the cooperation promised by the cooperator, and (2) the scope of the immunity or nature of the plea bargain that is extended. In *Ricketts v. Adamson*, 483 U.S. 1 (1987), discussed *infra* notes 29-45 and accompanying text, the plea agreement comprised 17 paragraphs. The full text of the agreement, taking up two pages of the Law Reports, is contained in Appendix A to the *en banc* decision of the court of appeals. *Adamson v. Ricketts*, 789 F.2d 722, 731 (9th Cir. 1986), *rev'd*, 483 U.S. 1 (1987).

and a sentence and still protect its interests. The cooperator makes a set of promises and assumes potentially onerous and protracted obligations. These will at least include interviews and debriefings and may involve undercover action or observation and reporting back. The cooperator's obligations will probably continue into more formal stages with grand jury and trial testimony and, perhaps, testimony at retrials years later. The State must find a way, therefore, to keep the immunity grant or plea bargain contingent on the cooperator's substantial performance of the promised obligations. The usual sequence of plea and sentencing, with the consequent engagement of the double jeopardy clause, would render these long-term cooperation agreements worthless unless the State carefully drafts the agreements to avoid this hazard.

For these reasons, deals involving promises to cooperate are sharply different from the general phenomenon of plea bargaining. They are exotic plants that can survive only in an environment from which some of the familiar features of the criminal procedure landscape have been expunged. A way must be found to prop open the double jeopardy lid; sentencing (if it is a plea agreement rather than an immunity grant) must be postponed, perhaps for years; immunity (if it is an immunity deal) must be contingent and not irrevocable. The prosecutor must retain the power to enforce the cooperation agreement for as long as necessary. In the end the disposition will be dictated by the terms that were negotiated and by the prosecutor's ability to hold the defendant to those terms.

Many years ago Sir Henry Maine, in the context of the civil law, made the famous observation that a conspicuous feature of modern society and modern law was a "movement from Status to Contract."⁵ That movement has now reached the criminal justice system both with mass plea bargaining and with cooperation agreements. If a regular practice of sentence discounts for guilty pleas represents the bureaucratization of criminal justice, then the cooperation agreement marks its privatization.⁶ In cooperation agreements the prosecutor and defendant resolve suspicion or charges by contract. Any subsequent litigation between the defendant and the prosecutor thus turns largely to concepts

5. HENRY S. MAINE, *ANCIENT LAW* 170 (1st Am. ed. 1864) (emphasis omitted).

6. As one scholar has noted, "Plea bargaining undercuts [the] distinctive moral aspects of the criminal law. First, negotiated dispute resolution 'privatizes' the dispute by empowering the parties themselves to resolve it without any significant involvement by either the public or the courts." Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 *Geo. L. J.* 185, 219 (1983) (footnote omitted). It may seem odd to refer to "privatization" when the state remains a party, but the characterization is apt in the sense that public standards of guilt and procedures for fact-finding yield to negotiated dispositions that are later reviewable for the most part only under the concepts and standards of contract law.

taken from contract law. In mass plea bargaining the defendant subscribes to a contract of adhesion.⁷ With cooperation agreements, by contrast, the terms are fashioned individually and the contract is executory on both sides.

These developments invite attention for several reasons. First, they redirect us to perennial questions about the free-ranging discretion of the American prosecutor. Second, they raise again the old question of whether it is fair to convict defendants on purchased testimony. Third, they invite reflection on the fairness of both the process and the result of the bargaining for immunity or for a plea for concessions. Fourth, they invite some appraisal of the changing face of the criminal process.

This Article examines these questions in the context of an overall survey of cooperation agreements. It identifies cooperation agreements as a subject worthy of detailed scrutiny in the future.

Part II traces the history of informal immunity grants and discusses their nature. Part III examines the prosecutor's discretion in choosing whom to immunize or treat leniently in return for cooperation, and discusses ways of monitoring the exercise of that discretion. Part IV raises the question of whether testimony admitted under cooperation agreements sometimes infringes on a defendant's right to a fair trial while Part V discusses whether the enforcement of these agreements by the government sometimes imposes an unfair burden on the cooperating witness. Part VI comments on how the existence of a cooperation agreement produces changes in the conventional forms and practices of the criminal process.

II. THE NATURE AND FUNCTION OF INFORMAL IMMUNITY GRANTS

Cooperation agreements may take the form of plea bargains or of informal immunity agreements. The general contours of the plea bargain are familiar enough, but at the outset we need to say something about the special features of informal grants of immunity. Nearly all jurisdictions have formal statutory provisions under which a court, upon application of a prosecutor, may grant immunity. The federal statute⁸ requires that a senior Justice Department officer⁹ approve a

7. The term "contract of adhesion" refers to a standardized form of offer about which one party, usually a consumer, has no liberty to negotiate and simply must take or leave the offered terms. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631-32 (1943).

8. 18 U.S.C. § 6003 (1988).

9. The request must be approved by "the Attorney General, the Deputy Attorney General, Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General." *Id.* § 6003(b). In practice the request almost invariably is referred to the Assistant Attorney General in charge of the Criminal Division.

federal prosecutor's application. It further states that the United States Attorney who makes the application must declare that the witness's testimony "may be necessary to the public interest" and that the witness "has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."¹⁰

Formal applications for immunity give the prosecutor certain advantages. A court has little or no discretion to refuse a formal application.¹¹ Also, after the court grants immunity, it may sanction the witness for contempt if he refuses to testify. The formal grant is thus well suited to compelling the recalcitrant witness. There are, however, features that make formal immunity grants less suitable for cooperation agreements.

First, if the formal grant is made in a public proceeding, the potentially important element of secrecy will be shattered. For example, once a court grants a subject formal immunity in a public proceeding, it becomes difficult to use her in an undercover capacity to report on activities of her associates. In some jurisdictions, including the federal, courts may seal the immunity grant to avoid this problem.¹²

Second, the grant's only direct impact is to immunize as to the use of testimony and its fruits, thereby compelling the subject to testify. The grant cannot, for example, expressly compel the subject to submit to debriefing and interviewing by agents of the prosecution or to work in an undercover capacity, though the prosecutor might apply for the grant on the basis of the cooperator's agreement to perform these tasks.¹³ Even the testimony is not guaranteed since the subject may be

10. 18 U.S.C. § 6003(b).

11. The federal statute affords no discretion, providing that the United States district court "shall issue" an order directing the witness to testify upon request by the government attorney. 18 U.S.C. § 6003(a) (emphasis added). In *Ryan v. Commissioner*, 568 F.2d 531, 541 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978), the Seventh Circuit noted that a court has no power to review a United States Attorney's conclusion that conferring immunity is in the public interest. According to the court, because "that judgment is entirely a matter for the executive branch, unreviewable by a court, there is no need for the record to contain any facts supporting the decision of the United States Attorney." *Id.*

12. Federal formal immunity usually is granted in the context of grand jury proceedings. The immunity grant thus typically is covered by the secrecy provisions that apply to the grand jury. See FED. R. CRIM. P. 6(e)(2) and (3) (imposing a general rule of secrecy on "matters occurring before the grand jury"). Formal immunity occasionally is granted in open court to a witness about to testify at a trial.

13. See Marc L. Sherman, *Informal Immunity: Don't You Let That Deal Go Down*, 21 *Lox. L.A. L. Rev.* 1, 48-49 (1987). This point is somewhat academic since, while the courts in the setting of formal immunity cannot apply sanctions for failing to undergo interviews or work undercover, the prosecutor actually loses nothing, because the formal immunity, while irrevocable, has no impact except to prohibit the use of any testimony the cooperator provides as a witness. The cooperator can be prosecuted if he does not testify or even if he testifies, provided no direct or derivative use is made of his testimony. See note 14 *infra*.

willing to undergo the sanction of punishment for contempt rather than testify. In that case the prosecution can do nothing more to procure the testimony though it may be able to prosecute the subject without the testimony.

Third, because the formal grant of immunity is restricted to "use and fruits immunity,"¹⁴ the subject remains vulnerable to the possibility of a prosecution based on evidence not derived from the testimony compelled by the grant.¹⁵ So narrow a protection may be an insufficient inducement to secure full cooperation. The greater security of transactional immunity may be necessary to convince the subject to cooperate.¹⁶ Conversely, in some cases transactional immunity has the added attraction for prosecutors of allowing them to define precisely the area of immunization by the terms of the agreement. The prosecutor thus may exclude certain crimes from the reach of the bargain if she does not wish to release the subject completely from liability. In this way transactional immunity may be narrower than use and fruits immunity since both crimes related to the testimony and other crimes may be excluded from the scope of immunity.¹⁷

14. Section 6002 provides that when an immunity order is issued "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002 (1988). Known as use and derivative use immunity (informally "use and fruits"), this is the degree of immunity required by the United States Constitution to erase the privilege against self-incrimination. See *Kastigar v. United States*, 406 U.S. 441 (1972). This was the type of immunity conferred on Lieutenant Colonel Oliver North when he testified before the congressional committees investigating the Iran-contra matter in the summer of 1987. *United States v. North*, 910 F.2d 843, 851, *later proceeding* 1990 U.S. App. LEXIS 16490 (D.C. Cir. 1990).

15. The government, however, carries the heavy burden in such a case of proving "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460. This *Kastigar* requirement has been enforced with a degree of rigor. See *North*, 910 F.2d at 861 (holding that testimony was tainted when witnesses may have refreshed their memory or focused their thoughts by adverting to the earlier, immunized testimony of the defendant). If informal immunity is stipulated to be of the use and derivative use kind, or if the agreement is silent as to its exact scope, then the *Kastigar* standards are applicable. See *United States v. Palumbo*, 897 F.2d 245, 248-49 (7th Cir. 1990) (applying the *Kastigar* tests to statements made by a defendant while negotiating for an immunity deal that was never finalized).

16. Transactional immunity means that the government cannot charge the witness with any offense about which he provided evidence. He may, however, be charged with perjury or contempt. Some jurisdictions, including New York, require transactional immunity to be conferred to meet the constitutional privilege against self-incrimination. Indeed, New York confers automatic transactional immunity on every witness who is summoned to testify before the grand jury. N.Y. CRIM. PROC. LAW §§ 50.10, 190.40(2) (McKinney 1981-82). In order to avoid the sweep of transactional immunity, New York prosecutors sometimes will bargain with a grand jury witness to waive his statutory immunity and accept instead an informal immunity agreement limited to use and derivative use immunity.

17. See, e.g., *United States v. Quatermain*, 613 F.2d 38 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980), discussed *infra* in notes 163-72 and accompanying text. Conversely, transactional immunity can reach crimes that will not form the subject of any part of the witness's testimony and as to

Sometimes, to offer the amplest measure of protection, the cooperator may seek and the government may wish to extend a combination of transactional and use and fruits immunity. The witness thus may gain immunity from use or derivative use of any testimony he gives and simultaneously obtain total immunity from prosecution for categories of offenses denominated in the agreement, whether or not the testimony given relates to them. In most jurisdictions the simple use and fruits immunity is all that flows from a formal grant. Prosecutors and subjects, therefore, often cannot achieve these desirable combinations and permutations through a formal grant. To escape these confinements, prosecutors have long been in the habit of offering to potential cooperators informal grants of immunity, sometimes called "letter immunity" or "pocket (or hip-pocket) immunity." These informal grants can be flexibly shaped to fit the contours of the deal that is negotiated.

A. *History of the Practice*

The old common law recognized a practice of "approvement" under which a person arraigned for a felony might accuse another as his accomplice and become entitled to a pardon if the accused accomplice were convicted.¹⁸ Apart from approvement, which fell into disuse by the eighteenth century,¹⁹ there also existed an informal practice by which an accused, though not legally entitled to a pardon, could obtain one by confessing to the crime and revealing his accomplices.²⁰ This practice was rife in the nineteenth century when the lack of an organized police force often made it essential to procure accomplice testimony in order to track down or build a case against a major criminal. It was customary to advertise prominently the offer of pardons to accomplices who would come forward and testify leading to a conviction of the principal and to

which use and fruits immunity thus would offer no protection.

18. 4 WILLIAM BLACKSTONE, COMMENTARIES *330, cited in *The Whiskey Cases* (United States v. Ford), 99 U.S. 594, 599 (1878).

19. *The Whiskey Cases*, 99 U.S. at 599 (describing approvement as an "obsolete practice"). Approvement had earlier come under severe criticism. Chief Justice Hale wrote, "The truth is that more mischief hath come to good men, by these kinds of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders." MATTHEW HALE, PLEAS OF THE CROWN 226 (1678).

20. Lord Mansfield described this informal practice as follows:

Where the accomplice has made a full and fair confession of the whole truth and is admitted as a witness for the crown, the practice is, if he act fairly and openly and discover the whole truth, though he is not entitled *of right* to a pardon, yet the usage, the lenity and the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the king's mercy.

The Whiskey Cases, 99 U.S. at 600 (paraphrasing Lord Mansfield in *Rex v. Rudd*, 98 Eng. Rep. 1114, 1116 (1775)).

offer cash payments to witnesses who might come forward.²¹

In *The Whiskey Cases*²² the Supreme Court discussed the practice in surprisingly modern terms. After recognizing the importance of prosecutorial discretion in deciding when immunization is necessary to apprehend other criminals, the Court described what evidently was regarded as a familiar procedure under which the prosecutor would interview the accomplice in an attempt to estimate the need for his testimony. In such a setting, the Court recommended:

Prosecutors . . . should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfils those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.²³

The Court was careful to explain that the existence of such an agreement and the defendant's full performance under it could not operate as a plea in bar to quash an indictment.²⁴ The practical consequences, however, appeared little different from a successful motion to dismiss, since the Court recognized that the defendant had an equitable right to a pardon and to a delay in the trial pending application for one.²⁵ The Court also recognized the essentially contingent features of the practice, commenting that if the defendant later refused to comply with the conditions of the agreement, he might be tried and convicted since his bad faith would forfeit his "equitable title to protection."²⁶

B. *The Modern Practice*

Modern practice thus has ancient roots. Significantly, the Court's discussion in 1878 involved no requirement of judicial approval for the immunity offer but acknowledged the prosecutor's unrestricted discretion to purchase testimony through immunity agreements. There al-

21. The tremendous inducement sometimes offered under this practice is described in the Welsh-language account of a murder in rural Wales in 1840 in G. PHILLIPS, LLOFRUDDIAITH SHADRACH LEWIS [The Murder of Shadrach Lewis] (1986), where the reward notice read:

A reward of 200 pounds . . . will be given to any person who will afford such information and evidence as shall lead to the discovery and conviction of the murderers and Lord Normanby [the Secretary of State] will advise the grant of Her Majesty's most precious pardon to any accomplice, not being the actual murderer, who will give such evidence as shall lead to the same result.

Id. at 40 (translated from the Welsh). The author noted the huge dimensions of the reward, stating that "[t]o a farm laborer earning six shillings a week [15 pounds a year] 200 pounds was a fortune." *Id.* at 40-41.

22. 99 U.S. 594 (1878).

23. *Id.* at 604.

24. *Id.* at 601.

25. *Id.* at 606.

26. *Id.* at 605.

ways has been, however, a tension arising out of the difficulty of harmonizing informal prosecutorial practices with the formal statutory procedures for granting immunity by way of judicial order.

Questions about the validity of the informal practice may arise in two ways. First, a reluctant witness may claim that the prosecutor has no power outside existing statutes to override his privilege against self-incrimination and compel his testimony by offering an informal immunity. Courts have upheld this contention, applying a jealous scrutiny to the destruction of a constitutional privilege against the will of the party involved.²⁷ When a witness's constitutional rights are at stake, courts properly hold that the prosecution must comply strictly with a legislative declaration of the formal procedure necessary to extinguish the privilege.²⁸

Second, questions about the validity of the informal practice arise when a defendant claims that he should not be prosecuted because he was informally immunized under a cooperation agreement and has performed his side of the bargain. The prosecutor may allege that the defendant did not perfectly carry out the terms of the bargain, or a subsequent prosecutor may not feel bound by the actions of a predecessor,²⁹ or there may be a dispute as to whether the prosecutor and defendant ever arrived at an immunity for cooperation deal. When the defendant negotiates for immunity in exchange for testimony, the considerations are sharply different than when a reluctant witness challenges a prosecutor's power to offer informal immunity. For a court to refuse to validate an agreement that a suspect bargained for would disable that suspect from advantageously waiving the constitutional right against self-incrimination. This judicial intransigence would be difficult to reconcile with the affirmative attitude that courts now display toward plea bargaining³⁰ and would be a strong brake on prosecutorial

27. *Commonwealth v. Brown*, 619 S.W.2d 699 (Ky. 1981), *overruled on other grounds by* *Murphy v. Commonwealth*, 652 S.W.2d 69 (Ky. 1983); *Grand Jurors for Middlesex County v. Wallace*, 343 N.E.2d 844 (Mass. 1976); *State v. Saliterman*, 150 N.W.2d 699 (Minn. 1967); *Campus v. State*, 580 P.2d 966 (N.M. 1978); *Apodaca v. Viramontes*, 212 P.2d 425 (N.M. 1949); *Commonwealth v. Carrera*, 227 A.2d 627 (Pa. 1967); *Commonwealth v. Brady*, 323 A.2d 866 (Pa. Super. 1974). *Contra In re Kelly*, 350 F. Supp. 1198 (E.D. Ark. 1978); *Surina v. Buckalew*, 629 P.2d 969 (Alaska 1981). See generally Robert M. Schoenhaus, Annotation, *Prosecutor's Power to Grant Prosecution Witness Immunity from Prosecution*, 4 A.L.R. 4TH 1221 (1981). In *Higdon v. State*, 367 So.2d 991 (Ala. Crim. App. 1979), the court, without any discussion of fairness issues, reversed a conviction on the ground, *inter alia*, that the testimony of a witness had been received over his claim of the Fifth Amendment privilege solely because the trial court had relied on the prosecutor's purporting to immunize the witness in court. *Id.* at 992, 993.

28. See cases cited *supra* note 27.

29. See *infra* note 152.

30. In *Santobello v. New York*, 404 U.S. 257 (1971), the Court said that plea bargaining "is an essential component of the administration of justice [and] . . . is to be encouraged." *Id.* at 260.

discretion. Furthermore, if a bargain was struck and the defendant performed his part, it seems intolerably unfair to allow the prosecutor to renege and subject the cooperator to the penalties that he paid to avoid.

While this context presents compelling considerations for honoring informal bargains, dangers still are discernable in the immunity for cooperation deal that are not present in the run-of-the-mill plea bargain in which the prosecutor simply trades immunity for a quick disposition. With the cooperation agreement, the prosecutor buys a witness's testimony against another defendant. This raises sensitive questions about the credibility of the testimony and the propriety of absolute prosecutorial discretion over whom to pursue rigorously and whom to allow to buy out of the criminal process. An immunity deal is also a more absolute benefit than a plea bargain, for the subject is escaping scot free by not submitting to any conviction or sanction.³¹ Finally, while a court must hold a plea hearing and approve a plea bargain, the informal immunity deal is not subject to any judicial scrutiny.

Some courts, therefore, have displayed reluctance to concede unfettered prosecutorial discretion to enter into informal immunity for cooperation agreements.³² These courts may insist that only the court has discretion to dismiss a prosecution and that even a faithfully performed agreement to testify is no absolute bar to a future prosecution.³³ More

Plea bargaining, the Court observed, is "highly desirable" and "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 261, 262.

31. This is not always the case. Some immunity agreements may require the cooperator to disgorge profits from illegal transactions.

32. This discussion is confined to agreements entered into between cooperators and prosecutors. A separate topic not pursued in this Article is the validity of agreements entered into between cooperators and investigative agents. Here some courts are more willing to ignore the agreement on the ground that the agent was not authorized to make an agreement not to prosecute. In such a case the position of the cooperator may be protected to an extent by suppressing any statements he made or any evidence derived from them. This was the course taken by the Supreme Court of Michigan in *People v. Gallego*, 424 N.W.2d 470, 476 (Mich. 1988). For a discussion of this case, see Recent Case, 102 HARV. L. REV. 539 (1988). Federal courts are more willing to enforce such agreements with investigative agents. See generally *United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983) (involving DEA agents); *United States v. Rodman*, 519 F.2d 1058 (1st Cir. 1975) (involving the SEC). This may be due to the close working relationship between federal agents and United States Attorneys, both of whom operate under the ultimate control of the Department of Justice.

33. *State v. Johnson*, 594 P.2d 514 (Ariz. 1979); *Commonwealth v. Brown*, 619 S.W.2d 699 (Ky. 1981), *overruled on other grounds* by *Murphy v. Commissioner*, 652 S.W.2d 69 (Ky. 1983). Compare the earlier decision, *In re Parham*, 431 P.2d 86 (Ariz. Ct. App. 1967), in which the court distinguished between an agreement to testify, which it viewed as generally enforceable, citing Restatement (Second) of Contracts § 549, and an agreement to give information, which it declared was enforceable only at the court's discretion. *Id.* at 88-89. The policy behind the distinction is that when a defendant agrees only to provide information, he has not waived any constitutional rights as he does when he agrees to give self-incriminating testimony. *People v. Marquez*, 644 P.2d 59 (Colo. App. 1981); see also *State v. Borrego*, 445 So.2d 666 (Fla. Dist. Ct. App. 1984). In *Gipson v. State*, 375 So.2d 514 (Ala. 1979), the court held that the prosecutor could not confer informal

frequently, courts deny that the prosecutor has the power to grant immunity, but simultaneously recognize good reasons for rejecting the prosecution of a defendant who performed his side of the bargain in an immunity-cooperation deal.³⁴ Sometimes this takes the weak form, derived from the ancient doctrine of approvement and *The Whiskey Cases*,³⁵ of acknowledging the defendant's equitable right to a pardon.³⁶

Most courts, however, now take a more expansive approach.³⁷ While usually refusing to accord the prosecutor a power to immunize,³⁸ they often are willing to devise an approach that effectively bars the prosecution of a defendant who has kept his part of the cooperation agreement. These courts have relied on notions of the honor and dignity of the State,³⁹ the fair administration of justice,⁴⁰ and contractual theories of consideration⁴¹ or equitable

transactional immunity.

34. See *infra* notes 36-37 and accompanying text.

35. See *supra* part II.A.

36. In *Bowie v. State*, 287 A.2d 782 (Md. App. 1972), the court stated in dicta that while the defendant after performance under a cooperation agreement had only an equitable right to clemency, the court usually would grant a continuance so that the defendant could apply for clemency. *Id.* at 788-89. By contrast, in *King v. United States*, 203 F.2d 525 (8th Cir. 1953), the court stated that the right to clemency arising out of the ancient doctrine of approvement and set forth in *The Whiskey Cases* was no longer a part of federal law. *Id.* at 526.

37. For a review of justifications in this area, see Note, *Judicial Supervision of Non-Statutory Immunity*, 65 J. CRIM. L. & CRIMINOLOGY 334 (1974). In *United States v. Palumbo*, 897 F.2d 245 (7th Cir. 1990), the court, referring to informal grants of use and derivative use immunity, said that "[s]uch grants of immunity are fully enforceable." *Id.* at 248 (citing *United States v. Williams*, 809 F.2d 1072, 1081-82 (5th Cir.), *cert. denied*, 484 U.S. 896 (1987)); *United States v. Society of Indep. Gasoline Marketers*, 624 F.2d 461, 469-74 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981); *United States v. Kurzer*, 534 F.2d 511, 513 (2d Cir. 1976).

38. This is no doubt because of fears of too loosely permitting prosecutors to compel reluctant witnesses to testify.

39. *United States v. Paiva*, 294 F. Supp. 742, 747 (D.D.C. 1969). In *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974), the court observed: "There is more at stake than just the liberty of this defendant. At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government." *Id.* at 428.

40. See, e.g., *State v. Hingle*, 139 So.2d 205 (La. 1962); *State v. Ashby*, 195 A.2d 635 (N.J. 1963), *rev'd*, 204 A.2d 1 (1964). In *Workman v. Commonwealth*, 580 S.W.2d 206 (Ky. 1979), a case in which the prosecution promised to drop charges if the defendant passed a polygraph test, the court, in finding the promise enforceable, said:

The standards of the market place do not and should not govern the relationship between the government and a citizen. . . . If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations.

Id. at 207, quoted in 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.5, at 207 (1984).

41. *People v. Brunner*, 108 Cal. Rptr. 501 (Cal. Ct. App. 1973). In *Brunner* the prosecutor was dissatisfied with the performance of the defendant as a cooperating witness and sought to prosecute on the ground that his purported immunity grant was inoperative because it did not conform with the statutory procedures. The court held that it would be inequitable to allow the

estoppel.⁴² One can now find recognition of the enforceability of these agreements not only in cases in which the defendant has performed an agreement to testify⁴³ but also in cases in which the defendant agreed only to cooperate in bringing other offenders to justice without testifying.

This willingness to recognize that informal agreements not to prosecute are binding seems an inevitable outcome of deep tendencies in the American criminal justice system. It emerges from the confluence of two important phenomena—our hardly questioned tradition of wide prosecutorial discretion and the benedictions bestowed by the Supreme Court on plea bargaining.⁴⁴ Because there is no effective doctrine under which courts can compel a prosecutor to proceed against a suspect when no charges have been filed, an agreement not to prosecute remains largely inaccessible to judicial intervention.⁴⁵ This is the source of the power. For the prosecutor to treat one defendant leniently in order to procure that individual's testimony against others has long been a familiar practice in plea bargaining. If a reduced sentence or charge is appropriate for the cooperating defendant, why should it be wrong to take one more step and immunize the cooperator altogether when, in the prosecutor's judgment, that is the only way of proceeding successfully against more culpable or more dangerous offenders? This is the justification for the exercise of the power. But neither the tradition of prosecutorial discretion nor the utility of dealing for cooperation as a way of building a case altogether dispels the concerns to which this Ar-

prosecution to go forward since the prosecutor had received substantially the performance for which he had bargained. The consideration issue presents difficulties when the cooperator stands ready to perform but performance becomes unnecessary. This situation may arise, for example, when the defendant pleads guilty. *See infra* text accompanying notes 213-15.

42. *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982).

43. *See United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983).

44. *See Santobello v. New York*, 404 U.S. 257 (1971).

45. The Supreme Court has stated that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . ." *United States v. Nixon*, 418 U.S. 683, 693 (1974). An application can be made by mandamus, or a local equivalent, to force a prosecutor to bring charges. A leading federal case in which such an attempt was made is *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973). The court dismissed the application on the grounds that there is no duty to prosecute and that the principle of separation of powers, the impracticality of judicial review, and the dangers of allowing private parties to open up the prosecutor's files all contribute to the inappropriateness of acceding to mandamus. *Id.* For a full discussion, see 2 LAFAYE & ISRAEL, *supra* note 40, at §§ 13.2, 13.3. Once charges have been filed, a prosecutor's power to withdraw them (to *nol pros*) in most jurisdictions is subject to some degree of judicial review. Rule 48(a) of the Federal Rules of Criminal Procedure provides that a United States Attorney may file for dismissal "by leave of [the] court." The purpose of this provision is primarily to protect the defendant from harassment, *see Rinaldi v. United States*, 434 U.S. 22 (1977), but it also confers some power on the court to inquire whether the proposed dismissal is "contrary to manifest public interest." *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). *See also* 2 LAFAYE & ISRAEL, *supra* note 40, at § 13.3(c).

ticle now turns.

III. THE PERILS OF PROSECUTORIAL DISCRETION IN CHOOSING COOPERATORS

Questions of ethics and policy arise when prosecutors confer immunity or make lenient bargains for cooperation in cases where the witness almost certainly could be convicted of a serious offense or would, absent the bargain, be sentenced more severely on a straightforward guilty plea.⁴⁶ May lesser imps justifiably be liberated if this will snare the grand Satan, or can no good come from bargains with the devil? One possible view is that the prosecutor should never reduce a charge or release an offender unless some aspect of the commission of the crime substantially diminishes culpability. This would not cover later repentance or rehabilitation even if evidenced by restitution or cooperation. Such postcrime actions indeed may support a finding that the offender is not as bad as the crime alone might indicate. One could argue, however, that in the division of responsibilities this is a matter for a sentencing judge, and that prosecutors should confine themselves to assessing the gravity of crimes already committed.

Indeed, even if the prosecutor acted properly in judging the moral character of the defendant or suspect, most cooperation agreements would be difficult to fit into any concept of repentance or rehabilitation.⁴⁷ These are agreements to sell a commodity—knowledge. The witness usually gains that knowledge through participation in criminal conduct, and the offer of testimony is a calculated attempt to gain immunity or leniency. Freeing such a person can powerfully excite the public's sense of injustice.

While this narrow view of the prosecutor's proper role sharply contradicts our actual practice in many cases, it has an almost irresistible appeal in cases involving the most serious crimes of personal violence, such as rape and murder. In those cases a cooperation deal would leave the crime inadequately punished. Suppose, for example, that murderer X, against whom the prosecutor has a strong case with respect to the averagely evil murder A, offers strong testimony against murderer Y,

46. This is not always so. The case against a cooperator may contain flaws which will strengthen the prosecutorial disposition to confer immunity or a favorable bargain. There may, indeed, be no real case against a cooperator, but he may seek immunity to guard against a chance that what he relays by way of cooperation might incriminate him.

47. This might be disputed by prosecutors who likely would assert that the cooperator, by his conduct, will strike a blow at crime and, in some cases, will effectively terminate the activities of a criminal organization to which he once belonged. This potential is undeniable, and this form of "restitution" may make the bargain a good one for society, but the cooperator's actions are not the same as an unsolicited demonstration of a change of heart by a criminal.

who is suspected of the peculiarly horrifying serial murders *B*, *C*, and *D*, and, against whom the prosecutor has no case without *X*'s testimony. While the prosecutor might offer *X* some degree of leniency, it is extremely unlikely that she would immunize *X* as to murder *A*, even if she believed that *Y* was conspicuously more evil and dangerous than *X*. This is because immunity would leave the score quite unsettled as to murder *A* with no retribution and no requital to the family of the victim. By contrast, prosecutors often are ready to make full immunity deals with respect to serious "victimless" crimes, such as controlled substance offenses, in which the public does not so clearly hear the voices of an individual victim and his family crying for retribution.

Prosecutors sometimes enter into cooperation agreements with suspects of even the most violent offenses when there are joint perpetrators. In those cases, if prosecutors sometimes offer immunity or a favorable plea to an accomplice even in a spectacularly horrible murder, they do so with the aim that the worst offenders *in that murder* shall not escape retribution. Immunization in such cases is a painful accommodation to produce the most retribution for the crime at the price of permitting some participants to escape their deserts altogether. Although the public's sense of injustice may be excited by such a bargain, it might be equally aroused if the planner or ringleader of the crime went untouched because no deal was cut.

The *Principles of Federal Prosecution* set out by the United States Department of Justice recognize in very general terms the propriety of permitting the prosecutor to make a utilitarian calculation.⁴⁸ Under these principles a prosecutor has a duty to neutralize the largest number of units possible of culpability and dangerousness expressed in behavior that the criminal code prohibits. As to each potential defendant,

48. The Department of Justice's PRINCIPLES OF FEDERAL PROSECUTION, Part F (1980), provides, in part:

1. Except as hereafter provided, the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.
2. In determining whether a person's cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including: (a) the importance of the investigation or prosecution to an effective program of law enforcement; (b) the value of the person's cooperation to the investigation or prosecution; and (c) the person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his history with respect to criminal activity.

Also noteworthy are the ABA STANDARDS RELATING TO PLEAS OF GUILTY § 1.8(a)-(v) (Approved Draft, 1968), which acknowledge as a justification for a plea bargain that "the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct."

the prosecutor must make a difficult calculation to measure the moral weight of the culpability, including the harm done, and the future danger to the public. When she can gather no more evidence without inducements, the prosecutor then decides whether to proceed and prosecute those suspects against whom the already produced evidence makes a case or whether to extend leniency or full immunity to some suspects in order to procure testimony against other, more dangerous suspects against whom existing evidence is flimsy or nonexistent.

This utilitarian approach is surely the correct one. A prosecutor has multiple public interests to protect and her concept of justice should be a synthetic one that blends considerations of public safety with judgments of moral culpability.⁴⁹ Fortunately, the two standards will not clash often since the morally worst offender is often the most dangerous. If the prosecutor makes the agreements properly, she achieves the maximum possible degree of retribution for moral wrongdoing and the maximum future protection of the public with respect to that crime. Naturally, prosecutors always should perceive immunization as a last resort. The thrifty prosecutor will buy cooperation at the lowest price,⁵⁰ and immunization should only rarely be necessary. In the worst cases, however, or in cases in which the suspect's crime is not so serious and his cooperation may be very fruitful, the skillfully represented suspect sometimes will be able to extract a high price.

A prosecutor's decisions in this area are painfully delicate. She is often not in a position to explain or defend her decisions. At an early stage in the case public statements may reveal too much to other defendants. Courts, in any case, may prohibit comment by the prosecutor;⁵¹ even if they do not, comment may appear unseemly.

While we may sympathize with the prosecutor's difficult position,

49. Judgments about public safety involve predictions of future dangerousness that are very difficult to make with precision. See Graham Hughes, *Legal Aspects of Predicting Dangerousness*, in 2 *CRITICAL ISSUES IN AMERICAN PSYCHIATRY AND THE LAW* 57 (Richard Rosner ed., 1985); *THE PREDICTION OF CRIMINAL VIOLENCE* (Fernand N. Dutilleul & Cleon H. Foust eds., 1987); Franklin E. Zimring & Gordon Hawkins, *Dangerousness and Criminal Justice*, 85 *MICH. L. REV.* 481 (1986).

50. The *Principles of Federal Prosecution* stipulate:

In entering into a non-prosecution agreement, the attorney for the government should, if practicable, explicitly limit the scope of the government's commitment to: (a) non-prosecution based directly or indirectly on the testimony or other information provided; or (b) non-prosecution within his district with respect to a pending charge or to a specific offense then known to have been committed by the person.

PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 48, Part F.3.

51. In *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991), the Supreme Court, while finding the particular Nevada Supreme Court Rule void for vagueness, held that generally a rule prohibiting an attorney in a criminal case from making an extrajudicial statement to the press does not violate the First Amendment when the lawyer knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding. *Id.* at 2725.

we must also recognize that the present system has weaknesses. These weaknesses transcend the mere need to defend the prosecutor's public image; they pose threats to the public interest as well. A prosecutor may immunize the wrong people as a result of misjudgment or even corrupt motives. He may "pick people that he thinks he should get, rather than pick cases that need to be prosecuted."⁵² By ignoring repeated offenses of a long-term informer, prosecutors may establish unhealthy relationships and create the appearance that the offender has a license to commit crimes. The intensity of the dilemmas, the lonely position of the prosecutor, and the possibility of bad decisions are good reasons for seeking some mechanism for review.

Three possibilities exist. First, we might wish to require that local prosecutors obtain the consent of a high prosecuting official before entering into a cooperation agreement. Federally, the government could assimilate the procedure for cooperation agreements to the current formal immunity grants procedure under which the prosecutor must obtain the consent of an Assistant Attorney General.⁵³ Since informal agreements often have much the same aim and impact as formal agreements, one could make a strong principled case for this extension of the practice.⁵⁴ But there would be practical difficulties. The number of requests by federal district offices for approval of informal immunity grants or plea bargains in cooperation situations probably would run into the thousands each year, and a requirement that a high-level official clear every request would demand additional staffing of a special office or some change in the present practice through devolution to regional committees. In most states, on the other hand, where there is no central prosecuting authority, the request would go no higher than the office of the chief local prosecuting attorney.⁵⁵ Another practical difficulty would be that prosecutors often would need a speedy green light

52. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

53. See *supra* notes 8-10 and accompanying text.

54. The policy behind this proposal is that the higher the official, the broader the outlook should be. With respect to formal immunity, the National Commission on Reform of the Federal Criminal Law recognized this justification for requiring high-rank approval. The Commission stated:

Is the public need for the particular testimony or documentary information in question so great as to override the social cost of granting immunity and thereby possibly pardoning a person who has violated the criminal law? Such a calculation can be made only by a person familiar with the total range of law enforcement policies which would be affected by an immunity grant, and not by one familiar only with the asserted public need in the particular case.

2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: WORKING PAPERS 1433-34 (1970), discussed in Sherman, *supra* note 13, at 61.

55. A district attorney may be the head of an office containing a staff of hundreds, covering a district with a population of millions, or of an office containing fewer than ten attorneys in a district with a population of thousands.

in order to seize an opportunity and move quickly with a cooperator. In the federal system, with so many cooperation negotiations, this might create a substantial problem. A similar practice functions smoothly and effectively with applications for electronic surveillance warrants,⁵⁶ but these occur much less frequently than would requests with respect to cooperation agreements.

A second possibility would be to require judicial approval of cooperation agreements. We must be careful to define exactly what judicial approval might mean. Under present practice, if there is a dispute over whether either side has breached an agreement, a court may decide the dispute, especially if one side, usually the government, seeks to avoid fulfilling its promises.⁵⁷ Judicial review in this limited sense already exists. A stronger concept of judicial review would require the government to submit any agreement to a court for approval before it goes forward with eliciting information from a cooperating witness or having him testify. A court at this stage could consider the public interest by balancing the importance of the potential information and testimony against the indulgence being granted to the cooperator. The court also could scrutinize the agreement for any unconscionable clauses.⁵⁸ It might include a colloquy with the cooperator, similar to the colloquy conducted when a guilty plea is accepted,⁵⁹ to ascertain whether the cooperator's surrender of his Fifth Amendment rights was voluntary and intelligent. No such judicial review is required for a grant of formal immunity,⁶⁰ but one could argue that it is not necessary there because, with formal immunity, the government irrevocably confers a precisely defined protection that is logically an exact equivalent of the constitutional guarantee the immunized witness surrenders. Thus, by its very nature, the transaction is fair and balanced. Informal immunity, by contrast, is flexible enough to accommodate different shades of immunity and simultaneously is open-ended with respect to the kinds of obligations that the cooperator may assume. It is also contingent on the cooperator's keeping his promises. Its flexible shape contains the possibilities of unconscionable clauses or agreements that are contrary to good public

56. The federal statute, 18 U.S.C. § 2516 (1988), provides that an application for an electronic surveillance warrant must be authorized by a Department of Justice officer of at least the rank of Deputy Assistant Attorney General of the Criminal Division, specially designated by the Attorney General. The parallel New York statute confers the power to apply for an eavesdropping warrant on any district attorney. N.Y. CRIM. PROC. LAW §§ 700.05(5), 700.20(1) (McKinney 1984). Federally, approval to apply for these warrants can be obtained very swiftly, once the initial paper work is done, with the aid of facsimile machines and the telephone.

57. See *infra* notes part V.

58. See *infra* note 153 and accompanying text.

59. See Fed. R. Crim. P. 11(c) and (d).

60. See discussion *supra* note 11.

policy. Thus, there is a need for threshold review, especially with respect to the voluntariness and intelligence of the cooperator's assumption of obligations and waiver of rights.

While some courts have stated that an informal immunity deal will not be binding without consent of the court,⁶¹ there are difficulties with judicial regulation of cooperation agreements. The nature of the difficulty depends in part on whether the agreement is for immunity or whether it involves a guilty plea. In the case of the guilty plea, the agreement must come before the court when the plea is tendered and accepted.⁶² But, under present practice, by the time the plea is tendered to the court, the defendant likely has at least partly executed the cooperation agreement by debriefing, or has executed it fully by testimony before a grand jury or at a trial. A strong brand of judicial review, thus, would require that the prosecutor submit the agreement to the court before obtaining testimony or information from the defendant. Even if this proceeding were sealed, it would be awkward and might considerably disrupt existing prosecutorial techniques.

Current federal practice illustrates the kind of difficulty that might arise from this stronger judicial review of cooperation agreements. Because the federal Sentencing Guidelines tie the range of sentences that courts may impose rather tightly to the degree and nature of the charges,⁶³ it is now a frequent practice for the government to enter into a plea agreement with a cooperator before the grand jury returns any indictment. An important part of that agreement concerns the nature of the charges that the government will seek from the grand jury and the statement of facts that the government will present to the court.⁶⁴ To

61. See cases collected in Jay M. Zitter, Annotation, *Enforceability of Agreement by Law Enforcement Officials Not to Prosecute if Accused Would Help in Criminal Investigation or Would Become Witness Against Others*, 32 A.L.R. 4TH 990, 995-97 (1984).

62. Rule 11(e)(2) of the Federal Rules of Criminal Procedure provides that "[i]f a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered." Under this Rule, if a cooperation agreement has been reduced to writing, it must be submitted to the court when the plea is taken. There will be cases, however, in which there is ongoing cooperation and the agreement has not been reduced to writing. If the defendant accepts a plea under these circumstances, the prosecutor likely will tell the court only that the defendant is cooperating and that the prosecutor may have later recommendations in the light of the cooperation.

63. The Guidelines are not written in terms of specific statutory offenses but in broader terms descriptive of generic conduct. The starting point of an inquiry into the appropriate sentence range is, nevertheless, an identification of which guideline covers the charged offense or offenses.

64. In addition to offering a generic statement of the conduct that invokes a particular sentence range, the Guidelines also contain listings of real offense elements such as the amount of money taken, whether a gun was used, and so forth. These elements will have a mitigating or aggravating impact on the sentence range. Courts can make further adjustments depending on factors such as the defendant's role in the offense and whether the defendant accepted responsibil-

assure judicial review before the cooperator incriminates himself, therefore, a court sometimes would have to review an agreement before the grand jury returns any indictment. The procedure thus would be rather different from the court's present inquiry when a plea is tendered. While this procedure is not impossible to contemplate, it would be cumbersome and interrupt the flow and rhythm of the investigation unless it could be completed very swiftly. At the same time, it would have no great impact unless the court possessed strong discretion to refuse to countenance the agreement on grounds of public policy and fairness.⁶⁵

Judicial review of immunity agreements also would be an almost complete innovation since these compacts presently are insulated from scrutiny except in two limited situations. First, courts currently exercise review over immunity agreements when litigation arises over the alleged breach of a term in the agreement. At this point the court, while probably not examining the agreement's overall acceptability, will determine the fair meaning of the term and whether there was a material breach.⁶⁶ Second, courts review immunity grants when the cooperator testifies at a trial and discovery or cross-examination reveal the agreement. Here the defense may allege that terms in the agreement taint the testimony and make it inadmissible.⁶⁷ This may trigger a narrow scrutiny, confined to certain terms in the agreement and their impact on the cooperator, only to determine the admissibility of his testimony.

Submission of immunity agreements for judicial approval before execution thus would constitute a substantial change of practice, subjecting the agreement, before implementation, to broad review based on public interest and fairness. This practice would not be easy to enforce.

ity. Federal Sentencing Guideline § 6B1.4, reprinted in 18 U.S.C.S. app. (Law. Co-op. 1990), provides that a plea flowing from a plea agreement "may be accompanied by a written stipulation of facts relevant to sentencing." Although the stipulation shall "not contain misleading facts," *id.* § 6B1.4(a)(2), the way in which it presents the facts may have a considerable impact on the final calculation of the appropriate sentencing range under the Guidelines.

65. The federal system presently confers a power on the courts to review plea bargains. Rule 11(e)(2) of the Federal Rules of Criminal Procedure provides that the court may accept or reject an agreement that involves the dismissal of charges or the imposition of a specific sentence. In *Santobello v. New York*, 404 U.S. 257, 262 (1971), the Court said that a defendant has "no absolute right to have a guilty plea accepted" and that a court "may reject a plea in exercise of sound judicial discretion." No specific standards have been declared for the exercise of this discretion. A few courts have asserted a broad discretion to disapprove pleas that appear too lenient. *See United States v. Carrigan*, 778 F.2d 1454, 1461-62 (10th Cir. 1985); *United States v. Bean*, 564 F.2d 700, 703-704 (5th Cir. 1977). Compare *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973), in which the court concluded that a court's power to reject a guilty plea involving a reduction of the initial charge is confined to cases where the "action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion." *Id.* at 622. The court should only interfere in a "blatant and extreme case." *Id.*

66. *See infra* part V.

67. *See infra* part IV.

Absent testimony by the cooperator or subsequent litigation between the cooperator and the government, the agreement would not inevitably come to light. Judicial review, therefore, might depend on self-policing by the prosecutor. The prosecutor would have to come to the court every time she did not proceed against a suspect in return for cooperation. The prosecutor would have little incentive to do this, at least in cases where the cooperator will not testify, if she could secure the cooperation without the court's seal of approval. The cooperating suspect, who would have the real interest in the court's validation of the arrangement, often would not be in a strong position to insist on an agreement's presentation to a court and, thus, would have to rely on the prosecutor's good faith.

Since American law never has accepted the proposition that a prosecutor has a general duty to prosecute every known offense, there are currently no concepts or procedures by which a court can challenge or investigate a prosecutor's decision not to prosecute suspects against whom probable cause exists.⁶⁸ Courts would have difficulty gathering information to review a prosecutor's decision not to proceed when the evidence might sustain a prosecution unless prosecutors had to keep files with formal notations of their decision.⁶⁹ Cases involving testimony are a large and important segment of immunity agreements and, in those cases, the sanction of excluding the witness's testimony at trial for failure to seek the court's prior approval of the agreement could defend and enforce the requirement of judicial review before implementation of a cooperation agreement. However, this would likely be an unacceptably strong sanction and would not reach the intractable difficulty of undoing any advantages the prosecutor gained through information provided by the cooperator.

Another possibility, very novel to American tradition but with attractive potential, would be to require the prosecutor to file the details of immunity agreements and plea agreements in major felony cases and create a standing commission that would include lay persons not engaged in prosecution to examine and report upon the agreements at regular intervals. The prosecutor's filings would include any written agreement with the cooperator and also would contain information on

68. See *supra* note 45. See generally 2 LAFAYE & ISRAEL, *supra* note 40, at 160-207. Some states have statutes that seem to require the prosecutor to proceed whenever she has cause. The court in *State ex rel. Ginsberg v. Naum*, 318 S.E.2d 454 (W. Va. 1984), relied upon such a statute to force a prosecution by mandamus. The conventional position is put tersely in *United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976), in which the court stated that "failure to seek court approval does not render the agreement unlawful," and concluded that "[t]he decision of whether to prosecute rests in the Executive Branch."

69. See 2 LAFAYE & ISRAEL, *supra* note 40, at 174.

any understandings, whether recorded or not, as to whether the cooperator would participate in any future criminal activity as part of the agreement. Standards and manuals for prosecutors' offices should contain provisions on the policies and considerations a prosecutor should weigh in drafting cooperation agreements⁷⁰ and should develop standard cooperation agreement forms. The reporting commission's comments should contribute helpfully to the development of these standards and agreement forms in greater detail than now provided by the *Principles of Federal Prosecution*.

The strongest model of this innovation would require prosecutors to submit cooperation agreements to the commission and receive its advice in all major cases. The commission's advice need not be binding but would be part of what the prosecutor must consider before arriving at an agreement. A weaker version of this innovation would require the commission retrospectively to examine cooperation agreements in all major cases and issue regular reports on the discharge of this prosecutorial function.

A question that arises at this point is why cooperation agreements deserve special scrutiny as opposed to plea bargains in general. One could certainly make an argument for review by a public commission of all plea bargains in major cases, but plea bargains involving cooperation agreements constitute a good starting point. Cooperation agreements are special because the extended leniency or immunity often does not rest, even in part, on any reduced culpability in the commission of a crime. Also, they sometimes carry a special danger of licensing continuing criminal acts. Simultaneously, no doubt because of the absence of any approval or review process, cooperation agreements are not standardized or governed by a detailed set of rules, but instead tend to be individually composed and may vary in important ways even from district to district in the federal system. The proper protection of the public interest and fairness in the administration of justice thus are implicated with a special sharpness. Ventilation and examination of these agreements by a public body outside the prosecutorial bureaucracy might have a healthy impact that later could be extended to a wider range of plea bargains.

The commission might review and comment on the following issues: (1) the development of standards for identifying situations in which granting full immunity appears inappropriate; (2) framing criteria for what should be permissible and impermissible conditions of

70. The *Principles of Federal Prosecution* do so now in a very general way. See *supra* notes 48, 50.

achievement attaching to the cooperation;⁷¹ (3) suggesting standards for when it is proper to immunize the cooperator with respect to the commission of future crimes;⁷² and (4) developing criteria for what should constitute a substantial breach of an agreement by a cooperator and when prosecutors should consider completing cooperation despite a breach.⁷³

Any proposal for review or monitoring of a prosecutor's decision to enter into a cooperation agreement with a witness suffers from the risk of imposing unhelpful rigidity on what is often a very flexible process. Currently prosecutors (and investigating agents) sometimes prefer to avoid or hold off on immunity agreements because the continuing suspense might strengthen their influence over the witness. Prosecutors, thus, often will not reduce an agreement to writing and will provide only vague assurances to the witness or informer that he will benefit from continued cooperation.

Under present practice no fixed time exists at which the prosecutor must reduce the agreement to writing. In some cases the discussion may proceed swiftly and neatly so that there is an early, precise understanding of what will be exchanged and, consequently, an early framing of a written compact. In many cases, however, the process is less tidy and much more protracted. A potential cooperator may go through numerous interviews, first with agents and then with prosecutors, during which the cooperator, the agents, and the prosecutors may slowly clarify the dimensions and value of his cooperation. The extent of the immunity or leniency offered similarly may remain undefined during these early stages. Indeed, agents and prosecutors often will prefer to keep the degree of leniency imprecise until the end or close to the end of the cooperator's expected contribution.⁷⁴ A new rule requiring that coopera-

71. See *infra* notes 131-44 and accompanying text.

72. Prosecutors sometimes use cooperators most productively by allowing them to continue to operate in a criminal organization while relaying information and perhaps setting up certain situations favorable to government investigation. It may be impossible for cooperators to do this kind of work without committing certain offenses. A very sensitive question is where to draw lines with respect to what criminal acts public policy can condone for these ends. All presumably would agree that the government should never allow crimes of violence or the irreversible infliction of loss on an individual under cooperation agreements. Some situations are more controversial. For example, should the government immunize a cooperator for contemplated participation in narcotics felonies if this appears to be the only way to build a case against persistent, major offenders?

73. See *infra* notes 196-216 and accompanying text.

74. A prosecutor may prefer not to have a written agreement that makes precise promises because its absence may strengthen the position of the witness before a jury. The witness will be able to say truthfully that, while he has a general assurance of leniency if he cooperates, the government has made no promises to him with respect to the exact extent of the leniency. If the prosecutor has a trustworthy and generous track record in this area, a cooperating witness's counsel may advise him that it is safe and even advantageous to proceed without a written agreement, since, if he does his best for the government, the prosecutor ultimately may give him a greater

tion agreements be submitted for approval or scrutiny, if faithfully complied with, would have an inevitable tendency to direct the present varying and fluid process into harder channels and would considerably formalize the proceedings, compelling the reduction of the agreement to writing at an early stage. A fundamental question, therefore, is whether the gains from innovation would be outweighed by the loss in prosecutorial flexibility and freedom of maneuver. There is also a risk that a review requirement simply would drive cooperation understandings underground and thus increase the occurrence of agreements that are contrary to public policy.⁷⁵

IV. FAIRNESS TO THE DEFENDANT

Conventionally our judicial system has relied primarily on the defense's adversarial capacity to reveal a cooperation agreement and expose its significance in cross-examination and in summation. Some courts may also supplement the defense's actions with a corroboration requirement for accomplice testimony or a charge to the jury on the importance of weighing the cooperator's testimony carefully.⁷⁶ In modern times these protections have been strengthened by the prosecutor's duty, in response to a properly framed request, to disclose to the defense the promises made to the witness. Breach of this duty may amount to a due process violation requiring the reversal of a conviction.⁷⁷

Beyond disclosure and confrontation, there is the possibility that some kinds of cooperation agreements will render testimony tainted and its use a violation of a defendant's due process rights. This possibil-

reward than the prosecutor would have promised in a written agreement at an early stage.

75. Prosecutors are unlikely to be pleased with the establishment of a commission to which they would have a duty to report cooperation agreements. They may feel that there are security risks in reporting certain information to the commission while simultaneously recognizing that they cannot properly defend the agreement as in the public interest without forwarding that information. They thus would be afraid of unfair criticism.

76. "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa v. United States*, 385 U.S. 293, 311 (1966). In *Hoffa* the trial court admitted the testimony of an informer who, among other rewards for his information and testimony, had federal and state charges against him dropped. The Court observed: "The petitioner is quite correct in the contention that Partin, perhaps even more than most informers, may have had motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible." *Id.* at 311. The Court held in *Lisenba v. California*, 314 U.S. 219, 227 (1941), that an agreement whereby an accomplice received a reduced sentence in return for testifying was not a violation of the due process clause.

77. See *Brady v. Maryland*, 373 U.S. 83 (1963). In *Giglio v. United States*, 405 U.S. 150 (1972), the Court held that nondisclosure of an immunity grant to a witness who testified against the defendant violated due process because there was an issue of the witness's credibility. This followed the earlier decision, *Napue v. Illinois*, 360 U.S. 264 (1959), to the same effect.

ity probably flows from the old common-law principle that confessions are involuntary when procured by promises or threats from a person in authority.⁷⁸ By analogy, one could argue that testimony is inadmissible when a witness who is in the position of a virtual defendant testifies in hopes of receiving leniency. Some courts have held that agreements for leniency or immunity that require a witness to testify in a particular fashion or are contingent on results (procuring indictments or convictions) are a violation of the due process rights of the defendant against whom the testimony is offered.

In 1884 the Texas Court of Appeals roundly condemned an arrangement by which the State promised to drop charges against one or another of six suspects depending on which of them gave the most productive testimony before the grand jury.⁷⁹ As the court moderately observed, this arrangement for immunity by public competition could induce a witness to swear to "any and all things" and was worse than a bribe.⁸⁰ Much more recently a California appellate court reversed a conviction on the ground that a witness against the defendant had been promised immunity on condition that his testimony at the trial did "not materially or substantially change" from prior recorded statements that he had made to the police.⁸¹ "[A] defendant," the court observed, "is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion."⁸²

A few courts have tried to curb the dangers of perjured testimony by requiring that the State execute its promises to the witness before he testifies. This essentially means that a court must sentence the witness under a plea agreement before he testifies or treat a promise of immunity as irrevocable.⁸³ Otherwise, the testifying witness still expects his

78. See *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954-59 (1966).

79. *Harris v. State*, 15 Tex. App. 629 (1884).

80. *Id.* at 634.

81. *People v. Medina*, 116 Cal. Rptr. 133, 141 (Cal. Ct. App. 1974).

82. *Id.* at 145. In *People v. Green*, 228 P.2d 867 (Cal. Dist. Ct. App. 1951), an accomplice gave testimony at the preliminary hearing with a promise of leniency if the testimony resulted in the defendant's being bound over for trial. At the trial the witness recanted and his preliminary hearing testimony was admitted over objection. The appellate court described the agreement as an "astonishing bargain," *id.* at 867, and went on to reverse the conviction, saying that such testimony was "tainted beyond redemption." *Id.* at 871 (quoting *Rex v. Robinson*, 30 B.C.R. 369, 375 (British Columbia, 1921)).

83. In *Franklin v. State*, 577 P.2d 860 (Nev. 1978), an accomplice witness in a murder prosecution bargained to escape the risk of a death sentence by pleading to second degree murder. The witness was not allowed to plead until after he had testified at the defendant's preliminary hearing, and sentence was not imposed on the witness until after the defendant had been convicted. The Nevada court reversed on the ground that this practice created such a risk of perjury that it

“fee” and the prosecution is tainted by the appearance of purchasing or coercing testimony.⁸⁴ From the State’s perspective, the obvious danger is that the witness may not give the testimony expected once he has irrevocably procured the benefit of the bargain.⁸⁵ In that situation, however, the State may still be able to revoke the plea⁸⁶ and perhaps prosecute for perjury, so that the prosecutor may still “keep a hammer” over the witness.⁸⁷

In any case, the great weight of modern authority, particularly in the federal courts, is that, in guilty-plea cases, the postponement of plea and sentence is unobjectionable. Federal courts consistently have refused to find a due process violation in this practice and have viewed the traditional safeguards of cross-examination, summation, and the court’s charge to the jury as adequate for exposing the possibilities of perjury.⁸⁸ At the same time, the suggestion of some older cases that an agreement with a witness should only demand full and truthful testimony and should in no way be contingent on the success of the prosecution⁸⁹ seems to have crumbled. In the analogous situation of testimony by informants, federal courts have held that the informant’s anticipated receipt of money if his testimony resulted in a conviction did not render

violated the defendant’s right to due process.

84. See *id.* at 862, 863.

85. In *LaPena v State*, 643 P.2d 244 (Nev. 1982), the witness was allowed to plead to second degree murder with a promised sentence of five years to life. He testified against the defendant at the preliminary hearing and then was sentenced under the bargain. At the defendant’s trial the witness recanted and his preliminary hearing testimony was admitted. The appellate court reversed on the ground that his preliminary hearing testimony was suspect because of the pending inducement.

86. The witness would have promised to testify fully and truthfully. If his trial testimony contradicted his testimony at the preliminary hearing, he broke his promise at one or the other of these proceedings and so, presumably, the State would be entitled to have the plea vacated. This seems at the least to be constitutionally permissible. See the discussion of *Ricketts v. Adamson*, 483 U.S. 1 (1987), *infra* notes 229-45 and accompanying text.

87. This was how the prosecutor expressed his intentions at a hearing held in *Franklin*, 577 P.2d at 863 n.5.

88. *United States v. Dailey*, 759 F.2d 192, 198-99 (1st Cir. 1985); *United States v. Kimble*, 719 F.2d 1253, 1255-57 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *United States v. Borman*, 437 F.2d 44, 45-46 (2d Cir.), *cert. denied*, 402 U.S. 913 (1971); *United States v. Insana*, 423 F.2d 1165, 1168-69 (2d Cir.), *cert. denied*, 400 U.S. 871 (1970); *United States v. Vida*, 370 F.2d 759, 767 (6th Cir.), *cert. denied*, 387 U.S. 910 (1966).

89. The First Circuit in *United States v. Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981), suggested that testimony might be tainted if leniency is dependent on its evaluation by the government. The Eighth Circuit made the same suggestion in *United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976). A rare federal case in which a court found testimony tainted and inadmissible on contingency grounds is *United States v. Baresh*, 595 F. Supp. 1132, 1134-37 (S.D. Texas 1984), in which the government promised the witness immunity and permission to keep assets derived from narcotics dealing if he would give information and testimony leading to the conviction of two specified defendants. After his testimony had been admitted, and in the absence of any corroboration, the court declared a mistrial.

him incompetent to testify;⁹⁰ that it was proper to admit the testimony of an informant who was a convicted felon and who had been paid for results rather than simply for information;⁹¹ and that it was proper to allow the testimony of undercover agents who worked under an agreement providing that their compensation was to be fixed after trial "on the basis of an appraisal of the extent and quality of [their] work."⁹²

A contrary tendency briefly appeared in *Williamson v. United States*.⁹³ In that case the government agreed to pay an informer, who became a witness,⁹⁴ if he could detect a pretargeted individual committing a crime. The former Fifth Circuit reversed the conviction because of the enhanced risk of entrapment.⁹⁵ The *Williamson* decision, however, was repudiated elsewhere, interpreted restrictively in the former Fifth Circuit, and ultimately reversed.⁹⁶ Courts rejected *Williamson* for several reasons. First, they noted the alleged importance to law enforcement of specific contracts with informers, even if they became witnesses. Second, courts have expressed confidence that the adversarial process adequately enables the jury to weigh the witness's credibility. Indeed, the Supreme Court decision in *United States v. Bagley*,⁹⁷ while not confronting this issue squarely, suggests that there is no impropriety in designating targets in agreements for information and testimony made with paid informers.⁹⁸

The cases noted above, however, did not involve cooperation agreements but rather dealt with paid informants who became witnesses. A question remains as to whether a witness's testimony is more deeply tainted when the contingency involves not simply a cash payment but

90. *United States v. Valle-Ferrer*, 739 F.2d 545, 546-47 (11th Cir. 1984).

91. *Heard v. United States*, 414 F.2d 884, 886 (5th Cir. 1969).

92. *United States v. Crim*, 340 F.2d 989, 990 (4th Cir. 1965) (per curiam).

93. 311 F.2d 441 (5th Cir. 1962).

94. Although this is not made clear in the opinion, a deposition by the informer in *Williamson* was admitted into evidence at the trial. See *United States v. Rey*, 811 F.2d 1453, 1457 (11th Cir. 1987) (court's analysis of the *Williamson* transcript).

95. *Williamson*, 311 F.2d at 444.

96. *Williamson* was interpreted narrowly in *United States v. McClure*, 577 F.2d 1021, 1022-23 (5th Cir. 1978), and was rejected in *United States v. Dailey*, 759 F.2d 192, 199-200 (1st Cir. 1985), *United States v. Grimes*, 438 F.2d 391, 394 (6th Cir.), cert. denied, 402 U.S. 989 (1971), *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1338 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978), and in *United States v. Hodge*, 594 F.2d 1163, 1167 (7th Cir. 1979). It was overruled by the Fifth Circuit in *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987).

97. 473 U.S. 667 (1985).

98. In *Bagley* the government had agreed to pay informers (state law enforcement officers and private security guards) lump sums for the provision of information regarding violations committed by Bagley and for testifying against Bagley in federal court. Although the issue presented in *Bagley* was whether there should be reversal for failure by the prosecutor to disclose the agreements in full to the defense, there is no suggestion in the opinion that the agreements themselves necessarily tainted the witness's testimony to the point of rendering it inadmissible. The Court appeared to take it for granted that the testimony was properly admitted.

immunity or leniency in some criminal matter. In one notable piece of litigation in this area, *United States v. Waterman*,⁹⁹ the government agreed to give a witness a twelve-year sentence if he cooperated. The district court found that the agreement entailed a promise that the government would make a further motion for the reduction of the witness's sentence if he gave truthful testimony before the grand jury that led to further indictments.¹⁰⁰ The government in fact did move to reduce the sentence after the witness testified before the grand jury, the defendant was indicted, and the witness again testified at the defendant's trial.

A panel of the Eighth Circuit Court of Appeals concluded that this agreement amounted to an offer of favorable treatment contingent on the success of the prosecution and, thus, reversed the conviction. The court noted that, while the agreement went only to grand jury testimony, the pressure for the defendant to stick to the same story at the trial was very strong.¹⁰¹ The court suggested that this was an "invitation to perjury."¹⁰² Although the jury was aware of the terms of the agreement, the court declared that there is "no place in due process law for positioning the jury to weed out the seeds of untruth planted by the government."¹⁰³ This check on the scope of such agreements was overturned, however, when, on a rehearing, the en banc court divided equally without any opinion, thus restoring the conviction. Although this outcome deprives the decision of any precedential value, it exemplifies a trend in the federal courts toward greater freedom for the prosecution to tie inducements more closely to performance in cooperation agreements.¹⁰⁴

Subsequent to *Waterman* the First Circuit considered the impact of a set of plea agreements in which the government offered cooperating witnesses sentence concessions the dimensions of which were to be fixed at a later date, "depending principally upon the value to the Government of the defendant's cooperation."¹⁰⁵ While suggesting that the government in the future include in plea agreements a clause stating that giving false information or testimony would be considered a failure to

99. 732 F.2d 1527 (8th Cir. 1984) (panel and en banc decisions), *cert. denied*, 471 U.S. 1065 (1985).

100. *Id.* at 1530.

101. *Id.* at 1531.

102. *Id.*

103. *Id.* at 1532.

104. This is now reinforced by changes in sentencing laws that restrict the motion for reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure to one made by the government on the ground of the defendant's cooperation. Formerly, defendants routinely made motions for reduction, and the Rules did not restrict the motion to any specific ground. Giving the government a monopoly over the motion puts even greater pressure on cooperating witnesses to perform up to expectations and to secure results. *See infra* note 162 and accompanying text.

105. *United States v. Dailey*, 759 F.2d 192, 194 (1st Cir. 1985).

cooperate fully,¹⁰⁶ the court found that the nature of the agreement did not taint the testimony.¹⁰⁷ The court stated that it was in agreement with the essential policy contained in a Sixth Circuit opinion where that court had said:

[There is no overriding policy to exclude the testimony of an informant if he is paid under] a contingent fee agreement for the conviction of specified persons for crimes not yet committed. Although it is true that the informant working under this type of arrangement *may* be prone to lie and manufacture crimes, he is no more likely to commit these wrongs than witnesses acting for other, more common reasons. . . . Rather than adopting an exclusionary rule for a particular factual situation, . . . we prefer the rule that would leave the entire matter to the jury to consider in weighing the credibility of the witness-informant. (Citation omitted). In our view this approach provides adequate safeguards for the criminal defendant against possible abuses since the witness must undergo the rigors of cross-examination.¹⁰⁸

Recent cases have confirmed this trend. In *United States v. Risken*¹⁰⁹ the informant-witness, who was not an accomplice receiving immunity or leniency, reached an understanding with the government whereby the government might give the witness a post-trial payment depending on whether there was a conviction. The court found no constitutional objection to the testimony. In *United States v. Wilson*¹¹⁰ the government promised the witnesses, who were cooperators, immunity and, in addition, notified them that they were eligible to receive millions of dollars from the United States for aiding in the detection and punishment of tax offenders depending on testimony they gave at the trial.¹¹¹ The court of appeals held that, since there had been full disclosure and a cautionary instruction had been given, the testimony was unobjectionable.¹¹² These decisions invite an appraisal of the present

106. *Id.* at 200.

107. Other cases in which courts found testimony to be properly admitted under agreements that promised leniency according to the government's evaluation of the worth of the testimony are *United States v. Spector*, 793 F.2d 932, 936-37 (8th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), and *United States v. Fallon*, 776 F.2d 727, 733 (7th Cir. 1985).

108. *United States v. Dailey*, 759 F.2d 192, 199-200 (1st Cir. 1985) (alterations in original) (quoting *United States v. Grimes*, 438 F.2d 391, 395-96 (6th Cir.), *cert. denied*, 402 U.S. 989 (1971)). The Sixth Circuit was dealing in this passage, however, with informant testimony and not with testimony in return for leniency.

109. 788 F.2d 1361 (8th Cir.), *cert. denied*, 479 U.S. 923 (1986).

110. 904 F.2d 656 (11th Cir. 1990), *cert. denied*, 60 U.S.L.W. 3264 (1991).

111. The Secretary of the Treasury is authorized by statute "to pay such sums . . . as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws . . ." 26 U.S.C. § 7623 (1988).

112. The instruction given was in the usual terms and ran:

The testimony of an alleged accomplice, and the testimony of one who provides evidence against a defendant as an informer for pay or for immunity from punishment or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses

Wilson, 904 F.2d at 659-60. In this case the argument might be made that the inducement is in no way objectionable since the prospect of financial reward comes from a general statute and not from

state of the law with respect to the testimony of cooperators.

A. Safeguards Against Perjured Testimony

While it may not be necessary for courts to apply a general exclusionary rule to testimony and fruits resulting from cooperation agreements, these agreements present specially sensitive situations because it is the government that extends inducements for a witness to lie. When the government either creates or sharply enhances its own witness's motivation to lie, adversarial equipoise calls for special safeguards to protect defendants. These safeguards might take a variety of forms.

First, there is a need to clarify and strengthen the defendant's rights to discovery and the prospect of postconviction relief in the absence of proper discovery.¹¹³ In practice, the discovery of a cooperation agreement is often not difficult for the defense. Not infrequently it will be evident well before the trial that the witness, who initially may have been or who may remain a codefendant, is cooperating with the government. The defense typically will prepare to meet the witness's testimony. Part of the preparation will include a request to the government for the details of any cooperation agreement with the witness and for the witness's criminal record. The prosecution generally will provide this information and might, of course, be compelled to do so, on application by the defense, under the *Brady* principle which, as a matter of due process, requires the government to disclose any material exculpatory information to the defense.¹¹⁴ The federal practice is to make *sua sponte* disclosure of cooperation agreements.¹¹⁵

There will, however, be some cases in which the government either through reluctance or mistake fails adequately to disclose a cooperation or a reward agreement. If this failure becomes an assignment of error on appeal, it will be imperative to know the exact scope of the defendant's discovery rights. The matter is not free from difficulty since the Supreme Court seriously eroded the *Brady* principle in *United States*

a specific promise made by the government to induce cooperation in a particular case. The statute evinces a general congressional policy to induce information and testimony by the prospect of financial reward in tax cases. But it seems inappropriate that the prosecution may tell witnesses that whether they will receive the bounty depends to an extent on the nature of their testimony. Further, in *Wilson* the prosecutor made an additional promise of immunity. *Id.* at 658.

113. See Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887 (1981).

114. See *Brady v. Maryland*, 373 U.S. 83 (1963).

115. Where an accomplice who has made a plea bargain testifies, the federal rule is that the court should inform the jury of the exact nature of the agreement and instruct the jury to weigh the accomplice's testimony carefully. *United States v. Insana*, 423 F.2d 1165, 1169 (2d Cir. 1970), cert. denied, 400 U.S. 841 (1971). Federal prosecutors make a practice, even in the absence of a specific request under *Brady*, of disclosing such agreements to the defense.

v. Bagley.¹¹⁶ In *Bagley* the Court effectively indicated that a prosecutor's suppression of information about inducements held out to government witnesses will not be a ground for reversal absent a reasonable probability that the outcome would have been different had the suppressed information been available.¹¹⁷ *Bagley* is a formidable obstacle to postconviction relief. It also may fortify any trial court tendencies to restrict discovery and may encourage the prosecution to make less than full disclosure.¹¹⁸

Bagley was not a case of failure to disclose a promise of leniency to a cooperating witness, but, insofar as it may apply to such cases, state courts should revise or reject the *Bagley* principle under their state constitutions. The principle is indefensible in light of the specific requirements of the Sixth Amendment's confrontation clause. Confrontation, the right to the effective assistance of counsel in pursuing confrontation, and independent general due process considerations demand that in all cases of cooperation the government make full pretrial disclosure to the defense.¹¹⁹ Courts should not permit the government to induce its witnesses to lie, fail to disclose the inducements, and then escape

116. 473 U.S. 667 (1985).

117. In *Bagley* the defendant made a pretrial request to the prosecutor for information on "any deals, promises or inducements made to witnesses in exchange for their testimony." *Id.* at 669-70. The response did not disclose any inducements. After conviction the defendant discovered that two principal witnesses against him had entered into agreements under which the government had promised to "pay to said vendor a sum commensurate with services and information rendered." *Id.* at 671. The agreement specified that the witness would provide information on the defendant. As a result, the Ninth Circuit granted the defendant's motion to vacate his sentence under 28 U.S.C. § 2255. The Supreme Court, however, upheld the government's appeal of the decision to vacate. Although the defendant had made a specific request for the suppressed information, the Court found that he was not entitled to reversal of his conviction unless there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. Other cases holding that incomplete disclosure of fee arrangements with government witnesses are not material are *United States v. Janis*, 831 F.2d 773 (8th Cir. 1987), *cert. denied*, 484 U.S. 1073 (1988), and *United States v. Risken*, 788 F.2d 1361 (8th Cir.), *cert. denied*, 479 U.S. 923 (1986).

118. *Bagley* is a serviceable test for appellate courts reviewing a conviction, but it is awkward for trial courts to apply. If a trial court is confronted before trial with the propriety of a defense demand for discovery, the judge presumably still must apply the *Brady* standard of "materiality" but with the gloss given by *Bagley*. The question of whether the result of the proceeding would be different (that is, would any guilty verdict probably not have been returned), however, is difficult to answer when no evidence has yet been presented. The knowledge of the appellate court's reviewing standard nonetheless will likely cause trial courts to make rulings unfavorable to the defense.

119. The Supreme Court's holding in *Pennsylvania v. Richie*, 480 U.S. 39, 52 (1987), to the effect that confrontation is primarily an in-trial doctrine going to the scope of cross-examination is distinguishable. *Richie* was a case of a defense subpoena addressed to a state agency to obtain records protected under a confidentiality statute. This reasoning may not apply when the very subject matter as to which a need for confrontation arises is created entirely by the government for the sole purpose of gaining a stronger position at the trial.

reversal on the grounds that disclosure would not have produced a different result. When the government is exclusively responsible for creating a need-to-know situation as to confrontation, the proper standard should be harmless error, with the usual burden of proof beyond a reasonable doubt on the government. The potential for grave prejudice through nondisclosure in any particular case and the systemic need to monitor cooperation agreements necessitates placing that burden on the government.¹²⁰

If clear rules for automatic full disclosure are the first necessary safeguard, the next question is whether special evidentiary rules also are needed. The cooperating witness, whether immunized or the recipient of a favorable bargain, is often an accomplice of the defendant against whom he testifies. Although some jurisdictions require accomplice testimony to be corroborated,¹²¹ the federal system and many states have no such rule.¹²² Federal courts generally agree, however,

120. In addition to discovery under a due process or confrontation requirement, any prior statements by the cooperating witness that relate to his testimony at the trial will be discoverable after he testifies under the Jencks Act, 18 U.S.C. § 3500 (1985); *see also* FED. R. CRIM. P. 26.2, or under a comparable state provision. These provisions extend to grand jury testimony by the witness but may not cover statements that the witness made in interviews with agents unless these were memorialized in a way that qualifies them as recorded statements for the purposes of the statute. Agents and the prosecutor often may refrain from verbatim recording of statements in order to take them outside the provisions of the statute.

121. A recent survey shows that 16 states have accomplice corroboration statutes. Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 791 n.40 (1990). For example, § 60.22(1) of the New York Criminal Procedure Law (1981) provides: "A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense." This corroborative evidence must be "truly independent," *People v. Hudson*, 414 N.E.2d 385, 387 (N.Y. 1980), and "[i]t may not depend for its weight and probative value upon the testimony of the accomplice." *People v. Kress*, 31 N.E.2d 898, 902 (N.Y. 1940). The New York court stated in *Hudson*:

The objective of the statute is not to require bolstering of the testimony of the accomplice as a witness or to lend credibility to the details of his testimony; rather the purpose of the statute is to protect the defendant against the risk of a motivated fabrication, to insist on proof other than that alone which originates from a possibly unreliable or self-interested accomplice.

Hudson, 414 N.E.2d at 388.

122. Federal courts have declared that neither the United States Constitution nor the Federal Rules of Criminal Procedure require corroboration of accomplice testimony. *United States v. Gardea*, 830 F.2d 41, 44 (5th Cir. 1987) (noting that "[a] conviction may rest solely on the uncorroborated testimony of one accomplice if the testimony is not insubstantial on its face"); *Jacobs v. Redman*, 616 F.2d 1251, 1255 (3d Cir.), *cert. denied*, 446 U.S. 944 (1980) (stating that "uncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction" (quoting *United States v. De Larosa*, 450 F.2d 1057, 1060 (3d Cir.), *cert. denied*, 405 U.S. 927 (1971))). Early this century, the Supreme Court apparently viewed accomplice testimony negatively, saying that it "ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses." *Crawford v. United States*, 212 U.S. 183, 204 (1909). But soon thereafter the Court came to accept accomplice testimony, even in the absence of a cautionary

that a cautionary instruction is desirable and should be given when requested.¹²³

While a corroboration requirement has a superficial common-sense appeal, it likely would not significantly protect the defendant when cooperating witnesses give key testimony. If courts understand corroboration as *some* independent evidence of the defendant's participation in the crime, this evidence usually will be forthcoming. In cases of cooperating witnesses, however, the absence of *any* other evidence is usually not as disturbing as the overwhelming, scale-tilting weight of the cooperating witness's testimony. The mere production of a second witness or second piece of evidence does not cure the suspect testimony at the heart of the prosecution's case. If courts understand corroboration in a weaker sense as evidence that strengthens the credibility of the witness without independently implicating the accused as to the offense, this evidence too will usually be readily available since the prosecutor easily can implicate the witness in the criminal activity. This implication will qualify the witness as having access to special knowledge and thus corroborate his credibility.¹²⁴ Thus, while a corroboration requirement would add a small measure of assurance,¹²⁵ it would not go to the heart of the problem of how best to guard against the suspect quality of informer or cooperating witness testimony.

A familiar safeguard is the special charge to the jury. The Supreme Court has not spoken decisively on the need for a special charge, either constitutionally or in the context of the federal criminal system. In *On Lee v. United States*¹²⁶ the Court acknowledged the need for "careful

instruction, with equanimity. See, e.g., *Caminetti v. United States*, 242 U.S. 470, 495 (1917); *Holmgren v. United States*, 217 U.S. 509, 524 (1910). See also Note, *supra* note 121, at 792-95.

123. The Supreme Court has never announced a requirement of corroboration but has made several comments on the need to treat accomplice testimony with caution. The Court has stated:

The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.

On *Lee v. United States*, 343 U.S. 747, 757 (1952). The Court also has noted that when the prosecution calls an accused accomplice to testify against the defendant, "[c]ommon sense would suggest that [the witness] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing." *Washington v. Texas*, 388 U.S. 14, 22 (1967). See also *Cool v. United States*, 409 U.S. 100, 103 (1972) (recognizing that "[a]ccomplice instructions have long been in use and have been repeatedly approved," and suggesting that "[i]n most instances, they represent no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity").

124. See *R. v. Farler*, 173 Eng. Rep. 418, 419 (1837) (stating that an accomplice "will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all").

125. Corroboration requirements thus would be a welcome requirement in all cases of bought testimony whether or not the witness was an accomplice of the defendant.

126. 343 U.S. 747 (1952).

instructions" when there are questions as to the credibility of accomplice testimony. The Court expanded on this remark in *Cool v. United States*¹²⁷ by noting that cautionary instructions as to accomplice testimony represented a common sense and traditional practice. The Court has not indicated, however, when the omission of such instructions might constitute reversible error.

Federal courts typically instruct juries to weigh and scrutinize accomplice testimony with great care.¹²⁸ Some courts have held that the omission of this instruction constitutes reversible error when there was no corroborating evidence and the evidence of guilt was not overwhelming.¹²⁹ The adequacy of the caution's present form is doubtful when, as is usually the case, the benefits expected by the cooperating witness are as yet unrealized and depend upon his continued cooperation. Courts should instruct juries to consider how easily suspects with inside knowledge can fabricate testimony and the strong incentive for suspects to do so when their liberty may depend on it. A defense summation likely will make these points vigorously, but that is not a substitute for a charge by the court.

B. *The Case for Exclusion*

If full disclosure, adversarial cross-examination and summation, and a strong charge to the jury cannot guard adequately against the dangers of perjury by cooperating witnesses, then the only alternative would be an exclusionary rule barring such testimony. Nonetheless, general application of the radical remedy of automatic exclusion is not justifiable. Testimony is frequently not disinterested. Victims and their families and friends may seek revenge by embellishing their testimony. A victim may shape testimony out of a desire for restitution, and with recent developments in the law, a victim's testimony at a criminal trial may secure a conviction that will fortify a subsequent civil claim by the victim for treble damages.¹³⁰

Courts generally do not bar witnesses simply because they are enemies of the defendant or stand to gain from his conviction. The expectation of some gain or pleasure from an outcome hardly makes it sure

127. 409 U.S. 100 (1972).

128. See Sheldon R. Shapiro, Annotation, *Necessity of, and Prejudicial Effect of Omitting, Cautionary Instructions to Jury as to Accomplice's Testimony Against Defendant in Federal Criminal Trial*, 17 ALR FED. 249, 263 (1973).

129. See *id.*

130. This is a common result under the RICO statute, 18 U.S.C. § 1962 (1984), and always has been possible under the antitrust laws. See Howard P. Marvel, Jeffrey M. Netter & Anthony M. Robinson, *Price Fixing and Civil Damages: An Economic Analysis*, 40 STAN. L. REV. 561, 572 (1988).

or even probable that a person is lying. The paths of truth and advantage do not always diverge. If these motives did bar testimony there often would be no competent witnesses. Furthermore, the defense has the opportunity to educate the jury thoroughly on all the possible motives to commit perjury. Law enforcement's success always has depended heavily on criminals' willingness to cut each other's throats. The offer of inducements traditionally has enhanced this willingness. Courts should not deny juries the opportunity to hear testimony that is very often decisive and true, nor should they deny society this most useful tool for convicting the guilty. A substantial number of valid convictions would be lost if these practices were forbidden.

Even if courts generally allow a cooperator to testify, they must still face the question of what might constitute a "worst case" situation in which the danger of concoction is so strong that courts should exclude the testimony.¹³¹ As noted above, some courts earlier concluded that testimony should be excluded when leniency or immunity for the witness was conditioned on a raw result (conviction or indictment of the defendant), or when the government attached a condition that testimony replicate earlier testimony or information given to the police or prosecutor in an interview.¹³² As also noted above, however, there is a movement in the federal cases away from this position toward an easier admission of testimony.¹³³

There are attractive arguments to the effect that the tendency toward easier admission of testimony is misconceived and should be reversed, at least in the strongest cases in which the government conditions immunity or leniency on testimony leading to the indictment or conviction of a pretargeted individual. It may be unobjectionable to condition the payment of a reward for information on some affirmative result. The notion that a reward will be paid only if the information leads to an arrest or conviction is familiar. Even when the contract for information designates a particular target, as to whom there must be a successful outcome, the risk to the innocent does not become unacceptable.¹³⁴ The practice is arguably a necessary tool of law enforcement,

131. See Yvette A. Beaman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800 (1987).

132. See *supra* notes 79-82 and accompanying text.

133. See *supra* notes 99-112 and accompanying text.

134. Information contracts contingent on results are now a common practice and courts have had no problems with them. Appellants sometimes attack these contracts on the ground that the government is guilty of "outrageous" conduct, *United States v. Russell*, 411 U.S. 423, 431-32 (1973), but courts have not been receptive. See *United States v. Valona*, 834 F.2d 1334, 1343 (7th Cir. 1987) (stating that "[i]t is clear that situations, as in the present case, which involve pre-targeting of a defendant . . . and a contingent fee arrangement, do not call for the activation and application of the outrageous conduct concept").

and the government has to transform the information into testimony by competent witnesses or relevant evidence subject to the adversarial process.

When the information giver is also to be a witness, however, the designation of targets and the demand for results before payment are much more suspect because the quality of testimony before a jury or grand jury is at issue. Due process considerations control with respect to the conduct of the trial. Courts should permit the government to offer inducements only within the compass of its generally proper exercise of prosecutorial discretion. To bargain for the truth is traditionally within this range; to bargain for results is not. Telling the truth is a normal obligation for all witnesses. Getting results is clearly not a normal or proper witness obligation. It is inconceivable that a witness who was not a suspect or defendant should be punished for not getting a result. Punishing a witness who tells the truth but does not get the prosecutor's desired result is analogous to punishing juries who acquit.

In due process terms, it is crucial to emphasize that the temptation to lie in cooperation agreement cases is not just a natural feature of the landscape but specifically is introduced or inflated by the government when it offers immunity or leniency in return for cooperation. Accomplices, if they give information or testify, may have a natural tendency to lie in order to minimize their part in the crime. A promise of leniency in exchange for cooperation surely enhances that tendency. The question then becomes whether we should tolerate yet a further increment of pressure by allowing the government to impose a specific contingency requirement. A requirement of procuring an indictment or conviction strongly indicates the nature and quality of the testimony that the government expects. The witness is being crudely told that he will get no reward unless his testimony is of a certain nature. This imposes a very high degree of pressure and influence and, thus, should render the testimony tainted. These practices weaken the concept of the trial as a truth-finding process and disturb the adversarial equipoise since the defendant has no similar weapons with which to cajole testimony.¹³⁵ Even if the outcome condition is coupled with a condition that the witness always tell the truth, the former is likely to loom larger. Courts should hold, therefore, that contingency requirements taint the testimony irretrievably.¹³⁶ As Sir Matthew Hale reminded us, we often are dealing

135. See Note, *supra* note 131.

136. A sample of a plea agreement in return for cooperation, embodying some of the conditions under discussion, is provided in 5 *Crim. Prac. Man.* (BNA) 11 (1991). The agreement, drafted by a Maryland prosecutor, binds the defendant to give truthful cooperation and to testify truthfully before the grand jury, but also contains the following clause:

That the defendant agrees that he will cooperate with the police in a manner that leads to the

here with "desperate villains"¹³⁷ whose disposition to tell the truth may be weak enough without demanding that their testimony produce results and subjecting them to severe penalties in the event of failure.

Additionally, contingency requirements violate ethical rules. The Model Code of Professional Responsibility forbids the "payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case."¹³⁸ As one federal judge observed in a decision that upheld the admission of contingent fee testimony for the government:

The prosecuting attorney is therefore permitted to adduce evidence in a criminal case despite the fact that it is gained by a breach of ethical standards. . . . If the government may do so, the defendant presumably may also employ experts and other witnesses to testify for a fee contingent on his acquittal. While this balances opportunity equally, it patently permits perversion of the trial process¹³⁹

In sum, the dangers of perjured testimony are already so great that they should not be underscored by unethical promises contingent on securing an indictment or a conviction, especially when the reward to the witness is immunity or leniency. This type of specific contingency in the agreement either should lead courts to exclude the testimony or should become a ground for reversal if a court allowed the testimony

indictment of the following four (4) individuals [individuals are then named]. . . . Any indictment of [A] must be for a minimum of one (1) kilo of cocaine. If for whatever reason insufficient evidence is available to indict [B], [C] or [D], a person may be substituted for them for the purpose of this agreement. Any substitution must have the approval of the State's Attorney and must come from the organization that is being investigated
Id. at 12.

137. See note 19, *supra*. The damage that can be wrought by such "desperate villains" is shown by the recent California allegations of wide spread concoction by jailhouse informers of "confessions" by other inmates, arguably leading to numerous false convictions. See 3 *Crim. Prac. Man.* (BNA) 181-82, 265-66, 453-54, 501-02 (1989).

138. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C) (1980). The Preliminary Statement to the Model Code states that the Disciplinary Rules (which contain the prohibition cited here) are "mandatory in character" and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." The Model Code has now been followed by the MODEL RULES OF PROFESSIONAL CONDUCT (1983), which were intended to take the place of the Code. Many states, however, still adhere to the Model Code. The Model Rules merely prohibit offering "an inducement to a witness that is prohibited by law." *Id.* Rule 3.4(b). The ABA'S STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3.2(a) (1974), declare that "[i]t is unprofessional conduct to compensate a witness, other than an expert, for giving testimony" The AMERICAN LAWYER'S CODE OF CONDUCT (ATLA) (1980) Rule 3.10 provides that "[a] lawyer shall not give a witness money or anything of substantial value, or threaten a witness with harm, in order to induce the witness to testify" It is also likely that a defendant's promise to a potential witness for a reward contingent on the value of his testimony to the defense would be a criminal offense. For example, federal law makes it an offense to "corruptly . . . endeavor[] to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503 (1988). Courts have held that this applies to nonviolent or nonintimidating efforts to interfere with testimony. *United States v. Lester*, 749 F.2d 1288, 1292-94 (9th Cir. 1984).

139. *United States v. Cervantes-Pacheco*, 826 F.2d 310, 316 (5th Cir. 1987) (en banc) (Rubin, J., concurring), *cert. denied*, 484 U.S. 1026 (1988).

and the error is not harmless. Thus, the State should only use contingent agreements for the provision of information from an informant who will not be a witness. Prosecutors may object that it is often difficult at the outset to foresee whether they will have to call the informer as a witness. But whenever this possibility exists, the safer practice is to eschew any contingency arrangement.¹⁴⁰

Terms in a cooperation agreement to the effect that the degree of leniency depends on a government appraisal of the value of the cooperation are just as bad as raw contingency clauses. In *United States v. Dailey*¹⁴¹ the government promised the cooperators, who already had been convicted, that if they cooperated fully, the government would recommend a sentence of twenty years or less, and that, depending on the value of the cooperation, the government "in its sole discretion" might recommend a term of no more than ten years. The First Circuit Court of Appeals held that this agreement did not taint the testimony of the cooperators. The court's holding is unconvincing. A sliding scale of benefits is eminently likely to egg the cooperators on to greater efforts. They know that even if they cooperate fully they still might not win the big prize. To receive the lightest possible sentence they must do something more, which is not precisely defined but which consists of impressing the government very much with the value of their testimony. These types of conditions dangle almost irresistible temptations before witnesses to lie or enhance testimony and invest the government with an unfailing capacity to apply coercion.¹⁴² The lack of measurable standards for fulfillment of the promise confers on the government a tyrannical power to profess a continuing lack of satisfaction so that the cooperator feels goaded to ever greater efforts to please. Courts should

140. At least in federal practice, it will be very unlikely that a cooperation agreement with an accomplice or someone receiving immunity or leniency in return for testimony will include an express contingency in terms of the return of an indictment or a conviction. These express contingencies are more likely to occur when the arrangement is with an informer rather than a cooperator. One court has suggested that, while contingency agreements generally do not taint testimony, there would be a due process violation if the government promised the witness a reward for information and testimony against a specific individual against whom no reasonable suspicion existed. See *United States v. Risken*, 788 F.2d 1361, 1374 (8th Cir.), cert. denied, 479 U.S. 923 (1986). This is "pretargeting" in the strongest sense and the suggestion of a constitutional violation is connected with the idea that certain government practices impermissibly lead to entrapment. See *id.*; see also *United States v. Terrill*, 835 F.2d 716 (8th Cir. 1987).

141. 759 F.2d 192 (1st Cir. 1985). For a discussion of *Dailey*, see *infra* notes 142-43 and accompanying text.

142. For a good analysis of *Dailey*, concluding that such agreements should render the testimony inadmissible, see Neil B. Eisenstadt, Note, *Let's Make A Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. Rev. 749 (1987). The danger here is not confined to tainting testimony. The imprecise government promise is given in exchange for the value of cooperation. This may tempt the cooperator to improprieties other than false testimony—such as entrapment, threatening others into cooperation, or supporting false stories.

not permit the prosecution to pressure the cooperator in this way, with a wink and a shake of the head, but should restrict the prosecution to obtaining simple promises to testify fully and truthfully.¹⁴³

But the prohibition of naked contingency clauses or vague standards for appraising the value of the cooperation, even though desirable, ultimately will not achieve very much. Realistically, there also must be protection for the government's interest in cooperation agreements. If a cooperator simply promises to tell the truth and fulfills his promise and wins immunity by testimony that exonerates the defendant, the government naturally will have satisfied no interest. How then may the necessary quid pro quo be assured while avoiding unacceptable doubts as to the truth of the cooperator's testimony? The answer lies in conformity between the proffer and later testimony. At the outset, the government will make no offer unless the proffer indicates that the cooperator's testimony will at least substantially strengthen the prosecution's case. It seems, therefore, that an appropriate, indeed a necessary, condition to impose is that future testimony not depart substantially from the proffer. Agreements can satisfy this condition indirectly, and in a seemingly bland and innocuous fashion, by requiring that the cooperator always tell the full truth, for if the testimony differs from the proffer then the cooperator has violated the truth-telling condition somewhere, and the prosecution may call off the deal.¹⁴⁴

This formula superficially will sanitize the agreement by eschewing any express promise to give testimony of a particular content, but the truth-telling requirement implicitly carries with it the same fundamen-

143. These pressures remain present in some form in many federal cooperation agreements. It is typical that a cooperator will receive specific transactional immunity for certain offenses but will be required to plead guilty to others. With respect to his sentence on the offenses to which he is pleading, a standard agreement in use in the Eastern District of New York (provided by the Federal Defenders Service of the New York Legal Aid Society) contains the following provision:

If the Office determines that [the cooperator] has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion with the sentencing court setting forth the nature and extent of [his] cooperation. . . . In this connection it is understood that the Office's determination of whether [the cooperator] has cooperated fully and provided substantial assistance, and the Office's assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon [him].

The extent of the benefit here is loosely governed by the Sentencing Guidelines, but the government seeks to empower itself to act in an unfettered way in deciding whether the cooperator will receive any benefit.

144. A standard form of cooperation agreement in use in the Eastern District of New York (supplied by the Federal Defenders' Service of the New York Legal Aid Society) provides:

Should it be judged by the Office that [the cooperator] has failed to cooperate fully, or has intentionally given false, misleading or incomplete information or testimony . . . [he] shall thereafter be subject to prosecution for any federal criminal violation of which the Office has knowledge, including, but not limited to, perjury and obstruction of justice.

tal demands. In the first place, the witness will know that he has no chance to gain immunity or leniency unless the information that he initially furnishes appears weighty enough to aid in convicting a target. At an early stage he almost certainly will testify before a grand jury. If this testimony differs in any significant way from the information he gave the police and the prosecutor, he may lose immediately any expectation of leniency or immunity, since it logically follows that either the information tendered to the police or the grand jury testimony was false. Similarly, if his testimony at trial differs either from the information tendered or from his grand jury testimony, he risks losing the benefits of the bargain and also risks prosecution for perjury. The prosecution thus may bring the strongest pressures to bear without, in the cooperation agreement, explicitly trading leniency or immunity for trial results.

The initial condition that information and projected testimony be sufficiently weighty to aid in the conviction of a known individual, and the continuing *de facto* condition, imposed obliquely by the healthy sounding promise to tell the truth, that the testimony conforms to the proffer combine to produce a dilemma. Even if the government receives minimal protection for its interests, the agreement will be tantamount to a pretargeting contingency. The intractable problem is that a witness may lie or make mistakes at the proffer, and conditions as to truthfulness may serve as the strongest inducement for the witness to perpetuate the lie or not to retract the mistake. The prohibition of frank contingency agreements, therefore, may ultimately be little more than cosmetic. It seems impossible to give the government any protection at all without giving it so much that the government elicits the testimony from a cooperator under the strongest pressure. We are left with a stark choice between excluding this whole category of testimony and trusting the adversary system to weed out perjury.

Because of the lack of developed special rules to protect the defendant, juries and occasionally courts are sometimes uneasy about heavy reliance on bargained testimony. One federal judge, in dismissing an indictment on a variety of grounds, all having to do with governmental improprieties before the grand jury, relied in part on the government's extensive use of informal immunity, which he described as a "damnable practice."¹⁴⁵ Such judicial condemnation is extremely rare, but we may speculate that acquittals by juries are sometimes attributable, at least in part, either to skepticism about the credibility of cooperating witnesses who, in addition to their confessed participation in the instant crime, may also have extensive criminal records, or to revulsion

145. *United States v. Anderson*, 577 F. Supp. 223, 233 (D. Wyo. 1983), *rev'd*, 778 F.2d 602 (10th Cir. 1985).

at the sources of the prosecution's case. Some may see these jury responses as a sufficient vindication of the system's reliance on cross-examination and summation to protect the defendant's position; others may view them as an admonition and a signal that we need to develop further safeguards.¹⁴⁶

V. FAIRNESS TO THE COOPERATING WITNESS

The cooperating witness is not a strong candidate for sympathy. He is likely getting much better than he deserves—either full immunity or a lenient outcome, unmerited in terms of the degree and nature of his criminal activity, and purchased by his often unrepentant and selfish willingness to assist in ensuring that others get what they deserve. But, whatever his moral worth, his fate under and after the cooperation agreement deserves attention because it is an important index of the fairness and integrity of the prosecutorial system. A bargain is, after all, a bargain. Double dealing by the State will create doubts about the rectitude of the criminal justice process.¹⁴⁷

146. As a postscript, it may be interesting to note recent British experience with a heavy reliance on cooperating witnesses. As with our federal system, Anglo-Welsh law does not require corroboration for accomplice testimony though cautionary instructions are required. The systematic use of cooperating informers in trials of violent or dangerous professional criminals apparently became prominent in London in the 1970s, TONY GIFFORD, *SUPERGRASSES: THE USE OF ACCOMPLICE TESTIMONY IN NORTHERN IRELAND* 6 (1984), giving rise to the British underworld term "supergrass" to denote an informer on a large scale. ("Grass" is a British underworld and law-enforcement term for an informer.) Sixteen convictions resulted from the evidence of Bertie Smalls who had received immunity and who was described in the Court of Appeal as "one of the most dangerous and craven villains who ha[s] ever given evidence for the Crown." *R. v. Turner*, 61 Crim. App. 67, 79 (C.A. 1975), quoted in GIFFORD, *supra*, at 7. Other prominent offenders were given short sentences and favorable treatment while in detention in return for their collaboration. GIFFORD, *supra*, at 6-7. But there was a high rate of acquittals in cases in which supergrasses testified, and the Director of Public Prosecutions later issued instructions that in the future no cases should be brought on uncorroborated supergrass evidence. *Id.* at 7-8.

In the early 1980s supergrass testimony became a frequent and initially very successful mode of prosecuting terrorists in nonjury trials in Northern Ireland. See Greer, *The Supergrass: A Coda*, *FORTNIGHT*, March 1984, at 7. Supergrasses were immunized and promised new lives in any English speaking country. In the first such prosecution, 38 people were charged and 35 convicted after an eight-month trial. A succession of these trials led to criticism that the supergrasses (or "converted terrorists" as the authorities preferred to style them) were being coached by police and, indeed, often simply were subscribing to statements written for them by the police. As the testimony given by some supergrasses became evidently and even ludicrously inaccurate, and as several of them recanted their initial testimony, acquittals and reversals on appeal ensued. The supergrass movement, therefore, waned and seemingly died out after a few years. See GIFFORD, *supra*, at 8.

147. In *United States v. Pavia*, 294 F. Supp. 742 (D.D.C. 1969), the government made what may have been its last attempt in a federal case to argue that it was not bound by an agreement not to prosecute even if the defendant had carried out his side of the bargain. It relied in part on *The Whiskey Cases*, *supra* notes 22-26 and accompanying text, to contend that the defendant's best remedy was to apply for executive clemency. It also argued that the doctrine of separation of powers should bar a court from interfering with prosecutorial discretion to pursue the case. The district court decisively rejected both arguments. Courts now generally recognize the importance of

The doctrines of the criminal process provide little help, however, in deciding whether bargains have been kept or whether a bargain was from the start unconscionable. Traditionally, courts look to the law of contracts to answer these questions. A prime task for the courts in this area is to adapt principles of contract in the light of the relevant issues of public policy and constitutional protection.¹⁴⁸

Clearly a suspect or defendant who enters into a cooperation agreement without an attorney's assistance in drafting the agreement will be at considerable risk. First, there is the question of what degree of use immunity extends to communications made during the first contacts between the government and the potential cooperator. This stage is a delicate dance in which the witness must seek to persuade the government that what he has to offer is worth immunity or leniency while, at the same time, not irretrievably incriminating himself. These early negotiations may occur through use of a formal proffer or they may take place in a series of informal meetings between the witness and government agents or prosecutors.

The cooperator's attorney at an early stage may make an offer couched in hypothetical terms. If the potential cooperator is not present at the proffer, no problem of incrimination will arise.¹⁴⁹ The prosecutor early on, however, likely will insist on an interview with the cooperator. Here questions arise as to the degree of immunity that will apply.¹⁵⁰

holding the government to immunity agreements. See *United States v. Palumbo*, 897 F.2d 245, 246 (7th Cir. 1990) (stating that "[t]he system works . . . only if each side keeps its end of the bargain").

148. As the Supreme Court stated:

A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.

Mabry v. Johnson, 467 U.S. 504, 507-08 (1984) (footnote omitted). Since immunity agreements do not result in any court judgment, it would be even more difficult to view them as directly implicating constitutional guarantees.

149. In *United States v. Catena*, 500 F.2d 1319, 1326-27 (3d Cir.), *cert. denied*, 419 U.S. 1047 (1974), the Third Circuit held that an attorney's nonverbal answers to an investigator's questions in the presence of the defendant were admissible as an admission.

150. Rule 11(e)(6)(D) of the Federal Rules of Criminal Procedure provides that "any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" shall not be admissible against the defendant in any civil or criminal proceeding. While this Rule does not expressly refer to immunity discussions, courts appear to treat it as applicable. See, e.g., *United States v. Boltz*, 663 F. Supp. 956 (D. Alaska 1987). But this provision confers bare use immunity without derivative use protection and so is limited in its value. See *United States v. Cusack*, 827 F.2d 696 (11th Cir. 1987). Counsel for a cooperating witness should try to insist on use and derivative use immunity for the witness's first proffer. Such immunity was promised in *United States v. Palumbo*, 897 F.2d 245, 247 (7th Cir. 1990), where the parties ultimately failed to work out a cooperation agree-

Controversial questions also may arise early in negotiations about the ultimate scope of immunity or the concessions to be afforded on a plea.¹⁵¹ Does informal immunity travel across jurisdictional frontiers, either between the federal government and a state or between federal districts? These issues may be crucial to the cooperator, and counsel's aid is thus virtually indispensable.¹⁵² From the defendant's point of view it

ment. Palumbo's conviction was reversed by the Court of Appeals on the ground that the government had not passed the *Kastigar* test, *see infra* note 166, of showing that their evidence was untainted. The federal prosecutor most likely will be unwilling, however, to accede to a full use and derivative use term in the agreement out of fear that the proffer may contain little of value and the witness may use it to take an "immunity bath." A standard form of proffer agreement used in the Eastern District of New York (provided by the Federal Defender's Office of the New York Legal Aid Society) provides that the government will give bare use immunity for the proffer and expressly states that "the Office may use information derived directly or indirectly from the meeting for the purpose of obtaining leads to other evidence, which evidence may be used in any prosecution and sentencing of [the one who makes the proffer] by the Office." The agreement form further requires the potential cooperator to waive any claim that his statements at the interview "are inadmissible for cross-examination should [he] testify." These provisions make proffers a risky business. If the information tendered is not what the government wants or is not consistent with the government's theory, the potential cooperator is likely to be prosecuted in the most disadvantageous circumstances.

151. *See infra* notes 152-62 and accompanying text.

152. With respect to the hazard of prosecution by a different sovereign, informal immunity gives less protection than a formal immunity grant. Federally granted formal immunity binds the states while the federal government and other states must recognize state-granted formal immunity under the Fifth Amendment and the due process clause. *See* *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). Since informal immunity has a primarily equitable foundation, it is not constitutionally binding in other jurisdictions. The federal government, thus, is not bound by informal immunity extended by a state officer unless the state officer was acting as a federal agent. *See* *United States v. Long*, 511 F.2d 878 (7th Cir.), *cert. denied*, 423 U.S. 895 (1975). As between federal districts, the approach laid down in *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986), is that "the agreements reached are those of the Government" and "[i]t is the Government at large—not just specific United States Attorneys or United States 'Districts'—that is bound by plea agreements. . . ." *Id.* at 303. In *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972) (en banc), *cert. denied*, 417 U.S. 933 (1974), the United States Attorney in one district promised a cooperating defendant that he would not be prosecuted on charges pending in another district. The court held that the United States Attorney in the second district was bound by the promise. *Id.* at 428. And in *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court noted that "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Id.* at 154. The court in *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986), however, made it clear that this approach is dispositive only when the agreement is ambiguous. The government may validly contract to limit the immunity or plea bargain to a particular district. In *United States v. Alessi*, 544 F.2d 1139 (2d Cir.), *cert. denied*, 429 U.S. 960 (1976), the court held that a promise not to prosecute for certain offenses made as part of a plea bargain by a federal strike force prosecutor in the Eastern District of New York did not bind the United States Attorney for the Southern District of New York. The Department of Justice in its *Principles of Federal Prosecution*, *supra* note 48, Part F(3)(b), now directs government attorneys, if practicable, to restrict an agreement to nonprosecution to the particular district. A provision in a standard cooperation agreement used in the Eastern District of New York (provided by the Federal Defender Service of the New York Legal Aid Society) reads: "This agreement is limited to the United States' Attorney's Office for the Eastern District of New York . . . and cannot bind other federal, state or local prosecuting authorities." If a state inter-

is important for the agreement to provide that the court, and not the government, determine questions as to breach,¹⁵³ and that only a material and substantial breach shall be a ground for rescission.

Even though the cooperator clearly may be prosecuted if he breaches the agreement, another important issue is whether the government can use the cooperator's statements after the breach. The federal statutory protection of statements made during plea or immunity negotiations¹⁵⁴ does not apply to statements made after an agreement is reached if there is a subsequent breach.¹⁵⁵ The application of this principle generally will render the cooperator's position hopeless if a breach is established. Counsel can attempt to secure a term in the agreement that rejects or limits the use or derivative use of defendant's statements if the government should assert a breach.¹⁵⁶ Assistance of counsel, therefore, is invaluable to a defendant-potential cooperator at these early stages. The presence of counsel during interviews is also important so that she may advise the cooperator on the dangers of offering a

pretends a state immunity agreement as not extending to another county or district in the state, a federal court in a habeas proceeding will not give relief if the restriction of the immunity was lawful under state law. *See* *Staten v. Neal*, 880 F.2d 962 (7th Cir. 1989). Courts sometimes approach this issue under agency principles and do not perceive it as having constitutional significance. *Id.*

153. The government typically will seek to insert a term that it shall be the sole judge of whether the agreement is breached. The standard form of cooperation agreement used in the Eastern District of New York (supplied by the Federal Defender's Service of the New York Legal Aid Society) provides that penalties for breach shall be imposed "[s]hould it be judged by the Office that [the cooperator] has failed to cooperate fully, or has intentionally given false, misleading or incomplete information or testimony . . . or has otherwise violated any provision of this agreement." Similarly, under the standard agreement form, the United States Attorney's Office shall decide whether there has been full cooperation. The form provides: "[I]t is understood that the Office's determination of whether [the cooperator] has cooperated fully and provided substantial assistance, and the Office's assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon [the cooperator]." Taken literally, this agreement is surely unconscionable and a court would not uphold perverse judgments on these matters.

154. *See* FED. R. CRIM. P. 11(e)(6), discussed *supra* note 150.

155. *See* *United States v. Davis*, 617 F.2d 677 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980); *United States v. Stirling*, 571 F.2d 708 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978). In *Hutto v. Ross*, 429 U.S. 28 (1976), the Supreme Court held that a defendant's confession made prior to withdrawing from a plea bargain was not per se inadmissible as involuntary and was not covered by Rule 11(e)(6). *Id.* at 30 n.3.

156. The point is that even if the breaching cooperator cannot get immunity from prosecution, he still might get immunity from the use or derivative use of any statements he made pursuant to the agreement. A careless promise also can prejudice the government's interests. In *United States v. Pelletier*, 898 F.2d 297 (2d Cir. 1990), for example, the government orally agreed that it would use the defendant's grand jury testimony only in a perjury prosecution. The defendant breached by not testifying truthfully before the grand jury, and the government sought to use defendant's grand jury testimony in its prosecution of him. The court held that the government was bound by its oral promise and could not use the grand jury testimony against the defendant in a prosecution for a nonperjury offense. *Id.* at 302.

different version in later testimony.¹⁵⁷

Agreement negotiations also afford the cooperating witness an opportunity to create sentencing benefits. Federally, in plea cases, the witness can seek to include acknowledgements in the agreement such as a recognition that the cooperator has accepted responsibility,¹⁵⁸ or that he played a minimal or minor role in the criminal activity.¹⁵⁹ Acknowledgements of this type may constitute grounds for favorable sentence adjustments under the Sentencing Guidelines. Even more important, a court may reduce a sentence below the Guidelines' lower limit if the government makes a motion stating that "the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."¹⁶⁰ The court has discretion to determine the appropriate reduction in these cases, and the Guidelines provide that, in so doing, the court should give "substantial weight" to the government's evaluation.¹⁶¹ The cooperator, therefore, will want a government promise to make a favorable sentencing motion included in the cooperation agreement. This promise also strengthens the prosecutor's hand since her assessment of the truthfulness and impact of the cooperator's testimony will determine both whether the government makes the sentencing reduction motion at all and how favorable that motion will be. Finally, the cooperator also will seek a promise that, if cooperation continues after sentence, the government will move within one year under Rule 35 of the Federal Rules of Criminal Procedure for a further reduction of sentence.¹⁶² This possibility keeps pressure on

157. Obviously counsel should not advise the witness to lie in order to preserve conformity, but interviews may be extensive and the witness, through faulty memory or confusion, might create discrepancies. Counsel can make notes during interviews and go over them with the witness prior to his testimony.

158. Section 3E1.1(a) of the Federal Sentencing Guidelines, reprinted in 18 U.S.C.S. app. (Law. Co-op. 1990), provides that the offense level for sentencing purposes should be reduced by two levels "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." A defendant does not have a right to this reduction, however, merely because he pleads guilty. *Id.* § 3E1.1(c). The government can help the defendant get his sentence reduced by telling the court that he has made full and truthful admissions.

159. Section 3B1.2(a) of the Federal Sentencing Guidelines provides that the sentencing level shall be decreased by four levels if the defendant was a "minimal participant in any criminal activity." Section 3B1.2(b) provides for a two level decrease if he was a "minor participant." Under the Sentencing Guidelines, the plea agreement may be accompanied by a stipulation of facts relevant to sentencing. *See* U.S. SENT. GUIDE. § 6B1.4(a). The stipulation must not contain misleading facts. *See id.* § 6B1.4(a)(2). Nevertheless, this provision gives the government some leeway to agree to a statement of facts that presents the defendant's participation in criminal activity in the best light possible.

160. U.S. SENT. GUIDE. § 5K1.1.

161. *See id.* application n.3.

162. The current version of Rule 35(b), FED. R. CRIM. P., provides that within a year after sentencing the court may, on motion of the government, lower a sentence:

the cooperator even after sentence has been imposed.

Complex questions with a vital bearing on the witness's fate often arise in interpreting immunity deals and plea bargains for cooperation. Consider the story of Drax Quatermain who, for some time, had been manufacturing amphetamines with a partner, Zelman Fairorth.¹⁶³ Quatermain testified against Fairorth in return for a promise of immunity. Quatermain's testimony covered, as the agreement recited, his "participation and involvement with Zelman A. Fairorth and others relating to the manufacture of methamphetamine."¹⁶⁴ Fairorth was duly convicted and sentenced to a term of imprisonment, but while on bail pending appeal, in a turn of the tables, he became an informant for the United States Attorney in an investigation of Quatermain relating to suspicions that Quatermain had diversified into manufacturing silencers for guns. With money supplied by the government, Fairorth bought materials for making silencers and delivered them to Quatermain.

Quatermain was indicted for a firearms offense,¹⁶⁵ and moved to dismiss on the ground that the government obtained the evidence sup-

to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of Title 28, United States Code. The court's authority to lower a sentence under this subdivision includes the authority to lower such a sentence to a level below that established by statute as a minimum sentence.

See also 18 U.S.C. § 3553(e); 28 U.S.C. § 994(n) (1988). A court may not take favorable notice of cooperation in the absence of a government motion, see *United States v. Reina*, 905 F.2d 638, 640 (2d Cir. 1990); *United States v. Ortez*, 902 F.2d 61, 64 (D.C. Cir. 1990), unless the government's refusal to file the motion is shown to be arbitrary and capricious, see *Reina*, 905 U.S. at 641; *United States v. LaGuardia*, 902 F.2d 1010, 1017-18 (1st Cir. 1990); *United States v. Smitherman*, 889 F.2d 189, 191 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1493 (1990). But see *United States v. Havener*, 905 F.2d 3, 8 (1st Cir. 1990) (stating that the sentencing judge was free to consider information regarding the defendant's cooperation despite the absence of a government motion).

163. *United States v. Quatermain*, 613 F.2d 38 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980).

164. *Id.* at 44 n.1. The full text of the pertinent part of the letter of agreement ran as follows: This letter is to confirm our understanding with respect to your cooperation with the Drug Enforcement Administration and the United States Attorney's Office in its investigation of Zelman A. Fairorth and others who are allegedly involved in the manufacture of methamphetamine. It has been agreed that in return for your cooperation and truthful testimony in any court proceeding related to these matters that the Government will provide you with immunity from prosecution for your participation and involvement with Zelman A. Fairorth and others relating to the manufacture of methamphetamine. It is further agreed that at the completion of our investigation the Government will provide you with a letter setting forth the extent of your cooperation and the results of that cooperation in terms of seizure of contraband and prosecution of suspected violators. Finally, it is understood that application has been made on your behalf to include you and your family under the Department of Justice witness protection plan. In the event that you are not accepted into the witness protection plan the Drug Enforcement Administration has agreed to provide you with the same services and protections afforded by the Department of Justice witness plan.

Id.

165. The government thus got two for the price of none.

porting the indictment in breach of Quatermain's immunity bargain. This ambitious and ingenious argument contended that, since Fairorth had a revenge motive that the government exploited, Fairorth's testimony to the grand jury was derived from Quatermain's earlier testimony against Fairorth. Treating the motion as one to suppress Fairorth's testimony, the district court, persuaded by Quatermain's argument, issued a suppression order. The government appealed.

Both sides agreed that the resolution of the appeal should depend on what kind of immunity the government had granted Quatermain. Quatermain argued that it must have been at least use and fruits immunity, the degree that is required constitutionally under a formal grant to compel testimony.¹⁶⁶ He thus posited that since Fairorth's testimony was a fruit of his own earlier testimony, it was properly suppressed. The government responded that a proper and natural reading of the agreement¹⁶⁷ suggested a limited transactional immunity only for offenses relating to amphetamines.¹⁶⁸ Avoiding a resolution of this question, the majority of the appellate court panel reversed on the ground that even derivative use immunity cannot extend to future crimes.¹⁶⁹ The dissent, calling the case an "odd mix of civil contract and estoppel law thrust into the context of a criminal prosecution,"¹⁷⁰ read the contract as providing a broader immunity with respect to Quatermain's involvement with Fairorth, especially in the light of other evidence indicating that the government, in contemplating future use of Quatermain as an informer, suspected that Quatermain might engage in

166. *Kastigar v. United States*, 406 U.S. 441 (1972).

167. The agreement used the term "immunity from prosecution for." See *supra* note 164.

168. The government argued that use and fruits immunity was not constitutionally required since Quatermain's testimony was voluntary. 613 F.2d at 40. This argument goes to the heart of the difference between formal and informal immunity. The case is also a good example of how use and fruits immunity can confer protection that is in one sense more extensive and in another narrower than transactional immunity. The use and fruits immunity was more extensive in that it barred use or derivative use of the testimony in any criminal prosecution, at least for crimes already committed, even if unrelated to amphetamines. On the other hand, use and fruits was narrower than transactional immunity since, even for the amphetamine crimes, prosecution remained a possibility if the government derived no independent evidence from Quatermain's testimony. Transactional immunity, by contrast, "accords full immunity from prosecution for the offense to which the compelled testimony relates." *Kastigar*, 406 U.S. at 453.

169. 613 F.2d at 40-42. In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court held that the Fifth Amendment privilege may extend to future acts when there is a substantial hazard of incrimination. The Court's holding in *United States v. Freed*, 401 U.S. 601 (1971), however, apparently narrowed *Marchetti*. The *Quatermain* court read *Marchetti* as confined to cases where the future conduct involved "was part of a continuing course of similar criminal activity." 613 F.2d at 42. In *Harvey v. United States*, 869 F.2d 1439 (11th Cir. 1989), the court held that informal transactional immunity for certain narcotics offenses did not extend to future tax offenses related to money derived from the immunized drug offenses.

170. 613 F.2d at 44 (Aldisert, J., dissenting).

future illegal acts.¹⁷¹

In light of these facts, one could simply be thankful that it is in criminals' nature to cut each other's throats and that prosecutors are clever enough to turn them against each other. But the case also reveals causes for concern: (1) Quatermain was uncounselled when he entered into his immunity agreement; (2) the government perhaps to some extent contemplated his participating in future criminal conspiracies; and (3) the agreement's loose phrasing led naturally to adversarial positions on its extent and import. Certainly, this case underlines the disadvantage to witnesses or defendants who enter cooperation agreements without the aid of counsel.

There is also a hanging question mark about what reward, apart from the sweet taste of vengeance, Fairorth received for turning in Quatermain. Fairorth's conviction was still on appeal and the government, therefore, still could join in a motion for the reduction of his sentence based on his cooperation in the prosecution of Quatermain.¹⁷² If this was the deal with Fairorth, then the government bought Fairorth's conviction with Quatermain's immunity, and subsequently, in a neat turnabout, bought Quatermain's conviction with Fairorth's sentence reduction. Practices like these, if left unregulated, can place the State in the suspect role of licensing and managing some crime and some criminals in order to hit the target of the day. Perhaps this is the only successful method of convicting for some categories of offenses and offenders, but there should be some attempt to introduce safeguards that could sanitize these strategies without seriously impeding them.

These concerns are highlighted and amplified by the fairly common cooperation agreement in *United States v. Brown*.¹⁷³ In *Brown* the government granted the defendant immunity for a narcotics offense in return for promises, incorporated in a letter agreement, that included the customary obligation to give "full cooperation."¹⁷⁴ In addition to giving information and testimony, "full cooperation" was defined to include "participation in ongoing investigations."¹⁷⁵ A further term stipulated that the government would not be bound by the agreement if the defendant committed any "future crimes punishable by a term of imprisonment exceeding one year."¹⁷⁶ The government later alleged that

171. *Id.* at 46 (asserting that "there was evidence that Quatermain was given some kind of license to participate in future illegal activities").

172. The defendant at that time could make a motion for reduction of sentence under FED. R. CRIM. P. 35(b).

173. 801 F.2d 352 (8th Cir. 1986).

174. *Id.* at 353.

175. *Id.*

176. *Id.* (emphasis omitted).

Brown had breached the agreement by committing subsequent narcotics offenses and, while conceding that he had given full cooperation, proceeded to indict Brown for the original offense.¹⁷⁷ A divided panel of the court of appeals held that the indictment was valid if the government could prove at a hearing that Brown had committed the subsequent offenses.

While the position that criminals must honor their bargains if they are to get leniency or immunity is generally impeccable, there are troubling aspects about its application in this case. The government received full performance of the agreement's main element of consideration for immunity—the cooperation of the defendant. The defendant was in a typically subservient negotiating position with the government. As a result, the agreement contained two elements that called for scrutiny. First, a natural reading of the agreement¹⁷⁸ bound the defendant to cooperation for an indefinite period that might run into years.¹⁷⁹ Second, in spite of his full cooperation, the commission of a later crime not only exposed the defendant to prosecution for that offense but also waived the immunity for his former offense. Cooperation should not give an offender a license to commit future crimes with impunity, but there is an appearance of overreaching when the government encourages "full cooperation," gets what it wants, and in the end, gives nothing in return. These considerations led the dissenting judge in *Brown* to conclude that the letter agreement was an unconscionable bargain and therefore void as against public policy.¹⁸⁰

Brown also raises questions about the extent to which use and derivative use immunity are affected by the defendant's breach of the agreement. In *Brown* the court held that, while the defendant might be prosecuted for the original offense that was the subject of the agreement, the government could not use any statements he made while the

177. *Id.* at 353-54. One should not view this kind of government action as purely vindictive. The witness has broken his agreement and the breach is not unrelated to the principal purpose of cooperation, since the defense can use the witness's crime to impeach him and thus undermine his testimony.

178. Generally speaking, a cooperation-immunity agreement is "contractual in nature and subject to contract law standards." *United States v. Irvine*, 756 F.2d 708, 710 (9th Cir. 1985) (per curiam). The agreement's language thus should be "read as a whole and given a reasonable interpretation." *Id.*

179. As the dissent suggested, "the government used its superior bargaining position to almost blackmail Brown into signing a contract committing him to being an informant for life." 801 F.2d at 355 (Hanson, J., dissenting). It is worth noting that in this case, as in many similar situations, the government initiated and possibly set the stage for the deal. When a government undercover agent's investigation ended, the United States Attorney "invited Brown and his attorney to review the government's evidence against Brown." *Id.* at 353.

180. *Id.* at 355.

agreement was in operation.¹⁸¹ The basis for the court's holding was that the agreement contained a promise that the government would not use the defendant's statements against him except on a prosecution for perjury. As a practical matter, however, this type of promise is tough to keep. Prosecutors cannot easily wash from their minds the massively inculpatory taint of the information obtained from debriefings and from testimony. Thus, at least in cross-examination and in anticipating defenses, the government, intentionally or not, may prosecute defendants with the aid of information derived from the statements it promised not to use.¹⁸² The use immunity contained in the agreement thus appears of very little value when the government takes the position that the witness has breached the agreement.

Also of potential concern to cooperators are federal cases holding that Federal Rule of Criminal Procedure 11(e)(6) confers use immunity for statements made during plea negotiation but does not apply to statements made after the agreement is reached.¹⁸³ One could read these cases as suggesting that, if an agreement collapses, use immunity attaches only up to the conclusion of the agreement. In these cases, however, the cooperator voluntarily withdrew from the agreement and finally elected to go to trial.¹⁸⁴ The courts decided that Rule 11 immunity did not apply in light of the cooperator's withdrawal.¹⁸⁵ This is understandable because of the danger that a defendant could enter a cooperation agreement in bad faith, take an "immunity bath," and then change his mind and go to trial. As in *Brown*, however, often the cooperator is not expressly repudiating the arrangement, but rather seeks to cling to it, and the government, upon alleged breach, asserts that immunity does not apply to statements made while the agreement was in operation. To accept the government's position in that situation seems to work hardship where the cooperator already has supplied decisive information or testimony.

The government typically seeks to make clear in the agreement that a breach by the defendant will forfeit any use immunity as to statements otherwise protected.¹⁸⁶ The government thus uses its supe-

181. *Id.*

182. Cooperating witnesses should try to avoid this hazard by clearly stipulating in the agreement that the government, upon breach, may not use any of the defendant's statements made pursuant to the agreement.

183. *United States v. Davis*, 617 F.2d 677 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980); *United States v. Stirling*, 571 F.2d 708 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978). These decisions are concerned only with the applicability of Rule 11(e)(6). The policy of the Rule is to encourage negotiations by removing a chilling threat.

184. *Stirling*, 571 F.2d at 730; *Davis*, 617 F.2d at 681.

185. *Stirling*, 571 F.2d at 731-32; *Davis*, 617 F.2d at 686.

186. The standard form of agreement used by the United States Attorney's Office for the

rior bargaining position to ensure that the cooperator receives no benefit upon breach even if he already has secured the government's major goal of convicting other defendants. Courts should not focus, therefore, on whether Rule 11 applies, but rather should ask whether, on all the facts of the case, the application of concepts of breach and performance equitably can lead to the loss of use immunity.

What further safeguards might alleviate potential unfairness to the cooperator? The Sixth Amendment right to counsel does not attach constitutionally unless the defendant has been formally charged.¹⁸⁷ Even if not required constitutionally, however, it would be good practice for prosecutors not to enter into cooperation agreements with suspects or defendants who are without counsel. Cooperating witnesses in fact often are counselled before letter agreements are signed. The government knows that the immediate advantage to the witness of cooperating is so great that counsel scarcely will obstruct the deal and often counsel may explain the deal's advantages to her client and so expedite matters.¹⁸⁸

Furnishing counsel for indigents presents some difficulty in informal immunity negotiations since counsel only can be appointed by the court and there is no occasion to come before the court if no charge is filed. Federally, this problem can be cured in most cases as an incident to the grand jury proceedings.¹⁸⁹ The witness almost certainly will have to appear before the grand jury and the court will appoint counsel to advise the witness if his appearance is connected with an immunity agreement. Courts will assign counsel from a list that, in most districts, includes several recent Assistant United States Attorneys familiar with

Eastern District of New York, stipulates that:

Any prosecution resulting from a breach of this agreement may be premised upon: (a) any statements made by [the cooperator] to the Office or to other law enforcement agents; (b) any testimony given by [him] before any grand jury or other tribunal, whether before or after the date this agreement is signed . . .; and (c) any leads derived from such statements or testimony.

187. See *Massiah v. United States*, 377 U.S. 201, 206 (1964); *United States v. Gouveia*, 467 U.S. 180, 187 (1984). Cooperation negotiations may start or continue after a formal charge. A defendant's counsel must be present at those negotiations unless there has been a waiver.

188. When cooperation is clearly in the witness's best interest, defense counsel can assist both sides greatly. Counsel can gauge the government's needs and willingness to offer leniency or immunity and make clear to the witness the type and extent of cooperation necessary to make the deal. The government, therefore, usually will be anxious to secure counsel for the witness once it is clear that he is going to cooperate. The government may wish, however, to interview the witness and secure incriminating statements before he obtains counsel.

189. If the potential cooperator is a target, the federal practice is that he will not be subpoenaed to appear before the grand jury. The formal need for appointment of counsel, however, easily can be created by serving a subpoena for exemplars (handwriting, fingerprints, and similar evidence) on the cooperator. The cooperator thus becomes eligible for the appointment of counsel by the court.

cooperation procedures. Federally, therefore, this process generally goes smoothly. Cooperation agreements nevertheless are reached in a significant number of cases without counsel representing the witness. In the absence of counsel, however, an agreement may not be reduced to writing, creating a situation obviously fraught with danger for the witness and for the defendant against whom his cooperation is directed.

While ensuring that cooperators have counsel during agreement negotiations is a step in the right direction, in light of the intense pressure on potential witnesses and the larger questions of public policy involved, we need to consider further possibilities of ventilating and scrutinizing cooperation agreements. As discussed earlier,¹⁹⁰ one possibility is requiring that a judge validate all cooperation agreements. The independent commission, proposed earlier,¹⁹¹ similarly could help remedy the lack of vigilance in this area.

Additionally, courts could improve their role in reviewing the implementation of cooperation agreements. Courts should hold, of course, the government¹⁹² and the defendant¹⁹³ to the bargain. Courts generally have no great difficulty in deciding what the government promised and whether it has discharged its promises, at least when the agreement is reduced to writing.¹⁹⁴ Whether the cooperator has performed under the agreement, however, is often more contestable. The cooperator's obligations—typically to cooperate and testify fully—are inherently vague. Prosecutors, having promised immunity or leniency before seeing the results, are naturally at times disappointed in the outcome and seek to avoid their contingent promise.¹⁹⁵

190. See *supra* notes 57-69 and accompanying text.

191. See *supra* notes 70-75 and accompanying text.

192. See *Santobello v. New York*, 404 U.S. 257 (1971); *United States v. Martin*, 788 F.2d 184, 187 (3d Cir. 1986); *United States v. Miller*, 565 F.2d 1273, 1274 (3d Cir. 1977) (stating that "[t]he Government must adhere strictly to the terms of the bargains it strikes with defendants"), *cert. denied*, 436 U.S. 959 (1978); *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973). See generally Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471 (1978).

193. See *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.) (stating that "[a] defendant's failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under the agreement"), *cert. denied*, 451 U.S. 1018 (1981); see also *United States v. Simmons*, 537 F.2d 1260, 1261 (4th Cir. 1976); *United States v. Resnick*, 483 F.2d 354, 358 (5th Cir.), *cert. denied*, 414 U.S. 1008 (1973); *United States v. Nathan*, 476 F.2d 456, 459 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

194. The government's promise is usually either not to prosecute at all or to prosecute only on specific charges. There may be supplementary promises, such as a promise to make a favorable sentencing statement, or to enroll the cooperator in the witness protection program. There may be an ambiguity, however, about the nature and scope of the immunity promised by the government. See, e.g., *United States v. Quatermain*, 613 F.2d 38 (3d Cir. 1980), discussed *supra* notes 163-71 and accompanying text.

195. If the prosecutor thus chooses to go forward against the cooperating defendant, the defendant may move to dismiss the indictment. This is the proper procedure for the defendant to

In determining enforceability of a cooperation agreement, principles of contract law govern.¹⁹⁶ Courts accordingly have taken the position that before the defendant will lose the benefit of the bargain the government must show that he was guilty of a substantial breach.¹⁹⁷ Not surprisingly, outcomes under this standard may be controversial. An immunity or plea agreement may require the cooperator to do many things.¹⁹⁸ There may be reasonable disagreement as to whether neglect to fulfill one or more of the items constitutes a substantial breach. A court sometimes may find that a defendant's breach was inconsequential.¹⁹⁹

An example is *United States v. Wood*.²⁰⁰ In *Wood* the defendant had negotiated an immunity agreement under which he promised to "fully and truthfully disclose to law enforcement everything that he knows concerning offers to, or the actual bribery of any public official concerning any matter . . . including drug importation and drug distri-

raise the claim that his prosecution is precluded by a prior agreement. See *United States v. Brimberry*, 744 F.2d 580, 586 (7th Cir. 1984). If the dispute then turns on whether the defendant has complied with the agreement, a hearing usually will be necessary. *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.), cert. denied, 451 U.S. 1018 (1981); see also *United States v. Verrusio*, 803 F.2d 885, 889 (7th Cir. 1986). These hearings are sometimes referred to as "pre-deprivation" hearings since they determine whether the cooperator is to be deprived of his benefits under the agreement. The government has the burden of establishing a breach by the defendant. *Calabrese*, 645 F.2d at 1390 (stating that "[t]he question of a defendant's breach is not an issue to be finally determined unilaterally by the government," and that "the government has the burden of establishing a breach by the defendant if the agreement is to be considered unenforceable"). A breach must be proved by a preponderance of the evidence. *Verrusio*, 803 F.2d at 890-91. One scholar who has examined the possible standards of proof for breach of cooperation agreements concluded that proof by a preponderance is both the majority view and the most suitable one. Julie A. Lumpkin, Note, *The Standard of Proof Necessary to Establish That a Defendant Has Materially Breached a Plea Agreement*, 55 *FORDHAM L. REV.* 1059, 1084-86 (1987). If terms in a plea agreement are ambiguous, courts should construe them in favor of the defendant. See, e.g., *United States v. Jeffries*, 908 F.2d 1520, 1523 (11th Cir. 1990); *United States v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990). Undue delay by the government in acting on the breach may be construed as a waiver if the government continues to accept the benefits of the agreement. *United States v. Vogt*, 901 F.2d 100, 102 (8th Cir. 1990).

196. See *United States v. Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985) (stating that "[p]lea bargains are subject to contract law principles insofar as their application will insure the defendant what is reasonably due him"); cf. *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (stating that application of private contract law "may require . . . tempering in particular cases").

197. See, e.g., *United States v. Wood*, 780 F.2d 929, 930-32 (11th Cir.), cert. denied, 479 U.S. 824 (1986); *United States v. Simmons*, 537 F.2d 1260, 1261 (4th Cir. 1976); *United States v. Paiva*, 294 F. Supp. 742, 748 (D.D.C. 1969).

198. For example in *United States v. Boulrier*, 359 F. Supp. 165, 167-68 (E.D.N.Y. 1972), *aff'd sub nom.* *United States v. Nathan* 476 F.2d 456 (2d Cir.), cert. denied, 414 U.S. 823 (1973), the agreement required Boulrier to furnish numerous very specific pieces of information, including particular methods of smuggling, the addresses and location of certain individuals, and the location of drug processing laboratories. It also required him to introduce an undercover agent to two narcotics dealers. *Id.* at 168.

199. See *United States v. Paiva*, 294 F. Supp. 742 (D.D.C. 1969).

200. 780 F.2d 929 (11th Cir.), cert. denied, 479 U.S. 824 (1986).

bution conspiracies now under investigation."²⁰¹ Over eight months Wood had several interviews with the Federal Bureau of Investigation and made extensive disclosures. The government nevertheless alleged breach of the agreement on the following grounds: (1) Wood had initially denied selling cocaine to a certain individual and had only admitted to the sale when confronted with evidence; (2) Wood had lied about one act of bribery; (3) Wood later was arrested for arranging a drug deal on which he had given no information to the government. Wood argued that he had substantially performed and ultimately had cured some of his omissions by telling the truth. The district court found that Wood's new drug deal did not constitute a breach since it was not a matter "under investigation" at the time of the agreement and the government had never asked Wood questions specifically relating to this incident. The court of appeals reversed, concluding that failure to disclose the new drug deal was a substantial breach since a proper reading of the agreement required Wood to disclose all that he knew about any drug offenses.²⁰²

In *Wood* the defendant had provided very useful information and testimony which may have led to the successful convictions of other offenders. Yet, failure to "come clean" with every piece of information relevant to a general segment of criminal offenses deprived the defendant of any benefit from the bargain. This all-or-nothing outcome amounts to a harsh application of formal contractual principles to cooperation agreements.²⁰³ In these agreements, the cooperator promises services that may be spread out over a period of time. He also may promise to abstain from certain conduct. If he actually performs a substantial segment of his promised acts of service, he should not lose the entire benefit of the bargain. Again, the cooperator usually trades away his Fifth Amendment rights against self incrimination. Once he has furnished information or given testimony, the constitutional deprivation is complete. The government retains substantial benefits from the executed portions of the contract.²⁰⁴ For the government then to withdraw

201. *Id.* at 930.

202. *Id.* at 931-32.

203. An example of a less harsh and perhaps more rational result is found in *United States v. Brimberry*, 744 F.2d 580 (7th Cir. 1984). In *Brimberry* the defendant, a participant in a complex fraud scheme, entered a cooperation agreement that allowed him to plead guilty to one tax felony. In exchange the defendant gave the government extensive information on the fraud scheme and led the government to records that might otherwise have been destroyed. He also testified before the Securities and Exchange Commission and before a grand jury, leading to the indictment of several persons. Two of those indicted told the government that Brimberry had instructed them to destroy records. The government viewed this as a breach of the plea agreement and indicted Brimberry for obstruction of justice. As to the original charges involving the fraud scheme, however, the defendant apparently was allowed to stand on his plea to one felony tax count.

204. Cooperation agreements do not fit easily into contract law concepts, which, for the most

all of the promised immunity or leniency is a momentous act that courts should permit only when the defendant's breach destroys the government's capacity to make any substantial use of the information or testimony.²⁰⁵

Courts should expand the equitable contracts doctrine of part performance to include these cooperation agreements. The doctrine of part performance entitles a party who fell short of full execution of the terms of a contract to some compensation for his efforts under the agreement.²⁰⁶ Courts have not yet applied this sophisticated doctrine to cooperation agreements, perhaps in part because the Supreme Court, in the seminal case of *Santobello v. New York*, listed specific performance and rescission as the only remedies available to a defendant who shows that the prosecutor breached the terms of a plea bargain.²⁰⁷ This approach may be entirely correct when the breach is committed by the government, for the defendant's constitutional rights are implicated and the only sufficient vindication would be to give the defendant what was promised or allow the defendant the alternative of reverting to prebargain status. If we apply *Santobello* to breaches by the defendant, however, rescission becomes the government's sole remedy. Specific performance will not be an available remedy, either because it is no longer factually possible for the defendant to perform the bargain or because it would involve unconstitutionally compelling the defendant to incriminate himself.²⁰⁸

part, have evolved with respect to commercial relationships in which a transfer of goods or services in return for money predominates and damages are the typical remedy. Several sections of the *Restatement (Second) of Contracts* are, however, relevant. Section 241(a) provides that, in determining whether a failure to perform is material, one relevant circumstance is "the extent to which the injured party will be deprived of the benefit which he reasonably expected." Another relevant circumstance is "the extent to which the party failing to perform . . . will suffer forfeiture." RESTATEMENT (SECOND) OF CONTRACTS § 241(c) (1979). The Comment to § 241 states:

[A] failure is less likely to be regarded as material if it occurs late, after substantial preparation or performance For the same reason the failure is more likely to be regarded as material if such preparation or performance as has taken place can be returned to and salvaged by the party failing to perform

Id. § 241 cmt. d.

205. This is not to say that the breach is immaterial. If a cooperator lies to the government, the defense could use the lie to impeach his testimony and so could diminish his usefulness to the prosecution. The government no doubt wants to send a message to future cooperators that all terms in cooperation agreements are important and any breach will be regarded as serious.

206. The *Restatement (Second) of Contracts* confines part performance to contracts in which the obligations to be exchanged "can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents"; that is, to contracts that are divisible. RESTATEMENT (SECOND) OF CONTRACTS § 240. An illustration in the comment to § 240 indicates that substantial performance of personal services is a category to which courts should apply the doctrine of part performance. *Id.* § 240 cmt. d, illus. 4.

207. *Santobello v. New York*, 404 U.S. 257, 263 (1971).

208. See Note *supra* note 195, at 1068-69. The Court's recognition in *Santobello* that specific

Thus, this parallelism does not make good sense. Because of the usual complexity of the defendant's promises²⁰⁹ and because the government may gain great value out of part performance, courts should invoke a flexible view of equitable remedies. Courts could limit the charges, reduce the sentence, or otherwise consider the defendant's part performance of his agreement. Courts can make these considerations informally in most jurisdictions, but we should formally recognize an obligation of courts to consider part performance of cooperation agreements.²¹⁰ Some charges might be eliminated by partial dismissal of the indictment; they also could be reduced to lesser included offenses. Since the remedy has an equitable provenance, the court would have discretion to reduce or eliminate the charges on the facts of each particular case. This would be a radical enlargement of orthodox grounds for dismissing all or part of an indictment, but the privatization of criminal justice entailed in the contractual model demands a radical departure. Modern contract law seeks to avoid allowing one party significant benefits under a bargain while the other party gets nothing. Since we now allow the disposition of an offender to be dictated by a negotiated contract with the State, largely independent of considerations of guilt and moral worth, we cannot shrink from modifying the charging and punishment processes in ways governed by the same modalities.

A different problem arises when a promise becomes impossible to execute while the agreement is still executory. Although the cooperator is in perfect good faith and has not breached the agreement, he may not yet have conferred any benefit on the government or acted to his own detriment. The guiding principle of modern law here is found in *Mabry v. Johnson*.²¹¹ In *Mabry* the government offered the defendant a plea bargain with a recommendation for a sentence of twenty-one years to be served concurrently with another sentence. When the defendant sought to accept the offer, the government informed him that a mistake had been made and proposed a new offer under which the sentences would be consecutive. The Supreme Court held that the original offer was not rendered binding by the acceptance. The Court stressed the

performance is an appropriate remedy for a defendant who shows that the government has breached a plea bargain is an acknowledgment that defendants have expectation rights in plea bargains and that these rights have due process implications since the defendant gains these rights by forfeiting constitutional protections. *Id.* at 1069-75.

209. One aspect of this complexity is that the defendant often will incur obligations that extend over a considerable period of time, perhaps years. Since these obligations may be difficult to perform (especially where they involve continuing undercover relations with criminals), the chance of some breach, in spite of very substantial compliance with the agreement, is great. Sherman, *supra* note 13, at 67.

210. In the federal system, an amendment to the Sentencing Guidelines would be necessary.

211. 467 U.S. 504 (1983).

nonconstitutional nature of a plea bargain that a court had not yet consummated by acceptance of the plea. Until the plea is consummated, the Court noted, it is merely an executory contract without the constitutional significance to compel judicial intervention.²¹²

On its facts *Mabry* may be unobjectionable, but its application may cause difficulty with cooperation agreements. Mere discussion of the possibility of immunity or leniency on a plea clearly should not create any enforceable rights. Once the potential cooperator has made a proffer, however, the situation is more controversial. In *Hammers v. State*, for example, a cooperator had agreed with the prosecution to testify against her lover in a murder case in exchange for immunity.²¹³ She stood ready at all times to testify, but the defendant pleaded,²¹⁴ rendering her testimony unnecessary. The Arkansas Supreme Court reversed her subsequent conviction for murder on the ground that she had an equitable entitlement to immunity. This decision seems correct chiefly because of the high probability that her readiness to testify was an important contributing reason for her codefendant's plea. Although this was not literally an execution of her promise, it fully achieved the government's ultimate objective. The Arkansas court, therefore, correctly treated the cooperator's readiness to testify as furnishing substantial consideration.²¹⁵

One could also justify *Hammers* in contractual terms by noting

212. The Court's position in *Mabry* to the effect that offer and acceptance do not always make a contract shows that courts are willing to depart from some traditional contracts principles in the light of the context of these agreements. They should be equally willing, in the interests of fairness, to show some liberality in construing the concepts of part performance and breach.

213. 565 S.W.2d 406 (Ark. 1978).

214. It appears that the prosecutor became uneasy about the strength of *Hammers'* expected testimony and, therefore, used the threat of *Hammers'* testimony to obtain the other defendant's plea. A condition of the plea was that the other defendant would now testify against *Hammers*. By playing one defendant against the other, and breaking his agreement with *Hammers*, the prosecutor hoped to register convictions against both.

215. Some decisions, however, go the other way. In the plea-bargain case of *People v. Boyt*, 488 N.E.2d 264 (Ill. 1985), the cooperator agreed to testify against a codefendant in return for charge reduction. As in *Hammers*, the codefendant pleaded guilty, making the cooperator's testimony unnecessary. The court held that the cooperator could not hold the State to its promise since she had not yet surrendered any constitutional right. Even more perverse is the holding, again by the Illinois Supreme Court, in *People v. Navaroli*, 521 N.E.2d 891 (Ill. 1988). In *Navaroli* the prosecutor promised the defendant reduced charges if he acted as an informant. It was undisputed that the defendant carried out his side of the bargain. The court, however, upheld the prosecutor's failure to comply with the agreement on the ground that no plea actually had been entered. This is an indefensible formalism. Doctrines of due process should estop the State from renegeing when the defendant has furnished consideration. The agreement was not purely executory, as in *Mabry v. Johnson*. The Illinois court's logic also would suggest that immunity promises would never be enforceable since they would never result in the acceptance of a plea. This reasoning would do great harm to prosecutors by making it difficult to assure potential cooperators that they can rely on agreements.

that the full performance of the cooperator's promise was frustrated by circumstances beyond her control. In circumstances of frustration, the government should be held to its promise when it benefits from the cooperation.²¹⁶ Counsel for the cooperator should try to address these potential difficulties during the negotiations of the agreement, but courts should not punish cooperators if their counsel fails or is unable to do so.

VI. PROCEDURAL DEFORMATIONS

A. Appellate Review Problems

Several familiar features of the criminal process are hostile to the aims of cooperation agreements. This hostility sometimes stems from the special features of cooperation agreements and sometimes from their similarities with plea bargains generally. For example, plea bargaining often conflicts with the appellate process. From the State's perspective, the attraction of the plea bargain lies in the certain and settled quality of the conviction. If, after the prosecutor already has granted leniency, the ungrateful defendant seeks to upset the arrangement on appeal, the prosecutor is likely to feel aggrieved. The response has been the inclusion in plea agreements of clauses binding the defendant not to appeal.²¹⁷ Courts sometimes have had difficulty in resolving this natural antipathy between traditional features of criminal procedure and the very different logic of privatized criminal justice.

An interesting example is presented in *United States v. Shaw*²¹⁸—a series of prosecutions for bid-rigging bribery and kickbacks. The government informed Shaw that he was a target and invited him to discuss a plea agreement. During negotiations the government raised four

216. This conclusion is supported by the old equitable doctrine of quantum meruit.

217. Several courts have held that an agreement not to appeal, as long as it was voluntarily arrived at and does not prohibit a challenge to the voluntariness or intelligence of the plea, is binding and does not invalidate a plea when time to appeal has expired. See the cases collected in Kristine Karnezis, Annotation, *Validity and Effect of Criminal Defendant's Express Waiver of Right to Appeal as Part of Negotiated Plea Agreement*, 89 A.L.R. 3d 864 (1979). Some of these courts also hold that a defendant under such an agreement will not be barred from appealing while an appeal is still timely. *Id.* Filing an appeal in such circumstances, however, may cause the prosecution to move to vacate the plea. If such a motion is made, double jeopardy will not be an obstacle to fresh proceedings against the defendant. *Id.* A few courts have disapproved of covenants not to appeal. See, e.g., *Commonwealth v. March*, 293 A.2d 57, 62 (Pa. 1972) (Roberts, J., concurring) (suggesting that "[t]o sanction [a no-appeal clause in a plea agreement] serves no proper interest of justice and would only invite attempts to insulate guilty pleas unlawfully obtained from appropriate appellate review"); see also *People v. Stevenson*, 231 N.W.2d 476 (Mich. 1975) (declaring that public policy will not permit the prosecutor to bar the review of a conviction). See generally Gregory M. Dyer & Brendan Judge, Note, *Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of A Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV. 649 (1990).

218. 655 F.2d 168 (9th Cir. 1981).

counts that it intended to include in the indictment against Shaw. Shaw's counsel argued that two of the counts were bogus because they alleged bribery of a public official and the person allegedly bribed, an employee of the Federal Reserve Bank, was not a public official for purposes of the statute.²¹⁹ The government was not persuaded. Before indictment Shaw's lawyer and the United States Attorney finally reached an agreement by which Shaw would give information about and testify against other defendants in return for being allowed to plead guilty to any one of the four counts. The government consented to move to dismiss the other counts. As part of the agreement, Shaw also promised not to appeal his conviction.

Shaw testified as promised before the grand jury and then, under the terms of the bargain, chose to plead guilty to one of the charges of bribing a public official. After the plea, however, Shaw filed, under Rule 34 of the Federal Rules of Criminal Procedure, a motion in arrest of judgment, which can be based only on want of jurisdiction in the court or failure of the indictment to state an offense.²²⁰ A professedly shocked government responded by moving to vacate Shaw's plea and try him on the four counts in the indictment. The government alleged that Shaw had committed a "fraud on the court and the government" by entering into the plea agreement with an undisclosed intention to violate his commitments.²²¹ The trial court granted the government's motion.

On appeal the circuit court reversed on the ground that, under a hallowed and well-founded tradition, subject-matter jurisdiction is always open to challenge. It cannot be conferred on the court by the consent of the parties and any agreement that prohibits a party from challenging jurisdiction is unenforceable. Since Shaw was exercising a statutory right in bringing his motion for arrest of judgment, the court suggested, the government's motion to dismiss his plea was an exercise in vindictive prosecution and, therefore, should have been denied.²²²

219. The federal statute at issue was 18 U.S.C. § 201(a) (1988).

220. Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides that an objection to an indictment on the ground that "it fails to show jurisdiction in the court or to charge an offense . . . shall be noticed by the court at any time during the pendency of the proceedings." Rule 12 is presumably a sufficient basis for a postverdict or postplea motion to dismiss the indictment. Rule 34, with its archaic formula of moving in arrest of judgment, is, therefore, probably superfluous.

221. 655 F.2d at 171. The government "freely admit[ted] that it moved to vacate Shaw's guilty plea in retaliation for Shaw's exercise of his right . . . to file a Motion in Arrest of Judgment after pleading guilty." *Id.*

222. In the Ninth Circuit at the time of the *Shaw* decision, the rule was that a district court's ruling against the defendant on a pretrial claim of vindictive prosecution constituted a "final decision" within the meaning of 28 U.S.C. § 1291 and, therefore, could be appealed before conviction. Subsequently, the Supreme Court held in *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982), that the right to relief from vindictive prosecution is fully protected by postconviction review. Today, therefore, in federal court Shaw would have to submit to trial or to a plea and

The *Shaw* decision is surely correct. Shaw was at all times willing to cooperate under the terms of the agreement. The government unwisely gave Shaw the choice of picking his charge for pleading, and Shaw turned that to his advantage. The government permitted him to plead exclusively to a charge the legality of which he had always contested.

The court of appeals' decision may seem disturbing since, assuming that Shaw's Rule 34 motion was well grounded, Shaw escaped conviction altogether. Public interest thus was not well served by the cooperation agreement. The government was properly held, however, to its unwise agreement. The government overreached by arguing that it could bind Shaw to abandon any challenge to the prosecution's interpretation of the public official bribery statute. It sought to fend off judicial review of its charges, even though the public interest and the demands of justice would seem to clamor for adjudication of an important question concerning the definition of a federal crime. If the government's position were accepted, the United States Attorney could insulate his office's interpretation of a statute from review by never trying a case involving a challenge to a statute. The prosecutor thus could continue to use the disputed statutory provision for plea agreements with a built-in barrier to judicial review. If the government wishes to make the most of cooperation agreements, perhaps it should brush up on its contract law, as well as its criminal procedure concepts.

The issues in *Shaw* serve as a microcosm of much that is troublesome about plea bargains in general and cooperation agreements in particular. It highlights the breadth of prosecutorial discretion and the great power of prosecutorial pressure to seal a bargain and suppress questions that may deserve public scrutiny. True, the attempt failed in *Shaw*, but it will succeed in many cases where the defendant is less bold or where the contested issue is not clearly a jurisdictional one.

B. *Double Jeopardy Problems*

While the cooperation agreement, like all plea bargains, avoids public inquiry into the cooperator's role and seeks to ban appeals as well as avoid trials, there still must be restraint and caution in executing the agreement lest the defendant enjoy an irrevocable benefit before

sentence arrangement before he could appeal on this ground. This surely will discourage these challenges after plea agreements, especially since bail may be denied after sentence and pending appeal. To escape the vindictiveness, Shaw's better tactic now might be to wait until after sentence on the plea agreement and then raise the jurisdictional point for the first time by way of appeal. The jurisdictional challenge is still timely, *United States v. Beard*, 414 F.2d 1014 (3d Cir. 1969), and the defendant would avoid the risk that the trial court might force him to trial on more serious charges before he could appeal.

he has performed his part of the bargain. The prosecutor always must be vigilant to preserve the contingent nature of the agreement in order to be able to invoke sanctions if the cooperator fails to perform. With an immunity agreement this presents no difficulty since no formal judicial acts take place that arguably could terminate the cooperator's liability. Unless the statute of limitations has run, the State always can prosecute the cooperator if it can show that he has not performed substantially under the agreement. With plea-bargain agreements, however, the situation is more delicate because at some point the double jeopardy clause may intervene to bar the prosecutor from any further action. The State avoids this difficulty by inserting a routine provision in cooperation agreements that sentencing be postponed until the cooperator has discharged his obligations. Since plea agreements may be complex and may involve testifying in future trials, sentencing may be postponed for a matter of years. The court must consent to this delay, but consent usually is routinely forthcoming in cooperation cases. Delay risks offending the speedy trial guarantee, but this danger is averted by the cooperating defendant's consent to the delay.²²³ Waiver thus becomes the commanding concept.²²⁴

The principal purpose of delay in sentencing contemplated by cooperation agreements is to avoid an entanglement with the double jeopardy clause. In this connection we are concerned with that aspect of double jeopardy that prohibits further proceedings for the same offense once jeopardy has attached.²²⁵ Courts have worked out the concept of when jeopardy attaches quite precisely in trials²²⁶ but not with respect

223. The Sixth Amendment right to speedy trials applies to the sentencing phase. *Pollard v. United States*, 352 U.S. 354 (1957). Following the general speedy trial analysis in *Barker v. Wingo*, 407 U.S. 514 (1972), however, courts apply a balancing test in which the defendant's failure to claim or move for a speedy trial strongly suggests no violation of the right to speedy trial. The presence of a clause in a plea agreement waiving the right to be sentenced at the usual time, coupled with the absence of any later application for sentencing, therefore, will rule out any claim on this ground.

224. Postponing sentence is not just in the government's interest. The longer sentencing is delayed, the more time a cooperator has to please the government, and the happier the government, the more likely it will make a generous recommendation to the court.

225. If the defendant has been exposed to jeopardy in proceedings terminated prematurely without his consent, then any initiation of fresh proceedings against him generally will violate the double jeopardy clause. This principle often becomes significant when a trial ends in the declaration of a mistrial. Here double jeopardy bars a retrial unless the mistrial was dictated by a "manifest necessity." *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). If a guilty plea is vacated at the prosecutor's application and over the defendant's objection, the defendant may raise a double jeopardy argument. The question then becomes what analogues in the guilty plea context can serve the role of manifest necessity in the trial context in justifying the vacation of a plea over the defendant's protest.

226. The federal rule, applicable through the Fourteenth Amendment to the states, is that in a jury trial jeopardy attaches when the jury is empaneled and sworn. *Crist v. Bretz*, 437 U.S. 28 (1978). In a bench trial jeopardy attaches when the first witness is sworn. *Serfass v. United States*,

to guilty pleas.²²⁷ The reason for this, no doubt, is that in typical guilty plea cases the double jeopardy question will not likely arise unless and until the State brings some subsequent prosecution after the defendant has been sentenced under the plea. At this point there is no doubt that jeopardy has attached,²²⁸ and the usual question is simply whether the subsequent prosecution falls within some elaboration of the concept of "same offense." The unnatural delay of sentencing in many cooperation cases, however, opens up a window through which jeopardy attachment questions may enter. These questions, implicating contingent aspects of plea agreements for cooperation, were the core issues for consideration by the Supreme Court in *Ricketts v. Adamson*.²²⁹

Adamson was charged with the car bombing murder of an investigative reporter, Don Bolles, in Phoenix, Arizona, in 1976. Early in 1977 he entered a plea agreement in which he agreed to plead to second-degree murder for which he would receive a sentence that would lead to just over twenty years actual incarceration time. In return, he promised to testify against two others, Dunlap and Robison, who allegedly had instigated the murder. It was agreed that the usual time for sentencing was waived and that Adamson would be "sentenced at the conclusion of his testimony in all of the cases referred to in this agreement."²³⁰ The trial judge accepted the agreement and Adamson's plea was entered.

For the next two years Adamson cooperated. He testified against Dunlap and Robison who were convicted of first-degree murder. While their convictions were pending on appeal, the State moved in December 1978, almost two years after his plea was entered, to have Adamson sentenced. The court sentenced Adamson in accordance with the plea agreement. But, in 1980 the Arizona Supreme Court reversed the convictions of Dunlap and Robison and remanded for new trials.²³¹ The State then informed Adamson that his testimony would be required in the retrials. In response, Adamson stated through his attorney that he

420 U.S. 377 (1975).

227. One criminal procedure treatise suggests that "[a]s for those cases which are not tried at all, that is, where defendant is convicted by virtue of his plea, jeopardy attaches when the court accepts the defendant's plea unconditionally." LAFAYE & ISRAEL, *supra* note 40, § 24.1, at 64. The vital word, for present purposes, is "unconditionally." The authors cite *United States v. Sanchez*, 609 F.2d 761 (5th Cir. 1980), which held that jeopardy had not attached when a negotiated plea was accepted subject to the condition that information received later would support the defendant's assertions. A prosecutor thus could rather easily arrange to stave off the attachment of jeopardy for most guilty pleas in cooperation cases. Jeopardy would presumably attach only when the court expressed its satisfaction that the relevant condition had been satisfied. Sentencing the defendant arguably could constitute such an expression.

228. *See supra* note 227.

229. 483 U.S. 1 (1987).

230. *Id.* at 14.

231. *State v. Dunlap*, 608 P.2d 41 (Ariz. 1980); *State v. Robison*, 608 P.2d 44 (Ariz. 1980).

viewed his obligations under the agreement as fully performed and that the State must furnish further consideration if it wished him to testify again. He demanded as consideration his final release after the testimony, full transactional immunity for any and all of his past crimes, protection for his ex-wife and son, and funds and transportation for him to relocate. The prosecutor brusquely retorted that he viewed Adamson's response as a breach of his plea agreement. The State then successfully moved to vacate Adamson's plea and filed a new information charging him with first-degree murder. The Arizona courts rebuffed Adamson's pretrial challenge to the new charge. They concluded that Adamson had breached his plea agreement and that the State was, therefore, free to revert to the pre-plea position.²³² Adamson then offered to testify against Robison and Dunlap, but the offer was rejected by the prosecutor.²³³ Adamson was convicted of first-degree murder and sentenced to death.²³⁴ His state appeals were denied.²³⁵

Adamson's petition for federal habeas corpus was rejected by the district court and his appeal denied in a memorandum decision by a panel of the Ninth Circuit Court of Appeals.²³⁶ On a petition for rehearing, however, a divided en banc court reversed the district court and granted habeas.²³⁷ Under the majority view, jeopardy had attached at the latest upon sentencing.²³⁸ The agreement contained no express waiver of protection against double jeopardy,²³⁹ and the presumptions

232. Adamson v. Superior Court, 611 P.2d 932, 937 (Ariz. 1980) (en banc).

233. 483 U.S. at 22.

234. State v. Adamson, 665 P.2d 972 (Ariz.), cert. denied, 464 U.S. 865 (1983).

235. *Id.*

236. Adamson v. Hill, 667 F.2d 1030 (9th Cir. 1981).

237. Adamson v. Ricketts, 789 F.2d 722 (9th Cir. 1986) (en banc). The court divided seven to four.

238. The majority, in noting that jeopardy attaches when the plea is accepted subject to any conditions annexed, cited *United States v. Vaughan*, 715 F.2d 1373, 1378 n.2 (9th Cir. 1983), and *United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir.), cert. denied, 439 U.S. 967 (1978). *Adamson*, 789 F.2d at 726. Since conditions were arguably still outstanding, however, it is not clear why the formal imposition of sentence should make any difference to the outcome of the case, especially since the court already had indicated that it would impose the sentence fixed by the plea agreement. While federal cases hold that a court's acceptance of a plea binds all parties, this is usually coupled, in cooperation cases, by the requirement that the defendants have complied with all conditions annexed. See *United States v. Blackwell*, 694 F.2d 1325 (D.C. Cir. 1982) (noting that "Rule 11 appears to speak unequivocally; if the plea is accepted, the judge does not announce any deferral of that acceptance, and the defendant adheres to the terms of the bargain, all parties to it are bound") (emphasis added). This is only another way of saying that the defendant's duty to observe his side of the bargain necessarily makes the attachment of jeopardy contingent and defeasible.

239. While the words "double jeopardy" were never used in the agreement, Paragraph 5 stated:

Should the defendant refuse to testify or should he at any time testify untruthfully . . . then this entire agreement is null and void and the original charge will be automatically reinstated. The defendant will be subject to the charge of Open Murder, and if found guilty of First

against tacit waiver of constitutional rights made ordinary contract principles inapplicable.²⁴⁰ There was a reasonable dispute under the contract as to Adamson's obligation to testify again.²⁴¹ Even if Adamson's interpretation of the contract was wrong, however, an unintentional breach could not constitute a waiver of a fundamental constitutional right. If the consequence for the State was the collapse of the bargain, then the State should have drafted the agreement better. They could have inserted a provision expressly waiving the double jeopardy right, or they might have waited until the appeals of Dunlap and Robison were disposed of before bringing Adamson up for sentencing.

The dissenters argued that Adamson had waived his double jeopardy rights. In their view the agreement as a whole was senseless unless Adamson agreed that he might be prosecuted again for first-degree murder if he committed a material breach. The only sensible interpretation of the agreement was that he undertook to testify in all proceedings against the other defendants. The dissenters further suggested that the re prosecution for first-degree murder and the death sentence could not be regarded as vindictive since they were not instituted or imposed to penalize the defendant's exercise of a constitutional or statutory right. His current disposition was always appropriate and legitimate but for the plea bargain, the protection of which he had now forfeited.

Degree Murder, to the penalty of death or life imprisonment

Adamson, 789 F.2d at 731 (appendix A). "Open murder" is a term used in some jurisdictions to describe the practice by which no degree of murder is specified in the indictment or information and the jury can return a guilty verdict for any degree. Paragraph 15 stated, "In the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement." *Id.* at 732. The appellate court dissenters read these clauses as establishing the defendant's implicit waiver of the double jeopardy guarantee. The full text of the agreement is given in Appendix A to the court of appeals' majority opinion. See *Adamson*, 789 F.2d at 731-33.

240. The majority relied largely on the principles declared in *Johnson v. Zerbst*, 304 U.S. 458 (1938), that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," *id.* at 464 (quoting *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937)), and that to find waiver a court must be persuaded that there was "an intentional relinquishment or abandonment of a known right or privilege." *Id.* The Court has held that a defendant can implicitly waive double jeopardy by moving to have greater and lesser offenses tried separately, a procedure that otherwise would offend the double jeopardy clause. *Jeffers v. United States*, 432 U.S. 137, 152 (1977). Adamson made no comparable motion, but the appellate court dissenters relied on his general assent to the agreement as an implicit waiver.

241. Paragraph 8 of the agreement stated that "[a]ll parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement." 789 F.2d at 732. Paragraph 18 stated that "[t]he defendant is to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this agreement." *Id.* at 732-33. These events, sentencing and removal from the custody of the Pima County Sheriff, occurred at the prosecution's initiative long before Adamson was asked to give further testimony. Adamson contended that it was, therefore, a reasonable interpretation of the contract that he had done all the testifying that was contemplated under the agreement.

In a brief, colorless and unprobing opinion by Justice White, the Supreme Court, dividing five to four, reversed the Ninth Circuit Court of Appeals and reinstated Adamson's conviction for first-degree murder with the accompanying death sentence. The Court agreed that jeopardy attached at least at the date when Adamson was sentenced. The Court found, however, that waiver was amply indicated by Adamson's assent to the agreement's clauses contemplating reverting to the original charge if he did not comply with his obligations. If there was a dispute as to whether Adamson had breached the agreement, that dispute had been resolved by the Arizona courts.

Justice Brennan, writing for the four dissenters, concentrated on what he described as "the only important issue in this case"²⁴²—whether Adamson had breached the plea agreement. He conceded that the "law of commercial contract may . . . prove useful as an analogy or point of departure," but insisted that it could do no more than that "because plea agreements are constitutional contracts."²⁴³ The State had failed to specify exactly how Adamson had broken the contract. His attorney's letter announcing that Adamson believed he already had fulfilled his contractual obligations hardly could be considered an anticipatory repudiation. Far from declaring an intention not to abide by the contract, the attorney's letter asserted reliance on an interpretation of the contract that had appeared reasonable to the majority of the court of appeals. As soon as an Arizona court decided that failure to testify further would amount to a breach, Adamson expressed his willingness to testify. At that point the State had suffered no serious harm since, while the informations against Dunlap and Robison had been dismissed, those dismissals were without prejudice to refile. Under contractual principles the State had a duty to mitigate damages. By neglecting to re prosecute Dunlap and Robison, it had neglected that duty.

In Justice Brennan's view, therefore, the Arizona court's holding amounted to a finding that Adamson had breached the agreement and forfeited his constitutional right not to be prosecuted again simply by asserting a reasonable interpretation of the contract and bringing this interpretation to a court for resolution. By declaring that Adamson's disagreement with the prosecution was a breach, the Arizona courts in effect allowed the prosecution to dictate the interpretation of the contract. The question of what can amount to a waiver of a constitutional right, however, is always subject to federal review.

In the end Justice Brennan's dissent, in spite of its initial dis-

242. 483 U.S. at 12 (Brennan, J., dissenting).

243. *Id.* at 16.

claimer about the centrality of commercial contract law, itself relied chiefly on concepts drawn from contract law. This is hardly surprising. The privatization of criminal justice in cooperation agreements inexorably demands central reliance on contract principles and the consequent demotion of double jeopardy to the status of a mere gloss on contract law. A strong view of double jeopardy would prohibit altogether the reprosecution of a defendant who had pleaded and been sentenced.²⁴⁴ Once the propriety of contingent plea agreements is upheld, we must find some way to neutralize the application of double jeopardy in order to preserve the threatened sanction against the defendant who still has promises to keep. This ultimately must mean that double jeopardy has no significance except as one conceptual way of expressing the impermissibility of reprosecuting a defendant who has kept his side of the bargain. The same result could be reached by purely contractual principles without any aid from the constitutional guarantee. Double jeopardy thus becomes a satellite concept and, indeed, a supererogatory one, performing no greater function than to echo the contractual logic of the plea agreement.

Justice Brennan's dissent in *Adamson* is more convincing than the majority opinion, but not because it demonstrates that the majority misconstrued the proper understanding of a constitutional doctrine. The persuasiveness of the dissent lies rather in its demonstration of the forced and unconvincing reading of a contract and the stunted understanding of concepts of breach and remedy revealed in the opinions of the Arizona courts and the Supreme Court majority. One can reduce the constitutional element in *Adamson*, first, to the (not unimportant) caution that the contract should be construed strictly since a constitutional right is involved, and second, to the legitimizing effect of federal review on the Arizona courts' findings which, but for the constitutional context, would be insulated from federal review.²⁴⁵

Generally, *Adamson* is a strong example of the transformation of conventional criminal process by the practice of plea bargaining for cooperation. The classical model views the criminal process as resulting either in an adversary trial or a plea. In either case the sentence is in the judge's hands, with actual incarceration time perhaps determined later by a parole board. Full appellate review is expected as a matter of

244. This would not apply, of course, to defendants who appeal and obtain a reversal of their conviction. At common law reprosecution after an appellate reversal of a conviction was forbidden by the principle of double jeopardy. The Supreme Court, however, took a different view in *United States v. Ball*, 163 U.S. 662 (1896).

245. *Ricketts v. Adamson* was brought into the federal courts as a habeas corpus petition challenging the constitutionality of the conviction under the double jeopardy clause as applied to the states through the Fourteenth Amendment.

course for convictions after trial and is possible as to some questions after a plea. Reprosecution for the "same offense" is permitted only if the conviction was overturned at the initiative of the defendant.

Adamson turns each and every one of these traditional attributes upside down. The defendant and prosecutor negotiated and decided the terms of Adamson's sentence. They had to seek judicial approval, but this is fairly routine and cannot easily be withheld. To bind the defendant tightly, the *Adamson* agreement prohibited appeal and application to the parole board for early release. Formal sentencing, which has become a ministerial act, was postponed for two years and might have been postponed a good deal longer. Sentencing lost much of its conventional finality since, under the terms of the *Adamson* agreement, the prosecution could vacate the plea anytime Adamson breached. The prosecution, therefore, could vacate the plea years after sentencing if Adamson failed to testify as promised, appealed his conviction, or applied for early parole. The double jeopardy clause thus became little more than a surrogate vehicle for arguing about whether Adamson had breached. *Adamson* further seems to suggest that the prosecution's interpretation of the agreement is binding because, by simply advancing his interpretation, Adamson was found to have repudiated the contract. Even though Adamson performed perfectly up to the point of dispute and the prosecution suffered no obvious damage, by challenging the prosecution's interpretation Adamson lost all benefits of the bargain. To Adamson this meant the death penalty for the offense of lese majeste.

VII. CONCLUSION

Modern criminal cases terminate along one of several channels. A very small number go to trial, either because the defendant asserts his innocence, or because the defendant believes he can win, or because the prosecution will make no concessions for a plea. The assembly line guilty plea, by contrast, disposes of the great bulk of criminal cases. This mode is characterized by a rough tariff of charge and/or sentence discounts. The discounts depend on the record of the offender and the degree and circumstances of the crime and are executed by quickly struck deals. One may more accurately describe these cases as "discount pleading," rather than plea bargaining since there is little or no negotiation about the deal. For a small number of serious cases, cooperation is not an issue, but other considerations, such as possible weaknesses in the prosecution's case, may lead to some measure of close negotiation with the defense. These are truer instances of plea bargaining.

This Article has surveyed a small but significant number of cases that travel a different path. While these dispositions properly are de-

scribed as plea bargains or immunity deals, they have distinctive features. Their dominant purpose of securing cooperation coopts a suspect or defendant into the prosecution team and creates a curious relationship that is both adversarial and allied. Although the cooperator may badly need the offered concessions, the prosecution also will urgently require the cooperator's services. While he is faithfully discharging his promises, the State will protect the cooperator, perhaps pay him, and maybe even license his continued criminality.²⁴⁶ If the cooperator fails to keep his promises, he may expect to feel the anger traditionally displayed by the jilted suitor.

The charged atmosphere of this relationship is heightened by the unique independence and sweeping powers of the American prosecutor. The prosecutor is often an elected official without clear accountability to any superior or any institution. The prosecutor's delicate and difficult obligation to enforce the criminal laws, thus, sometimes is in danger of being clouded by public and private pressures and by personal ambition. With the great range and complexity of American criminal laws, it sometimes seems as if all Americans commit crimes. The prosecutor must choose whom and whom not to prosecute. In this light, the prosecutor's power not to prosecute some suspects may become a weapon for prosecuting others.

Conspicuous criminal trials often succeed one another incessantly and are prime-time television news entertainment. They feature prominent local politicians and alleged members of organized crime families. Many of these prosecutions rely on the testimony of immunized or favorably treated accomplices. The prosecutor plays the double role of impresario and combatant in this gladiatorial show, setting some criminals against others and managing his own champions against the other side.

This performance demands scrutiny. The chief dangers of cooperation agreements are: (1) improper or imprudent selection of the beneficiaries of informal immunity or lenient bargains; (2) presentation of unacceptably tainted or suspect testimony of evidence against defendants; (3) agreements with cooperators that may impose unconscionable obligations on cooperators, confer unacceptable license to commit future crimes, or excessively forgive their past crimes; and (4) vindictive or excessively harsh retaliations against cooperators who, in a prosecutor's opinion, have not satisfied their obligations.

246. If the agreement contemplates that the cooperator shall continue to be a member of a criminal organization and report back to the government, the cooperator likely will have to continue to collaborate in crimes committed by the organization. In the overall interests of law enforcement, this may be defensible, and in some cases, the cooperator might not commit crimes at all since his law-enforcement objectives deprive him of the necessary *mens rea*.

Courts are capable of sufficient invigilation with respect to some of these dangers. For example, courts or the legislature could fashion rules requiring corroboration of accomplice testimony or special jury charges. Courts also may prevent prosecutorial vindictiveness against cooperators and reject unduly severe interpretations of agreements. While courts may at times have failed to discharge these duties perfectly, they certainly have the capacity to do so.

Other dangers are not, under our present system, within the scope of judicial power. Courts can do nothing about the prosecutorial selection of subjects for informal immunity, and they can do little about a prosecutor's offering lenient plea bargains for cooperation. Courts also cannot control effectively the nature of the promises that a prosecutor extracts from a cooperating witness, unless the alleged breach of a promise becomes the subject of later litigation. When courts lack control, we should at least foster the continued development of published internal standards for prosecutors. We also should consider the potential contribution of novel practices such as establishing an independent commission to advise and monitor prosecutors' behavior.

We have noticed the impact of cooperation agreements on some customary steps of criminal process and constitutional doctrines—notably with respect to the imposition of sentence, the time for sentencing, and the double jeopardy clause. These departures must be viewed doctrinally as intelligent and voluntary waivers of some of the defendant's rights. A defendant always must waive certain rights when pleading guilty. Loss of these protections is thus unobjectionable from the cooperator's perspective, unless the prosecutor and courts unreasonably interpret the agreement, as was arguably the case in *Ricketts v. Adamson*.

From a systemic viewpoint, the phenomenon of cooperation agreements should by no means be condemned. It demonstrates the extent to which prosecutors can wield their discretion to invent new ways of settling criminal cases. In this sense, however, cooperation agreements are no more than a refined and complicated version of the well-accepted plea bargain. The volume of criminal cases, overflowing the banks of the traditional river, carved out the new channel of the discounted plea system. One consequence has been the relegation of the judiciary to the role of assembly-line overseers. The cooperation agreement springs from a unique impulse—the need that prosecutors perceive to fashion flexible instruments for securing accomplice testimony while retaining control over cooperators. The agreement's form grew out of and owes a great deal to devices, such as promises not to appeal, developed from ordinary plea bargain experiences. While, in the great scheme of things, cooperation agreements may be rare, they illuminate the spread of the

privatization of criminal justice. The cooperation agreement may be a necessary and even desirable method of prosecuting certain dangerous criminals. It is time, therefore, to confront its risks and dangers and to introduce guiding standards and supervision. The traditions and current trends of American criminal procedure make it unlikely that this supervision will come from the judiciary. Attention must be paid, therefore, to administrative possibilities.

