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

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Prosecutors “Doing Justice” Through Osmosis – Reminders to Encourage a Culture of Cooperation

A cooperating defendant\(^1\) can be an invaluable source of insider information about unsolved crimes and unidentified criminals. For example, in June of this year, the Federal Bureau of Investigation foiled a terrorist plot aimed at bombing a fuel pipeline under the John F. Kennedy International Airport in New York based on assistance from a convicted drug dealer.\(^2\) Given the potential importance of cooperation, one might assume that the Department of Justice (“DOJ”) and federal prosecutors\(^3\) employ systematic methods to attract and process such tips and that prosecutors always pursue a cooperator’s lead. Although there is no specific, scientific data to show how DOJ receives or handles information from cooperating defendants or to measure how

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


\(^{3}\) The scope of this Article is confined to the federal system of criminal justice in recognition that there are differences in the way federal and state systems undertake prosecution and the use of cooperation. See Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 Geo. J. Legal Ethics 309, 353 n.235 (2001) (noting the difference in various prosecutors’ offices and the lack of discussion on the differences between state and federal prosecutors’ offices); Fred C. Zacharias and Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 Geo. L. J. 207 (2000) (recognizing that “federal prosecutors have long considered themselves unique” and that “federal prosecutors have always seemed different than state prosecutors.”); Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 920 n.11 (1999) (noting the “[s]triking differences between state and federal systems).
aggressively prosecutors pursue cooperation,\textsuperscript{4} the anecdotal evidence indicates that prosecutors could make more effective uses of these important leads.\textsuperscript{5} The limited data also suggests that the Department of Justice can improve the consistent and vigilant use of cooperating defendants and their information, if DOJ fosters an office culture in which prosecutors are reminded of the value of such tips and are warned of the risks of manipulative cooperators.

A prosecutor’s decision to use a cooperating defendant can be anything but clear cut. In deciding whether or not to pursue a tip, the prosecutor must balance numerous interests: 1) an interest in encouraging the cooperator to provide truthful information; 2) an interest in ensuring that the cooperating defendant is punished adequately for his or her own crimes; 3) an interest in protecting victims, including society, from both the cooperating defendant and the target of his information; and 4) an interest in making sure that similarly situated defendants, cooperator or not, are sentenced similarly. Imagine the following scenario . . .

\textsuperscript{4} See Yaroshefsky, \textit{supra} note 3 at 919-20 (explaining that analyzing how prosecutors deal with cooperators “does not lend itself to traditional methods of scholarly study” and that “[b]y its nature, dealing with cooperators is dependent on a constellation of factors whose impact on the process is extremely difficult to analyze.”); Linda Drazga Maxfield and John H. Kramer, \textit{Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice} at 6 (Jan. 1998) (noting that when a Substantial Assistance Staff Working Group studied substantial assistance practices in the U.S. attorney’s offices, the group learned that the Department of Justice did not maintain such information and that the U.S. attorneys offices did not keep the information in a consistent, usable form).

\textsuperscript{5} Maxfield and Kramer, \textit{supra} note 4 at 7-9 (finding inconsistencies in the U.S. attorney’s office policies on substantial assistance departures, and also finding that while roughly 68% of defendants provided assistance to the government in some form, only about 39% received a substantial assistance departure); and see Lisa M. Farabee, \textit{Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts}, 30 Conn. L. Rev. 569, 570, 603-622 (1998) (discussing the disparities in the way the District of Connecticut and the District of Massachusetts promoted sentencing departures).
While sitting in her office, a seasoned federal prosecutor ("Susan") hears the familiar chime of the computer, indicating that she has received a new email message. Instinctively, she checks the subject-matter line and sender identity. Susan sees that she has received an intra-office, office-wide email from another prosecutor ("Steven") who is a new prosecutor. In the email, Steven asks who is responsible for the prosecution of Defendant Smith. Because Susan is assigned to prosecute Smith for a recent bank robbery in the district, she opens the email and reads further. Steven says that "his" Defendant, Jones, claims to have important information about additional crimes committed by Smith. Steven reports that Jones was a rather major participant in an interstate drug ring. Evidence also suggests that the ring dealt in unlawful, automatic weapons and physical violence, including several violent assaults on rival drug dealers. Jones now wants to "cooperate" with authorities and provide "substantial assistance in the investigation and prosecution of Smith" for these other crimes, in hopes of earning a reduction in the length and severity of his own sentence.

Concerned that Smith receive the punishment he is due for all the crimes he has committed, Susan arranges an interview with Defendant Jones during which Susan (and

6 The names of the prosecutors and the defendants are fictitious, chosen merely to make a point.
7 See U.S. Sentencing Guidelines Manual ("USSG") § 5K1.1 (2002) (allowing for a sentence reduction by means of a departure from the otherwise applicable, but advisory, sentencing guideline range for a defendant’s "substantial assistance in the investigation or prosecution of another person who has committed an offense"). See also 18 U.S.C. § 3553(e) (permitting the sentencing court to depart below a statutory minimum sentence, if the government files a motion indicating that the defendant substantially assisted in the investigation or prosecution of another person).
8 Id.
9 In prosecutor jargon, such an interview is typically called a "proffer session." Such a meeting is normally accompanied by a "proffer letter" outlining the rules that will govern the proffer. See, e.g., United States v. Burke, No. 06-5625, 2007 WL 1748150 at *4 (6th
the FBI agent assigned to aid in the prosecution of Smith) learns about Smith’s other crimes. During the interview, Jones claims to know about four other bank robberies Smith committed and provides details of the robberies, which are not publicly known. Jones also says that Smith has raped several women and that Smith molested and then attempted to murder a young child. Two of the bank robberies Jones discusses are unsolved crimes in the district in which Susan prosecutes crimes. The other two were committed outside the district. The rapes and the attack on the child are state crimes over which Susan’s office lacks jurisdiction and venue to prosecute. One of the violent crimes happened in another state.

To complicate matters, because it took a week to arrange the interview of Jones and another for the FBI agent to begin his investigation of Jones’s information to evaluate it for truth, enough time passed that Steven has soured on Jones. Steven now reports that Jones balked at the plea agreement offered to him; that Jones insists on arguing for a sentence reduction for his “minor role” in the charged crime, although “Jones does not

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

11 Because Steven is assigned to prosecute Jones, he makes all “government” recommendations to the sentencing judge about the value of Jones’s cooperation and the appropriate sentence that Jones should receive. See generally Wade v. United States, 504 U.S. 181 (1992).

12 The U.S. Sentencing Guidelines provide for a decrease in the length of a defendant’s sentence, if he plays a lesser role in the commission of a crime. See USSG § 3B1.2 (explaining that based on a defendant’s role as a “minimal participant” in criminal
qualify as such a minor participant”; that Jones is “minimizing his involvement” in the drug conspiracy for which he is being prosecuted; and that “there is no way Jones is getting a 5K1.1 sentence reduction for substantial assistance.” Can and should Susan still use Jones’s tips, given Steven’s change in position?

This fictitious (albeit factually representative) scenario demonstrates that a prosecutor’s interaction with a cooperating defendant routinely raises several questions about making the best use of a cooperator’s information. Without Jones’s information, the federal government may never have discovered Smith’s involvement in the four other federal crimes of bank robbery, and without Jones’s tip, two states may never solve the violent crimes committed by Smith in their jurisdictions. Unless the leads are pursued, Smith will receive less punishment than he is due and may completely escape responsibility for several of his crimes. Unsolved crimes mean additional angst for victims who may continue to suffer from unanswered questions about the perpetrators of their crimes, prolonging their healing and denying them retribution and restitution. At the same time, if the prosecutors ignore the tip, someone other than Smith could be

activity his offense level should be decreased by 4 levels and that a role as a “minor participant” will reduce his offense level by 2 levels).

13 See USSG § 5K1.1 (2002) (“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”).

14 Although the term “best use” may be vague, it will be assumed that in making a best use of a cooperator, a federal prosecutor should, at a minimum, seek to adhere to the U.S. Department of Justice’s Mission – “to enforce the law and defend the interests of the United States according to the law; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; . . . and to ensure fair and impartial administration of justice for all Americans.” Mission of the U.S. Department of Justice, reproduced at http://www.usdoj.gov/archive/mps/strategic2000_2005/intro.htm.

15 Although these other jurisdictions unquestionably have an interest in Jones’s information, Steven may squelch the ability of those jurisdictions to use the information.
wrongly prosecuted for Smith’s acts, and Jones will likely believe that he was treated unfairly by “the system.”¹⁶ Jones is likely to share his experience with other would-be cooperators who may conclude that there is no benefit to speaking honestly and openly with the government.¹⁷

The other concern the scenario raises is sentencing disparity – the Department of Justice has expressed a desire to ensure that Jones and Smith receive sentences in the same range as other defendants of similar culpability and comparable to those who have engaged in similar efforts to assist law enforcement.¹⁸ Is Jones the type of defendant who should be given a significant sentence reduction? Although he was a rather major participant in a drug ring, his information about Smith’s other crimes appears accurate.

While it is common for prosecutors to hear from defendants who hope to gain a substantial assistance departure through cooperation,¹⁹ the routine nature of the scenario

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¹⁶ See, e.g., Alan Ellis, Federal Sentencing: Practice Tips: Part 1, Criminal Justice 20, No. 4 (Winter 2006) (noting that many criminal defendants have cooperated with the government in anticipation of a sentencing benefit without receiving a downward departure).

¹⁷ In other words, Steven’s treatment of Jones could chill future cooperators’ willingness to cooperate. See Hughes, supra note 1 at 40 (noting that a “bargain is, after all, a bargain” and suggesting that double dealing by the government “will create doubts about the rectitude of the criminal justice process.”). On the other hand, if Steven is too lenient in his dealings with Jones, Steven may encourage other would-be cooperators to concoct false information about other criminals and crimes. See, infra, at 1B.

¹⁸ See Memorandum from U.S. Attorney John Ashcroft to All Federal Prosecutors 1 (Sept. 22, 2003) (on file with author), reproduced at http://www.crimlynx.com/ashchargememo.htm (recognizing the desirable goals of the Sentencing Reform Act, including: “to guide sentencing discretion, so as to narrow the disparity between sentences for similar offenses committed by similar offenders; and [] to provide for the imposition of appropriately different punishments for offenses of differing severity.”).

¹⁹ See Maxfield and Kramer, supra note 4 at 9 (acknowledging data from a working group coding review, indicating that “assistance to authorities was a common occurrence,” regardless of whether the substantial assistance resulted in a departure, including about two-thirds of all defendants).
does not guarantee that prosecutors will make consistent or even sound decisions about cooperation. A study conducted in 1998 was “unable to find direct correlations between type of cooperation provided, type of benefit or result received by the government, the making of a § 5K1.1 motion, and the extent of substantial assistance departure received.”

Such disparity is not necessarily surprising. In the hypothetical scenario, for example, prosecutors Susan and Steven have different personal backgrounds, different levels of prosecutorial experience, and an interest in prosecuting different defendants. Deciding how best to balance these divergent interests is challenging. There is no clear-cut “right” answer to the dilemma of what should be done. The established law does not demand any response, let alone dictate a particular one. The murkier question is

20 Id. at 20.
21 As representatives of the federal sovereign, the prosecutors represent the interests of society in fully and fairly prosecuting Smith for all federal crimes he committed. They represent the interests of the victims of the various federal bank robberies. They represent the sovereign’s interest in ensuring that similarly situated federal defendants are treated and punished similarly. Arguably, the federal prosecutors represent the interests of others too, potentially including a responsibility to citizens of the states impacted by Smith’s crimes, as well as the individual victims of those state crimes. In DOJ’s Strategic Plan for 2000-2005, see DOJ’s Strategic Plan for 2000-2005, reprinted at http://www.jsdoj.gov/archive/mps/strategic2000_2005/chapter2.htm, the Department declared its commitment “to continuing and strengthening collaborative efforts with other federal agencies, states and localities, tribal governments, community groups, foreign countries, and others.” Id. at 1. DOJ also announced: “We are committed to fulfilling our leadership responsibilities in forging a coordinated national and international response to crime and justice and assisting states, localities and tribal governments.” Id. DOJ’s announced goals certainly seem to indicate that the prosecutors should consider the interests of the states in which Smith committed crimes and the interests of all of his victims, even the state victims. See also Brady v. Maryland, 373 U.S. 83, 87 (1963) (noting an inscription on the wall in the Department of Justice stating, “The United States wins its point whenever justice is done its citizens in the courts.”).
22 Law here includes the federal Constitution, federal statutes, administrative rules and case-made law.
whether or not a federal prosecutor’s ethical responsibilities to “seek justice”\textsuperscript{23} dictate a consistent course of action.\textsuperscript{24}

To faithfully satisfy her ethical and professional duties, must Susan accede to Steven’s assessment of Jones’s value to the system of justice, even if she believes that Jones’s information should be pursued and Jones awarded a sentence reduction for assisting the government? Should Susan seek supervisory intervention to mediate and resolve the tension between her view and Steven’s? Is there a responsibility to communicate Jones’s information about the rapes and the child molestation to the state jurisdictions that may capitalize on those tips? How can Steven and Susan be sure that they are exercising their extensive prosecutorial discretion in a way that encourages valuable cooperation without undermining other goals of a fair system of justice?

The scholarly literature and decisions from the federal courts have been quick to chastise prosecutors for overzealous exercise of prosecutorial discretion.\textsuperscript{25} But what

\textsuperscript{23} Throughout the Article the terms “seek justice” and “do justice” are used interchangeably.

\textsuperscript{24} This ethical question seems to remain unanswered in the scholarly literature and the courts. See R. Michael Cassidy, Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,” 82 Notre Dame L. Rev. 635 (2006) (noting the lack of academic attention to the “fundamental issue of when it is ethically appropriate to grant leniency in exchange for cooperation”).

\textsuperscript{25} See, id. at 639 (2006) (advocating for a greater focus on the character of the individual prosecutor who makes discretionary decisions and asserting that in a largely discretionary system, better training and closer supervision of prosecutors, as well as the strengthening of rules, will not “insulate criminal defendants from the potentially ruinous decisions of overzealous prosecutors”); see also Caldwell v. Mississippi, 472 U.S. 320, 336 (1985) (addressing misstatements in the prosecutor’s argument to the jury); Brady v. Maryland, 373 U.S. 83, 87–88 (1963) (suppression of evidence favorable to the defendant can be prosecutorial abuse). Much of the scholarship discussing the ethical obligations of a prosecutor focuses on the risk of convicting an innocent person because of the powerful discretion prosecutors wield. See, e.g., Gershman, The Prosecutor’s Duty to Truth, supra note 3 at 311-12 (discussing a prosecutor’s ethical obligation to believe in a defendant’s guilt before seeking conviction and citing the risk that discretion creates – “the criminal
about the opposite – prosecutors who through inexperience, lack of training, personal bias
(known or subconscious), apathy, poor judgment, or mistake, ignore, reject or overlook
information that could have and would have solved crimes and resulted in convictions of
guilty persons with just a telephone call or some minimal follow-up investigation? What
about the federal prosecutor who fails to capitalize on accurate and compelling
cooperation? Although the Executive Branch (and, thus, federal prosecutors) has
exclusive legal authority and absolute discretion to decide whether to prosecute a case,
are prosecutors absolved from all responsibility beyond their legal obligations to accept a
valid lead or at least communicate the information from that lead to some investigative or
prosecutorial agency that can pursue it?

This Article posits that while federal prosecutors are shielded from any legal duty
to pursue such leads, they always bear an ethical duty to thoroughly and thoughtfully
evaluate a cooperator’s information.27 The ethical duty is part of a prosecutor’s

justice system often miscarries, almost always with tragic results.”); see also Bennett L.
Gershman, Reflections on Brady v. Maryland, 47 S. Tex. L. Rev. 685, 728 (2006); Daniel
S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of
is subject to constitutional constraints, the decision whether or not to prosecute and what
charges to bring generally rests entirely in the discretion of the Attorney General and the
U.S. Attorneys); United States v. Nixon, 418 U.S. 683, 693 (1974) (recognizing that the
Executive Branch holds exclusive authority and “absolute discretion” to decide whether
to prosecute a case).
27 Although not in the context of dealing with cooperating defendants, Bennett Gershman
touched on this affirmative obligation in his article exploring the prosecutor’s legal and
ethical duty “to promote truth and to refrain from conduct that impedes truth.”
Gershman, The Prosecutor’s Duty to Truth, supra note 3 at 313. As Gershman
recognized, “the prosecutor has the overriding responsibility not simply to convict the
guilty but to protect the innocent.” Id. at 314. Part of protecting innocent defendants can
be in ensuring that the guilty are prosecuted.
obligation to “do justice.”28 If the leaders within the Department of Justice and the ninety-four U.S. attorneys offices establish a culture of “doing justice,” by training young prosecutors to think critically about cooperation and through talking about how justice is attained in this context, an assistant U.S. attorney will be better able to set her self-interest and biases aside and carefully weigh all of DOJ’s interests before deciding what course of action, if any, to take.

This Article develops in four parts. Part I discusses the importance of cooperation to the criminal justice system. Part II outlines the federal prosecutor’s general duty to “do justice” in his role as “minister of justice” and discusses the ambiguous nature of the duty in the context of dealing with defendants who seek to assist in the investigation and prosecution of other persons and crimes. Part III explores the parameters of the federal prosecutor’s duty to adequately evaluate every cooperator’s tip, given the value such tips can have in preventing and solving crimes and in ensuring that guilty defendants receive adequate, proportional punishment. Finally, Part IV offers some thoughts on how a “culture of cooperation” can foster an individual prosecutor’s ability to fulfill her ethical and professional responsibility to “do justice.”

I. The Impact of Cooperation

A. Its Importance

The value of cooperation is infinite and unknowable. In June 2007, the Federal Bureau of Investigation revealed that it had foiled a terrorist plot to bomb a fuel pipeline

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28 This ethical obligation that I contend is imposed on every federal prosecutor as part of her duty to “do justice” might be considered part of the prosecutor’s general ethical “duty to truth” espoused by Bennet Gershman. *Id.* at 314.
supplying the John F. Kennedy International Airport in New York.\textsuperscript{29} The FBI acknowledged that it squelched the terrorists’ plan with the significant help of a “cooperating,” convicted felon. The cooperator had been convicted in a New York state court of illegally dealing drugs.\textsuperscript{30} Subsequently, he agreed to pose as a terrorist and infiltrate a group suspected of developing the terrorist plan directed at JFK.\textsuperscript{31} The men composing the suspected terrorist group were ultimately charged in a federal district court in New York. According to news reports of the drug dealer’s cooperation with authorities, the cooperating defendant traveled overseas, including to Trinidad, where he met with the suspected terrorists and pretended to assist in plotting the explosions.\textsuperscript{32} He then reported surreptitiously to agents of the Federal Bureau of Investigation about the progress of the plan.\textsuperscript{33} The drug dealer agreed to the risky task of infiltrating the terrorist group and, correspondingly, to provide the FBI with inside information about the groups’ activities because, like the typical cooperating defendant, he hoped to reduce the severity and length of his sentence for his state-court drug conviction.\textsuperscript{34}

Commenting on why the FBI would rely on a convicted drug dealer for such an important mission, a former member of the FBI-NYPD Joint Terrorist Task Force

\textsuperscript{29} Larry McShane, \textit{Informant Helped Bust Alleged JFK Plot}, AP Online Regional-U.S. (Jun. 4, 2007).

\textsuperscript{30} Id. In fact, recent accounts of the informant’s criminal past suggest that his criminal history is extensive and that he has cooperated and received leniency before. See Samantha Gross, Court Documents Detail History of JFK Terror-plot Informant, APAAlert-New Jersey (Jun. 15, 2007) (reporting that court documents indicate that the informant had substantially assisted the government in 1996 and received a seven-year prison sentence for a crime for which the Guidelines normally called for 27 years).

\textsuperscript{31} McShane, \textit{supra} note 30.

\textsuperscript{32} Id.

\textsuperscript{33} Id.

\textsuperscript{34} Id.
explained: “In most cases, you can’t get from A to B without an informant.”35 The impact of cooperators and “snitches” on reducing and preventing crime is well documented.36

Recently, albeit in the specific context of addressing international terrorism and the gathering of foreign intelligence information to prevent such crimes, the Department of Justice expressly touted the potential significance of cooperators’ information to crime prevention. In a memorandum dated January 10, 2007, Deputy Attorney General Paul J. McNulty reminded federal prosecutors that criminal defendants are potentially rich sources of valuable “F[oreign] I[ntelligence] information that may prove critical to thwarting terrorist attacks, espionage, sabotage, and other threats to our national

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35 Id. (quoting Tom Corrigan); see also Carol Eisenberg, Kennedy Airport, Newsday A16, 2007 WLNR 10808704 (Jun. 10, 2007) (discussing the use of informants in solving terror plots, including frustration of the Herald Square Subway bombing and quoting a former assistant U.S. attorney, who prosecuted the 1993 World Trade Center bombing as saying, “When we have human intelligence, we can stop things before they happen.”).

36 See, e.g., id.
security.” The DOJ has previously emphasized the need to encourage cooperation. Testifying before the House Subcommittee on Crime, Terrorism and Homeland Security, former Assistant Attorney General Christopher A. Wray proclaimed that cooperation agreements are an essential component of law enforcement and are necessary to penetrate criminal organizations and to obtain convictions in court. Wray further told the committee that prosecuting crimes such as drug trafficking, gangs, corporate fraud and terrorism offenses would be difficult, if not impossible, to investigate without cooperators.

B. The Critics

Despite numerous stories illustrating that tips (even anonymous ones) can help law enforcement prevent crime and successfully prosecute criminals, law professors and other commentators have routinely criticized the government’s generous use of “cooperating defendants,” “informants,” and “snitches.” These detractors typically emphasize the risk of wrongful convictions that can accompany a reliance on a cooperating defendant’s information, while downplaying the benefits that such “snitches” can provide. For instance, in claiming that the use of “snitch witnesses” can “[o]ccasionally . . . result in dramatic miscarriages of justice[,]” George C. Harris cites the book, “Actual Innocence,” which details the story of Ron Williamson, a man

39 Id. at 16.
convicted of murder who was eventually freed by exonerating DNA evidence. Other commentators have, similarly, maintained that “there is an inherently high risk that cooperating witnesses will testify falsely and will be believed by juries, thus resulting in convictions of the innocent.” Such legal commentators usually express particular skepticism at the way federal prosecutors prepare the cooperating witnesses to testify at trial.

The core of the criticism rests with the claim that prosecutors or their investigative agents act unethically, unprofessionally, or otherwise inappropriately in communicating with the cooperator. On this point, Professor Alexandra Natapoff asserts: “[I]nformants do not generate wrongful convictions merely because they lie. After all,

43 See Michael S. Ross, Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals, 23 Cardozo L. Rev. 875, 884 (2002) (“[W]hen a prosecutor tells a defendant or defense counsel what testimony is expected of the defendant . . . . in order to qualify for cooperator/leniency/immunity status, the defendant is powerfully motivated to parrot what the prosecution wants and expects to hear.”); Bennett L. Gershman, Witness Coaching by Prosecutors, 23 Cardozo L. Rev. 829, 848 (2002) (stating that the dynamics of the preparation process allow cooperating witnesses to be “able to present [their] testimony to the jury in a truthful and convincing manner”); Roberts, supra note 42 (As naturally biased advocates, prosecutors will ignore or downplay signs that the cooperator may be making false statements, such as inconsistencies or gaps in the cooperator’s account, and opt instead to believe the portions of the witness’s account that support the prosecutions’ theory of guilt); see also R. Michael Cassidy, Soft Words of Hope: Giglio, Accomplice Witnesses, and the Problem of Implied Inducements, 98 Nw. U. L. Rev. 1129, 1140 (2004)(“Not only do accomplice witnesses have a motive to fabricate, they have an ability to fabricate and to fabricate convincingly.”).
lying hardly distinguishes informants from other sorts of witnesses. Rather, it is how and why they lie, and how the government depends on lying informants, that makes snitching a troubling distortion of the truth-seeking process.\footnote{Natapoff, \textit{supra} note 41 at 108.} Professor Natapoff’s criticism goes on: “[P]olice and prosecutors are heavily invested in using informants to conduct investigations and to make their cases.”\footnote{Id. at 108 n.6 (citing Natapoff, \textit{Snitching: The Institutional and Communal Consequences}, 73 U. Cin. L. Rev. 645, 652 (2004)).} Natapoff claims that as a result of prosecutors’ interest in using informants, “they often lack the objectivity and the information that would permit them to discern when informants are lying.”\footnote{Id. at 108 n.7 (citing Ellen Yaroshefsky, \textit{Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment}, 68 Fordham L. Rev. 917, 945 (1999)).} Natapoff concludes, “This gives rise to a disturbing marriage of convenience: both snitches and the government benefit from inculpatory information while neither has a strong incentive to challenge it.”\footnote{Id. at 108.}

While these criticisms seem fair when properly directed at the inadequately trained, inexperienced prosecutor and the occasional, bumbling, unethical or overzealous prosecutor, the condemnation of prosecutors’ use of cooperating witnesses as a whole is undeserved. There is no doubt that the use of a cooperator’s information creates a risk of false testimony and even wrongful convictions. But false testimony and wrongful convictions also result from inaccurate witness testimony and identifications, even when witnesses have the purest motives.\footnote{See Gershman, \textit{The Prosecutor’s Duty to Truth}, \textit{supra} note 3 at 313 n.14 (discussing numerous documented reasons leading to wrongful convictions, including: coerced or false confessions; inaccurate child testimony; misidentification; prosecutorial misconduct; etc.).} Not only does the criticism overlook the many

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\footnote{Natapoff, \textit{supra} note 41 at 108.}
\footnote{Id. at 108 n.6 (citing Natapoff, \textit{Snitching: The Institutional and Communal Consequences}, 73 U. Cin. L. Rev. 645, 652 (2004)).}
\footnote{Id. at 108 n.7 (citing Ellen Yaroshefsky, \textit{Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment}, 68 Fordham L. Rev. 917, 945 (1999)).}
\footnote{Id. at 108.}
\footnote{See Gershman, \textit{The Prosecutor’s Duty to Truth}, \textit{supra} note 3 at 313 n.14 (discussing numerous documented reasons leading to wrongful convictions, including: coerced or false confessions; inaccurate child testimony; misidentification; prosecutorial misconduct; etc.).}
reasons (besides a cooperator’s testimony) for wrongful convictions,\textsuperscript{49} but the criticism also unduly minimizes the benefits of cooperators to crime resolution, so long as prosecutors comply with their ethical duty – to seek justice – when dealing with them.

Without encouraging criminals who have information about other crimes to come forward and reveal that information, many guilty and some incredibly dangerous people would remain unhindered in pursuing new crimes and victimizing other law-abiding people. The key, of course, is for prosecutors to investigate, corroborate,\textsuperscript{50} and use informants only when it is ethically and professionally responsible to do so and always when “doing justice” requires.\textsuperscript{51}

II. A Federal Prosecutor’s General Ethical Obligations

A. “Doing Justice”

A federal prosecutor is subject to the ethical standards imposed on every practicing lawyer by the state in which he or she practices law and to the local federal court rules of that state.\textsuperscript{52} In addition, “[t]he federal courts in analyzing conduct

\textsuperscript{49} Id.

\textsuperscript{50} See Yaroshefsky, supra note 3 at 932 (noting that former assistant U.S. attorneys emphasize that corroboration of facts provided by cooperators is “the key factor” in assuring cooperators’ truthfulness).

\textsuperscript{51} I recognize that these criteria for the appropriate use of cooperators creates a nebulous standard. The amorphous concept is discussed in more depth, infra, IIB.

\textsuperscript{52} See 28 U.S.C. § 530B(a) (2000) (commonly called the “McDade Amendment”), Pub L. No. 105-277 (1998) (“An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”); See also 28 C.F.R. § 77.2(h) (defining the phrase “state laws and rules and local federal court rules governing attorneys” to mean “rules enacted or adopted by any State or Territory of the United States or the District of Columbia or by any federal court, that prescribe ethical conduct for attorneys and that would subject an attorney, whether or not a Department attorney, to professional discipline, such as a code of professional responsibility.”); 28 C.F.R. § 77.3 (1999) (“In all criminal investigations and prosecutions . . . attorneys for the government shall conform their conduct and
unbecoming to a member of the bar turn invariably to the Model Rules or other codes of professional conduct."53 The Model Rules of Professional Conduct, as well as the parallel rules in many states, place “special,” responsibilities on prosecutors.54 All of these rules essentially demand that a prosecutor act fairly, honestly, impartially, and with a sense of fair dealing that the rules categorize as “seeking justice.” For instance, the comment to Model Rule of Professional Conduct 3.8 amplifies the prosecutor’s responsibilities this way:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. . . . 55

activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State[].”). See also 28 C.F.R. § 77.2(a) (1999) (defining “attorney for the government” as including “any Assistant United States Attorney”).

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

54 See Model Rules of Prof’l Conduct R. 3.8 (2004) (“Model Rules”) (listing several directives to prosecutors, including that the prosecutor in a criminal case “shall” refrain from prosecuting a charge that he or she knows is unsupported by probable cause and requiring that prosecutors “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel . . . .”); see also Georgia Rules of Prof’l Conduct R. 3.8 (stating similar special requirements on prosecutors in the state of Georgia).

55 Model Rules of Prof’l Conduct, R. 3.8, cmt. 1 (2004). As compared to the Comments, the Model Rules are more definitive about a prosecutor’s additional ethical obligations, but none of the responsibilities outlined in either the Rules or the Comments addresses a prosecutor’s dealings with cooperating witnesses. See Rule 3.8, Model Rules.
The American Bar Association, Criminal Justice Section, also provides general guidance for federal prosecutors.\(^5^6\) In particular, Standard 3-1.2, entitled “The Function of the Prosecutor,” explains in pertinent part:

\[\ldots\]

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

\[\ldots\] \(^5^7\)

And Ethical Consideration\(^5^8\) 7-13,\(^5^9\) says, “The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict. This special duty exists because . . . the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute[.].”\(^6^0\) In short, the various model rules and codes of professional conduct are uniform in demanding that federal prosecutors “seek justice” and exercise their discretion soundly. But the rules and codes are equally consistent in their failure (or inability) to delineate what these benevolent “do justice”-type concepts mean.

\(^5^6\) See Standard 3-1.1, ABA Criminal Justice Section General Standards (1993) (explaining that the standards “are intended to be used as a guide to professional conduct and performance.”).

\(^5^7\) Standard 3-1.2, ABA Criminal Justice Section Standards (1993).

\(^5^8\) The Ethical Considerations “are aspirational in character and represent the objective toward which every member of the profession should strive.” Preliminary Statement, ABA Model Code of Prof’l Responsibility (1983).

\(^5^9\) ABA Model Code of Prof’l Responsibility (1983).

\(^6^0\) Id.
Federal court decisions also discuss attributes of an ethical prosecutor. But the courts, too, talk in utopian platitudes. Perhaps the most quoted case discussing a prosecutor’s ethical responsibilities (or at least the best known among federal prosecutors) is *Berger v. United States*, in which the United States Supreme Court declared:

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

In sum, the rules and the courts concur – a federal prosecutor is duty bound to “do justice,” whatever “doing justice” requires.

B. The Trouble With “Justice”

1. The lack of external directives

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63 *Id.* at 88.
Although a federal prosecutor’s discretion is broad when charging crimes, it is, perhaps, the broadest when dealing with cooperating witnesses.\textsuperscript{64} Even the power that a low-level, assistant U.S. attorney levies over cooperating defendants is extensive.\textsuperscript{65} There is no statutory duty on a federal prosecutor to allow a defendant to cooperate and no legal duty to use a defendant’s information about other crimes or criminals. The federal case law does not demand that a prosecutor even consider such information. There is no rule of ethics specifically speaking to the topic and no instruction from DOJ either.\textsuperscript{66} Even if a prosecutor does listen to a defendant’s claims about other criminals

\textsuperscript{64} The U.S. Attorney General and the U.S. Attorneys have enormous discretion in decisions regarding whom and how to prosecute. “This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.” Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999) (quoting Wayte v. United States, 470 U.S. 598, 607-08 (1985)) (brackets in original). Historically, assistant U.S. attorneys had much more discretion in charging decisions than they do today. The “Ashcroft Memo” issued in 2003 by then Attorney General John Ashcroft restricted the freedom of prosecutors in selecting charges. See Memorandum from Attorney General John Ashcroft to All Federal Prosecutors 1-2 (Sept. 22, 2003) (on file with author), reproduced at http://www.crimlynx.com/ashchargememo.htm (setting forth “basic policies that all federal prosecutors must follow” in charging). In the Ashcroft Memo, the Attorney General announced that DOJ policy requires that “federal prosecutors . . . charge and pursue the most serious, readily provable offense or offenses that are supportable by the facts of the case . . . .” Id. Attorney General Alberto R. Gonzales has not rescinded the directives in the Ashcroft Memorandum.

\textsuperscript{65} See Gershman, \textit{The Prosecutor’s Duty to Truth, supra} note 3 at 314 (noting the prosecutor’s ethical duty “to truth” because of “prosecutor’s domination of the criminal justice system and his virtual monopoly of the fact-finding process.”).

\textsuperscript{66} There is written DOJ guidance that generally discusses reductions for a defendant’s substantial assistance. See, e.g., Memorandum from U.S. Attorney Janet Reno to All U.S. Attorneys 1-2 (Jan. 9, 1998) (on file with author), reproduced at http://www.usdoj.gov/ag/readingroom/racenut.htm (discussing the need for race neutral decisions about substantial assistance motions and requiring that all such motions be approved at the supervisory level). There are no policies about ignoring information from a potential cooperator or about when a prosecutor must pursue a lead from such a defendant. The United States Attorney’s Manual also provides some very general direction for federal prosecutors who must decide whether or not to offer a criminal defendant an “incentive” in the way of a reduced sentence or dismissed charge in
and other crimes, the prosecutor has no, well-defined legal responsibility to follow-up on that lead, charge the target of the information, or relay the information to another, appropriate law enforcement authority or even to share the information with her own supervisor. The individual prosecutor is left to decide for herself. And, aside from possible tarnish to her reputation, there are no designated penalties for her failure to act wisely in deciding what response to take to a seemingly valid tip.

It is axiomatic that federal prosecutors rely to some degree on their own subjective barometers when exercising their prosecutorial discretion. It also seems obvious that there is the greatest risk that individual prosecutors will differ in the way they treat a common fact pattern, the more unguided latitude they have in making decisions. To complicate matters, when a federal prosecutor’s discretion is at its peak, the prosecutor is often provided the least amount of external direction about how to exercise that potent judgment. As a result of the substantial discretion and the lack of direction, when federal prosecutors are faced with the most difficult and amorphous exchange for cooperation that assists in the prosecution of another. See U.S. Attorney’s Manual, 9-27.400 (2002); see also Cassidy supra note 24 at 654 (noting that neither the text of Model Rule 3.8 nor the ABA’s criminal Justice Standards provide any direction for conscientious prosecutors on the related topic of granting leniency to a codefendant in exchange for cooperation and noting a lack of academic attention to the subject). 67 Here, I use external to mean any guidance, whether intra-office or from other source that does not originate within the prosecutor herself. 68 The United States Attorney’s Manual, which contains policies of the Department of Justice, outlines internal operating procedures addressed to charging decisions and a few other areas in which federal prosecutors must exercise discretion. See U.S. Attorney’s Manual, Chapter 9 (2000). Although the Manual does not talk in terms of “seeking justice,” the guidance it contains is presumably designed to standardize charging, add to uniformity in the way defendants are treated and, therefore, “maximize justice.” Id.; see also Memorandum from U.S. Attorney General John Ashcroft to All Federal Prosecutors, supra note 64 at 1-2 (implementing a policy in which federal prosecutors are generally directed to “charge and pursue the most serious, readily provable offense or offenses” in an effort to encourage consistency in prosecutorial discretion in charging and sentencing recommendations).
questions – like what to do, if anything, with information received from a cooperating defendant -- they confront the biggest risk of subjective, biased or self-interested decision making, resulting in great potential for inconsistent and inequitable handling of similarly situated people and like situations.\(^6\)

Moreover, when the choices seem infinite, prosecutors are more likely to make hasty, poor, uniformed, or under-informed decisions, unless they are adequately experienced or sufficiently trained to carefully evaluate these choices. Unless federal prosecutors are keenly aware of the impact and importance of their discretion in the context of evaluating the worth of a cooperator’s tip, they may undermine justice by leaving victims unrequited, crimes unsolved, and wrongdoers unpunished. The need is critical to encourage every federal prosecutor to focus on fairness, crime resolution, impartiality, and other benevolent goals, not only when they charge crimes or evaluate the government’s position on sentencing, but also when they evaluate the best use of a cooperator’s lead about other crimes and criminals.\(^7\)

Federal prosecutors wield broad discretion with virtually no guidance from the Constitution,\(^7\) statutes, or the Department of Justice’s policies and procedures when they


\(^7\) At least one legal scholar would likely argue that a focus on fairness will be insufficient to ensure just results. See Alafair S. Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 Wm. & Mary L. Rev. 1590 (2006) (arguing that prosecutors sometimes fail to make decisions that rationally further justice because prosecutors are irrational human beings).

\(^7\) The Constitution would, however, most assuredly prohibit a prosecutor from selecting or deselecting cooperators based on their race, gender or religion. See United States v. Armstrong, 517 U.S. 456, 464 (1996) (acknowledging that a prosecutor’s discretion is subject to constitutional constraints, including limits imposed by the equal protection component of the Due Process Clause of the Fifth Amendment).
are asked to decide whether to use and/or investigate information proffered by a defendant who seeks to “cooperate” in the investigation and prosecution of another criminal. Other than a desire and/or responsibility to “do justice,” often there are no incentives (or there are even disincentives) for a prosecutor to pursue such leads. For instance, there is no personal or observable benefit to a prosecutor who learns from a cooperating defendant that another defendant targeted by the office has committed numerous, albeit heinous, state crimes. Assuming the cooperator’s information is accurate, the prosecutor will not be able to capitalize on the information to improve her successful prosecution record. The victims of the cooperator’s federal crimes will not usually be impressed that through “cooperation” on some other crime(s) the cooperator is gaining a lighter sentence despite victimizing them. At best, the prosecutor will pass the cooperator’s information along to someone in the proper state who maintains the authority to investigate and prosecute state crimes, and that person will exercise his discretion to determine whether and what to charge. Of course, there is no guarantee that the state will prosecute the case or that such prosecution will succeed in convicting the wrongdoer.

72 My assertion about the prosecutor’s lack of direction in this area is qualified because in a memorandum dated January 10, 2007, Deputy Attorney General Paul J. McNulty provided some guidance for dealing with cooperating defendants who seem to have information about Foreign Intelligence. In his memo to all federal prosecutors, Deputy Attorney General McNulty discussed the need for “all federal prosecutors to be trained on the identification and utilization of F[oreign] I[ntelligence] information.” Memo from Deputy Attorney General Paul J. McNulty to All Federal Prosecutors (January 10, 2007) (entitled, “Incentives for Subject and Targets of Criminal Investigations and Defendants in Criminal Cases to Provide Foreign Intelligence Information”), reprinted at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9. That memo not only calls for additional training and increased incentives for cooperating defendants who appear to have valuable information regarding terrorism activities, but it also directs line assistant U.S. attorneys who learn of potentially valuable information to contact the relevant FBI office for help in collecting the information. Id. at 6.
The same is true of information about crimes committed in other federal
districts.\textsuperscript{73} Even if a prosecutor learns valuable information from a defendant about
crimes in her own district, which she could charge, and indict, what guarantee does she
have that the prosecutor assigned to the cooperating defendant’s case will adequately
reward the defendant for sharing the information, so as to encourage the continuation of
the cooperation? The prosecutor may expend time and resources pursuing a case that
ultimately fails because the cooperator’s prosecutor “sours” on “his” defendant and
thereby encumbers the successful prosecution of the targets of the cooperator’s
information. And while there are DOJ office procedures in place to ensure that a
cooperating defendant does not receive too large a sentence reduction (5K1.1 departure)
for his cooperation,\textsuperscript{74} there are no equivalent requirements that an AUSA advise a
supervisor when a cooperator relays what appears to be valuable and accurate
information about other crimes and criminals. There is absolutely no legal requirement
or DOJ policy prohibiting the prosecutor from ignoring a valid tip out of ignorance, lack
of training, convenience, apathy, personal dislike of the cooperator or desire to obtain a
lengthy sentence with no break for substantial assistance for a particular defendant. The
defendant has no recourse through the prosecutor’s supervisor or other DOJ policy.

The lack of direction to prosecutors in how and when to use cooperating
witnesses results in an acute ethical bog, which undermines every federal prosecutors’
ethical and professional duty to “do justice.” There is simply no guarantee that a

\begin{footnotesize}
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\textsuperscript{73} The difference when dealing with crimes in other federal jurisdictions, is that the
prosecutor can seek to facilitate a global plea deal with the offending defendant.
\end{footnotesize}
cooperator with information crucial to the avoidance or resolution of a heinous or particularly dangerous crime will be effectively heard.

a) Tension Among Sovereigns

Not uncommonly, someone who violates a federal law will break one or more state laws too, whether because the perpetrator has little concern for all criminal laws or whether in committing his federal crime, he also violated a state law. When a defendant breaches both federal and state law, which jurisdiction should have priority to prosecute? Which crime is worse? Is a federal fraud scheme with 500 elderly, minority victims more prosecution-worthy and deserving of priority, or is the violent state crime more worthy in which only one middle-aged woman was tortured and sexually assaulted? Such judgment calls have no right answer, but they can match the interests of one jurisdiction against the interests of another jurisdiction and one sovereign against another.

In a world where resources are unlimited, a criminal would be prosecuted fully and completely in every venue possessing an interest in ensuring justice, retribution and/or recompense for its victims and citizens. But what happens when solving the violent crime requires a significant reduction in the length of the fraudster’s sentence, although the fraudster victimized hundreds?

b) Tension Among Victims

Second only to knowing whether the perpetrator of his crime will be convicted, a victim of crime wants to know how long a defendant’s period of incarceration will be.

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75 This analysis will obviously include some balancing of monetary costs and resource availability, but for purposes of this inquiry (one that the prosecutor must undertake before knowing the balance of costs and resources), the question is posed with little regard for the financial burdens on each sovereign in an effort to focus the query on the difficult decision prosecutors face when weighing interests that are difficult to compare.
Because a federal defendant’s agreement to cooperate in the prosecution of others can significantly reduce the length of a defendant’s sentence (although not the amount he owes his victims in restitution), the victim(s) of a federal crime may have a strong interest in opposing such cooperation. Interestingly, however, even with the increase in awareness and implementation of rights for victims in the federal judicial process, a prosecutor is not obligated to consult, or even inform, a crime victim that the prosecutor is considering using the defendant and his information in the prosecution of another and thereby providing the perpetrator of the victim’s crime the possibility to lessen the defendant’s sentence. The victim has a right to be heard at sentencing but no right to “be heard” on cooperation.

While one crime victim may oppose the prosecutor’s use of a cooperating defendant, the victim of the target of the cooperation would usually favor giving the cooperator a lighter sentence as an incentive to provide the government important information. Without the cooperator’s help, the second victim’s crime may go unsolved or unprosecuted. Which victim’s interests are paramount? Again, there is no one “right” answer.

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76 See, infra, IVB(1) (discussing the Crime Victims’ Rights Act).
77 See Douglas E. Beloof, Judicial Leadership at Sentencing Under the Crime Victims’ Rights Act: Judge Kozinski in Kenna and Judge Cassell in Degenhardt, Federal Sentencing Reporter, Vol. 19, No. 1 (Oct. 2006) (noting that “the government [prosecutor] represents the people, not the individual victim” and that “[v]ictims are often under the illusion that prosecutors represent them, and are surprised when they find out it is not so.”).
Why should federal prosecutors worry with these difficult questions if they are not legally compelled to do so? The answer – ethics, professionalism and (most of all) justice.78

(2) “Doing Justice” has multiple meanings.

As numerous legal experts have recognized, “doing justice” is a concept that “has no universally accepted meaning and does not lend itself to easy interpretation.”79 The concept may have one meaning when a prosecutor is trying a case and another when she is advising an investigative agent.80 One legal scholar has said that the vague nature of

78 Professor Michael Cassidy has also concluded that when a prosecutor decides to strike a deal with a defendant’s accomplice in exchange for cooperation, the prosecutor’s decision to deal with the accomplice implicates the prosecutor’s ethical obligations. Cassidy, supra note 24 at 655-56. Cassidy believes that the prosecutor’s ethics are implicated because the decision to deal with an accomplice gives the cooperator an incentive to fabricate testimony and to minimize his own involvement in a crime. Id. Cassidy says that such dealings “implicate[] the prosecutor’s obligation of candor to the tribunal” and “sometimes impact[] morality . . . .” Id. I conclude that a prosecutor’s ethical obligations are implicated when dealing with a cooperator and assessing the value of his information simply because the prosecutor is duty bound to maximize or “do” justice.

79 Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 46 n.4 (1991) (discussing the prosecutor’s duty to “do justice” during a trial). See also Cassidy, supra note __ at 637 (2006) (noting the general nature of the ethical directive to prosecutors and the lack of criteria for them to “determine what is just”); Bruce A. Green, Why Should Prosecutors “Seek Justice”?, 26 Fordham Urb. L.J. 607, 608 (1999) (Symposium) (noting that the source of the prosecutor’s responsibility was “never identified” and that “[i]t assumed different meanings in different contexts”); id. at 622 (describing the phrase “seek justice” as vague and asserting that “[s]tanding alone . . . [the phrase] points in many directions.”). But see William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1120 (1988) (acknowledging that the meaning of justice in the ethics context is less than clear but contending that judgments about “justice” are not arbitrary, only controversial and asserting that “judgments” about legality and justice are grounded in the norms and practices of the surrounding legal culture.”).

80 Zacharias, supra note 79 at 46 n.4; see also Cassidy, supra note 24 at 638 (noting that justice may mean several overlapping but different things simultaneously, including safeguarding the substantive and procedural rights of an accused, exhibiting general “fairness” to others, and showing consistency in decision making); Green, supra note 79
the ethical directive “leaves prosecutors with only their individual sense of morality to
determine just conduct.”

Undoubtedly, if prosecutors are left to weigh justice for themselves, their sense of
“right” and their beliefs about the wisest course to follow will inevitably depend on
infinite, opaque factors, many probably unknowable and unidentifiable even to the
prosecutors themselves. When left unguided about its meaning, a prosecutor’s sense of
justice will be impacted by her personal ambitions, life experiences, religious beliefs,
history (if any) as a victim of crime, degree of cynicism about the world, peer pressures
in the office (whether conscious or subconscious), attitudes of the leaders within her
office, pressures from the defense bar, and the list goes on. Because there can be as
many definitions of “do justice” as there are prosecutors and fact scenarios, without

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81 Zacharias, supra note 79 at 48 (citing Frampton, Some Practical and Ethical Problems
of Prosecuting Public Officials, 36 Md. L. Rev. 5, 8 (1976)); see also Rory K. Little,
Proportionality As An Ethical Precept For Prosecutors in Their Investigative Role, 68
Fordham L. Rev. 723, 738 (1999) (noting the “remarkably little references to the
prosecutor’s investigative function in ethical codes.”).

82 These factors of life experiences, beliefs, history of victimization, and the like are the
same indicators that a trial lawyer seeks to uncover in jurors during voir dire because
such factors impact the way a juror will view and decide a case. Such factors suggest
bias, conflicts, and leanings for and against certain positions.

83 Bruce Green suggests that doing justice “assume[s] different meanings in different
contexts, meanings that one c[an] only infer.” Green, supra note 79 at 608. He asserts
that in the context of exercising discretion in deciding whether to charge someone or
defer prosecution, “doing justice” means “seeking to achieve a just, and not necessarily
the most harsh result.” Id. Green says that in the “trial context, the concept seem[s] to
mean something else . . . something to do with fidelity to the fairness of the process . . .
.” Id.

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some discussion of its meaning in a given context, there will be a built-in disparity in how prosecutors undertake to fulfill their duty to “seek justice.”

In an article published in 1999, Professor Bruce A. Green explored how prosecutors should “conduct themselves in light of the principle that has traditionally been thought to define the prosecutor’s professional ethos: the duty to seek justice.” In his article, Green avoided addressing specific areas of a prosecutor’s conduct in favor of targeting “the overarching concept.” In evaluating the concept, he delineated two types of “ethical” implications: 1) prosecutorial decisions, which may be “subject to legal rules that have been (or arguably should be) adopted by courts or other appropriate bodies to

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84 Some prosecutors value convictions the most; others give maximum value to ensuring that innocent persons are never convicted. Zacharias, supra note 79 at 48 (citing Felkenes, The Prosecutor: A Look at Reality, 7 SW. U. L. Rev. 98 (1975) and Adlerstein, Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems, 6 Hofstra L. Rev. 755, 758 (1978)). Disparity in the way similarly-situated defendants are treated is one negative aspect of a prosecutor’s unbridled discretion in dealing with cooperators. See Maxfield and Kramer, supra note 4 at 20-21 (indicating findings that the definition of “substantial assistance” was not consistently applied across federal districts and that the making of 5K1.1 motion was not based on factors indicating principles of equity). The Federal Sentencing Guidelines were adopted, at least in large part, to avoid such disparity. Koon v. United States, 518 U.S. 81, 113 (1996) (indicating that the goal of the Federal Sentencing Guidelines was “to reduce unjustified disparities” and “reach toward the evenhandedness and neutrality that are distinguishing marks of any principled system of justice.”). Likewise, past administrations of the Department of Justice have expressed concern about unintended gender, race and religious bias when prosecutors exercise unguided discretion. See Memorandum from U.S. Attorney General Janet Reno to All United States Attorneys, supra note 65 at 1-2 (advising that as the chief federal law enforcement officers in their districts, U.S. Attorneys should take a leadership role in ensuring an awareness of issues of racial disparity and should examine their office’s practices regarding race-neutral exercise of prosecutorial discretion).

85 Green, supra note ___ at 611.

86 Id. at 611-12.
control lawyers’ conduct”; and 2) a more nebulous, broader sense of ethics – “involving what a prosecutor should do in situations where the law offers a choice.”

Assessing the value of a cooperator’s information and deciding whether and how to act in response to the information could not fall more squarely within the second, “choice,” category described by Green. It would be impossible for Congress or the courts to fashion effective rules to guide each prosecutor in the myriad of dilemmas she will face in dealing with cooperators. Worse yet, any such rules could unduly restrict the prosecutor’s ability to respond quickly and with a tailored reaction to the varying scenarios cooperating defendants are certain to present.

Because of the difficulty in creating rules effective for every situation, and given the need for prosecutorial discretion and flexibility in dealing with unique factual situations, no specific rules should be adopted. Instead, all federal prosecutors should be trained and routinely reminded of the importance of dealing wisely with every cooperator and his information. DOJ should emphasize and reward (financially and through office-wide recognition) prosecutors who demonstrate an ability to make well-informed, good-faith decisions in the best interest of “doing justice.”

(3) The potential for prosecutorial abuse

“There is no doubt that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and

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87 Id. at 618-19 (citing John M. Burkoff, Prosecutorial Ethics: The Duty Not to Strike Foul Blows, 53 U. Pitt. L. Rev. 271 (1992)).
88 Id. at 619.
89 But see Little, Proportionality As An Ethical Precept, supra note 81 at 752 (proposing specific ethical rules to guide prosecutors in the investigative stage).
institutional abuse.”

Without some internal or external guidance or, at least expressed expectations, about how to weigh the need and desire to pursue a cooperator’s lead, a prosecutor may allow his personal interests, biases, unique background, and numerous other factors to infect his ability to “do justice.” Such factors may inhibit a prosecutor’s ability to make the best decision about a cooperator and his information.

In the Fourth Amendment context, the United States Supreme Court has often recognized the difficulty of resting law enforcement decisions with the person responsible for zealous enforcement of the law. As the Court remarked in Horton v. California, “[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”

Because of this preference for objective criteria to guide

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92 Id. at 138. This quote was offered by the Court in the context of a Fourth Amendment issue in which the Court held that the Fourth Amendment does not prohibit the seizure of weapons discovered in plain view during the execution of a search warrant, even when the warrant did not include such guns. Id.
law enforcement decisions, the Fourth Amendment generally favors warrants for searches for evidence and contraband.

The same basic principle — desire for impartial, fair and thoughtful decision making — applies to choices made by the numerous assistant U.S. attorneys who make most of the day-to-day decisions on how to prosecute a case, including decisions about which cooperators to use, whether their information is valid and credible, whether to pursue leads provided by such cooperators, and whether to relay information obtained from a cooperator to law enforcement authorities, federal or state. Like “a search warrant [that] ‘provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer’ engaged in the often competitive enterprise of ferreting out crime,”93 the federal prosecutor needs some clear notions about how to appraise a cooperator and make an intelligent, well-informed, logical and just decision about whether (and, if so, how) to use a cooperator’s information.94 Even understanding that most federal prosecutors seek to

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94 Having noted a need for “clear notions” and “external guidance” is not to say that developing such concrete guides will be simple or a substitute for the individual prosecutor’s sound judgment. Moreover, by drawing a parallel between law enforcement officers who must make split-second decisions about how to comply with the Fourth Amendment (and still uncover evidence), I do not intend to suggest that prosecutors make decisions hurriedly or to unduly minimize the need for prosecutorial discretion in making decisions about cooperators or any other choice important to the successful prosecution of federal crimes. Certainly, in making charging decisions, dealing with cooperating witnesses, advising investigative agents, preparing witnesses to testify, trial strategy and preparation, and in choosing sentences to recommend for persons who have been convicted of violating the federal criminal laws, someone must exercise discretion. The oft-debated question is whether the discretion should rest with the Executive Branch, i.e., the Attorney General and concomitant U.S. and assistant U.S. attorneys, or the Judicial Branch, i.e., the sentencing judge. My point is not that the power should shift to the judicial branch, but that there should be more dialogue about the proper exercise of the prosecutor’s discretion — both within the U.S attorney’s offices and with the sentencing
“do justice,”95 “[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues.”96

(4) The prosecutor’s unfettered power over cooperators.

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

a. The Mechanics of Substantial Assistance Departures for “Cooperating” With Authorities

Many a federal defendant has asserted that he was willing, able, and (often) did provide substantial assistance to the government but was never rewarded for his

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95 Cassidy supra note __ at 637 (asking “What prosecutor doesn’t think that he or she is ‘seeking justice?’”) (citing Abbe Smith, Can You Be a Good Person and a Good Prosecutor?, 14 Geo J. Legal Ethics 355, 379 (2001)).
cooperation because the prosecutor refused to file the necessary motion.97 From the federal defendant’s perspective, the refusal of a prosecutor to support a substantial assistance departure is particularly discouraging because, the defendant cannot simply look to the sentencing judge’s generosity for some other departure from the sentencing guideline range.98 While it is true that a cooperating defendant is “not a strong candidate for sympathy . . . whatever his moral worth, his fate under and after the cooperation agreement deserves attention because it is an important index of the fairness and integrity of the prosecutorial system.”99

There are only two legal sources for a sentencing judge’s authority to downwardly depart from the otherwise applicable (now advisory) federal Sentencing Guideline range based on a defendant’s “substantial assistance” or “cooperation” to the government. Both sources derive from the federal prosecutor’s decision to hear and then use the cooperator’s information. The first source is found in the sentencing statute. That statute permits a sentencing court to depart below an otherwise mandatory statutory minimum

97 See Wade v. United States, 504 U.S. 181, 185 (1992) (recounting a defendant’s claim of substantial assistance but holding that federal district court has authority to review a prosecutor’s decision refusing to file a substantial assistance motion only if the prosecutor’s decision “was based on unconstitutional motives”); Alan Ellis, Federal Sentencing: Practice Tips: Part 1, Criminal Justice 20, No. 4 (Winter 2006) (“Many of us have been in situations where our client has cooperated to comply with the purposes of sentencing under 18 U.S.C. § 3553(a) and yet the government has refused to file a 5K1.1 motion for downward departure based on substantial assistance.”); Jonathan D. Lupkin, Note, 5K1.1 And Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guidelines, 91 Colum. L. Rev. 1519, 1519-20 (1991) (recounting case in which assistant U.S. attorney acknowledged at sentencing that defendant provided vital testimony for government but refused to file 5K1.1 motion based on office policy against such motions without the defendant’s having gone “under cover”).

98 See Noelle Tsigounis Valentine, Note, An Exploration of the Feeney Amendment: The Legislation That Prompted the Supreme Court to Undo Twenty Years of Sentencing Reform, 55 Syracuse L. Rev. 619, 628-29 (2005) (explaining the history and effect of the Feeney Amendment on downward departures).

99 Hughes, supra note 1 at 40 (1992).
sentence, if a defendant substantially assists authorities. The second source is in the federal sentencing Guidelines. The Guidelines expressly provide for a sentencing reduction to reflect a defendant’s substantial assistance to the government authorities.

In either instance, a defendant is virtually impotent to gain a sentence reduction, unless the federal prosecutor chooses to investigate (hopefully, corroborate) and rely on

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

101 See Chapter 5, Part K, USSG (2002) (expressly authorizing a departure from the otherwise applicable Guidelines when “a convicted defendant provides ‘Substantial Assistance to Authorities.’”). Until January 2005, trial courts were required to apply the federal Guidelines in a mechanical manner. See United States v. Booker, 543 U.S. 220 (2005). Except in very circumscribed instances, sentencing courts did not have discretion to withhold application of the Guidelines to certain defendants or to lessen the severity of the Guidelines for specific factual scenarios. Id. But in Booker, the Supreme Court decided that as long as the sentencing statute mandated that trial courts apply the Guidelines, the Guidelines were unconstitutional. Id. at 245. In reaching its conclusion, the Court remarked:

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

Id. Finding the Guidelines mandatory and, therefore, unconstitutional, a majority of the Court “remedied” the unconstitutionality of the Guidelines by declaring them “advisory.” More specifically, the Court struck two provisions in the Sentencing statute – 18 U.S.C. § 3553(b)(1) (which made the Guidelines mandatory) and Section 3742(e) (which the Court said “depend[ed] upon the Guidelines’ mandatory nature.”). Id. at 245. According to the Court, these “modifications” to the sentencing statute “requires a sentencing court to consider Guidelines ranges, . . . but it permits the court to tailor the sentence in light of other statutory concerns as well[.]” Id.
the cooperator’s information, and even then, arguably, only if the prosecution files the necessary formal motion at the defendant’s sentencing hearing or thereafter.102

(i) Statutory Departures – 18 U.S.C. § 3553(e)

A prosecutor must file a motion pursuant to 18 U.S.C. § 3553(e) and authorize any downward departure that would lessen a statutorily mandated minimum sentence.103 A defendant’s unilateral claim that he “provided substantial assistance will not entitle a defendant to [a sentence reduction,] a remedy or even to discovery or an evidentiary hearing.”104 Section 3553(e) always requires a “motion of the Government.”105 A sentencing court is rarely empowered even to review the government’s decision, refusing to file a substantial assistance motion under Section 3553(e).106 As declared by the Supreme Court in *Wade v. United States*, Section 3553(e) limits the sentencing court’s authority and gives the prosecutor “a power, [but] not a duty, to file a motion when a defendant has substantially assisted.”107

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102 A federal defendant can receive a downward departure at the time of his sentencing. He can also receive a sentence reduction for substantial assistance after imprisonment. *See* Fed. R. Crim. P. 35(b) (permitting the court to reduce a convicted defendant’s sentence even post-imprisonment, “[u]pon the government’s motion”).
103 18 U.S.C. § 3553(e); *see also* Melendez v. United States, 518 U.S. 120, 123-24 (1996) (holding that a government motion attesting to the defendant’s substantial assistance and requesting the sentencing court to depart below the applicable Guideline range does not simultaneously permit the court to depart below a statutory minimum sentence).
104 *Wade*, 504 U.S. at 186.
105 *Id.*
106 *Id.* Notably, though, *Wade* was decided long before the Court declared the mandatory nature of the federal sentencing Guidelines unconstitutional in *United States v. Booker*, 543 U.S. 220 (2005).
107 *Wade*, 504 U.S. at 185. Defendant Wade presented a compelling case. He pled guilty to drug charges and unquestionably provided law enforcement agents with information that led to the arrest of another person who had been distributing drugs. *Id.* at 181, 183. But the government refused to file a motion for a substantial assistance downward departure. *Id.* at 184. Although the Court rejected Wade’s contention that he was entitled to a departure without the government’s motion, the Court, nevertheless,
(ii) Federal Guideline Departures

The applicable substantial assistance departure provision in the Federal Sentencing Guidelines states: “Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.” Thus, the government arguably holds the key to a departure accorded by the Guidelines too.

Nevertheless, many experts assert that after the Supreme Court’s 2005 decision in United States v. Booker, “judges can now impose a sentence that is below the advisory guidelines ([but] not [below] a [statutory] minimum sentence), even without a government motion for cooperation.”

suggested that a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion based on “an unconstitutional motive” such as a defendant’s race or religion, id. at 185, or “if the prosecutor’s refusal to move was not rationally related to any legitimate Government end . . . .” Id. at 186.

108 USSG § 5K1.1.
110 Alan Ellis, Federal Sentencing: Practice Tips: Part 1, Criminal Justice 20, No. 4 (Winter 2006). See also India Geronimo, Comment, “Reasonably Predictable”: Reluctance to Embrace Judicial Discretion for Substantial Assistance Departures, 33 Fordham Urban L.J. 1321 (2006) (discussing judge’s increased discretion after United States v. Booker to depart from the federal Guidelines pursuant to 5K1.1 without a government motion); but see United States v. Crawford, 407 F.3d 1174, 1181-82 (11th Cir. 2005) (holding after Booker that a defendant is not entitled to a 5K1.1 departure without a government motion). Whether a government motion is required or not, “[t]he appropriate [amount of any] reduction [for substantial assistance] shall be determined by the court . . . .” See USSG § 5K1.1(a), USSG (noting that in deciding the “appropriate reduction” the court may consider: (1) the court’s evaluation of the significance and usefulness of the defendant’s assistance (taking into account the government’s evaluation of the assistance); (2) “the truthfulness, completeness, and reliability of any information or testimony provided by the defendant”; (3) “the nature and extent of the defendant’s assistance”; (4) the risk of injury to the defendant or his family resulting from his assistance; and (5) the timeliness of the assistance). Once the government moves for a departure, declaring that the convicted defendant has provided substantial assistance to authorities, the sentencing judge determines how much sentencing benefit or credit the defendant deserves for his or her “cooperation.”
Even if a sentencing judge can depart downward for the defendant’s substantial assistance without the government’s motion, the defendant, as a practical matter, cannot provide such assistance without some willingness and participation by the federal prosecutors or their agents. The defendant will be hard pressed to demonstrate assistance, let alone substantial assistance, if his tips are ignored or never investigated and used.

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

Such unbridled discretion can undoubtedly lend itself to poor choices that minimize justice because currently, there is no individual prosecutorial accountability for making such poorly reasoned choices. Without individual accountability, dealing with cooperators is a fertile area for growth of an already existing ethical quagmire.
III. The Federal Prosecutor’s Ethical Responsibility To Consider a Cooperator’s Valid Tip

A. The Duty

Because there is no one “right” answer to whether, when or how a federal prosecutor should use information she receives from a seemingly candid cooperating defendant, there might appear to be no “wrong” way to react to such defendants. That’s where the logic fails. Although federal prosecutors are spared from a legal directive to use seemingly valuable information obtained from a cooperating defendant, their ethical responsibility to “do justice” requires, at a minimum, careful deliberation of such tips.

While “doing justice” is an amorphous concept, in the setting of evaluating a potential cooperator’s seemingly valid lead, its meaning becomes more discernable. “Doing justice” does not mean taking the easiest path\textsuperscript{111} or making a random decision. It does not involve simply choosing the course that will please the greatest number of people. Instead, prosecutors must be mindful of the many interests at stake in the criminal justice system.\textsuperscript{112} They must evaluate their options, keeping in mind the various constituents they serve, while asking whether the proposed course will promote the following ideals:\textsuperscript{113} 1) to convict a guilty perpetrator of a federal crime; 2) to ensure that

\textsuperscript{111} Arguably, a totally arbitrary decision might violate a legal duty. See discussion of \textit{Wade}, supra, IIB(4)(a).
\textsuperscript{112} Professor Green discussed the prosecutor’s multiple roles when exploring the source of the prosecutor’s special ethical obligations. Green, supra note 79 at 633.
\textsuperscript{113} \textit{Id.} Green describes the prosecutor’s duties as including a need to “enforce[] the criminal law by convicting and punishing some (but not all) of those who commit crimes; avoiding punishment of those who are innocent of criminal wrongdoing . . . ; and affording the accused, and others, a lawful, fair process.” \textit{Id.} at 634. Two other “aims” of doing justice, according to Green, are: “to treat individuals with proportionality” and “to treat lawbreakers with rough equality.” \textit{Id.}
the perpetrator receives adequate but not disproportionate punishment; 3) to promote the interests of victims, so they may begin to heal and live without fear of further victimization; 4) to satisfy society’s need for retribution; 5) to satisfy society’s need to deter crime – both by the individual perpetrator\textsuperscript{114} and by other would-be criminals;\textsuperscript{115} and 6) to tailor each defendant’s sentence and punishment to his individual culpability, likelihood of rehabilitation, and individual characteristics.\textsuperscript{116} The federal prosecutor must seek to support these ideals in pursuit of the goals expressed by DOJ in its Mission Statement. In pertinent part, that Mission requires prosecutors to “enforce the law and defend the interest of the United States according to the law; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; . . . and to ensure fair and impartial administration of justice for all Americans.”\textsuperscript{117}

There is no recipe or formula for prosecutors to derive an answer that maximizes justice. But by considering all the circumstances of the situation and respecting all of the interests that may be served by a tip, the prosecutor is in a good position to evaluate whether or not pursuing the lead will serve these ideals. In some circumstances, justice will result from the fullest prosecution of the potential cooperator, without rewarding or encouraging cooperation. For other defendants, who express strong remorse for a less

\textsuperscript{114} Often referred to as “specific deterrence.”
\textsuperscript{115} Often referred to as “general deterrence.”
\textsuperscript{116} See 18 U.S.C. § 3553(a) (noting important factors for choosing a sentence including, the nature and circumstances of the offense; the history and character of the defendant; and the need for a sentence that reflects the seriousness of the offense, promotes respect for the law and provides just punishment).
\textsuperscript{117} See, supra, note 14.
serious federal crime, the balance of justice may well tip toward the need to pursue other crimes and criminals at the expense of awarding the cooperator a sentence reduction.\textsuperscript{118}

Because the prosecutor represents so many diverse interests within the criminal justice system, she will sometimes (perhaps even often) face direct conflicts in her representation of those interests. For instance, she may recognize that she can serve the interests of two victims, if she acts on a tip but that such reliance will compromise the interests of two others who are expecting the cooperating defendant to receive a statutorily mandated minimum sentence. “It is the prosecutor’s task, in carrying out the sovereign’s objectives, to resolve whatever tension exists among them in the context of the individual cases.”\textsuperscript{119} Professor Graham Hughes has explained the balancing of interests this way: “[A] prosecutor has a duty to neutralize the largest number of units possible of culpability and dangerousness expressed in behavior that the criminal code prohibits.”\textsuperscript{120} Accordingly, a prosecutor must fully and carefully consider any and all information received from a potential cooperator.\textsuperscript{121}

\textsuperscript{118} Although he proposed the solution in the setting of civil practice, my proposed solution is akin to the allotment of ethical discretion urged by William H. Simon. See Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1090 (1988) (proposing that civil lawyers “should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice.”).

\textsuperscript{119} Green, supra note 79 at 634.

\textsuperscript{120} Id. at 14.

\textsuperscript{121} I do not go so far as to require federal prosecutors to affirmatively prompt potential cooperators to provide tips because in prompting a cooperator, I suspect that there is a greater likelihood that the cooperator may manufacture information and concoct a story in hopes of pleasing the prosecutor. See Bennett Gershman, Witness Coaching by Prosecutors, 23 Cardozo L. Rev. 829, 852-53 (2002) (noting the vulnerability of a cooperating witness to easy manipulation by coercive and suggestive investigative techniques); Roberts, supra note 42 at 268-9 (arguing that cooperators are “skilled at learning details about the case or about what information the government wants to hear); Michael S. Ross, Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals, 23 Cardozo L.
When dealing with cooperating defendants, a prosecutor should consider: (1) What is the fairest and wisest course, given the interests of the crime victims affected, including society, and the federal government as a whole? (2) Is it necessary to act at all? (3) If the prosecutor does not act, will it be an abuse of her discretion? In answering the third question, the prosecutor should contemplate (a) Who will benefit from her actions? (b) Who will suffer? (c) Will a defendant avoid punishment he should receive; (d) Will another defendant escape punishment altogether? (e) Will victims of crime be victimized a second time by the justice system? (f) Which of these interests are the most important under the circumstances and why? In forcing herself to ask and answer these questions and evaluate her options, a prosecutor is sure to make a better choice than if she decides intuitively or with less conscious thought.

Moreover, while prosecutors are certainly subject to influence from their own personal interests and biases, the fact that they do not represent the interests of a particular client but rather owe their primary duty to the sovereign tends to favor their ability to act as independently and fairly as anyone could be expected to act when choosing between options.122

One might assume that every federal prosecutor would carefully deliberate before rejecting or accepting an offer of cooperation. Such an assumption would, however,

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Rev. 875, 884 (2002) (“[W]hen a prosecutor tells a defendant or defense counsel what testimony is expected of the defendant . . . . in order to qualify for cooperator/leniency/immunity status, the defendant is powerfully motivated to parrot what the prosecution wants and expects to hear.”).

122 See H. Richard Uviller, *The Neutral Prosecutor: Dispassion in a Passionate Pursuit*, 68 Fordham L. Rev. 1695 (2000); Gershman supra note 3 at 340 n.178 (making his own observations as a former prosecutor and describing those relayed by others in the criminal justice system that prosecutors are generally better evaluators of truth than jurors).
overlook the fact that prosecutors are human with human frailties.\textsuperscript{123} It would ignore the fact that many federal prosecutors, while bright and well-meaning, lack training and experience.\textsuperscript{124} It would understate the heavy work loads prosecutors can confront, which also tends to favor cursory consideration of tips.\textsuperscript{125} It would overlook the fact that some prosecutors focus narrowly on convicting defendants and that such a myopic focus can unduly narrow their ability to evaluate tips in an unbiased manner.\textsuperscript{126} Finally, assuming careful consideration of every tip appears to contradict empirical findings that show a disparity in the way different U.S. attorney’s offices award substantial assistance departures.\textsuperscript{127} Reasoning logically from the empirical findings, presumably disparity in the way different offices award substantial assistance departures is due to disparity in the way they are valued and evaluated.

B. The Duty Derives From the Responsibility to “Do Justice.”

\textsuperscript{123} See Alafair S. Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 Wm. & Mary L. Rev. 1587, 1590-91, 1614 (2006) (asserting that prosecutors sometimes fail to make decisions that rationally further justice, “not because they fail to value justice, but because they are, in fact, irrational” as human beings.).

\textsuperscript{124} See Yaroshfsky, supra note 3 at 950-51 and n.155 (1999) (reporting, based on interviews with former assistant U.S. attorneys in the Southern District of New York, a finding that many federal prosecutors lack life experiences and finding that assistant U.S. attorneys are typically hired after three years of experience at a large, top-tier law firm).

\textsuperscript{125} See Darryl K. Brown, Criminal Procedure, Justice, Ethics, and Zeal, 96 Mich. L. Rev. 2146, 2148 (1998) (noting an acknowledgment in the literature that prosecutors and defenders work “in a world of heavy case loads”).

\textsuperscript{126} Cassidy, supra note 24 at 667 (asserting that widespread reliance on accomplice bargaining leads prosecutors to view convictions as paramount to other values in the criminal justice system); Yaroshefsky, supra note 3 at 949 (finding evidence of a “gung ho” or “true believer” mentality in the Southern District of New York that caused these prosecutors to “target[] bad guys and then . . . push the margins to achieve a result”).

\textsuperscript{127} Maxfield and Kramer, supra note 4 at 20 (reporting that the evidence compiled from the efforts of a working group who explored 5K1.1 departures indicated “an equity problem” in the way substantial assistance motions were made).
The federal prosecutor’s affirmative obligation to weigh the value of the cooperator’s information derives from her duty to “seek justice”\textsuperscript{128} because, in this setting, justice is fostered when prosecutors encourage cooperators to provide accurate information about other wrongdoers and other crimes. Such cooperation has proven (in general) to be very important in reducing crime and convicting guilty defendants.

A federal prosecutor’s ethical and professional duty to carefully consider every valid tip also rests on the federal prosecutor’s role as the representative of the government and, correspondingly, the protector of society’s and victims’ rights.\textsuperscript{129} This position is consistent with Justice Sutherland’s view of the federal prosecutor’s role in the criminal justice system. As Justice Sutherland explained, the prosecutor is the representative of “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”\textsuperscript{130} If every federal prosecutor remembers that guilt can escape prosecution entirely and innocent victims may continue to suffer without answers, prosecutors will make more thoughtful decisions about how a tip can best serve justice. Prosecutors must also remember that unless and until the guilty are convicted, there is always a risk that an innocent person will be targeted for prosecution.

\textsuperscript{128}See also Gershman, The Prosecutor’s Duty to Truth, supra note 3 at 316 (arguing that prosecutors have “both a negative duty to refrain from conduct that impedes the search for truth and an affirmative duty to protect and promote the search for truth.”); id. at 337 (asserting that “[a]lthough not articulated in judicial decisions, a prosecutor’s duty to truth embraces a duty to make an independent evaluation of the credibility of his witnesses, the reliability of forensic evidence, and the truth of the defendant’s guilt.”).

\textsuperscript{129}See id. at 315 (explaining that prosecutors are special guardians of facts of the case).

\textsuperscript{130}Berger v. United States, 295 U.S. 78, 88 (1935).
The ethical obligation to give thorough and thoughtful consideration to every potential cooperator’s tip grows, in large part, out of the importance of such tips to the prevention and resolution of crime. Vigilant, but cautious, use of cooperators will support justice because defendants’ tips have proven to be effective crime prevention tools, provided that prosecutors guard against the manipulative cooperator.

C. Consideration Does Not Mean Acceptance.

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

IV. Some Thoughts on Encouraging Prosecutors to “Do Justice” Around Cooperation

Certain prosecutors already successfully impede crime through their effective use of cooperating defendants; others are more apathetic or inconsistent in their reliance on seemingly valid information revealed through cooperators.131

Increasing federal

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131 Because prosecutors decide in secret with no reporting requirements and no personal accountability for poor decisions, no one knows how effective or ineffective federal prosecutors are at using and accurately assessing the value of cooperator’s tips. But the inconsistent way that individual U.S. Attorneys handle cooperators, see Maxfield and
prosecutors’ attention to cooperators and elevating their awareness of the need to thoroughly assess each cooperator’s information will properly recognize the importance of such tips in preventing crimes and punishing wrongdoers and hopefully decrease the inconsistent manner in which federal prosecutors (often in the same office) treat and reward cooperating defendants.

A. A Culture of “Doing Justice”

In some U.S. attorneys’ offices, “doing justice” seems to be a more prominent theme than in others. Likewise, in some divisions and/or sections within a U.S. attorney’s office, there will be more emphasis on “justice,” “fairness,” “process” and/or “doing the right thing” than in other factions of the same office. Moreover, political changes in high-level officials within the Executive Branch regularly result in a different Attorney General and new U.S. attorneys. With such changes, the emphasis on “doing justice” fluctuates. Some administrations, some U.S. attorneys, and some Criminal Division Chiefs favor rules, procedures, and/or convictions. Others favor “justice” and

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Kramer, supra note 4 at 6, tends to suggest too much disparity at the individual prosecutor level too. 132 This observation is my own from the time I spent in the Northern and Middle districts of Georgia and the several weeks I spent on detail in the Southern district of Florida. See also Gershman, The Prosecutor’s Duty to Truth, supra note 3 at 350 (asserting that a prosecutor’s moral courage to seek truth is “possible only in an office that encourage prosecutors to be ministers of justice.”); id. at 353 (noting that some prosecutors’ offices fail to train and supervise young prosecutors on basic norms like not to lie, while others embrace a duty to the truth); Yaroshefsky, supra note 4 (indicating that within the ninety-four U.S. Attorneys Offices, there are “significant differences in legal culture and traditions, office policies and priorities”). 133 See Gershman, The Prosecutor’s Duty to Truth, supra note 3 n.235 (stating that “[b]ecause prosecutor’s offices are so very different, there has been relatively little discussion over the extent to which a ‘prosecutorial culture’ can be identified.”).
doing the “right thing” in all its benevolent abstraction. \(^{134}\) In other words, the ninety-four U.S. attorneys act independently and develop their own, unique culture of “doing justice.” \(^{135}\)

This Article urges every U.S. attorney and his or her managing attorneys to give more thought to how to motivate assistant U.S. attorneys to make the best use of cooperators and their information. Such leaders should then communicate their thoughts with every prosecutor in the office. With modern technology, such dissemination of ideas is simple. Electronic mail messages can quickly and efficiently relay the U.S. Attorney’s expectations of justice to every federal prosecutor in an office. The topic of cooperation should also be a regular topic of discussion at office-wide meetings and meetings of the criminal divisions, as well as at inter-office gatherings. \(^{136}\)

\(^{134}\) It is the position of this author that these persons are the ones in the best position “to give meaning to a phrase that might otherwise seem to be an entirely empty vessel.” See Green, supra note 79 at 618 (discussing justifications for the duty to do justice). See also Gershman, The Prosecutor’s Duty to Truth, supra note 3 at 309 (2001) (explaining that the “accepted ethos” in the office in which he once worked as a prosecutor required that each prosecutor be personally convinced of a defendant’s guilt before pursuing a conviction). See, e.g., Yaroshefsky, supra note 3 at 961-62 (noting one prosecutor who was taught to take minimal notes in sessions with cooperators so that the notes did not need to be produced to the defense); George T. Felkenes, The Prosecutor: A Look At Reality, 7 SW. U. L. Rev. 98, 109, 116 (1975) (recounting the experience of some prosecutors who feel restricted in their ability to do the “right” thing).

\(^{135}\) See Lisa M. Farabee, Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts, 30 Conn. L. Rev. 569, 570 (1998) (finding different prosecutorial cultures in two different districts and linking those different cultures to disparities in the manner sentencing departures were pursued). Professor Judith L. Maute has suggested that the ethical culture within a prosecutor’s office may tacitly encourage repeat violators of prosecutorial ethics. Judith L. Maute, What Does It Mean to Practice Law “In the Interests of Justice” in the Twenty-First Century?, 70 Fordham L. Rev. 1745, 1750 (2002).

\(^{136}\) When I was an assistant in Georgia, the three district offices met annually for continuing legal education. Such conferences are ideal for raising awareness of the importance of cooperation.
Tough decisions in which a prosecutor must employ her discretion and choose the most desirable course of action, or (at a minimum) the least undesirable course, “should be easier . . . when prosecutors serve in an office where the duty to seek justice is fairly understood and taken seriously.” As Professor William Simon asserted in his oft-cited law review article: “In the dominant understanding, judgments about legality and justice are grounded in the norms and practices of the surrounding legal culture. These norms and practices are objective and systematic in the sense that they have observable regularity and are mutually meaningful to those who refer to and engage in them.”

Thus, the message leaders within DOJ send to assistant U.S. attorneys will create these objective and systematic norms for dealing with cooperating defendants and will give concrete structure to an otherwise amorphous and vague term of art. “As professionals, prosecutors probably are capable of exercising discretionary judgment in a manner consistent with [such] general norms of behavior.” In short, leaders within the DOJ can create a culture that values cooperation from defendants and thereby give important meaning to the otherwise ambiguous terms. By adding meaning to the term,

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137 Green, supra note 79 at 643.
139 Gershman, supra note 3 at 350 (noting that “[p]rosecutors should be encouraged to evaluate a case critically with colleagues and supervisors to decide whether a prosecution should be undertaken”).
“do justice,” leaders within the Department can increase the likelihood that young, inexperienced and other prosecutors will maximize the justice they do.141

The importance of office culture to the way individual prosecutors pursue sentencing departures is illustrated by an empirical study of two federal judicial districts – the District of Connecticut and the District of Massachusetts.142 Professor Lisa Farabee’s study uncovered departure disparity between the districts and tracked that disparity, in large part, to “dissimilar local traditions and legal cultures[.]”143 The study found that in Connecticut there existed “a prosecutorial philosophy of rewarding only maximum cooperation by defendants[.]”144 The assistant U.S. attorneys in Connecticut “painted a picture of a federal district with rampant judicial independence and high standards for defendants seeking to cooperate with the government.”145

In contrast to the District of Connecticut’s philosophy on sentencing departures, in Massachusetts, the study found evidence of a “prosecutorial culture of discretion and cooperation.”146 In Massachusetts, where prosecutors filed large numbers of substantial assistance motions, assistant U.S. attorneys indicated that such motions were filed “when defendants agree[d] to cooperate and the targets [of the cooperation] plead guilty.”147

141 See also Gershman, supra note 3 at 351 (asserting that a prosecutorial culture can encourage prosecutors “to judge truth aggressively” or, conversely, advocate winning, which can discourage “critical examination of truth” and encourage misconduct too).


143 Id. at 570, 593.

144 Id. at 603-04.

145 Id. at 608.

146 Id. at 621.

147 Farabee, supra note 142 at 621-22 (citing telephone interview with an assistant U.S. attorney in Massachusetts district).
The District of Massachusetts frequently sought and rewarded cooperation “to pursue ‘bigger fish.’”

Although creating a culture of “doing justice” through encouraging discussion among assistant U.S. attorneys and their colleagues and supervisors may seem like an overly simplistic solution to the unanswerable question of what action to take in response to a cooperator, such discussions have proven highly effective in other settings. For instance, psychotherapy has proven to be an effective treatment for some mental illnesses, including atypical depression, and it has sped the improvement of persons afflicted with bipolar disorder. Likewise, group discussion, which is a type of psychotherapy, has proven to be an effective learning tool in the college classroom.

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148 Id. at 622 (citing telephone interview with another assistant U.S. attorney in Massachusetts district).
149 As Professor Burke notes in his article on the affects of cognitive bias on prosecutorial decision making, there is empirical evidence that suggests that self awareness of cognitive limitations can improve the quality of individual decision making. Alafair S. Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 Wm. & Mary L. Rev. 1587, 1617 (2006) (citing Richard Nisbett & Lee Ross, Human Inference: Strategies and Shortcomings of Social Judgment at 191); id. at 1621 (discussing the value of a “fresh-look” committee within a prosecutor’s office to evaluate newly discovered evidence when evaluating the strength of evidence against a criminal defendant).
150 Psychotherapy is the “treatment of mental disorder by psychological rather than medical means.” The Oxford American College Dictionary at 1096 (2002). Psychotherapy seeks to treat problems (usually psychological or emotional) through verbal and non-verbal communication.
151 See results of tests conducted at the University of Texas-Southwestern Medical Center at Dallas, appearing in the Archives of General Psychiatry, summarized at www.pslgroup.com/dg/fdb32.htm (indicating that psychotherapy can be just as effective for treating atypical major depression as a standard drug treatment with phenelzine sulfate); see also results published in April, 2007 issue of the Archives of General Psychiatry, summarized at http://www.emaxhealth.com/112/10704.html (indicating that patients who take medications for bipolar disorder are more likely to get well faster and stay well if they receive intensive psychotherapy).
setting. The point is (hopefully clear) not that federal prosecutors need psychotherapy, but that they need communication and discussion about what it means to “do justice” when evaluating the best use of a cooperator’s information.

Communication about how to assess cooperating defendants and their information will allow DOJ and its leaders to foster a culture of “doing justice” that will serve as an effective crime prevention and resolution tool.

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

B. A Discussion With Victims and the Sentencing Judge

In addition to raising every prosecutor’s awareness of the potential value of a cooperator’s tip through inter-office and intra-office discussion, DOJ should urge its prosecutors to engage in more frank discussions with the victims of crime and even on occasion, with the district judges who regularly sentence cooperating defendants. These

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152 See Wilbert McKeachie, “Research on College Teaching,” summarized at http://www.k-state.edu/catl/discuss.html (asserting that discussion as a teaching tool in college is effective for the following skills: retention, application, problem-solving, attitude change and motivation for future learning).

153 Figuratively, osmosis is “the process of gradual or unconscious assimilation of ideas, knowledge . . . .” The Oxford American College Dictionary, p. 965 (2002).
additional discussions will act as a natural restraint on the prosecutors’ broad discretion by encouraging prosecutors to be particularly reflective about tips. Such transparency of the prosecutor’s process will allow victims to feel more included in the justice system, will serve to raise society’s, defendants’ and defense counsel’s confidence in the work of federal prosecutors, and will provide a positive pressure on prosecutors to use their best efforts in deciding how to respond to cooperation.

(1) A Conversation With the Victims

Whether the prosecutor engages in a personal conversation with the victims of the cooperator’s crime or that of the target’s crime, or whether she allows her investigator to undertake one or more conversations with such victims, when appropriate, assistant U.S. attorneys can sometimes benefit from feedback from victims. Victims have a keen interest in seeing that defendants are swiftly and justly prosecuted and punished. Because of their interest, they offer a unique perspective about the benefits and detriments of reducing one defendant’s punishment to successfully prosecute another.

The Crime Victims’ Right Act [CVA] passed in 2004\(^{154}\) recognizes the need to protect the rights of victims in prosecuting and sentencing criminal defendants.\(^{155}\) The CVA gives federal crime victims\(^ {156}\) several rights in the prosecution process. The Act codifies the right “to be reasonably heard at any public proceeding in the district court


\(^{155}\) Contrast the spirit of the CVA with the description of a victim in Jeffrey J. Pokorak, Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships, 48 S. Tex. L. Rev. 695, 695 (2007) (stating that “the victim of a crime is relevant to a prosecutor only as a witness and as a symbol of the threat the defendant poses to society.”).

\(^{156}\) See 18 U.S.C. § 3771(e) (defining “crime victim” to include “a person directly and proximately harmed as a result of the commission of a Federal offense,”).
involving release, plea, or sentencing, or any parole proceeding[,]” the right “to confer with the attorney for the Government in the case[,]”\textsuperscript{157} and the opportunity “to be treated with fairness and with respect[,]”\textsuperscript{158} Although the CVA limits the types of proceedings in which the victims’ rights attach and the amount of input a victim may demand in the prosecutor’s decision-making process, the underlying idea of the CVA is to allow victims greater input in the criminal prosecution process because the process so directly impacts their interests.\textsuperscript{159}

The CVA does not demand that a prosecutor seek or hear input from any victim on any issue directly affecting cooperation. And this Article in no way suggests that a prosecutor \textit{must} consult a victim before deciding how to respond to a cooperator’s lead. But the interests of justice will sometimes benefit from a victim’s viewpoint. After all, ensuring that “victim participatory rights are appropriate and meaningful”\textsuperscript{160} is a strong societal interest that the criminal justice system is designed to protect. Because victims, just like society and the government, are harmed by crime,\textsuperscript{161} their interests should be part of the calculus when a prosecutor decides what action to take on a cooperator’s tip.

\textsuperscript{157} \textit{See} commentary, National Institute for Trial Advocacy (NITA), 18 U.S. NITA 3771, VII (2006) (citing statement of Sen. Kyl) (that the CVA “preserves prosecutorial discretion by allowing victims to confer with the attorney for the government without giving the victim the right to direct the prosecution”).

\textsuperscript{158} 18 U.S.C. § 3771.

\textsuperscript{159} \textit{See} Commentary, NITA, 18 U.S. NITA 3771 (2006) (describing the Crime Victims’ Rights Act as providing “crime victims a voice in the criminal justice process”); \textit{but see} Kelly and Erez, \textit{Victim Participation in the Criminal Justice System}, Victims of Crime (Apr. 15, 1997) (arguing that victim participation in sentencing is problematic because it can erode prosecutorial control over the case).


\textsuperscript{161} Beloof, \textit{supra} note 77 at 5.
A Conversation With the Sentencing Judge

There is a raging debate in Congress, the courts, and the literature about the proper balance of power at sentencing between the Executive Branch and the Judicial Branch. The Feeney Amendment appeared to shift the power balance in favor of the Executive Branch and, correspondingly, the prosecutor. The Supreme Court’s decision in United States v. Booker arguably shifted some of that power back to the judiciary. But no matter how one decides the balance, justice can be furthered when an intelligent, well-meaning prosecutor discusses the defendant’s attempts at cooperation, or lack thereof, with a knowledgeable and accomplished sentencing judge. The thought, attention and preparation such a meaningful conversation requires, will help guarantee that the prosecutor has thoughtfully and fairly assessed the role of the defendant in a fair, impartial and “just” manner.

Prosecutors already engage in such discussions with the judge in cases in which the government files a substantial assistance motion. But this Article proposes that

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163 The Feeney Amendment was enacted as a rider to part of the “PROTECT ACT,” Pub. L. No. 108-21, 117 Stat. 650 (2003). It changed the federal sentencing law and, thereby, shifted the power of judges to depart from a Guideline sentence to the prosecutor. See Wright, supra note 162 at 133.

164 See United States v. Booker, 543 U.S. 220, 245 (2005), discussed supra note ___ (finding that the mandatory nature of the federal Guidelines rendered unconstitutional and declaring them “advisory,” which effectively gives sentencing judges more discretion than they possessed before Booker).
sentencing judges insist on hearing about a defendant’s attempts at cooperation during every sentencing hearing, not just those hearing in which the prosecutor files a motion.

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

C. A Databank of Informants’ Tips

“[N]o process can assure one hundred percent accuracy in a prosecutor’s decision making.” Even the best-trained, well-meaning prosecutor will make mistakes and under or over-value tips offered by cooperators. In addition, sometimes a tip will be too vague or incomplete for the prosecutor and his agents to effectively use the information. For these reasons, and because it is clear that federal and state law enforcement agencies

165 See discussion, supra, IIB(4)(a).
166 Burke, supra note 90 at 1616.
need better methods of inter-agency communication, DOJ should develop and establish a databank for informant’s tips.

The databank should be accessible by federal and state law enforcement authorities and federal and state prosecutors. The databank should permit and encourage law enforcement officers to input and retrieve information using the alleged perpetrator’s name, the geographic local of the crime, and the victims’ identities.

Access to information in such a databank will enhance law enforcement’s ability to obtain pertinent information in a timely way that might otherwise go undetected and unused. Often the investigator or prosecutor who could make the greatest use of information has no means of learning that the information exists and is available. A databank also has the added benefit of ensuring that prosecutors (and agents) treat cooperators’ tips with uniformity. Every tip will be loaded in the databank for further consideration. Like the conversation with victims and judges, reporting a defendant’s attempts at cooperation will tend to ensure that prosecutors do not reject or overlook tips without conscious evaluation. Furthermore, the databank will sometimes chart trends of a potential cooperator toward the manufacture of false information or, to the contrary, a record of producing reliable leads.

CONCLUSION

Cooperating defendants have proven to be necessary and valuable tools in preventing crime and prosecuting criminals. Federal prosecutors must exercise vigilance in making thoughtful decisions regarding how best to pursue the information cooperating

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167 See 140 U.S. News & World Report 17, 2006 WLNR 9092083 (May 8, 2006) (recounting the 9/11 Commission’s finding of the government’s communication failures on September 11, 2005 and reporting that a 2003 study by the Department of Justice found no shortage of problems in sharing information among law enforcement).
defendants can provide. Such informed and good-faith judgment calls will inevitably require every prosecutor to weigh “the relative value or importance of different rights and interests”¹⁶⁸ and decide what, if any, action to take in a given situation. The Department of Justice and the ninety-four U.S. Attorneys can foster good decision making by developing a culture of “doing justice” in which every prosecutor is encouraged and rewarded for making deliberate, good-faith, well-informed and well-reasoned decisions about the use of cooperators. Encouraging a culture of cooperation will enhance every federal prosecutor’s ability to “do justice,” even if through osmosis.

¹⁶⁸ Simon, supra note 79 at 1092.