SHOULD WE FLIP ON FLIPPERS: A RATIONAL APPROACH TO PROVIDING PENALTY REDUCTIONS TO CRIMINAL INFORMERS

MIRKO BAGARIC,[*] *LIDIA XYNAS,*[**] *& DANIEL MCCORD*[***]

---

* Professor, Director of the Evidence-Based Sentencing and Criminal Justice Project, Swinburne University Law School, Melbourne.

** Deputy Dean and Director, Teaching & Learning, College of Law & Justice at Victoria University, Melbourne.

*** J.D. Candidate 2020, Northwestern Law School.

President Trump has declared that "flippers" (offenders who inform on other criminals to receive a reduced penalty) should not be eligible to strike deals in order to reduce their sentences. The President believes that many informers simply lie to get a penalty discount. Flippers present a complex paradox in the legal system. Jurisprudentially, President Trump is correct. Flippers are a scourge on the criminal justice system. Offenders should not benefit from the fact that their crime happened to be committed with others, and it is objectionable to reward disloyalty and opportunism. Moreover, the community often spends large amounts of money paying informers for their testimony and protecting them from other criminals. However, pragmatically there is a strong social imperative to detect and convict criminals, and sometimes a means of achieving this is to elicit the assistance of other criminals. The best way to get criminals to assist with this aim is to incentivize them with a penalty reduction or, in some instances, indemnity from prosecution. Flipping is a very common practice, with studies showing that nearly half of all drug trafficking convictions involve evidence by one offender against other offenders. Pragmatically, however, it has been established that flippers often lie in order to receive a penalty reduction, and evidence from criminal informers has been shown to be one of the most common causes of wrongful convictions. The maxim that it is "better that ten guilty people walk free, than one innocent person is convicted" is arguably given insufficient weight when considering the desirability of the flipper discount. The jurisprudential and pragmatic tensions relating to flippers represent an under-researched area of the law. This Article evaluates the desirability of providing penalty discounts to flippers and makes a number of reform recommendations. These include limiting the circumstances in which flippers can receive a penalty discount and quite often reducing the discount they actually receive. The current penalty reduction that is accorded to informers should be collapsed into the broader discount that is applied for rehabilitation. This enhances the coherency of this area of law and still provides some incentive for offenders to cooperate with authorities. However, the size of the discount is reduced, thereby reducing the likelihood of false testimony and wrongful convictions.

INTRODUCTION

President Trump is not a fan of "flippers."[1] They are offenders who commit offenses that often involve other criminals and then give evidence against their accomplices in return for a reduction to their penalty or sometimes an indemnity from prosecution.[2] In less charitable terms, flippers are also sometimes labelled "snitches."[3] More formally, they are often referred to as "informants."[4] President Trump expressed his dislike of flippers in the context of his former lawyer, Michael Cohen, who in December 2018 was sentenced to three years in prison for offenses relating to campaign finance violations and lying to Congress.[5] The sentence was discounted on account of the fact that Cohen had cooperated with an investigation by the FBI into suspected Russia-related campaign irregularities relating to the 2016 U.S. presidential election.[6]

President Trump is so opposed to flipping that he thinks it should be outlawed.[7] He states, "You get 10 years in jail, but if you say bad things about somebody in other words, make up stories if you don't know. Make up. They just make up lies. I've seen it many times."[8] He further states, "For 30, 40 years I've been watching flippers. Everything's wonderful and then they get 10 years in jail and they—they flip on whoever the next highest one is, or as high as

---

1. *See, e.g.*, Benjamin Weiser, *Trump's Views on "Flippers" Not Welcome at Trial, Judge Rules*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/nyregion/trump-flipper-witness-judge-rules.html.

2. *See generally, e.g.*, ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009) (analyzing criminal informant practices, the issues they create, and posing reformations in order to correct those issues).

3. *See generally, e.g.*, *id.*

4. *See* Alexandra Natapoff, *Secret Justice: Criminal Informants and America's Underground Legal System*, PRISON LEGAL NEWS (June 15, 2010) [hereinafter *Secret Justice*], https://www.prisonlegalnews.org/news/2010/jun/15/secret-justice-criminal-informants-and-americas-underground-legal-system/.

5. *See* Erica Orden, Sophie Tatum & Kara Scannell, *Michael Cohen Sentenced to Three Years in Prison After Admitting He Covered Up Trump's 'Dirty Deeds*,*'* CNN (Dec. 13, 2018), https://edition.cnn.com/2018/12/12/politics/michael-cohen-sentencing/index.html.

6. *See id.*

7. *See* Mark Moore, *Trump Says Flipping Should Be 'Outlawed' After Cohen Plea Deal*, N.Y. POST (Aug. 23, 2018, 9:23 AM), https://nypost.com/2018/08/23/trump-says-flipping-should-be-outlawed-after-cohen-plea-deal/ (quoting President Trump as saying that flipping "almost ought to be outlawed").

8. *See id.*

you can go."[9]

Flippers present the legal system with a complex problem. There are compelling, principled reasons why flippers should not receive a sentencing discount. They should not benefit from the fact that their crime is often committed with others, and their willingness to violate an important virtue in the form of loyalty should arguably not be rewarded. It is not surprising then that snitches attract a large degree of public opprobrium, even to the extent of inspiring a "stop snitching" cultural phenomenon.[10] Moreover, the practice of rewarding informers is objectionable because it "represent[s] a fundamental alteration of the criminal system's response to wrongdoing. No longer simply a basis for arrest, prosecution, or punishment, criminal conduct becomes instead the starting point for negotiations that may never be publicly revealed, and in which police and prosecutors may tolerate ongoing crime."[11]

Yet at the same time, pragmatism leans heavily in favor of detecting and apprehending criminals, and sometimes the only or main source of evidence against criminals are the words of other criminals.[12] The criminal justice system deals with this tension by coming down strongly in favor of expedience.[13] The social imperative to detect and convict criminals is strong. Hence, we see that the sentencing system provides a considerable discount to offenders who provide information to officials, which assists them in the investigation of criminal offenses.[14] While there is no reliable data on the extent of use of informer evidence, it is clear that the practice is very common.[15] Thus, it has been noted:

> While informants have been around since time immemorial, the past few decades have seen an explosion in their use and numbers. This is largely due to the war on drugs, but the phenomenon has

---

9. *Id*.

10. *See* NATAPOFF, *supra* note 2, at 121–38.

11. *Id*. at 16.

12. *Secret Justice*, *supra* note 4.

13. *See, e.g.*, Leon Neyfakh, *Putting Justice Before Expediency*, NAT'L POST (Apr. 9, 2015, 6:52 PM), https://nationalpost.com/opinion/leon-neyfakh-putting-justice-before-expediency (discussing expediency as related to plea bargains).

14. *See Secret Justice*, *supra* note 4 (discussing the leniency for persons willing to act as informants).

15. *See id.* (stating that "[w]hile the federal government has started keeping some records, most state and local governments simply have no mechanism for counting their snitches").

> spread to every area of law enforcement. . . . The U.S. Sentencing Commission estimates that approximately half of all federal drug defendants cooperate in some way, although not all cooperators receive sentencing credit.[16]

However, the benefits of flipping are often overstated. The prospect of a significantly reduced sentence (and in some instances immunity from prosecution) provides criminals with a strong motivation to provide untruthful testimony to officials.[17] Sometimes this testimony diminishes their role in the relevant crime, while enhancing the role of others in the commission of the offense.[18] On other occasions, the testimony relates to crimes committed by other offenders or suspects, which informers often learn about while spending prison time with the other suspects.[19] The incentive for an individual to turn informer is sometimes so powerful that it induces offenders to provide false evidence about the activities of other suspects or criminals.[20] For example, in a study by the Innocence Project, informants contributed to wrongful convictions in 16% of 244 surveyed wrongful sexual assault convictions.[21]

In addition to this, the community spends enormous amounts of money protecting flippers from other criminals.[22] This extra expenditure arises within the prison system, whereby flippers are generally kept in more secure parts of prisons, and also in the mainstream community, where flippers often receive police protection and sometimes even new identities.[23] Further, offenders are sometimes paid large amounts of money for informing on other criminals.[24] The additional financial burden associated with flipping has not been previously calibrated into the cost and benefit calculus relating to the approach by the criminal justice system to flippers. Arguably, the money spent on protecting informers could be more

---

16. *Id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. Jeffrey S. Neuschatz et al., *Unreliable Informant Testimony*, *in* CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH 213, 214 (Brian L. Cutler ed., 2012), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.464.3743&rep=rep1&type=pdf.
22. *See infra* notes 329 and 330 and accompanying text.
23. *See infra* note 328 and accompanying text.
24. *See infra* note 340 and accompanying text.

effectively utilized, from the crime detection and prosecution perspective, by increasing police resources.

In this Article, we examine whether the flipper discount should be retained. Ostensibly, there are powerful reasons for providing informers with a sentencing discount. This will encourage them to inform on criminals, and there is a powerful community imperative to catch and punish criminals. However, the burdens associated with the flipper discount have been potentially understated. The desirability of practices that contribute to wrongful convictions need to be carefully analyzed, as do those which drain the public revenue in a manner whereby there are alternative and more productive expenditures. We disagree with President Trump that the flipper discount should be totally abolished. But the nature and scope of the discount does need to be reformed.

The problems associated with relying on evidence from informers have been increasingly recognized in recent years.[25] This has resulted in some jurisdictions in the United States passing legislation to make it easier for defense counsel to more fully probe and examine the accuracy and honesty of such evidence.[26] In addition to this, it has been proposed that the informer discount should be abolished or attenuated considerably in some circumstances.[27] However, these reforms have not focused on the main reason that encourages criminals to lie when flipping: the nature and size of the penalty reduction that they can receive for giving evidence against other informers. Further, insufficient regard has been paid to the need for alignment between the approach to the flipper discount, core objectives of criminal law and sentencing, and the desirability of not breaking the nexus between crime and punishment. Committing a crime should be the catalyst for the imposition of a penalty, not signify the commencement of a negotiation process between the offender and the prosecution.

We argue that flippers should receive a penalty discount. However, this should only be conferred once they have fulfilled their promise to give evidence against other criminals. Further, the informer concession should be abolished as a stand-alone mitigating factor. The concession is too large, and hence it will invariably continue to encourage false evidence and result in wrongful convictions. Cooperation with authorities should instead be regarded as a demonstration of rehabilitation by an offender and evidence of a

---

25. *See infra* Part IV.
26. *See infra* Part IV.
27. *See generally, e.g.*, NATAPOFF, *supra* note 2.

diminished likelihood of re-offending. This logically entails that the flipper discount should be incorporated into the well-established mitigating consideration of rehabilitation.[28] This would still result in informers receiving a penalty discount, but it would be smaller than the current discount, thereby reducing the incidence of false testimony without meaningfully eroding the community benefits associated with the current discount.

In Part I of this Article, we examine the existing law and practice in relation to flippers. We do this from the perspective of the federal jurisdiction and the four largest U.S. states. In Part II, we consider the approach in Australia, where the matter has been considered at some length. This is because in Australia, unlike the United States, plea bargains are not lawful. It is for the court to make a decision with regard to the ultimate penalty, resulting in a large degree of legal analysis regarding the desirability of the informer discount and its scope and manner of operation. This is unlike the informer system in the United States which is "clandestine and unregulated, inviting inaccuracy, crime and sometimes corruption."[29] In Part III, we evaluate the rationales in favor of providing a sentencing reduction for informers. This is followed in Part IV by an analysis of the disadvantages of the current approach. Reform proposals are set out in Part V. The concluding remarks summarize the key propositions in the Article.

I. THE EXISTING LAW IN RELATION TO FLIPPERS IN THE UNITED STATES

A. The Definition of Flipper and the Role of Plea Bargaining in Providing the Discount

Prior to evaluating the desirability of the current approach to flippers, we first make clear the scope of the discussion. To contextualize this Article, it is important to set out the type of informers that exist in the criminal justice system. Broadly, informers are criminals who provide information against other offenders in order to receive a more favorable criminal justice disposition.[30] Typically, informers are people who commit a crime that involves other criminals (most commonly drug trafficking) and

---

28. *See infra* Part V.
29. *See* NATAPOFF, *supra* note 2, at 3.
30. *See id.* at 2–4.

then give evidence against other offenders involved in that crime.[31] To be clear, the crime that flippers give evidence in relation to does not need to be strictly the same as that with which the informer is charged. Thus, for example, a common informer scenario is where an offender is charged with drug trafficking and the offender then gives evidence against offenders higher up in the drug hierarchy who have committed or are involved in other more serious drug or organized crime offenses.[32] There is also one other relatively common form of informer. This relates to offenders who give evidence against other offenders who have committed offenses not connected to the informer's criminal activity.[33] This most commonly occurs where an offender is in prison already after being sentenced and comes across information, often a confession, from another inmate regarding an unsolved crime or a crime the prosecution of which has not been finalized.[34]

Moreover, there are two common forms of benefits received by informers. The first, and most common, is a penalty reduction.[35] As we will see, flipping is a mitigating factor at the sentencing stage of criminal proceedings—and often a very strong one. The other benefit, and one which is less common, is an indemnity from prosecution.[36] In addition to this, flippers sometimes receive large monetary payments for informing on others.[37]

The flipping concession applies irrespective of the types of offenses that informants have committed.[38] It can even relate to the most serious of offenses, including murder.[39] To this end Alexandra Natapoff notes:

> In exchange for cooperation, informants can earn forgiveness for every kind of crime. While the most common snitch deals typically involve drug offenses, there are many other core categories of informants who earn leniency for all sorts of crimes: from jailhouse snitches to mafia informants to antitrust

---

31. *See Secret Justice*, *supra* note 4.
32. *See id.*
33. *See, e.g.*, Neuschatz et al., *supra* note 21, at 216 (detailing the story of Leslie Vernon White).
34. *See Secret Justice*, *supra* note 4.
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.*

> defendants. The U.S. Sentencing Commission reports that federal defendants in every single offense category receive sentence reductions for cooperation, from murder to child pornography. In other words, no crime is off limits.[40]

This Article considers the practice of informing in all of these contexts. To further contextualize the discussion, we provide a brief overview of the current legal approach taken to informers. We do this in the context of the federal jurisdiction and the four largest states in the United States.

Prior to doing so, it is important to note that in the United States, most sentences are determined by way of plea bargain between the prosecution and the defense, as opposed to being determined by a court following an examination and application of all the relevant factors, including cooperation with authorities.[41] This explains why there has not been a large amount of jurisprudence and analysis regarding the desirability, scope, and nature of concessions provided to informers.

Plea bargaining is the process by which defendants give up their right to trial and instead plead guilty in exchange for concessions from the prosecution, generally in the form of withdrawal of charges or lighter sentences.[42] Plea bargaining is a multifaceted process that usually involves discussions and negotiations between the defendant, his or her attorney, and the prosecutor.[43] All negotiations take place directly between the parties without the involvement of the court.[44] Discussions in the plea bargaining process can focus on any aspect of the case, including what charges the state will elect to bring, what facts will be included in the agreement, and what

---

40. *Id*.

41. *See* Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 66 (2015) ("Prosecutors select the defendants and the charges and come to the bargaining table with the most leverage. Defense attorneys make their best pitch for leniency but ultimately encourage their clients to take a deal. Judges ensure that the plea is 'knowing' and 'voluntary' but essentially rubberstamp most plea agreements and sentence the defendants according to the parties' agreement.").

42. *See id*.

43. *See id.* at 66–69.

44. Carol A. Brook et al., *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147, 1164 (2016).

proposed sentence will be submitted to the judge.[45] Lawyers, not judges, play the primary role in plea negotiations.[46]

Plea bargaining is extremely widespread. Most defendants in the United States do not go to trial and thus are not found guilty following a trial.[47] Instead "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[48] As noted by Justice Kennedy, "[T]he reality [is] that criminal justice today is, for the most part, a system of pleas, not a system of trials."[49] He adds, "[H]orse trading [between the defendant and prosecution] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system."[50]

In nearly all instances, the plea bargain reached by the prosecutor and defendant is implemented by the court.[51] As alluded to above, one form of plea bargaining is charge bargaining. Broadly, charge bargaining is the process whereby the prosecution agrees to drop certain charges in exchange for the defendant's guilty plea on other charges.[52] The prosecution will agree to reduce the number of charges brought, charge less serious offenses, or dismiss certain charges against the defendant in exchange for the defendant's guilty

---

45. *See id.* at 1164–67.

46. *See id.* at 1182.

47. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012); John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ ("Nearly 80,000 people were defendants in federal criminal cases in fiscal 2018, but just 2% of them went to trial.").

48. *Frye*, 566 U.S. at 143; *see also id.* at 142–44 (discussing the frequency of plea bargaining use); Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 565 (2014) (discussing the structure of plea bargaining in the United States); Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process:* Missouri v. Frye *&* Lafler v. Cooper, 46 LOY. L.A. L. REV. 457, 459–63 (2013) (providing an overview of the plea-bargaining process and relevant decisions). For an overview of the plea-bargaining process, its frequency of use in the United States, and a comparison with other countries, see Brook et al., *supra* note 44, at 1167–69.

49. Lafler v. Cooper, 566 U.S. 156, 170 (2012); Aditi Juneja, *A Holistic Framework to Aid Responsible Plea-Bargaining by Prosecutors*, 11 N.Y.U. J.L. & LIBERTY 600, 600 (2017) (quoting *Lafler*, 556 U.S. at 170).

50. *Frye*, 566 U.S. at 144 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

51. *See* Brook et al., *supra* note 44, at 1176.

52. *See In re* Ellis, 356 F.3d 1198, 1213–14 (9th Cir. 2004) (Kozinski, J., concurring); Brook et al., *supra* note 44, at 1165.

plea.[53] Thus, where an offender promises to give evidence against another offender, this can be rewarded by the prosecution reducing the severity of the charges brought against the defendant or in fact even dropping all of the charges.

Alternatively (and often in conjunction with charge bargaining), the prosecution may employ sentence bargaining to encourage the defendant to enter a guilty plea. Sentence bargaining is the process whereby the prosecution and defendant agree, and the prosecution recommends to the court, that the defendant will receive a specified sentence or a sentence within a specified range, which is less onerous than the sentence that the defendant would have otherwise received had they been found guilty following a trial.[54] With sentence bargaining, the prosecution has a wide array of tools at its disposal. The prosecution can agree to recommend a particular sentence or particular sentence range, to suggest that a sentence be reduced by a fixed percentage, or to refrain from opposing a particular sentence requested by the defendant.[55] Finally, the prosecution may offer the defendant the possibility of using a particular section of a sentencing guideline which, unlike the bulk of other plea agreements,[56] is binding on the sentencing court once it accepts the bargained plea.[57]

The allure of charge reductions or sentencing discounts offered by the prosecution to informers is especially appealing because of the fact that in nearly all circumstances it is operationalized by the court.[58] As alluded to above, the presiding trial judge, for the most part, plays no role in the actual process of negotiating the plea.[59] The Federal Rules of Criminal Procedure, for example, mandate that "the court must not participate in [plea bargaining discussions]."[60] However, the judges retain the role of manager of cases before the

---

53. *See* Brook et al., *supra* note 44, at 1165.

54. *See* John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 639 (2008).

55. Brook et al., *supra* note 44, at 1166.

56. In most plea bargains, the court may impose a sentence other than what it recommended, even after accepting the agreement. *See id.* at 1161 (noting the court's "absolute discretion" regarding sentencing).

57. *Id.* at 1166.

58. McConkie, *supra* note 41, at 63 (discussing why judges typically accept plea deals).

59. *Id.*

60. FED. R. CRIM. P. 11(c)(1).

court and decide how much time to give the parties to negotiate.[61] While the judge retains final control over whether to accept or reject the plea ultimately produced as a result of the negotiations,[62] and there are numerous bases for rejection of a plea, the reality is that nearly all plea agreements are in fact accepted by the courts.[63] This is an almost inevitable by-product of the fact that bargaining occurs outside the presence of the court; courts know very little about the case, and there are considerable time pressures to process criminal matters.[64] In the rare instances that the court does reject guilty pleas, the court must, on the record and in open court, tell the parties that the plea is rejected, advise the defendant that the court is not obligated to follow the plea agreement, provide the defendant with an opportunity to withdraw the plea, and inform the defendant that if the plea is not withdrawn, the defendant may be treated less favorably than under the plea agreement.[65]

While the nature of the plea-bargaining process and its degree of utilization limits the degree of discussion and evaluation of the informer discount by the courts, it is illuminating to examine its legal basis and scope and operation. It is to this that we now turn.

B. The Federal Jurisdiction in the United States

Federal offenders are sentenced pursuant to the Federal Sentencing Guidelines. The Federal Sentencing Guidelines are similar to other grid sentencing systems (which operate widely throughout the United States) in that an offender's prior convictions and the perceived severity of the crime hold the most weight in determining his or her penalty.[66] Criminal history can thus account for a significant increase in penalty severity. For example, level fifteen crimes in the Federal Sentencing Guidelines mandate a

---

61. *See* Brook et al., *supra* note 44, at 1181–82.

62. *Id.*

63. *See id.* at 1176 ("Although most plea agreements are accepted by the courts, a plea is occasionally rejected because the court believes it is unjust, the factual basis is inadequate, or the defendant has been coerced or misled into pleading guilty.").

64. *See id.* at 1176–77.

65. FED. R. CRIM. P. 11(c)(5)(A)–(C).

66. *See* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1109 (2008); *see also* ROBIN L. LUBITZ & THOMAS W. ROSS, U.S. DEP'T OF JUSTICE, SENTENCING GUIDELINES: REFLECTIONS ON THE FUTURE 4 (2001), https://www.ncjrs.gov/pdffiles1/nij/186480.pdf ("In the grid system conventionally used to impose sentences, the judge uses two discrete factors—severity of current offense and past criminal record—to determine the length and severity of the sentence.").

presumptive penalty of eighteen to twenty-four months of incarceration for a first offender and forty-one to fifty-one months for an offender with thirteen or more criminal history points.[67]

Criminal history score and offense severity are the two most important considerations that influence the nature and severity of the criminal sanction, but there are many other factors that influence sentencing under the Guidelines. The Guidelines establish dozens of other matters that can affect which penalty is imposed as well.[68] Also, judges are permitted to deviate from a guideline when certain mitigating and aggravating considerations apply;[69] such considerations take the form of "adjustments" and "departures."[70] Adjustments are considerations that increase or decrease the designated amount of a penalty.[71] For example, an offender who shows remorse can have his or her penalty decreased by up to two levels, while an offender who pleads guilty can have his or her penalty decreased by three levels.[72] Departures also facilitate courts' imposition of sentences outside a given guideline range.[73] 18 U.S.C. § 3553 empowers courts to use considerations not specified in the Guidelines as rationales for departing from the applicable guideline

---

67. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (U.S. SENTENCING COMM'N 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf. The offense levels range from one (least serious) to forty-three (most serious). *Id.* The criminal history score ranges from zero to thirteen or more (worst offending record). *Id.*

68. *See* AMY BARON-EVANS & PAUL HOFER, NAT'L SENTENCING RES. COUNSEL, LITIGATING MITIGATING FACTORS: DEPARTURES, VARIANCES, AND ALTERNATIVES TO INCARCERATION, at i (2010), https://static1.squarespace.com/static/551cb031e4b00eb221747329/t/5883e40717bffc09e3a59ea1/1485038601489/Litigating_Mitigating_Factors.pdf.

69. *See id.*

70. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 67, at ch. 3, ch. 4, pt. K.

71. These are set out in Chapter 3 of the U.S. Sentencing Guidelines. *See id.* §§ 3A1.1–3E1.1.

72. *See id.* § 3E1.1. However, section 5K2.0(d)(4) provides that the court cannot depart from a guideline range as a result of:

> The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.*, a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court).

Id. § 5K2.0(d)(4) (internal citation omitted).

73. *See id.* §§ 5K1.1–5K3.1.

range.[74] However, when judges invoke 18 U.S.C. § 3553, they must specify their reason for stepping outside the range.[75] In other words, they must provide some detail justifying their sentencing decision.

Despite the Federal Sentencing Guidelines being advisory (a rule laid down by the Supreme Court in *United States. v. Booker*[76]), the sentencing ranges they provide have had a substantial impact on many sentences. Only recently have judges deviated more from the Guidelines. For example, only "46% of sentences imposed by federal courts in 2014 were within the Guidelines" whereas, before that time, the majority of sentences fell within them.[77] Since 2014, there has been only a marginal increase to the number of sentences imposed within the guideline range. Specifically, 48.6% of sentences

---

74. *Id.* § 5K2.0(a)(2)(A)–(B); *see* Pepper v. United States, 562 U.S. 476, 490 (2011); Gall v. United States, 552 U.S. 38, 49–50 (2007).

75. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 67, § 5K2.0(e).

76. 543 U.S. 220, 227 (2005). In *Booker*, the Supreme Court held that aspects of the Guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial. *Id.* at 226–27; *see also Pepper*, 562 U.S. at 481 ("[W]hen a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence [that may] . . . support a downward variance from the now-advisory Federal Sentencing Guidelines range."); Greenlaw v. United States, 554 U.S. 237 (2008) (discussing sentencing appeals); Irizarry v. United States, 553 U.S. 708, 715 (2008) ("[T]here is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a)."); Rita v. United States, 551 U.S. 338, 341 (2007) (holding that a federal appellate court may apply a presumption of reasonableness to a district court sentence that is within the properly calculated Sentencing Guidelines range); *Gall*, 552 U.S. at 41 ("[W]hile the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.").

77. *See* Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994, 1012 n.133 (2017) (citing U.S. SENTENCING COMM'N, NATIONAL COMPARISON OF SENTENCE IMPOSED AND POSITION RELATIVE TO GUIDELINES RANGE (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/TableN.pdf); *see also* U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT: FISCAL YEAR 2014, at 1, 10 (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf (providing an overview of sentencing over time). *See generally* AMY BARON-EVANS & JENNIFER NILES COFFIN, NO MORE MATH WITHOUT SUBTRACTION: DECONSTRUCTING THE GUIDELINES' PROHIBITIONS AND RESTRICTIONS ON MITIGATING FACTORS (2010), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/no-more-math-without-subtraction.pdf.

fell within the guideline range in 2016, with a slight increase to 49.1% in 2017.[78]

Assistance to authorities is expressly recognized as a mitigating factor by guidelines. Section 5K1.1 provides:

> 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.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
> (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) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
> (5) the timeliness of the defendant's assistance.[79]

The Application Notes to this provision state that the reduction in penalty accorded on this basis is not contingent on the defendant accepting responsibility for his or her role in any offending.[80] It also expressly states that if a defendant refused to assist authorities, this is not an aggravating consideration.[81]

---

78. U.S. SENTENCING COMM'N, ANNUAL REPORT: FISCAL YEAR 2017, at 5 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017-Annual-Report.pdf.

79. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 67, § 5K1.1.

80. *Id.*

81. *Id.* § 5K1.2. As noted by Baron-Evans:

> In some districts, such as the Northern District of Iowa, the U.S. Attorney's Office generally does not grant immunity under

Section 5K1.1 is a frequently invoked basis for a sentencing departure. For example, in fiscal year 2010, departures on this basis were granted in 11.5% of all cases.[82] However, there are wide variations in the use of this ground. This does not seem to relate to any policy reason, but rather to inconsistent prosecution practice. Thus, it has been observed that:

> Wide differences in the rate of § 5K1.1 departures exist among districts, even in the same circuit. For example, for fiscal year 2010, courts in the Fourth Circuit granted § 5K1.1 departures in only 4.1% of cases in Eastern District of Virginia, while in the Eastern District of North Carolina, courts granted such departures in 35.5% of cases. . . .

> §1B1.8. There (and unlike most other districts), cooperation agreements provide that any self-incriminating information given by the defendant during proffer sessions with government agents will be used against the defendant at his sentencing, which in turn impacts whether the government makes a motion under § 5K1.1.

BARON-EVANS & COFFIN, *supra* note 77, at 156. This provision should be read in conjunction with section 1B1.8, which relates to situations where cooperation immunity can or is granted:

> (a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.
>
> (b) The provisions of subsection (a) shall not be applied to restrict the use of information:
>
> (1) known to the government prior to entering into the cooperation agreement;
>
> (2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);
>
> (3) in a prosecution for perjury or giving a false statement;
>
> (4) in the event there is a breach of the cooperation agreement by the defendant; or
>
> (5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities).

U.S. SENTENCING GUIDELINES MANUAL, *supra* note 67, § 1B1.8.

82. BARON-EVANS & COFFIN, *supra* note 77, at 154.

> Notably, these differences are generally not mirrored in the rate of downward departures not identified as government-sponsored, which means that they likely result from the inconsistent exercise of prosecutorial discretion and the varying ability of defendants to provide assistance, not the institutional predilections of different districts.[83]

The frequency of the application of section 5K1.1 remains high. In 2017, slightly more than 7000 of the 66,873 cases received a section 5K1.1 substantial assistance departure.[84]

C. California

Under California law, there are some offenders who are sentenced under the Indeterminate Sentencing Law (ISL) where life imprisonment is imposed with the possibility for parole.[85] However, most criminal offenders are sent to prison for a determined period of time under the Determinate Sentencing Law (DSL).[86] Courts can increase the sentences imposed under the DSL depending on whether there are "specific enhancements" or "circumstances in aggravation" (these are conduct enhancements specific to the crime, such as using a weapon or causing great bodily harm).[87] Under the DSL rules, there are also factors that courts can refer to in "mitigation" or "circumstances in mitigation" in its broad discretion in imposing one of three (low, medium, or high) authorized prison terms for a given offense.[88] "Mitigation" here can also include a court exercising discretion by taking into account factors that will justify it not imposing an additional punishment related to a specific

---

83. *Id*. (internal citations omitted).

84. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-90 tbl.30 (2017), https://www.ussc.gov/research/sourcebook-2017.

85. *See Sentencing, Incarceration, & Parole of Offenders*, CAL. DEP'T CORRECTIONS & REHABILITATION, https://www.cdcr.ca.gov/Victim_Services/sentencing.html#CALIFORNIAS_SENTENCING_LAWS (last visited Apr. 2, 2020).

86. *Id.*

87. *See* CAL. PENAL CODE §§ 1170.11, 1170.7 (West 2020); CAL. R. CT. 4.405(3)–(4), 4.421(a)(1)–(2).

88. CAL. PENAL CODE § 1170(b) (West 2020) ("When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court."); CAL. R. CT. 4.405(4) (defining "mitigation" and "circumstances of mitigation").

enhancement.[89] These sentencing approaches follow the objective of the California legislature where "the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice."[90]

There are two distinct categories for mitigating factors in California: those that relate to the defendant and those that relate to the crime in question.[91] There is an additional catchall category that covers "[a]ny other factors statutorily declared to be circumstances in mitigation or that reasonably relate to the defendant or the circumstances under which the crime was committed."[92]

Rule 4.423 of the California Rules of Court sets out six mitigation factors that relate to the defendant and include: (1) that the defendant has no prior criminal record or an insignificant criminal record, (2) that the defendant was suffering from a mental or physical condition at the time of the offense, (3) "that the defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process," (4) "that the defendant is ineligible for probation" or otherwise would have been granted probation, (5) "that the defendant made restitution to the victim," and (6) that the defendant had a prior satisfactory performance on probation, supervision, or post-release parole.[93]

California's rule enumerating mitigating factors does not expressly refer to "assistance to authorities" within the list.[94] But, the list of factors found in Rule 4.423 is not exclusive, so judges have a broad discretion to consider other relevant factors at sentencing.[95] The courts in California also have the discretion to consider plea bargain agreements during sentencing.[96]

As noted above, plea bargain agreements can include lesser sentences given to defendants in exchange for their testimony against others involved in the same crime,[97] and there are guidelines

---

89. *See* CAL. R. CT. 4.405(4).

90. CAL. PENAL CODE § 1170(a)(1).

91. CAL. R. CT. 4.423(a)–(b).

92. *Id.* at 4.423(c).

93. *Id.* at 4.423(b)(1)–(6).

94. *See id.* at 4.423(b).

95. *See id.* at 4.408(a).

96. *See* People v. Maldonado, 84 Cal. Rptr. 2d 898, 902, 905 (Cal. Ct. App. 1999).

97. *See id.* at 903 ("The courts have thus already determined, by long-standing precedent, that the provision of a plea bargain in exchange for truthful testimony, is not such an untoward 'compensation' that the testimony will render the accused's trial unfair.").

from precedent cases on how the agreement can be structured.[98] The guidelines are quite broad in terms of the nature of discount that is accorded for testifying against other offenders; however, there are some parameters in terms of what the prosecution can demand regarding the nature of the evidence that is given by an informer. The standard for structuring plea agreements based on informer testimony was established in *People v. Medina*,[99] where California's Second District Court of Appeals ruled that a plea agreement between the prosecution and an accomplice witness effectively denied the defendant a fair trial because it compelled the witness to testify in a particular fashion.[100] The court in *Medina* reasoned that it was improper to condition a grant of immunity for accomplice testimony on whether the individual testified without any material changes to their prior recorded statement.[101] The proper practice in California, then, is to extend grants of immunity to an accomplice if they testify "*fully and fairly as to his knowledge of the facts out of which the charge arose*."[102] If that standard is met, an informer can receive a lesser sentence, or even immunity, from an agreement to testify against others involved in the same underlying crime.[103]

D. Texas

Texas has the second highest population in the United States.[104] Under Texas law, criminal offenses are divided into eight tiers, providing extensive discretion to judges in their sentencing approaches.[105] The eight "Offense Tiers" include (in rising severity): misdemeanors (lower-level crimes with a maximum punishment of up to one year in jail), which are sorted by Class C, Class B, and Class A, and felonies, which are sorted by state jail, third degree,

---

98. *See infra* notes 99–103.

99. 116 Cal. Rptr. 133 (Cal. Ct. App. 1974).

100. *Id.* at 145–46.

101. *Id*. at 143.

102. *Id.* at 144 (emphasis added) (quoting People v. Green, 228 P.2d 867, 871 (Cal. Ct. App. 1951)).

103. *See id.* at 145 (citing People v. Brunner, 108 Cal. Rptr. 501, 506 (Cal. Ct. App. 1973)).

104. As of 2019, California was the most populous U.S. state with 39.5 million residents. Texas ranked second, with 28.9 million residents. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock (last visited Apr. 2, 2020).

105. TEX. PENAL CODE ANN. §§ 12.01–12.04 (West 2019).

second degree, first degree, and capital felony.[106] This sentencing structure provides judges with broad discretion to impose a sentence for a first-degree felony from five years to life; for a second-degree felony from two to twenty years; and for a third-degree felony from two to ten years.[107]

The statutory elements defining specific crimes in Texas encompass "aggravating factors." Consequently, they are reflected in the sentencing range a judge receives following the conviction of an accused for an offense.[108] Further, judicial discretion at sentencing can also be shaped by the severity of the charge(s) chosen by the prosecution. Prosecutors have wide discretion in electing what charges to bring in a given case since offenses may substantively qualify under multiple tiers (for example, "theft of service" under section 31.04 of the Texas Penal Code can be charged from a Class C misdemeanor up to a first-degree felony, depending on the monetary value involved).[109]

Mitigation factors in sentencing in Texas, on the other hand, are based on case law only. For example, during sentencing, evidence that relates to the offense or the defendant and tends to reduce a defendant's moral blameworthiness can be brought forward as mitigating factors.[110] A defendant must have the opportunity to offer mitigating evidence during sentencing if it has not already been elicited during the proceedings, especially if the defendant requests the opportunity to do so.[111] "Mitigating evidence" applies in every case where the defendant offers evidence to assist the jury or judge in assessing the fair and proper sentence for the offense committed and includes the defendant's level of culpability and all other relevant matters.[112] Allowable mitigating factors must bear a common relationship to the circumstances of the offense itself or to the defendant personally.[113]

---

106. *Id.* §§ 12.03–12.04.

107. *Id.* §§ 12.32–12.34.

108. *See, e.g.*, *id.* § 22.02 (stating that causing serious bodily injury or using a deadly weapon during the commission of an assault are examples of aggravating assault factors).

109. *See id.* § 31.04(e).

110. Willingham v. State, 897 S.W.2d 351, 359 (Tex. Crim. App. 1995); Ellison v. State, 165 S.W.3d 774, 778 (Tex. App. 2005) (quoting Draheim v. State, 916 S.W.2d 593, 600 (Tex. App. 1996)); Garcia v. State, 704 S.W.2d 495, 498 (Tex. App. 1986).

111. *See* Castro v. State, 807 S.W.2d 417, 419 (Tex. App. 1991) (citing Duhart v. State, 668 S.W.2d 384, 387 (Tex. Crim. App. 1984)).

112. *See* Eaves v. State, 141 S.W.3d 686, 692–93 (Tex. App. 2004).

113. Goudeau v. State, 788 S.W.2d 431, 435–36 (Tex. App. 1990).

Assisting authorities is a well-established mitigating factor in Texas.[114] The discount is normally negotiated as part of the plea bargain agreement, in which the defendant agrees to provide testimony in exchange for the lighter sentence.[115] Courts in Texas have broad discretion on whether to follow, strengthen, or lessen the plea agreement, but as noted above, plea bargains are generally upheld by the courts.[116] A rare exception to this was the case of *State v. Mungia*, where the appellate court declined to follow the plea deal struck by prosecutors and the defendant and instead awarded an even greater discount to the defendant.[117] Ultimately, this judgment was reversed by the Texas Court of Criminal Appeals, but the authority of a trial court to dismiss an indictment for informers was affirmed.[118]

When a defendant is sentenced after striking a plea bargain agreement, they cannot successfully appeal the sentence, absent the exception discussed below, if the sentence is within the bounds of the agreement.[119] In *Ellis v. State*, the appellant struck an agreement with prosecutors to cap his punishment at fifteen years imprisonment in exchange for his truthful testimony against his co-defendants.[120] When the appellant was sentenced to nine years

---

114. *See, e.g.*, Castillo v. State, 221 S.W.3d 689, 694–95 (Tex. Crim. App. 2007) (noting that prosecutors did not violate federal anti-bribery statutes or the rules of professional conduct when they offered two co-defendants lesser sentences in exchange for their truthful testimony against the appellant); Reed v. State, 744 S.W.2d 112, 114 (Tex. Crim. App. 1988) (noting that a co-perpetrator of the appellant agreed to testify against appellant and received a plea bargained sentence of five years as a result).

115. *See, e.g.*, Taylor v. State, 19 S.W.3d 858, 861 (Tex. Crim. App. 2000) (a co-defendant entered into a plea agreement to receive probation instead of jail time in exchange for her truthful testimony against the defendant).

116. *See* Brook et al., *supra* note 44, at 1176; *see also supra* Section I.A.

117. 119 S.W.3d 814, 817–18 (Tex. Crim. App. 2003).

118. *Id*. at 818 (reversing the lower court's dismissal of the indictment because there were other options available to the court to protect the defendant's safety). The court in *Mungia* noted that trial courts have broad discretion in following or rejecting plea agreements at sentencing, but that they can only dismiss an indictment without consent from the state in limited circumstances and when there are no lesser alternatives available to protect a defendant from retaliation. *Id*. at 816–18.

119. *See* TEX. R. APP. P. 25.2(a)(2); Ellis v. State, No 01-08-00658-CR, 2009 Tex. App. LEXIS 7717, at *2 (Tex. App. Oct. 1, 2009) ("In a plea-bargained case in which the punishment assessed does not exceed the plea agreement, a defendant may appeal only those matters that were raised by written motion filed and ruled on before trial, or after obtaining the trial court's permission to appeal.").

120. *Ellis*, 2009 Tex. App. LEXIS 7717, at *1.

imprisonment, he filed an appeal.[121] Plea bargained cases that do not exceed the punishment agreed upon may only be appealed for issues raised and ruled on before trial, with a trial court's permission, or where the appeal is authorized by statute.[122]

E. New York

Unlike the approach in California, most offenders in New York receive indeterminate sentences, where they can be subject to a range of sentences (e.g., fifteen years to life).[123] Felonies are classed as "violent" or "non-violent," with a range spanning from "A" to "E," with "A" being the most serious.[124]

The "violent" and "non-violent" classified felonies correspond to the minimum end of the sentencing range. For example, the minimum sentence for a first-time offender for a "violent" felony conviction is three and a half years for a Class C felony; however, the minimum sentence for that same first-time offender for a "non-violent" felony conviction is no less than one year for a Class C felony.[125]

The maximum end of a sentencing range is reflected under the letter range. For example, for a Class C felony, the term "shall not exceed fifteen years," while the maximum term for a Class E felony "shall not exceed four years."[126]

As in Texas, "aggravating factors" in New York are typically defined in the statutory elements for specific crimes.[127] Thus, these factors will generally be accounted for in the sentencing range provided to judges and in the conviction.

In New York, lists of "mitigating factors" are also outlined in crime-specific statutes; however, such lists do not provide any details on the role they play in reducing a specific sentence.[128]

---

121. *Id.* at *2.

122. *See* TEX. R. APP. P. 25.2(a)(2); *Ellis*, 2009 Tex. App. LEXIS 7717, at *2.

123. *See* N.Y. PENAL LAW § 70.00 (McKinney 2019) ("Except as provided . . . a sentence of imprisonment for a felony . . . shall be an indeterminate sentence.").

124. *Id.* §§ 70.00(2)(a)–(e), 70.02.

125. *Id.* §§ 70.00(3)(b), 70.02(3)(b), 70.06.

126. *Id.* § 70.00(2).

127. *See, e.g.*, *id.* § 125.26(1)(a)(i) (stating if the murder victim is a police officer, for example, the murder charge is aggravated).

128. *See, e.g.*, N.Y. CRIM PROC. LAW § 400.27(9)(a)–(f) (McKinney 2020) (listing six mitigating factors for first-degree murder conviction, such as the defendant's criminal history and mental state at the time of the offense, but without tying specific mitigating factors to specific reductions in sentence).

Similar to California and Texas, plea bargain agreements are generally upheld by the courts.[129] In New York, plea bargains are codified by statute.[130] At common law, it is well established that plea bargain agreements granting lesser sentences to defendants who agree to testify against others will be considered by the court at sentencing.[131] But, if a defendant fails to uphold their end of the agreement, a judge can enhance their sentence from the originally agreed upon sentence from the agreement.[132]

Discounts are not codified explicitly in the statutes, so prosecutors and the courts have near total discretion on what to offer defendants.[133] A lesser sentence for a cooperating witness can come in the form of a reduced charge, rather than a lighter sentence for the same charge.[134] As in other jurisdictions, this approach is deemed appropriate by the courts.[135]

F. Florida

The Criminal Punishment Code (Florida Code), which came into effect on October 1, 1998, governs Florida's criminal sentencing policy.[136] The Florida Code applies to offenses committed on or after that date.[137] The Florida Code provides for significant discretion in sentencing, has provisions that lower mandatory prison thresholds, and provides for increased penalties.[138] Consequently, the Florida approach to punishment has become harsher since the introduction of the Code.[139]

---

129. *See* Brook et al., *supra* note 44, at 1176.

130. N.Y. CRIM. PROC. LAW § 220.10 (McKinney 2019).

131. *See* Brook et al., *supra* note 44, at 1176.

132. *See, e.g.*, People v. Paige, 697 N.Y.S.2d 771, 771–72 (App. Div. 1999); People v. Lewis, 625 N.Y.S.2d 191, 192 (App. Div. 1995).

133. *See, e.g.*, People v. J.T., 820 N.Y.S.2d 780, 782 (Sup. Ct. 2006).

134. *See* People v. Johnson, 967 N.Y.S.2d 217, 219, 221 (App. Div. 2013) (accomplice witness testified against defendant and was permitted to enter a guilty plea of second degree assault instead of first degree assault).

135. *See id.* The court in *Johnson* notes the agreement between the accomplice and the prosecution in the context of its analysis on whether or not the agreement had to be disclosed in order to avoid a Brady violation. *Id.* The court treats the agreement as being a routine part of prosecution. *Id.* at 221–22.

136. FLA. STAT. ANN. § 921.002 (West 2020).

137. *Id.*

138. *Id.* § 921.002(1)(c)–(d), (f)–(g), (3).

139. *See* LISA MARGULIES, SAM PACKARD & LEN ENGEL, AN ANALYSIS OF FLORIDA'S CRIMINAL PUNISHMENT CODE 25 (2019).

In Florida, felonies are categorized by degree. Section 775.082 of the Florida Code details penalties for felony categories, the applicability of various sentencing structures, and mandatory minimum sentences for certain reoffenders.[140] There is also significant and wide discretion available to judges within a felony degree under the Florida Code. A "life felony" is punishable by up to life in prison; a first-degree felony can be subject to imprisonment by up to thirty years; a second-degree felony can be subject to imprisonment by up to fifteen years; and a third-degree felony is punishable by up to five years in prison.[141]

The Florida Code provides for a points calculation system, which determines the lowest permissible sentence for felony degrees. Under section 921.0026(1), a downward departure from the minimum sentence is "prohibited unless there are [mitigating] circumstances or factors that reasonably justify" it.[142] Section 921.0026 of the Florida Code sets out statutory "mitigating circumstances," which can apply to all felony offenses (not including capital felonies) that have been committed on or after the Florida Code came into effect.[143] Under section 921.0026(2)(a)–(n), mitigating circumstances may permit a departure from the lowest permissible sentence in certain reasonably justified circumstances, including the age of the offender and whether the victim was an initiator of the incident.[144]

Unlike its counterparts in California, Texas, and New York, Florida lists cooperation with the state as a mitigating factor for purposes of sentencing.[145] In order to receive the downward departure per the statute, the defendant's cooperation must *actually* resolve another offense.[146] Moreover, a defendant has the burden of proof of showing that their cooperation resolved a crime.[147] Even

---

140. FLA. STAT. ANN. § 775.082 (West 2020).
141. *Id.* § 775.082(3)(a)(2), (3)(b)(1), (3)(d), (3)(e).
142. *Id.* § 921.0026(1).
143. *Id.* § 921.0026.
144. *Id.* § 921.0026(2)(a)–(n).
145. *Id.* § 921.0026(2)(i).
146. *Id.*; *see* Romans v. State, 221 So. 3d 647, 652 (Fla. Dist. Ct. App. 2017) (noting that because the trial court found the defendant did not help resolve another offense, the defendant's cooperation did not permit a downward departure at sentencing).
147. *See, e.g.*, State v. Bell, 854 So. 2d 686, 691 (Fla. Dist. Ct. App. 2003) (explaining that defendant has the burden to prove that a crime was resolved as result of his or her cooperation).

then, the court is not required to grant a downward departure.[148] But, when a defendant turns themselves in, confesses fully, and cooperates, courts have found those criteria to be sufficient to grant a downward departure.[149]

G. Summary of the U.S. Approach

Thus, cooperating with authorities is a well-established mitigating factor. It is also one that is frequently applied—in fact it is invoked in nearly a quarter of sentences at the federal level.[150] However, there is little guidance regarding the extent of the discount and the circumstances in which it is applied. This is because most sentences in the United States are determined pursuant to negotiations between the prosecution and defense, and then implemented by the courts.[151] This undermines transparency and consistency regarding the discount. In particular, plea bargains do not produce written reasons for the deal that has been struck or an exact quantification of the size or nature of the discount that has been accorded.[152] Further, the discount is often accorded for a promise to assist with authorities, and it is not clear to what extent prosecution authorities attempt to rescind the contract when an offender does not fulfil the promise. The exception, however, is in Florida, where a discount is only conferred when the cooperation resolves another offense.[153]

---

148. *See* State v. Subido, 925 So. 2d 1052, 1059 (Fla. Dist. Ct. App. 2006) (citing State v. Munro, 903 So. 2d 381, 382 (Fla. Dist. Ct. App. 2005)) (finding that a downward departure is not justified just because the defendant confessed after being arrested and cooperated thereafter).

149. *See, e.g.*, State v. Bleckinger, 746 So. 2d 553, 557 (Fla. Dist. Ct. App. 1999).

150. *See* OFFICE OF GEN. COUNSEL & OFFICE OF EDUC. AND SENTENCING PRACTICE, U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 19 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf (Two of the common grounds for downward departures are (1) that the defendant provided assistance in investigating or prosecuting another, and (2) the defendant participated in an early deposition or fast track program. One of these two reasons for departure or both have been used in nearly a quarter of sentences at the federal level.).

151. *See* Brook et al., *supra* note 44, at 1176.

152. *See* Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/ (stating that "written records of a deal are almost never required").

153. *See* FLA. STAT. ANN. § 921.0026(2)(i) (West 2020).

A telling aspect about the informer discount is that it is largely unregulated, and hence there is little basis to evaluate the efficacy of the system. Alexandra Natapoff underlies the unregulated and unreviewable nature of deals which reward informants in the following passage:

> The law imposes almost no restraints on police and prosecutorial authority to create and reward informants. As long as police have probable cause to believe a suspect has committed a crime, they have complete discretion to arrest or not to arrest, and the law permits them to use that opportunity to seek information. Prosecutors likewise have nearly unreviewable [sic] discretion to make charging decisions, and can make those decisions based on a defendant's cooperativeness or lack thereof. Police and prosecutorial discretion is the central reason why informant use remains largely unregulated and undocumented; U.S. law simply delegates decisions about who should become an informant and how they should be rewarded to individual law enforcement officials.[154]

Natapoff adds that:

> The heart of snitching is the deal between the government and the criminal suspect, in which the government permits the suspect to avoid potential criminal liability or punishment in exchange for information. . . . This is one of the most important features of informant use: it is not merely an investigative tactic, but a widespread, secretive and almost completely unregulated method of resolving guilt.[155]

Although there is no consistency or transparency regarding the extent of the discount that is granted for assisting authorities, it is clear that a sizeable penalty reduction, or in some cases even total

---

154. *Secret Justice*, *supra* note 4.
155. *Id.*

immunity, is often granted for assisting authorities.[156] This often leads to the systemization of the practice by both criminals and authorities in a manner that undermines the integrity of the criminal justice system.

Leslie Vernon White, for example, is a career criminal who has given informer testimony in over forty cases and repeatedly used snitching as a way to get out of prison: "[E]very time I come in here, I inform and get back out."[157] White would systematically implement a process to make false testimony believable (which normally involved contacting relatives' victims to acquire information about them that he would then use to craft a false confession), and prosecutors continued to rely on his evidence even after he had perjured himself in a murder trial.[158]

Further, police often proactively assist flippers to elicit confessions, as occurred in relation to the wrongful conviction of Bruce Lisker in 1983.[159] Lisker was convicted based on informant testimony for the 1983 murder of his mother in Los Angeles.[160] Before his trial, Lisker was sent to the Los Angeles County Jail; he was named a suspect almost immediately after detectives began their investigation of the murder.[161] Lisker was only seventeen years old when the murder took place and had no prior experience with the criminal justice system.[162] What Lisker did not know was that he was held in what has become infamously known as the "snitch tank."[163] This cell block in the Los Angeles County Jail was purposefully designed in the 1980s to give experienced informants, such as the one who tricked Lisker, easy access to "naive inmates."[164] This made it easy for the informant housed in the adjacent cell to

---

156. *See, e.g.*, THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY 1 (2007), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf; Claire Trageser, *Dr J's Part 5: The Use of Informants in the Shooting at Dr J's Liquor*, KPBS (Feb. 26, 2019), https://www.kpbs.org/news/2019/feb/26/dr-js-part-5-use-informants-shooting-dr-js-liquor/.

157. THE JUSTICE PROJECT, *supra* note 156, at 13.

158. *Id.*

159. Parker Yesko, *$100,000 to Snitch? Perks for Jailhouse Informants Come Under Scrutiny*, NPR (June 10, 2017, 5:00 AM), https://www.npr.org/2017/06/10/531721751/-100-000-to-snitch-perks-for-jailhouse-informants-come-under-scrutiny.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

elicit the information he needed to fabricate an ostensibly credible confession by Lisker in return for a reduction in his sentence.[165]

Thus, we see that flippers are a very common aspect of the U.S. criminal justice system. The manner in which they are used is largely unregulated, but it is clear that the practice is premised on providing substantial concessions to criminals for giving evidence against suspects and other criminals. This often assists in detecting and prosecuting criminals, but it also sometimes has the unintended consequence of producing false evidence, which leads to wrongful convictions.[166]

II. THE EXISTING LAW IN RELATION TO FLIPPERS IN AUSTRALIA

One jurisdiction where considerable attention has been accorded to the doctrinal basis of the informer discount is Australia. Prior to considering the manner in which flipping is dealt with in Australia, we provide a brief overview of the operation of the Australian sentencing system in order to better contextualize the discussion.

Sentencing in each of the nine Australian jurisdictions (the six states, the Northern Territory, the Australian Capital Territory, and the federal jurisdiction) is governed by a combination of legislation and the common law.[167] While there are differences between the sentencing law in each Australian jurisdiction, there are also key areas of considerable convergence. As is the situation in the United States, the main sentencing objectives are: community safety, general deterrence, specific deterrence, rehabilitation, and retribution.[168] For the purposes of this Article, the important point to note regarding sentencing in Australia is that it is largely a discretionary process in which judges can process potentially hundreds of aggravating and mitigating considerations.[169]

In contrast to the United States, fixed penalties for serious offenses in Australia are rare.[170] The overarching methodology and conceptual approach that sentencing judges undertake in making

---

165. *Id*.

166. *See infra* Section IV.A.

167. *See Sentencing Guidelines: Australia*, LIBR. CONGRESS, https://www.loc.gov/law/help/sentencing-guidelines/australia.php (last updated Aug. 24, 2016).

168. *See, e.g.*, *Sentencing*, COUNTY CT. VICTORIA, https://www.countycourt.vic.gov.au/learn-about-court/sentencing (last updated July 8, 2019) (outlining the sentencing objectives).

169. *See, e.g.*, *R v Williscroft* [1975] VR 292, 300 (Austl.).

170. An example is people smuggling offenses. *See, e.g.*, *Migration Act 1958* (Cth), ss 233A–233C (Austl.).

sentencing decisions is the same in each jurisdiction. This approach is known as "instinctive synthesis."[171] The term originates from the forty-year-old Full Court of the Supreme Court of Victoria decision of *R v Williscroft*, where Justices Adam and Crockett stated "[n]ow, ultimately, every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process."[172]

The process of instinctive synthesis is a mechanism whereby sentencing judges make a decision weighing all the considerations relevant to sentencing (and, in the process, incorporate considerations that incline towards a heavier penalty and off-set against the factors that favor a lesser penalty) and then set a precise penalty.[173] The hallmark of this process is that it does not require (nor permit) judges to set out with any particularity the weight (in mathematical terms) accorded to any particular consideration.[174] A global judgment is made without recourse to a stepwise process that demarcates the precise considerations that influence the judgment.[175]

Another important commonality in all Australian jurisdictions is that aggravating and mitigating factors operate relatively uniformly, despite the different ways in which they are dealt with by statute.[176] The considerations derive mainly from the common law and are continually evolving. There are between 200 and 300 such factors.[177] The large number of aggravating and mitigating factors is a key reason why it is not possible to predict with confidence the exact sentence that will be imposed in any one particular case. The unfettered, discretionary nature of the Australian sentencing calculus is similar to the largely uncontrolled sentencing process that prevailed in parts of the United States approximately fifty years

---

171. *Williscroft* [1975] VR at 300.

172. *Id.*

173. *See generally Markarian v. The Queen* (2005) 228 CLR 357 (Austl.).

174. *See Barbaro v The Queen* (2014) 253 CLR 58, ¶ 34 (Austl.). With minor exceptions discussed in Part IV, *infra*.

175. *See Barbaro* (2014) 253 CLR ¶ 7.

176. *See* Mirko Bagaric, *An Argument for Uniform Australian Sentencing Law*, 37 AUSTRALIAN B. REV. 40, 46–74 (2013).

177. ROGER DOUGLAS, GUILTY YOUR WORSHIP: A STUDY OF VICTORIA'S MAGISTRATES' COURTS 62 (1980) (A study of Victorian Magistrates' Courts identified 292 relevant sentencing factors.).

ago and led Justice Marvel Frankel to describe this system as "lawless."[178]

Similar to the situation in the United States, there is no established or accepted theory of what should constitute mitigating and aggravating considerations in Australia.[179] Although most of these factors are defined by the common law, some legislative schemes set out a number of mitigating and aggravating considerations. The most expansive scheme is in New South Wales, pursuant to section 21A of the Crimes (Sentencing Procedure) Act 1999.[180]

Similar to the position in the United States, in Australia, providing assistance to authorities is a sentencing consideration in all jurisdictions. In Australia, cooperating with law enforcement authorities is a well-established mitigating factor at common law,[181] and it also has a statutory foundation in several Australian jurisdictions. For example, section 23(1) of the Crimes (Sentencing Procedure) Act 1999 of New South Wales provides:

> A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.[182]

---

178. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972). For a critique of Frankel's impact, see generally Lynn Adelman & Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239 (2008).

179. *See supra* Part I.

180. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (Austl.).

181. *See Ungureanu v The Queen* (2012) 272 FLR 84, 99–100 (Austl.) (holding that cooperation in this context means voluntary cooperation and does not include information provided in the context of compulsory examination unless the person goes beyond the provision of information which is necessary pursuant to the terms of the forced examination).

182. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(1). Section 23(2) of this Act sets out the considerations relevant to the discount including:

> (b) the significance and usefulness of the offender's assistance to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered or undertaken to be rendered, (c) the truthfulness, completeness and reliability of any information or evidence provided by the offender, (d) the nature and extent of the

Section 36(2) of the Crimes (Sentencing) Act 2005 of the Australian Capital Territory is similarly worded.[183] Section 16A(2)(h) of the Crimes Act 1914 of the Commonwealth and section 37(1) of the Sentencing Act 2017 of South Australia also expressly provide that cooperation with authorities is a relevant sentencing consideration.[184]

A key difference between sentencing practice in the United States and Australia is the manner in which penalties are determined. In Australia, there are several different forms of negotiations that can potentially occur in relation to sentencing. One method regularly used in Australia is charge bargaining, whereby the prosecutor and defendant agree to withdrawing or amending charges in exchange for a guilty plea.[185] However, sentence bargaining, whereby the prosecution and defense agree to a specific sentence, is not permitted in Australia.[186] Thus, Australian courts oversee and determine sentencing decisions. For example, in *Barbaro v The Queen*, the High Court of Australia held that the prosecution was not permitted to submit information regarding the appropriate sentence or range of sentences at the plea-bargaining stage.[187] The Court discussed several rationales for this prohibition.

> offender's assistance or promised assistance, (e) the timeliness of the assistance or undertaking to assist, [and] (f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist.

Id. s 23(2).

183. *Crimes (Sentencing Procedure) Act 2005* (ACT) s 36(2) (Austl.).

184. *Crimes Act 1914* (Cth) s 16A(2)(h) (Austl.) (this section applies for past cooperation while section 16AC (formerly section 21E) applies for past cooperation and requires the court to state the penalty that would have been otherwise imposed); *Sentencing Act 2017* (SA) s 37(1) (Austl.) (Section 37(1) also provides scope for additional mitigation where the disclosure relates to "serious and organised criminal activity."); *see also Penalties and Sentences Act 1992* (Qld) ss 9(2)(i), 13(A) (Austl.) (section 9(2)(i) applies to past cooperation and section 13(A) applies to promised cooperation and mandates that a discount be prescribed); *Sentencing Act 1991* (Vic) ss 5(2AB)–(2AC) (which expressly stipulate that a discount can be given for a promise to assist authorities and that a court can indicate the sentence that would have otherwise been imposed, but that it is *not* necessary to stipulate that sentence); *Sentencing Act 1995* (WA) s 8(5) (Austl.).

185. *See* KENNETH J. ARENSON & MIRKO BAGARIC, CRIMINAL PROCESSES AND INVESTIGATIVE PROCEDURES: VICTORIA AND COMMONWEALTH 312–17 (2d ed. 2012).

186. *See R v Marshall* [1981] VR 725 (Austl.); *see also LJW v Western Australia [No. 2]* [2007] WASCA 275, ¶ 90 (Austl.) (stating that the sentencing was the sole decision of the judge).

187. (2014) 253 CLR 58, ¶ 65 (Austl.).

First, the prosecution's statement regarding the bounds of the appropriate sentence was a "statement of opinion."[188] Second, the Court believed the prosecutor's proposed sentencing range was inappropriate because it could lead to an erroneous view regarding the role of the prosecutor in the sentencing process.[189] Further, the Court noted that the prosecution's view was not "dispassionate" because they are bound to advance their case.[190] Third, the Court stated that "[i]f a judge sentences within the range which has been suggested by the prosecution, the statement of that range may well be seen as suggesting that the sentencing judge has been swayed by the prosecution's view of what punishment should be imposed."[191]

Some have argued that the rationales for not permitting prosecutor's proposed sentencing ranges are flawed.[192] In short, most legal submissions to the court constitute counsel's opinion regarding their view of the law or relevant facts, and the main purpose of any submission is to influence the court.[193] Despite these criticisms regarding the sentencing process, the courts in Australia continue to have significant control over all aspects of the process.[194]

The important point that emerges from the structure of the Australian sentencing process, for the purposes of this Article, is that when a sentence is imposed by a court in Australia, the sentencing court gives reasons for the sentence. In the context of explaining the sentence, jurisprudence has developed, and it involves a relatively detailed analysis of numerous sentencing considerations, including the informer discount. Judicial analysis of the informer discount provides the backdrop against which the desirability of the discount can be evaluated. This is particularly relevant given that, as we have seen, the overarching sentencing objectives in the United States and Australia are indeed similar.

To this end, we see that the Australian courts enthusiastically apply the informer discount—operationalizing it in a wide range of circumstances. Thus, we find that an informer's sentence reduction is not contingent upon the information resulting in either an arrest or successful prosecution. In order to attract the discount, it is

188. *Id.* ¶ 7.
189. *Id.* ¶ 33.
190. *Id.* ¶ 32.
191. *Id.* ¶ 33.
192. *See generally* Mirko Bagaric, *Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain that Is the Instinctive Synthesis*, 38 U.N.S.W. L.J. 76 (2015).
193. *Id.* at 97–98.
194. *Id.* at 112.

sufficient that the information "could" assist authorities.[195] Indeed, "discount[s] for cooperation may be given even if the information and assistance is of limited value and sometimes where it is of no value."[196] The discount is also available even if the information that is provided turns out to be of no practical assistance to the police or prosecutors.[197]

Nevertheless, while the information does not need to be proven to be of tangible use to attract the discount, as a general rule the discount will be more substantial where the information proves to be effective.[198] This approach finds its statutory foundation in some Australian jurisdictions. For example, in New South Wales and the Australian Capital Territory, the relationship between the importance of the information and reductions in sentences are governed by statute.[199] Specifically, section 23(2) of the Crimes (Sentencing Procedure) Act 1999 of New South Wales states that a court is required to have regard to the "significance and usefulness" of the assistance offered or given by the offender.[200] This does not, however, extinguish the discount in relation to non-useful information.[201] Rather, it merely potentially diminishes the extent of the discount.

In order for the discount to apply, the information provided does not need to relate to the offense in which the accused is being implicated.[202] The information can be provided in relation to a completely separate offense and also an offense committed against the offender that provides some insight into the circumstances of the offending.[203] In *RJT v The Queen*, for example, the Court held that the discount for assisting authorities applied even when the victim of the reported offense is the accused who is being sentenced; in this

---

195. *See Ungureanu v The Queen* (2012) 272 FLR 84, 85 ¶ 2.

196. *Id.*

197. *See R v Cartwright* (1989) 17 NSWLR 243, 244 (Austl.).

198. *See R v FAF* (2014) 247 A Crim R 572, ¶¶ 12, 14 (Austl.) (citing *Cartwright* (1989) 17 NSWLR 243).

199. *See Crimes (Sentencing Procedure) Act 2005* (ACT) s 36(3)(b) (Austl.); *Crimes (Sentencing Procedure) Act 1999* (NSW) (Austl.).

200. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(2); *see Zhang v The Queen* [2011] NSWCCA 233, ¶ 33 (Austl.) (26 October 2011); *see also Crimes (Sentencing Procedure) Act 2005* (ACT) s 36(3)(b) (emphasising the "significance and usefulness" of the assistance).

201. *See R v Ngata* [2015] ACTSC 356, ¶¶ 55, 57 (Austl.) (3 November 2015) (citing *Cartwright* (1989) 17 NSWLR at 252–53).

202. *See RJT v The Queen* (2012) 218 A Crim R 490, 491 (Austl.).

203. *See id.* at 491–92.

case, a sex offender informed police that he himself had been sexually abused by his grandfather.[204]

An important limitation to the discount applies in situations where the discount relates to future cooperation as opposed to cooperation that has already been provided. If an accused does not provide the cooperation that was promised, they can be resentenced and the mitigatory effect of the cooperation retracted.[205] However, when this occurs, the increased penalty does not always equate to the initial decrease, particularly in cases where the failure to fulfill the undertaking results from illness or threats to the offender or his or her family.[206]

The importance of the informer discount is further illustrated not only by the scope of situations in which it is accorded but even more so by: (1) the size of the discount, and (2) the distinctive manner in which the size of the reduction is typically quantified. In this Article, we discuss each of these issues more broadly in this order. Generally, courts in Australia stipulate the quantum of the informer discount. This occurs in some jurisdictions as a matter of practice and in others pursuant to legislation.[207] The discount that is accorded for cooperating with authorities is large by any measure. It is normally between 20% and 50%, and in rare instances can be even more.[208] The reasoning informing the calculation of the discount has been described by the Western Australian Court of Appeal, which stated in *R v Baldock*:

> Counsel for the prosecutor made submissions to the sentencing judge about what discount should be allowed for the undertaking pursuant to s 21E of the *Crimes Act*. Reference was made to *R v Sukkar* (2006) 172 A Crim R 151, where the New South Wales Court of Criminal Appeal considered cases in New South Wales where discounts had been granted

---

204. *Id.* at 491–93.

205. *See generally R v YZ* (1999) 162 ALR 265 (Austl.) (discussing the process for the non-cooperation of the accused).

206. *See id.*

207. *See, e.g.*, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(4) (Austl.) (The Act requires the court to specify the discount for both past and future assistance, and where both are applicable, to separate them out. As with the guilty plea discount, the quantification of the informer discount can occur in two ways: either in percentage terms or by stipulating the penalty that would have been imposed without the cooperation.).

208. *See R v Baldock* (2010) 2013 A Crim R 214, 220 ¶ 6 (Austl.).

> for pleas of guilty and assistance. The court there concluded that while there is no fixed tariff, discounts customarily range between 20% and 50% and that, generally speaking, a discount of 50% is regarded as appropriate to assistance of a very high order. In this State, this court has said that there is no tariff for such a discount but that it may be 'as much as 50% or even more.'[209]

In *R v Holland*, a 45% discount for cooperation with authorities and pleading guilty was upheld by the New South Wales Court of Criminal Appeal following a prosecution appeal.[210] Justice Howie, in *SZ v The Queen*, stated that the cooperation discount combined with a guilty plea "should normally not exceed 50 per cent" and emphasized that a relevant consideration in determining the size of the discount is the usefulness of the information provided by the offender.[211] Yet in some rare cases, including *Z v The Queen*, an offender who gave evidence against other offenders and pleaded not guilty to most of the offenses still received a 50% discount for cooperating with authorities.[212]

There are no rigid criteria that the courts are required to observe in order to determine the quantum of a specific sentence reduction. There is, for example, no set "tariff" for the discount.[213] Even the upper end of this range is not fixed, with courts noting that the discount can be as great as 60%.[214]

---

209. *Id.* (citing *Western Australia v Tran* [2008] WASCA 183, ¶¶ 75–77 (2 September 2008) (Austl.); *Western Australia v Wynne* (2009) 188 A Crim R 502 (Austl.)).

210. *R v Holland* (2011) 205 A Crim R 429, ¶ 77 (Austl.).

211. (2007) 168 A Crim R 249, 251 ¶ 3 (Austl.). In *R v Jones*, (2010) 76 ATR 249, 256–57 (Austl.), the court attempted to further demarcate the boundaries of the discount by reaffirming that, normally, 50% sets the upper limit but that this should be reduced to 40% or less where the offender will not serve at least a substantial part of his or her sentence in more onerous prison conditions due to the provision of the information. This approach, however, has not been followed in other cases. In *MSO v Western Australia*, a 50% discount was given on account of past and future cooperation. *MSO v Western Australia* [2015] WASCA 78, ¶ 62 (14 April 2015) (Austl.).

212. *Z v The Queen* [2014] NSWCCA 323, ¶ 43 (18 December 2014) (Austl.).

213. *See, e.g.*, *Hill v Western Australia* [2014] WASCA 150, ¶ 85 (19 August 2014) (Austl.).

214. *See R v AMT* [2005] NSWCCA 151, ¶ 22 (14 April 2005) (Austl.); *see also R v OPA* [2004] NSWCCA 464, ¶¶ 30, 52, 55 (17 December 2004) (Austl.) (discussing the calculation of the percent reduction).

The second indication of the importance of the informer discount is the preparedness of the courts to quantify the exact size of the discount. In relation to promised future undertakings, it is understandable that the courts would indicate the exact discount.[215] This is necessary to ensure that an offender who does not comply with the undertaking can be resentenced on the basis of the reduction being retracted.[216] This is partly why statutes in several Australian jurisdictions require sentencing judges to stipulate the penalty reduction attributable to an undertaking to cooperate with authorities.[217]

However, as noted above, quantitative discounts for cooperation extend beyond promised cooperation to past assistance. This is notable because it is a rare deviation from the instinctive synthesis, which has been so staunchly endorsed by the Australian courts.[218] Despite there being several hundred aggravating and mitigating considerations, the informer discount is one of only two factors that often results in a quantifiable discount.[219] Departure from a supposedly important methodology can presumably only occur for compelling reasons. These reasons are discussed below.

III. RATIONALES IN FAVOR OF A DISCOUNT FOR FLIPPERS

A. Social Imperative to Prosecute Offenders

There are several rationales that have been argued in support of awarding a discount to offenders who cooperate with authorities. One argument is that, from a utilitarian perspective, the provision of

---

215. *See R v Golding* (1980) 24 SASR 161, 176 (Austl.).

216. *See, e.g.*, *R v Ngata* [2015] ACTSC 356, ¶ 59 (Austl.). Although, as we have seen, the additional penalty does not always correlate with the original reduction. *See supra* note 206 and accompanying text.

217. *See Sentences Act 1992* (Qld) s 13A(7) (Austl.) (stating that a reduction for cooperating with authorities is appropriate and adding further that the court must specify the penalty that would have been imposed without the reduction); *see also Crimes Act 1914* (Cth) s 16AC (Austl.) (same); *Sentencing Act 1995* (WA) s 8(5) (Austl.) (same).

218. In *R v Sahari*, it was suggested that a quantified discount is not a departure from instinctive synthesis but is instead an example of sequential reasoning. *R v Sahari* (2007) 17 VR 269, 273–75 (Austl.). However, this distinction is without basis; a quantified discount is clearly a two-step approach. *See, e.g.*, *R v Johnston* (2008) 186 A Crim R 345, 350–51 ¶¶ 18–21 (Austl.).

219. The other mitigating factor that attracts a quantifiable discount is pleading guilty. *See R v Holland* (2011) 205 A Crim R 429, ¶ 35–36 (Austl.) (discussing cooperating with authorities and pleading guilty as the two mitigating factors).

the information will benefit the community by aiding in the prosecution of criminal offenses, which ultimately enhances community safety. In *R v Cartwright*, the New South Wales Court of Criminal Appeal stated that "[i]t is clearly in the public interest that offenders should be encouraged to supply information to the authorities which will assist them to bring other offenders to justice, and to give evidence against those other offenders in relation to whom they have given such information."[220]

A sentencing discount for offenders who cooperate with police gives them a practical motivation to provide cooperation. In *R v Barber*, Chief Justice Bray states, "We have, I think, to accept that the courts have acted on the view that it is not expedient that there should be honour amongst thieves and have therefore sometimes rewarded the informer and encouraged other potential informers by an appropriate mitigation of his sentence."[221]

The criminal law in both the United States and Australia regulates the most destructive and harmful conduct by people towards other individuals and the community at large. By prescribing sanctions for this conduct, the law seeks to discourage criminal behavior and protect the community from further criminal offending. Thus, it is clear that there is a strong social imperative to detect crime and prosecute criminals. It is incontestable that this rationale for providing the informer discount is sound. An implication stemming from this rationale is that providing a sentence reduction or immunity from prosecution does in fact provide an incentive for offenders to inform on other criminals, and in particular that informers would not flip without the discount. This assumption too seems valid. It is demonstrated by the fact that many offenders expressly premise their cooperation on the basis that they will receive a more lenient disposition,[222] and certainly there are no known instances of flippers who reject a sentencing discount or immunity.

---

220. *R v Cartwright* (1989) 17 NSWLR 243, 252 (Austl.); *see R v Ngata* [2015] ACTSC 356, ¶ 55 (3 November 2015) (Austl.).

221. *R v Barber* (1976) 14 SASR 388, 390 (Austl.).

222. *See, e.g.*, Brook et al., *supra* note 44, at 1164–65 ("In some cases, the prosecution may reach out to the person who is a target of its investigation before any charges are filed and offer the target a potential benefit in exchange for the target's cooperation against others. . . . Sometimes it is the defense that initiates negotiations. Highlighting the potential benefit of cooperation, this affirmative attempt to come to an agreement with the government is often called the 'race to the courthouse,' meaning whoever gets there first is likely to benefit the most.").

Another rationale that has been advanced against the flipper discount is that holding offenders accountable for their crimes can provide some satisfaction and comfort to the crime victims in addition to the overall community benefit.[223] This in fact is not a discrete rationale. It is one of the benefits that flows from apprehending and prosecuting criminals and hence is consumed within the first rationale discussed immediately above.

B. Informers Risk Their Safety

A second rationale for conferring the informer discount is that cooperating with authorities will often put the offender at risk of being harmed by other criminals, especially those in relation to whom they are informing. Criminals will obviously not be favorably disposed to people who are partly responsible for their apprehension and prosecution and hence will have a reason to harm informers. And certainly, there are many instances of flippers being killed or harmed by criminals as a result of snitching.

For example, Rachel Hoffman, a twenty-three-year-old graduate of Florida State University, was murdered while working as an informant in 2008 in Florida.[224] Over a year earlier, Hoffman had been caught with marijuana in her car and decided to become an informant out of fear of prosecution.[225] Hoffman had only been working for three weeks when she went on the sting that costed her life.[226] Despite having no experience in narcotics operations or in law enforcement generally, Florida police sent Hoffman to buy a large amount of cocaine and ecstasy, as well as a semi-automatic handgun, in order to catch a drug dealer.[227] Hoffman met with the targets, two convicted felons, alone, and the operation quickly got out of hand.[228] The same gun Hoffman was sent to buy was used to shoot her five times.[229]

This is far from an isolated incident. For example, in 1996, Lebron Gaither, an eighteen-year-old special education student, who

---

223. For a discussion of the importance of satisfying victims from the perspectives of the objectives of the punishment, see TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 42–45 (rev. ed. 2006).

224. Sarah Stillman, *The Throwaways*, NEW YORKER (Aug. 27, 2012), https://www.newyorker.com/magazine/2012/09/03/the-throwaways.

225. *Id*.

226. *Id*.

227. *Id*.

228. *Id*.

229. *Id*.

had already been compromised while testifying as an informant during the trial of Jason Derek Noel, was murdered during a drug buy operation in Kentucky.[230] Like Hoffman, Gaither was facing an assault charge and agreed to be an informant in order to reduce his punishment and earn money.[231] Despite the fact that Gaither had just testified against Noel a day before as an informant, the Kentucky State Police used him to conduct the drug buy with Noel.[232] Noel kidnapped, tortured, and murdered Gaither after police failed to intercede in an effort to salvage the operation.[233]

Compromised informants face severe danger outside of police operations as well. In 2011, Shelley Hilliard, a nineteen-year-old transgender woman from Detroit, was brutally murdered just days after assisting in the arrest of a drug dealer.[234] Hilliard had also been caught with marijuana and quickly agreed to help police in order to avoid a harsher punishment.[235] During the arrest, one of the officers on the scene gave enough information to the companion of the drug dealer to expose Hilliard as the informant.[236] With her identity compromised, the arrested drug dealer's associates intercepted her at her home a few nights later, burning and dismembering her body.[237]

There is a risk that the offender will be targeted by criminal elements in prison, even if the subjects of the information provided by the informant to the authorities have no desire or ability to harm the informer.[238] The danger to informers stems not only from those they have informed against, but also from a strong (seemingly pervasive) prison culture of animosity towards informers, which

---

230. Andrew Wolfson, *Court: Police Liable for Teen's Murder*, COURIER-JOURNAL (Aug. 21, 2014, 5:51 PM), https://www.courier-journal.com/story/news/crime/2014/08/21/court-ky-police-liable-informants-murder/14406973/.

231. *Id.*

232. *Id.*

233. *Id.*

234. Ed White, *Family of Slain Police Informant Gets $1M Settlement*, DETROIT NEWS (Oct. 3, 2017, 5:59 PM), https://www.detroitnews.com/story/news/local/oakland-county/2017/10/03/family-shelley-hilliard-transgender-police-informant-one-million-settlement/106272800/.

235. *Id.*

236. *Id.*

237. *Shelley Hilliard, Missing Transgender Teen, Found Dead, Burned in Detroit*, HUFFPOST (Feb. 2, 2016), https://www.huffpost.com/entry/shelley-or-treasure-hilliard-henry-hilliard-jr-transgender-teen_n_1088373.

238. *See generally Silvano v The Queen* (2008) 184 A Crim R 593 (Austl.); *R v Barci* (1994) 76 A Crim R 103 (Austl.).

often spills over into violence against them.[239] Accordingly, informers are often placed in more secure parts of prisons.[240]

Thus, the rationale that flippers should get a discount because they place themselves in danger of reprisal has some merit. However, it is important to not universalize this consideration to all informers. Informers will not always be sentenced to prison or face any risk of reprisal in the community. For example, providing information against people working in the finance industry for financial crimes in circumstances where the offenders have no links to other criminals is not likely to imperil the safety of informers.[241]

C. Evidence of Rehabilitation

The third basis which has been advanced for the informer discount deals with the informer's motivation for providing the information. The willingness to cooperate with authorities can serve as an expression of the informer's desire to become a law-abiding member of the community, indicating remorse for the crime and a repudiation of a criminal lifestyle. In sentencing terms, this may serve as an indication that the offender has remorse and has sound prospects of rehabilitation.[242]

However, remorse[243] and rehabilitation[244] are both separate sentencing considerations (in Australia and the United States[245]). These are mostly irrelevant to the informer discount because the informant's motivation to provide information can be purely expedient, to receive the discount.[246] In *R v Ngata*, Justice Refshauge noted that "[t]he motive of the offender providing the assistance is irrelevant. . . . [and] [g]reater leniency may be given where the offender shows genuine remorse and contrition, but that

---

239. *See* NATAPOFF, *supra* note 2, at 42–43, 131–35.

240. *See* NATAPOFF, *supra* note 2, at 42.

241. *See Secret Justice*, *supra* note 4.

242. *See A Child v Western Australia* [2007] WASCA 285 (24 December 2012) (Austl.).

243. *See, e.g.*, *Phillips v The Queen* (2012) 37 VR 594, 601 (Austl.) (discussing remorse in terms of sentencing decisions); *R v Whyte* (2004) 7 VR 397 (Austl.) (same).

244. *See, e.g.*, *Elyard v The Queen* [2006] NSWCCA 43, ¶ 18 (3 June 2006) (Austl.) (discussing rehabilitation considerations in terms of sentencing decisions); *R v Skilbeck* [2010] SASCFC 35, ¶ 34 (24 September 2010) (Austl.) (same).

245. *See infra* Part IV.

246. *See, e.g.*, *R v Kohunui* [2009] VSCA 31, ¶ 24 (11 March 2009) (Austl.).

is a function of ordinary sentencing principles and is not required for this discount."[247]

D. Weakens Trust Among Criminals

A fourth rationale that has been argued in support of the informer discount is that the discount will diminish the trust that offenders have in one another.[248] Thus, this distrust could potentially result in a higher number of crimes being prosecuted and solved (which overlaps with the first rationale that there is a social imperative to prosecute offenders) and could potentially lead to a long-term benefit of fewer crimes being committed.

This rationale is not persuasive. There is no evidence to suggest that offenders are less inclined to commit offenses with other people because of the prospect that by including others in their criminal activities this may present informer associated risks to them. In fact, the evidence would suggest the contrary. "Organized crimes" refers to crimes committed in a systematic and planned manner with a financial motive.[249] There is no reason to believe that this type of crime is declining, and in particular that it is being impacted by the prospect of an informer discount.

Thus, it emerges that there are in fact two rationales that underpin the informer discount: the social imperative to detect crime and prosecute criminals and the fact that many informers face the risk of being harmed by criminal elements.

IV. ARGUMENTS AGAINST THE INFORMER DISCOUNT

While there are several reasons in favor of according concessions to flippers, there are also numerous counter-arguments that question the utility of the discount. The first relates to unreliability of evidence that often comes from informers. Secondly, the cost burden stemming from reducing the risk faced by informers militates against the overall benefit derived from the discount. Thirdly, the betrayal and disloyalty that often underpins the informer evidence can result in wider adverse consequences to the

---

247. *R v Ngata* [2015] ACTSC 356, ¶ 57 (3 November 2015) (Austl.) (citing *R v Cartwright* (1989) 17 NSWLR 243, 252–53 (Austl.)).

248. *See Isaac v The Queen* [2012] NSWCCA 195, ¶ 46 (14 September 2012) (Austl.) (internal citations omitted).

249. *See Organized Crime*, BLACK'S LAW DICTIONARY (11th ed. 2019).

community. We now consider these arguments in greater detail, in that order.

A. Informer Discount Contributes to Wrongful Convictions

The benefit stemming from the informer discount is considerably reduced by the reality that it is often the cause of innocent people being convicted. The criminal justice system has a strong aversion to convicting the innocent. This is exemplified by the maxim that it is "better that ten guilty persons escape, than one innocent suffer."[250] However, arguably this principle is given insufficient weight in the context of the informer discount. This is especially so given the extent to which research establishes that informers provide false evidence, often leading to wrongful convictions.

While the benefits of informants are obvious in certain contexts, the tendency of informants to participate in wrongful convictions presents a glaring problem. Wrongful convictions are objectively one of the most harmful outcomes of the criminal justice system, and there is evidence that informants contribute substantially to the issue. According to the Innocence Project data in 2009, "testimony from a jailhouse informant contributed to a wrongful sexual assault conviction in 16% of the 244 post-conviction DNA exonerations in the United States."[251] Of the 367 DNA-based exonerations of innocent individuals nationwide, as of April 2020, informant testimony played a part in 17% of the original convictions.[252]

Other studies note even more wide-ranging instances of false conviction stemming from false testimony by informers, and that in fact, snitching is the main cause of wrongful convictions in capital cases:

> Large-scale studies confirm that wrongful convictions are a common result of informant use. The Center on Wrongful Convictions at Northwestern University Law School issued a report finding that over 45 percent of all wrongful capital convictions are due to lying by criminal informants, making "snitching the

---

250. *See* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) (quoting 4 William Blackstone, Commentaries *352).

251. Neuschatz et al., *supra* note 21, at 215.

252. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/# (last visited Apr. 20, 2020).

> leading cause of wrongful convictions in U.S. capital cases." According to The Innocence Project, 15 percent of DNA-based exonerations alone involve a lying informant. Professor Samuel Gross, founder of the National Registry of Exonerations, has estimated that nearly 50 percent of wrongful murder convictions involved perjury by someone such as a "jailhouse snitch or another witness who stood to gain from the false testimony." These demonstrated risks of wrongful conviction have generated informant reforms in numerous states.[253]

During cases that produce false convictions, "the central convicting evidence is often a statement from an informant who has an incentive to testify."[254] This incentive is often either money, a sentence reduction, or immunity from prosecution—or a combination of these matters.[255] These factors can be incredibly powerful incentives, especially for those who have no other reasonable alternatives to improve their level of flourishing.[256] It has been recognized amongst leading wrongful conviction advocates that these benefits create a strong motivation to fabricate testimony.[257] Of course, any witness has the potential to lie on the stand, but informants are distinguished by their motivations for lying.[258] Other witnesses might lie to protect their privacy, because of the fear of embarrassment, or due to some personal stake in the outcome of the case. But informants arguably have a far stronger reason to lie—to secure their freedom or reduce their time in prison: "[I]t's hard to imagine a greater inducement to fabricate than the promise of one's own liberty."[259] Importantly, these incentives generally remain undisclosed to juries and defense counsel in many cases.[260]

The strength of the inducement to lie is reflected in the alarming rate at which informers provide false testimony throughout the United States. California, the most populous state in the United

---

253. Alexandra Natapoff, *The Shadowy World of Jailhouse Informants: Explained*, APPEAL (July 11, 2018), https://theappeal.org/the-shadowy-world-of-jailhouse-informants-an-explainer/.

254. Neuschatz et al., *supra* note 21, at 215.

255. *See id.*

256. *See id.*

257. *See id.* at 223–24.

258. *See* NATAPOFF, *supra* note 2, at 108.

259. Yesko, *supra* note 159.

260. *See* Neuschatz et al., *supra* note 21, at 215.

States,[261] is infamous for its use of "professional" informants in criminal cases.[262] These informants tend to testify in multiple cases over time and work to elicit confessions from unsuspecting inmates with whom they are in custody.[263] One extreme case of California's use of this practice, the work done by ex-Mexican mafia members Raymond Cuevas and Jose Paredes, was recently reported on Injustice Watch.[264] Cuevas and Paredes were both facing life imprisonment for their crimes but were later freed and paid as much as $339,000 collectively for their work in eliciting confessions from 2010 to 2011.[265] They were paid regardless of whether they actually secured a confession.[266] They reportedly worked on over 300 undercover jailhouse operations, where they sometimes used death threats to acquire confessions from defendants.[267] At the same time, the pair testified that their work actually helped establish the innocence of forty to fifty suspects, but this number is not verified.[268]

The damage caused by false informer evidence has led to calls to considerably reform this area of the law. The American Civil Liberties Union of Northern California lobbied for a bill to limit the payments given to informants, but the bill did not pass.[269] The bill would have limited a payment to an informant to $100 per case, a major decrease from the $3000 given to Cuevas and Paredes in some cases.[270] While the bill originally had some momentum in the legislature, prosecutors' groups in California successfully blocked the bill on the grounds that these types of informants were essential to penetrating intricate criminal networks to obtain convictions.[271] California has not taken up legislative or judicial measures to combat this practice since the defeat of the original bill in 2018.[272]

---

261. *See US States—Ranked by Population 2020*, WORLD POPULATION REV., https://worldpopulationreview.com/states/ (last visited Apr. 20, 2020).

262. *See Injustice Watch Report: California Authorities Use 'Professional Jailhouse Informants' to Entice Confessions*, INNOCENCE PROJECT (June 4, 2018), https://www.innocenceproject.org/california-authorities-use-jailhouse-informants-to-entice-confessions/.

263. *See id.*

264. *Id.*

265. *Id.*

266. *See id.*

267. *Id.*

268. *Id.*

269. *See id.*

270. *Id.*

271. *See id.*

272. *See id.*; *see also* Katie Zavadski & Moiz Syed, *30 Years of Jailhouse Snitch Scandals*, PROPUBLICA (Dec. 4, 2019), https://projects.propublica.org/graphics/

However, as the most populous state in the nation, California is in serious need of meaningful reform on this issue, as a 2004 report demonstrated that nearly twenty percent of all of California's wrongful convictions were caused by false informant testimony.[273]

Some U.S. states have taken meaningful steps to address this issue. Illinois is a recent state to pass legislation dealing with informant testimony in criminal trials.[274] The pervasiveness of wrongful convictions caused by informants has had a significant financial and human impact on Illinois.[275] Seventeen wrongful convictions involved informants in the state, totaling a whopping $88.4 million in civil lawsuits and compensation payments from Illinois taxpayers.[276] Senate Bill 1830, while originally vetoed by former Governor Bruce Rauner (a Republican), was eventually enacted into law in November 2018.[277] The legislation requires that certain impeaching evidence, such as criminal history of the informant, be disclosed before the testimony can be admitted in homicide, sexual assault, and arson cases.[278]

This is common among other states in the United States (see below); however, Illinois has distinguished itself by also requiring pre-trial reliability hearings on the informant.[279] This critical component will enable defense counsel to challenge informant testimony before it ever reaches the jury. While many U.S. states have required that juries be instructed on the potential unreliability of informants,[280] that alone is not enough to ensure that the jury will weigh the evidence fairly. The secrecy surrounding informants

---

jailhouse-informants-timeline (discussing the timeline of scandals and reforms related to informants).

273. *See* NATAPOFF, *supra* note 2, at 70 (citing Nina Martin, *Innocence Lost*, S.F. MAG., Nov. 2004, at 87–88).

274. *See Five Facts You Need to Know About Groundbreaking Jailhouse Informant Law in Illinois*, INNOCENCE PROJECT (Nov. 28, 2018) [hereinafter *Five Facts*], https://www.innocenceproject.org/five-facts-about-illinois-new-law/; *see also* Zavadski & Syed, *supra* note 272 (discussing the timeline of scandals and reforms related to informants).

275. *See Five Facts*, *supra* note 274.

276. *Id.*

277. *See Illinois Enacts the Nation's Strongest Jailhouse Informant Bill into Law*, INNOCENCE PROJECT, https://www.innocenceproject.org/il-informant/ (last visited Apr. 20, 2020).

278. *Five Facts*, *supra* note 274.

279. *Id.*

280. *See, e.g.*, Robert J. Norris et al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against*, 74 ALB. L. REV. 1301, 1346 tbl. 4 (2011) (highlighting various states practices).

means that juries may not understand how much a benefit has affected the informant and their testimony.[281] Therefore, they might not appreciate the risk that the informant will lie on the stand to get the promised benefits.[282]

Pre-trial reliability hearings ensure that the court can weigh the credibility of the informant in a way that will not prejudice the defendant or slow down the trial proceedings with a voir dire examination. According to the Innocence Project, pre-trial reliability hearings should require a court to rule on several important factors before admitting an informant's testimony at trial.[283] In addition to benefits conferred, criminal history, and previous cooperation, the court should also rule on the setting in which the accused made the alleged statement to the informant and any recantations made by the informant.[284] This would enable the court to make a more informed decision about the informant's credibility. Notably, all of the requirements in Illinois' new law only apply to jailhouse informants (those who are already in custody), so "street" informants are still unregulated.[285]

Texas is another major state in the United States that has taken action to address wrongful convictions based on informant testimony.[286] In 2017, House Bill 34 was signed into law by Governor Greg Abbot, also a Republican.[287] Before this bill was enacted, the Timothy Cole Exoneration Review Commission was formed by the state legislature in 2015 to investigate informant testimony in wrongful convictions and recommend changes in the law.[288] Two Republican lawmakers, Representative John Smithee and Senator Charles Perry, chaired the commission and subsequently advocated for the 2017 legislation.[289] Broadly speaking, the commission found that nine exonerations came in cases that originally involved

---

281. *See* State v. Leniart, 140 A.3d 1026, 1074, 1079–80 (Conn. App. Ct. 2016).

282. *See id.* at 1074.

283. *Informing Injustice: The Disturbing Use of Jailhouse Informants*, INNOCENCE PROJECT, https://www.innocenceproject.org/causes/incentivized-informants/ (last visited Apr. 20, 2020).

284. *See id.*

285. 725 ILL. COMP. STAT. ANN. 5/115-21(a) (West, Westlaw through Pub. L. No. 101-629).

286. *Texas Governor Signs Landmark Comprehensive Legislation to Prevent Wrongful Convictions*, INNOCENCE PROJECT (June 15, 2017) [hereinafter *Texas Governor*], https://www.innocenceproject.org/texasgovernorsignslandmarkbill/.

287. *Id.*

288. *Id.*

289. *Id.*

informant testimony.[290]

Unlike Illinois, the new Texas law does not require pre-trial admissibility hearings, but it does force the disclosure of impeaching evidence to defense counsel.[291] Prosecutors are now required to reveal any benefits, such as compensation, leniency, or special treatment while incarcerated, that they have conferred to the informant in exchange for their testimony.[292] By disclosing information of informant benefits, their previous testimonies, and their complete criminal history, the bill ensures that defense counsel will have the information it needs to raise issues of credibility at trial.[293] Prior convictions of witnesses, no matter who the witness is, are usually admissible for purposes of impeachment at trial.[294] However, the law in Texas now also enables the admission of charges against the witness that did not result in a conviction, a seismic shift towards favoring the defense.[295]

On the flip side, the bill provides access to vital information for prosecutors to determine if the informant is reliable enough to utilize in their case.[296] This enables both sides of the justice system to deter false testimony from informants. The bill makes other important changes beyond regulating the use of informant testimony at trial. It requires prosecutors to track any use of the testimony of informants who are in custody, regardless of whether they ultimately use the testimony at trial.[297] Because some informants testify in numerous cases while they are in custody, this rule will provide important information to prosecutors in future cases as they determine whether to use a particular informant.

The disclosure of information, as well as the requirement for prosecutors to record their interrogations, has an intrinsic benefit to it that goes beyond the fairness of a trial. One of the major systemic issues with informant testimony is the secrecy of the setting in which it is acquired. Prosecutors might, understandably, be tempted to bend rules or cut corners in order to convict somebody they believe to be guilty.[298] The new rule in Texas helps mitigate this risk, which helps both sides in a criminal proceeding. Wrongful convictions

---

290. *Id.*
291. *Id.*
292. *Id.*
293. *See id.*
294. *See* FED. R. EVID. 609.
295. *Texas Governor*, *supra* note 286.
296. *See id.*
297. *Id.*
298. *See id.*

typically involve evidence of secret wrongdoing, so removing the temptation to cut corners behind closed doors can reduce the types of actions that give rise to a wrongful conviction in the first place.[299]

Other major jurisdictions have created rules to govern informant testimony through other methods. In Florida, the state's supreme court enacted its own rules for informants.[300] Similar to Texas, these rules require prosecutors to disclose the benefits conferred on informants, as well as their criminal history and prior history of cooperation.[301] Disclosure is a common trend in the legislation that has come up in major states in the United States.[302] This is likely due to the fact that in an adversarial criminal justice system, asymmetry of information will typically cause an unfair proceeding for the party that is left in the dark.

Disclosure of information to both parties is a necessary component in reducing the number of wrongful convictions based on false testimony, but it is not a sufficient one. Juries also must be equipped with the knowledge to make an informed decision on the reliability of an informant's testimony at trial. In *State v. Leniart*, the Connecticut Appellate Court recognized that expert testimony was an important element in determining the credibility of an informant witness at trial.[303]

In addition to noting the recognition among the legal community of the general unreliability of informants, the court in *Leniart* cited the fact that the public is generally unaware of prosecutorial practices surrounding informant testimony.[304] While cautionary jury instructions can alert a lay person to the potential risk of a lying informant, it does not necessarily inform them of the extent of that risk.[305] Expert testimony, on the other hand, can educate juries on the scope of the problem nationwide, as well as how certain incentives may produce unreliable testimony.[306] The court noted this, determining that the expert witness in that case could have

---

299. *See id.*

300. *Florida Supreme Court Regulates Criminal Informant Testimony*, SNITCHING.ORG (July 24, 2014), http://www.snitching.org/2014/07/florida-supreme-court-regulates.html.

301. *Id.*

302. *See, e.g.*, *Five Facts*, *supra* note 274; *Florida Supreme Court Regulates Criminal Informant Testimony*, *supra* note 300; *Texas Governor*, *supra* note 286.

303. *See* State v. Leniart, 140 A.3d 1026, 1077 (Conn. App. Ct. 2016).

304. *Id.* at 1073–74, 1078.

305. *See id.* at 1073.

306. *See id.*

aided the jury in making an independent and informed choice and, therefore, it was improperly excluded by the trial court.[307]

The inclusion of expert testimony in a case involving informants provides an additional and vital protection against wrongful convictions, as disclosure requirements have not always been followed. For example, prosecutorial misconduct resulted in knowledge of benefits conferred to informants going undisclosed during the 1983 murder trial of Ellen Reasonover in Missouri.[308] In that case, prosecutors were obligated to disclose the informant benefits when they used informant testimony to prove that Reasonover had confessed to the murder while in jail.[309] However, they did not disclose this information, resulting in Reasonover not being able to effectively cross-examine the informants.[310] The informant testimony was a cornerstone of the prosecution's case.[311] Reasonover was convicted, spending sixteen years in jail before being exonerated in 1999.[312] Even though legislation cannot guarantee prosecutors will not violate the law, it does provide a stronger deterrent and helps prevent cases like *Reasonover*.

The reliability of an informant also depends on the characteristics of the individual. In North Dakota, a new law took effect in 2017 that restricts the use of informants by age.[313] No person under the age of fifteen can now be used as an informant by prosecutors in the state.[314] For those informants between fifteen and eighteen, there are also specific regulations.[315] Additionally, police forces on university campuses in the state are now prohibited from recruiting confidential informants.[316]

The new legislation also recognizes that informants face danger by agreeing to cooperate. The law itself is named after Andrew Sadek, a twenty-year-old college student who was murdered while

---

307. *Id.* at 1077.

308. Reasonover v. Washington, 60 F. Supp. 2d 937, 941, 980 (E.D. Mo. 1999).

309. *Id.* at 964, 974.

310. *Id.* at 945.

311. *Id.* at 963.

312. *Id.* at 941, 981.

313. *North Dakota Passes Cutting Edge Legislation*, SNITCHING.ORG (Apr. 26, 2017) [hereinafter *North Dakota Legislation*], http://www.snitching.org/2017/04/north-dakota-passes-cutting-edge.html.

314. *Id.*

315. *Id.*

316. *Id.*; *see* Amy Dalrymple, *'Andrew's Law' Receives Final OK from ND Legislature*, GRAND FORKS HERALD (Apr. 18, 2017), https://www.grandforksherald.com/news/4252783-andrews-law-receives-final-ok-nd-legislature.

acting as an undercover informant.[317] Sadek had previously been caught with a small amount of marijuana, and police coerced him into acting as an informant in order to receive leniency.[318] The legislation seeks to avoid this type of recruiting by prohibiting campus police from using informants as well as regulating the use of minor informants generally.[319] Minors and young adults who have not had previous run-ins with the law could be more susceptible to becoming a police informant against their will, so this law provides an important restriction on law enforcement.[320] Not only does this protect vulnerable individuals from becoming unwilling informants, it also ensures that law enforcement cannot rely on informants who feel obligated to provide information based on fear for their own well-being. Further, the North Dakota legislation provides additional protection for informants by requiring investigations by an independent agency into any deaths of informants.[321]

U.S. states that have not followed the lead of states like Illinois and Texas will likely face more costly litigation that comes in the aftermath of most exonerations. The financial toll is indisputable, where even without litigation, states are spending large sums of money incarcerating innocent individuals.[322]

Moreover, the human toll is unconscionable. If the criminal justice system seriously believes that it is more deplorable to convict an innocent person than to let a guilty one go free, states cannot ignore the fact that unregulated informant testimony causes considerable unjustifiable human suffering. In Illinois alone, the seventeen exonerees who were convicted through informant testimony had collectively served 227 years in prison for crimes they did not commit.[323] The death penalty, which has been effectively stopped in some states in the United States,[324] would also be

---

317. *See* Jacob Sullum, *Busted over $80 Worth of Pot, College Student Turns Informant, Then Turns Up Dead*, REASON (Feb. 2, 2015, 12:08 PM), https://reason.com/2015/02/02/busted-over-60-worth-of-pot-college-stud#.xo1qjum:vNg5.

318. *Id*.

319. *See North Dakota Legislation*, *supra* note 313.

320. For example, Rachel Hoffman, a twenty-three-year-old police informant in Florida, was murdered while working undercover for police. *See* Stillman, *supra* note 224. According to a segment on police informants, the recruiting officer gave Hoffman a choice between working for them or facing harsher punishment. *Id.*

321. *North Dakota Legislation*, *supra* note 313.

322. *See, e.g.*, *Five Facts*, *supra* note 274.

323. *Id*.

324. *See State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Apr. 20, 2020).

significantly reduced if informant testimony was utilized more responsibly. Informant testimony was found to be the leading cause of wrongful convictions in death penalty cases by the Center on Wrongful Convictions at Northwestern.[325] As of 2004, nearly half of all of the 111 exonerees on death row were convicted due in large part to false informant testimony.[326] This statistic exposes the immediate risk that informant testimony poses to human life.

While the aforementioned reforms to informant use are desirable, none of them address the manner in which the sentencing system approaches flipping. This is important because this is at the heart of why flippers lie. The key reason that informers lie is simple—to receive a penalty discount or immunity from prosecution. The existence of the discount provides criminals with a strong incentive to fabricate information. This is especially important given that criminals may be prone to breaking rules and acting in an expedient manner. Prior to examining this more closely, we look at two more problems associated with the informer discount.

B. The High Cost of Protecting Informers

As noted above, the second rationale favoring a flipper discount is that cooperation by informers places them at risk of being harmed by other criminals. In order to mitigate this risk, the criminal justice system mobilizes considerable resources to protect informers. When informers are in prison, this often means they are placed in protective custody, which is a far more expensive unit to manage than mainstream prison.[327] In circumstances when the informer is in the community, sometimes they are accorded significant around the clock police protection, placed in witness protection, or even provided with a new identity.[328]

By way of example, at the federal level, the cost of protecting informants is substantial. For fiscal year 2019, the Department of Justice requested an appropriation of $45 million for its annual expenses incurred while protecting endangered witnesses.[329] The

---

325. *Texas Governor*, *supra* note 286.

326. NORTHWESTERN UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM 3 (2004).

327. *See infra* notes 329, 330 and accompanying text.

328. *See, e.g.*, Gabriel Falcon, *Inside the Witness Protection Program*, CNN (Feb. 16, 2013, 8:40 AM), https://www.cnn.com/2013/02/16/justice/witness-protection-program/index.html.

329. DEP'T OF JUSTICE, FEES AND EXPENSES OF WITNESSES: FY 2019 CONGRESSIONAL SUBMISSION 6 (2019).

overall budget request for expenses concerning witnesses generally was $210 million.[330] The smaller figure exclusively covers those witnesses whose testimony, typically against organized crime, would endanger either themselves or their family.[331] This fund covers a broad set of expenses, including medical and dental care, housing, travel, documentation in order to change identities, and even assistance finding new employment.[332] This budget includes the Department of Justice's Witness Security Program, which does include non-criminal informants.[333] However, according to Gerald Shur, the founder of the program, 95% of people who participate are involved in some type of criminal activity.[334] Considering that, as of 2013, only approximately 8500 witnesses have been protected by this program since its inception in 1971, a budget request of nearly $45 million for just one year protection of witnesses indicates that the costs of protecting an informer can be very costly.[335]

Each state also has its own separate informant expenditure. Just like the federal government, states provide relocation expenses, as well as rent coverage, meals, and other incidental costs.[336] For fiscal year 2017–2018, the Office of the Governor of California requested just under $3.3 million for its witness protection program.[337] Despite having a much lower budget than the overall budget request, the costs were still likely substantial per inmate. In 2015–2016, for example, California's program handled 314 witnesses with a budget allocation of just under $5 million.[338] California spends a substantial portion of the allocated budget, as it spent just over $3 million the year before with the same budget allocation.[339]

---

330. *Id.* at 5.

331. *Id.* at 3, 6–7.

332. *Id.* at 3.

333. *Id.* at 7.

334. Falcon, *supra* note 328.

335. *See id.* (Approximately 8500 witnesses and 9900 family members of those witnesses have participated in the program since its beginning.); *see also* DEP'T OF JUSTICE, *supra* note 329 (discussing the budget requests for the program).

336. *See, e.g.*, CAL. OFFICE OF THE ATTORNEY GEN., CALIFORNIA WITNESS RELOCATION AND ASSISTANCE PROGRAM 7 (2016), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/fy-15-16-calwrap-ar.pdf.

337. *California Spending Plan: Judiciary and Criminal Justice*, LEGISLATIVE ANALYST'S OFF. (Oct. 18, 2017), https://lao.ca.gov/Publications/Report/3694/11.

338. CAL. OFFICE OF THE ATTORNEY GEN., *supra* note 336, at 1 (noting that services were provided to 314 witnesses and their 459 family members).

339. *Id.* at 6.

Further, informers are sometimes paid large amounts of money for snitching on other people. For example, as noted above, two informers in southern California were paid more than $300,000 for informing on inmates between 2011 and 2015.[340] Even more sizeable is the tens of millions of dollars that are sometimes paid by taxpayers, as occurred in Illinois, as compensation for wrongful convictions caused by informer testimony.[341]

Cumulatively, these costs are considerable. They do not provide a knockdown argument against the informer discount, however. Rather, they need to be made clearer so that a proper cost and benefit analysis of the practice of informer discounting can be made. It may be that these costs might be more productively applied by hiring more police or investing in technologies that detect and assist in apprehending criminals.

For example, Artificial Intelligence (AI) has the capacity to greatly increase the effectiveness of proactive policing. Algorithms can be designed to predict the likelihood of crime in a certain geographical location and time with a high degree of accuracy.[342] Predictive policing algorithms are now used in a number of jurisdictions, including Los Angeles.[343] The system utilized in Los Angeles is called PredPol.[344] The algorithm used to predict crime incorporates aspects which have been developed to describe seismic activity. Professor Jeff Brantingham has noted that:

> Just as earthquakes happen along fault lines, Brantingham explained research has shown crime is often generated by structures in the environment, like a high school, mall parking lot or bar. Additional crimes tend to follow the initial event near in time and space, like an aftershock. PredPol uses years of crime data to establish these patterns and then the algorithm uses near real-time crime data to predict the next property crime. Other systems use even

340. Yesko, *supra* note 159.

341. *Five Facts*, *supra* note 274.

342. *See, e.g.*, Ind. Univ., *Field-Data Study Finds No Evidence of Racial Bias in Predictive Policing*, PHYS.ORG (Mar. 13, 2018), https://phys.org/news/2018-03-field-data-evidence-racial-bias-policing.html#nRlv.

343. *See, e.g.*, *id.*

344. *See* Emmy Rey, *Stats LA*, PREDPOL (Nov. 11, 2019), https://www.predpol.com/ucla-predictive-policing-study/stats-la/.

> more esoteric data—from the weather to phases of the moon—to arrive at their crime forecasts.[345]

Some available data suggests that systems like PredPol are statistically more likely to predict when and where crime will occur than human crime analysts.[346] Further, while some studies have shown that such systems can target minority groups when applied in certain contexts,[347] a recent study of PredPol has shown "no statistically significant difference between arrest rates by ethnic group."[348]

In addition to using AI to determine where crime is likely to occur, more nuanced algorithms are used by some police departments to assist police in determining whether particular individuals are likely to commit a crime or have a crime committed against them. For example, in Chicago, people who are arrested or observed by police receive a threat score between 1 and over 500, calculated by an algorithm, which is designed to measure the risk that the individual will get shot or shoot another person.[349] The score influences who police target for proactive intervention and the manner in which they deal with suspects and people who are arrested.[350] The code utilized by the algorithm is confidential, but some of the integers that are used include individualized factors, such as the individual's past history of offending and their age.[351] More generic factors are also utilized, such as whether criminal activity is generally increasing or decreasing.[352] A number of police departments in other cities in the United States are also using similar algorithms.[353] The algorithms have been supported on the

---

345. Justin Jouvenal, *Police Are Using Software to Predict Crime. Is It a "Holy Grail" or Biased Against Minorities?*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/local/public-safety/police-are-using-software-to-predict-crime-is-it-a-holy-grail-or-biased-against-minorities/2016/11/17/525a6649-0472-440a-aae1-b283aa8e5de8_story.html?utm_term=.e0875d4113f8.

346. *Id.*; *see* G.O. Mohler et al., *Randomized Controlled Field Trials of Predictive Policing*, 110 J. AM. STAT. ASS'N 1399, 1408 (2015); Ind. Univ., *supra* note 342.

347. Ind. Univ., *supra* note 342.

348. *Id.*

349. Andrew Guthrie Ferguson, *The Police Are Using Computer Algorithms to Tell If You're a Threat*, TIME (Oct. 3, 2017), http://time.com/4966125/police-departments-algorithms-chicago/.

350. *Id.*

351. *Id.*

352. *Id.*

353. *See* ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT 62 (2017).

basis that they have accurately predicted a high rate of shooting victims.[354]

Of course, incorporating AI into policing does not exhaust the range of options for enhancing crime detection. However, the success of this approach does show that there are other ways to enhance crime detection and prosecution and that the benefit to be derived from this could outweigh any reduction in criminal prosecutions stemming from curtailing the use of informers. Importantly, a calculus of this nature is feasible to embark upon given the profound financial cost associated with continuing with the current approach of using flippers. The reality is that using flippers less is likely to result in less crime detection and prosecution, but this will also save hundreds of millions of dollars, and from a crime prevention and detection perspective, these funds could be more efficiently spent on other crime solving approaches and practices.

C. Normative Objections to Informer Discount: Benefiting from Expedience and Advantage over Offenders Committing Crime Solo

A further problem with the flipper discount is that it is a concession to unsavory parts of human nature. It rewards disloyalty and expedience. Loyalty is generally a desirable virtue. It is the expression of a commitment to a person or object even when it is not in the self-interest of a person.[355] Loyalty is important for several reasons. At the pragmatic level, it is a catalyst for an enormous amount of desirable human conduct. It has been proclaimed that loyalties ground more of the principled, honorable, and other kinds of non-selfish behavior in which people engage than do any other moral principles.[356] Loyalty can be such a powerful force that it moves some people to willingly lose their life for their country or other causes.[357] It is the force that sees many make great personal sacrifices, by caring for sick or infirm relatives, friends, or even pets.[358]

Loyalty is also one of the foundations of trust that enables society to engage in cooperative action by allowing us to make

---

354. Ferguson, *supra* note 349.

355. Mirko Bagaric & Eithne Mills, *Disloyalty and Divorce: Why (and When) the Traitor Should Pay*, 18 AUSTL. J. FAM. L. 69, 79 (2004).

356. *Id*. at 71, 75.

357. *Id*. at 75.

358. *Id*.

confident predictions regarding the way in which others will behave and respond to our requests and actions.[359]

Loyalty can of course be misguided and lead to damaging behavior, as is the case with criminal gangs and commitment to other harmful projects. Thus, offenders who rescind their loyalty to other criminals should ostensibly be commended. However, where the motivation for this is utter self-interest, as opposed to an acceptance that the objects of their loyalty were misguided, this is a signal of their ongoing immoral behavior. It is not surprising then that snitching has wider adverse consequences.

Snitches are even prepared to turn on police and prosecutors when they believe they can elicit more money from them by revealing their role as informants in incidents that have not yet resulted in an arrest.[360] The disloyalty involved with snitching also has the unintended consequences of causing more crime and community fragmentation.[361] While it can be argued that criminals should be urged to inform on other criminals, it seems that it is difficult for the wider community to compartmentalize betrayals of this nature to the narrow confines of snitching against other criminals. If snitching becomes commonplace and widespread it can undermine the level of trust and cooperation that exists within a general community and thereby act as a catalyst for criminality and violence within the broader community.[362] Thus, it has been noted that:

> No single tactic of law enforcement has contributed more to violence in the inner city than the practice of seeding the streets with informers and offering deals to "snitches." . . . [R]elying on informers threatens and eventually cripples much more than criminal enterprise. It erodes whatever social bonds exist in families, in the community, or on the streets—loyalties which, in past years, kept violence within bounds.[363]

---

359. *Id*. at 76.

360. *See, e.g.*, Gus Garcia-Roberts, *Confidential Informants Are Supposed to Keep Their Work Confidential. These Two Didn't*, USA TODAY (Dec. 4, 2018, 5:05 PM), https://www.usatoday.com/story/news/2018/12/04/fbi-informant-dishes-back story-case-against-ahmad-suhad-ahmad/2161931002/ (discussing the case of Ahmad Suhad Ahmad).

361. *See* NATAPOFF, *supra* note 2, at 101.

362. *See generally id.* (discussing the impact that snitching can have).

363. *Id.* at 101 (quoting Dr. Jerome Miller).

This community deterioration especially impacts African Americans who suffer from higher rates of victimization and incarceration than the wider community.[364] As noted by Natapoff:

> Inner-city America has been living with drug informants for . . . over twenty years. . . . It represents two decades of criminals remaining on the street, or receiving reduced sentences in exchange for turning in others, and two decades of the kinds of unreliability and violence that we know to be associated with informant use. For residents of those communities, it has also been two decades of watching addicts, girlfriends and boyfriends, family members, and other vulnerable acquaintances succumb to police pressure and provide information under threat of increasingly severe mandatory drug sentences.[365]

The use of informants can destabilize communities and undermine compliance with the law. People obey the law not only because of potential adverse consequences for breaching legal rules, but also because they believe the content of the law and the manner in which it is implemented complies with ethical and procedural norms. The use of snitches to achieve supposedly desirably legal outcomes undermines this objective:

> The use of criminal informants is a powerful example of procedural justice failure. By its very nature, informant use is based on shaky facts and involves the inconsistent and nonneutral application of rules. . . . [I]nformant practices can undermine public perception of police legitimacy, thereby discouraging trust and cooperation.[366]

It is thus perhaps not surprising that a "stop snitching phenomenon" arose.[367] This was promoted most heavily by aspects of the music industry (especially rappers) and even featured on *60*

---

364. *Id.* at 130.
365. *Id.* at 128.
366. *Id.* at 129.
367. *See id.* at 121–24 (discussing the "'stop snitching' phenomenon").

Minutes.[368] "While the phenomenon was born in the penal system, it has spread beyond its criminal roots, a product of the multifaceted challenges of urban crime, gang violence, race, drugs and policing through criminal informants."[369]

Flipping by its very nature involves immoral conduct because the offenders betray other criminals. This infringement of the virtue of loyalty is potentially defensible because it seeks to attain the greater good of convicting more serious offenders. But it is questionable whether the benefits outweigh the disadvantages when the consequences of violating fundamental moral and legal norms are examined more broadly. Snitching violates trust not only between the offender and the other defendant but also amongst the wider community. More importantly, it violates fundamental procedural norms, namely that criminals should be prosecuted commensurate with their level of wrongdoing and that the law should be applied consistently and transparently. It is fundamentally foreign to this maxim that the charging and arrest of a suspect should mark the time at which he or she can commence negotiating away criminal guilt for the objective of punishing others more heavily.

Further, the existence of the informer discount means that offenders who commit crimes with others are potentially treated more favorably than offenders who commit crimes by themselves. These offenders can often avail themselves of the opportunity to reduce their penalty by turning on co-offenders. This is a somewhat paradoxical aspect of the informer discount given crime committed in gangs or with other people is generally regarded as crime performed by the one person. This provides another basis for abolishing or reducing the extent of the informer discount.

V. REFORM RECOMMENDATIONS: COLLAPSE THE INFORMER DISCOUNT INTO THE EXISTING MITIGATING GROUND OF REHABILITATION

The arguments in favor of conferring an informer discount are not as compelling as ostensibly might seem to be the case. Consideration should be given to revisiting the manner in which the informer discount applies. There are four broad positions that can be suggested. The first is to adopt the existing approach, on the basis that while it has its flaws it is the best manner in which to deal with criminal informers. The next position is to acknowledge that a key shortcoming of the current system is that informer evidence is often

368. *Id*. at 123.
369. *Id*. at 124.

compromised, largely because it is not credible, and hence only apply the discount once the information leads to a productive outcome, typically a conviction. Third, the informer discount could be abolished as a stand-alone sentencing consideration and instead be merged into the general mitigatory ground of rehabilitation. Finally, it could be suggested that cooperation with authorities should be abolished as a mitigating factor altogether.

Which of these broad alternatives is the most desirable largely follows from the above analysis of the current operation of the discount. The last alternative is not seriously viable, given the strong community imperative to convict criminals and the reality that informer testimony can be used to facilitate this aim.

However, it also seems clear that the rationales in favor of the discount have been overstated—certainly the problems associated with the discount have not been fully articulated and appreciated. Flipper evidence does not always result in a conviction. Even far more problematic is the fact that evidence by flippers is often false, leading to wrongful convictions.[370] Furthermore, there are also normative problems associated with conferring the flipper discount.[371] People should not be rewarded for behaving in an expedient and opportunistic fashion, and it is far from ideal that charging an accused should signify the start of a negotiation between the accused and the prosecution regarding how much culpability is to go unpunished in return for higher levels of punishment for others. Thus, there are compelling reasons to depart from the existing status quo; therefore, the first option is unsatisfactory.

The second option, only applying the discount when information leads to a productive outcome, is undesirable because there can be many reasons for a not guilty verdict, many of which are beyond the control of a witness, even when the witness is an informer. For example, other witnesses may be unpersuasive, the prosecution's overall case might be weak, or the defense's case might be unexpectedly strong. Thus, it is not tenable to suggest that the informer discount should be conferred only if a conviction is secured. More sound is the suggestion that the discount should be accorded only once the accused makes good on his or her commitment to give the evidence promised. This too, however, involves a degree of speculation. The accused might give evidence against a co-offender but be utterly unpersuasive. This could be deliberate or because the

370. *See supra* Section IV.A.

371. *See supra* Section IV.C.

witness is nervous or simply a poor communicator. Despite these vagaries, this is effectively the position adopted in Australia.[372] Thus, if witnesses do not come through with their promise, the discount can be rescinded.

The experience in Australia shows that this approach can be implemented. This approach ensures a degree of utility being secured as a result of the informer discount. However, it still does not deal with the problems associated with false convictions, including the cost of protecting informers and the normative objections associated with allowing offenders to benefit from their wrongdoing.[373] The appropriate response given these considerations is to merge the informer concession into a broader sentencing objective that serves to mitigate penalties, however, not so powerfully as is often currently the situation with the informer discount.

To this end, there is one obvious ground with which cooperation with authorities aligns or overlaps—rehabilitation. Therefore, the third recommendation, that the informer discount could be abolished as a stand-alone sentencing consideration and instead be merged into the general mitigatory ground of rehabilitation, holds the most promise. Rehabilitation is positive attitudinal reform that makes it less likely that an offender will commit other offenses.[374] It can be demonstrated in a number of ways, including cessation from offending for a period of time, undertaking counselling, and completing drug or alcohol rehabilitation. It has also been expressly acknowledged that another manner in which rehabilitation can be demonstrated is by cooperating with authorities, including providing evidence against other offenders.[375] Thus, there is already a well-established overlap between informing on other offenders and the goal of rehabilitation. As we have seen, current orthodoxy maintains that when informers provide information against other offenders not because of a changed criminal disposition but for purely expedient sentence-reduction reasons, they are still entitled to a separate and distinct discount.[376] It is this aspect of the informer discount that requires revision and, more precisely, abolition. This entails that

---

372. *See supra* Part II.

373. *See supra* Part II.

374. Mirko Bagaric, Gabrielle Wolf & William Rininger, *Mitigating America's Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 LEWIS & CLARK L. REV. 1, 5–6 (2018).

375. *See supra* Section III.C.

376. *See supra* Section III.C.

offenders who turn on other offenders still receive a discount penalty but only when this is indicative of rehabilitation. Furthermore, the reduction would not be as significant, thereby reducing the inducement to give false evidence.

This option is made more tenable by the fact that rehabilitation is an established sentencing objective in all U.S. jurisdictions. Thus, we see that rehabilitation is one of the central stated objectives of the U.S. Sentencing Commission Guidelines Manual (the Federal Sentencing Guidelines).[377] While rehabilitation does not feature prominently in the setting of penalties, there is latitude for a court to import rehabilitation into the sentencing calculus under the Guidelines.[378] Pursuant to 18 U.S.C. § 3553, considerations that are not set out in the Guidelines can be invoked to justify departing from the range, provided that a court states its reason for doing so.[379] In *Pepper v. United States*, the U.S. Supreme Court held that post-sentence rehabilitation may be relevant to a number of § 3553(a) factors including, "the history and characteristics of the defendant," the need for deterrence and incapacitation, the need to "provide the defendant with needed educational or vocational training . . . or other correctional treatment," and the need not to "impose a sentence sufficient, but not greater than necessary" to serve the purposes of sentencing.[380]

In California, punishment as the primary objective of sentencing remained a fixture of sentencing law for most of the last forty years; however, in 2016, the California legislature made significant amendments to the penal code, placing a greater emphasis on rehabilitation in sentencing.[381] Although those amendments will not take effect until 2022, the shift in focus is clear, for they state, "[t]he Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice."[382]

References to rehabilitation of criminal offenders in relevant legislation in Texas focus on its capacity to protect the public. For instance, Texas' penal code indicates that "the provisions of this code are intended [to] . . . insure the public safety through . . . the

---

377. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 67, at ch. 1, pt. A.

378. *Id.*

379. *Id.*; *see also* Gall v. United States, 552 U.S. 38, 47 (2007) (stating that courts can issue sentences outside of the range of the Guidelines).

380. 562 U.S. 476, 491 (2011) (quoting 18 U.S.C. § 3553 (2000)).

381. CAL. PENAL CODE § 1170(a)(1) (West 2020).

382. *Id.*

rehabilitation of those convicted of violations of this code,"[383] and courts should "prescribe penalties . . . that permit recognition of differences in rehabilitation possibilities among individual offenders."[384]

In Florida, the Criminal Punishment Code, which applies to all felony offenses, except capital offenses, notes that the "primary purpose of sentencing is to punish the offender"[385] and that "[r]ehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment."[386] Similarly in New York, courts are instructed that in sentencing offenders, they are "[t]o insure the public safety by . . . the rehabilitation of those convicted [and] the promotion of their successful and productive reentry and reintegration into society."[387]

Accordingly, it is clear rehabilitation is already an existing, well-established sentencing objective. There is a clear pathway for cooperation with authorities to be subsumed within this mitigatory factor.

The other key advantage of this approach is that it is normatively and jurisprudentially consistent with the objectives of criminal law and sentencing. A bulwark principle of criminal law is that offenders should be punished commensurate with their level of wrongdoing. This is reflected in the proportionality principle, which is expressly adopted in several jurisdictions in the United States.[388] In crude terms, it is often powerfully expressed in the notion that the "punishment should fit the crime." In a more nuanced manner, it is the view that the seriousness of the crime should be met by the harshness of the punishment.[389] The principle is also an indispensable aspect of the just deserts theory of punishment, which has been the dominant philosophical theory of punishment over the past few decades.[390]

---

383. TEX. PENAL CODE ANN. § 1.02(1) (West, Westlaw through the 2019 Reg. Sess.).

384. *Id.* § 1.02(3).

385. FLA. STAT. ANN. § 921.002(1)(b) (West 2020).

386. *Id.*

387. N.Y. PENAL LAW § 1.05(6) (McKinney 2009).

388. Mirko Bagaric & Sandeep Gopalan, *Sound Principles, Undesirable Outcomes: Justice Scalia's Paradoxical Eighth Amendment Jurisprudence*, 50 AKRON L. REV. 301, 323 (2017).

389. *Id.* at 303.

390. *See id.*; *see also Retributive Justice*, STAN. ENCYCLOPEDIA PHIL. (June 18, 2014), https://plato.stanford.edu/entries/justice-retributive/ (stating that retributive

The proportionality principle rejects making deals with informers. Concessions made to informers which are unrelated to the severity of their crime or the harshness of punishment make inroads into this principle. Snitching can undermine confidence in the law and, as we have seen, lead to community unrest.[391]

The objective of rehabilitation also makes some inroads into proportionalism, but the integrity of the criminal justice system is less damaged by reducing sentence severity in recognition of an offender making progress towards rehabilitation. The first reason for this is that the principle of proportionality needs to be balanced against other legitimate and established sentencing aims. To this end, the main sentencing objective that has been pursued in the United States over the past few decades is community protection.[392] An offender who has rehabilitated is less likely to commit another crime, and hence the need for stern punishment, typically in the form of a long prison term, is less strong. It could be contended that flippers also advance community protection by informing on other offenders. However, as we have seen, the benefits of this often do not eventuate because either the testimony of the flipper does not secure the conviction of the other offender or the flipper testimony is often contrived.[393]

The other doctrinal advantage of pursuing the goal of community protection through providing a discount for flippers who show evidence of rehabilitation, as opposed to those who give evidence against other offenders, stems from the manner in which the respective discounts are accorded. The rehabilitation discount is accorded through the transparent application of legal rules and principles, and the applicability and operation of the discount is governed by statutory principles and case law. This factor can of course be rolled into a plea bargain, but at least the lawyer for the defendant and prosecutor have some legal guidance regarding the appropriate manner in which this consideration should be reflected in the overall plea bargain. The informer discount, on the other hand, as we have seen, is largely a principle-free zone, and there are virtually no fetters on how it is applied in any particular case. Its operation is largely ad hoc and unregulated and hence undermines

---

justice "calls for giving the wrongdoer his [or her] just deserts even if no other good (such as the prevention of harm) should follow").

391. *See supra* Section IV.C.

392. *See* Bagaric & Gopalan, *supra* note 388, at 329.

393. *See supra* Section IV.A.

the efficacy and integrity of the criminal justice system.[394] The opaque and unsatisfactory nature of the law is underlined by the fact that there is no publicly available information regarding the outcome of informer deals and whether in fact it resulted in any demonstrable benefits to the community.

Incorporating the flipper discount into rehabilitation would, however, create one potential procedural difficulty. The prospects of rehabilitation are determined at the time of sentence, and hence when a defendant has become an informant prior to sentencing, this mitigating factor can be accommodated into the ultimate penalty. However, if an offender decides to give informer evidence after they have been sentenced—for example, several years into a prison term—then it is obviously not feasible to factor this into the sentencing stage of the matter. In such circumstances, it would be necessary to resentence the offender in light of this new consideration. This would be accommodated by enabling a reopening of the sentence on the basis of fresh evidence in the form of cooperating with authorities. This is not, however, an overwhelming obstacle given that offenders can, in most jurisdictions, often have their sentenced reviewed if fresh evidence comes to light.[395]

It is important to recognize that the mere fact that an offender does give informer evidence will not necessarily lead to a discounted sentence. The rationale that underpins any discount is rehabilitation. There are a number of considerations that courts typically use to determine if an offender has good prospects of rehabilitation, including good behavior since the commission of the offense, completion of drug and alcohol programs and other educational courses, and engagement in stable employment and the like.[396] One other factor is if the offender has cooperated with authorities, including giving evidence against other offenders. This behavior would generally be viewed as a considerable renunciation of involvement in crime but would obviously not be definitive of progress towards rehabilitation given that in some cases any such cooperation might be viewed as being driven solely by expediency—in the form of the desire to receive a sentencing discount.

In each case, it will be for the court to determine (as a factual matter) whether providing evidence against other criminals stems from a genuine attempt at rehabilitation or a purely expedient attempt to secure a sentence reduction. This of course requires a

---

394. *See supra* Part I and Part II.

395. *See, e.g.*, FED. R. CRIM. P. 35.

396. *See, e.g.*, Pepper v. United States, 562 U.S. 476, 491 (2011).

degree of judgment by the court, but the task is no different than other fact-finding assessments that are already undertaken as part of the sentencing process.

CONCLUSION

Current sentencing principles and prosecution practices provide for a significant sentencing discount or in some cases immunity from prosecution for criminal informers who assist authorities. There are a number of rationales that have been advanced in support of this approach, including the social imperative to detect and punish offenders and the fact that informers often place themselves in a position of danger. However, the extent of the benefit derived from the discount is compromised for a number of reasons. The first stems from the fact that the informer discount is conferred merely for the provision of evidence by an offender against other alleged offenders. This evidence forms part of the overall prosecution case and will only secure a finding of guilt if the other offender pleads guilty or the informer's evidence in conjunction with other evidence establishes guilt beyond reasonable doubt. The key point is that the informer discount does not necessarily lead to a productive outcome from the perspective of the criminal justice system. Viewed in this manner, the informer discount does not necessarily result in an increase in the number of criminals who are punished; rather, it merely increases the likelihood that more criminals will be punished. In light of this, the benefit from the discount is significantly diluted.

Moreover, a close examination of the operation of the informer discount, including the wider consequences it produces, reveals pragmatic and normative problems associated with the practice. The key problem with the informer discount is that it induces offenders to behave in expedient ways in order to reduce the severity of their criminal justice disposition. This incentive is especially problematic given that it is aimed at a class of people in the community who are by nature inclined to break the rules and act in self-serving and expedient manners. The empirical data reveals that informer evidence is one of the main causes of false convictions; hence, it leads to a violation of one of the most cardinal bulwarks of the criminal justice system—the innocent should not be punished. The other tangible problem associated with the informer discount is that it results in massive criminal justice resources being directed towards protecting flippers from other criminals.

From the normative perspective, it is objectionable that flippers should be rewarded for their expedience and disloyalty and that they

should be better situated to receive penalty discounts than offenders who commit crimes without the involvement of other criminals. Moreover, the informer concession is unregulated and lacking in transparency. Accordingly, it undermines the integrity of the criminal justice system and leads to an erosion of trust in some communities.

Thus, there is a need to re-evaluate the approach to flippers in the sentencing domain. The most desirable approach is to abolish the informer discount as a stand-alone mitigating factor and view it as being one of a number of considerations that is demonstrative of the fact the offender takes responsibility for his or her actions. Moreover, the discount should only be operationalized once the offender has in fact fulfilled his or her promise to provide evidence against other offenders. This approach has the advantage of harmonizing the grounds of mitigation for offenses committed by a sole offender. It also provides less incentive for offenders to provide false informant evidence, given that the discount for prospects of rehabilitation is normally not as significant as that which is available for informer evidence. In addition, this ground of mitigation would only apply where the court was satisfied that the decision to provide the informer evidence stems from genuine attitudinal reform and hence indicated that the offender was on the path towards rehabilitation. This would abolish the current unsatisfactory position whereby an offender is granted a sentencing discount for acting in a self-serving, expedient manner.

Given that the size of the proposed discount and the circumstances in which it is available are reduced from the current position, it is likely that fewer offenders will flip. Viewed narrowly, this will result in fewer crimes being detected and prosecuted. However, this is not necessarily the case. Fewer flippers mean fewer false convictions. Moreover, it will mean considerable cost savings in terms of the money and resources which are applied to protecting flippers. Diligently directing these resources to other policing activities could in fact result in more crimes being prosecuted.