2002

Introduction to the Cooperating Witness Conundrum: Is Justice Obtainable?

Ellen Yaroshefsky
Maurice A. Deane School of Law at Hofstra University

INTRODUCTION

*Ellen Yaroshefsky**

On November 30, 2000, the Jacob Burns Ethics Center at the Cardozo Law School sponsored a day-long Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?* The Symposium sought to publicly present a wide range of perspectives about the use of informants and other cooperating witnesses in the criminal justice system. While the problems associated with cooperating witnesses are informally discussed within segments of the bar and bench, this conference sought to broaden the discussion and explore systemic responses to perceived concerns about the use of cooperators.

To that end, the Ethics Center brought together state and federal prosecutors, defense lawyers and jurists, social scientists, and criminal justice policy experts to openly exchange views about many aspects of the use of informants and other cooperating witnesses. The conference included a perspective from the Canadian justice system and from a renowned research psychologist, as well as thoughtful commentary by members of the federal judiciary, state and federal prosecutors, and defense lawyers.

The conference was organized into three panels: *Perspectives on the Role of Cooperators and Informants*; *Screening for Truth Telling: Is it Possible?*; and *Thinking Outside the Box: Proposals for Change.*[1] The presentations on each panel were followed by

---

* Clinical Professor of Law and Executive Director of the Jacob Burns Ethics Center in the Practice of Law, Benjamin N. Cardozo School of Law. I am grateful to all the participants in the conference and those who assisted in its planning and execution. The moderators, Raymond Brown, Maureen O'Connor, and Jo Ann Harris were especially helpful as was Judge Stephen Trott, whose ironic humor spurred us into action. I am especially grateful to Peter Walsh for his superb organizational skills and painstaking work.

[1] The participants for Panel One, *Perspectives on the Role of Cooperators and Informants*, were: Steven Skurka, Counsel for the Ontario Crown Attorneys Association at the Morin Inquiry, Toronto, Ontario; Professor H. Richard Uviller, Columbia University School of Law; Ellen S. Podgor, Visiting Professor, University of Georgia School of Law; and Howard M. Shapiro, Wilmer, Cutler & Pickering. The presenters for Panel Two, *Effective Screening for Truth Telling: Is it Possible?* were: Michael R. Bromwich, Fried, Frank, Harris, Shriver & Jacobson; Dr. Saul M. Kassin, Professor of

commentary from noted jurists and lawyers. There was lively interchange among participants.

In this issue, the *Cardozo Law Review* presents a number of the articles from that conference. This collection includes numerous proposals to address longstanding concerns about the reliability and truthfulness of cooperator information.

Certainly a one-day forum could only begin to explore the issues presented by different kinds of cooperating witnesses in both state and federal courts in different jurisdictions throughout the country.[2] The conference participants recognized the distinctions that make for difference while focusing upon the issues common to all cooperating witnesses. While, for instance, jailhouse informants, informants who work with the police and cooperating witnesses who work with prosecutors each present distinct problems (with jailhouse informants commonly recognized as the most troublesome), the recognized distinction is often one of degree of difference rather than kind.

Similarly, the participants recognized the need to examine the unique characteristics of state and federal systems in the use of such informants and cooperating witnesses. In some jurisdictions, such as New York, state prosecutors believe that the evidentiary requirement of corroboration for the testimony of accomplices and the greater sentencing flexibility in state courts causes less of a problem with informant reliability than in the federal system. On the other hand, federal prosecutors often claim the nature of the

---

Psychology, Williams College; Steven M. Cohen, Kronish, Lieb, Weiner & Hellman; and Professor Bennett L. Gershman, Pace University School of Law. Commentators for Panel Two were: Shirah Neiman, Deputy United States Attorney, Southern District of New York; Hon. John F. Keenan, U.S. District Judge, Southern District of New York; and Joel Cohen, Stroock & Stroock & Lavan. The following presenters participated in Panel Three, *Thinking Outside the Box, Proposals for Change*: Hon. Stephen S. Trott, U.S. Court of Appeals, Ninth Circuit; Professor Rory K. Little, University of California, Hastings College of the Law; Michael S. Ross, Law Offices of Michael S. Ross and Professor, Benjamin N. Cardozo School of Law; and Hon. Gerard E. Lynch, U.S. District Judge, Southern District of New York. Commentators for this panel were: Gerald B. Lefcourt, Esq.; Loretta E. Lynch, United States Attorney, Eastern District of New York; and Professor Daniel C. Richman, Fordham University School of Law.

[2] The terms "cooperating witness" and "informant" are often used interchangeably. This is reflected in the articles in this issue as well as in the panel discussion. In general, the distinction drawn between these categories of cooperators is that "cooperating witness" refers to defendants or potential defendants who work with prosecutors, while informants are those persons who work with the police agencies. Jailhouse informants are persons, other than co-defendants, accomplice co-conspirators, or percipient witnesses "whose testimony is based upon statements made by the defendant where both the defendant and the informant are held in the same correctional institution." HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN 558 (ONTARIO MINISTRY OF THE ATTORNEY GENERAL 1998), *available at* http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/morin.htm (last visited Mar. 18, 2002) [hereinafter MORIN COMMISSION].

cases prosecuted, more thorough investigation, and the *practice* of corroboration are among the factors that make for a better system of truth detection. A number of other distinctions include the differences between the Federal Bureau of Investigation and state police agencies, written or unwritten guidelines on the use of informants and cooperators, and the formality of sentencing schemes.

Despite these distinctions, it is an accepted proposition that an effective criminal justice system is dependent upon informants and other cooperators and, with notable exceptions, our criminal justice systems operate on the premise that there exist sufficient checks on well-recognized dangers associated with such witnesses.

These professed checks on such dangers include police training, prosecutorial screening, corroboration requirements in the state system or corroboration practice in the federal system, cross-examination (called our engine for truth telling), and cautionary jury instructions. To the extent that there are instances where informants or cooperating defendants have been found to implicate innocent people or embellish the guilt of others, our system has viewed these as aberrant—as unique and singular instances that are not representative of a systemic problem.

While the dangers associated with the use of cooperating witnesses have been well documented,[3] the concern about their use has increased in the last fifteen years because of a number of changes in the criminal justice system. A common perception is that these changes have resulted in a sea change in the powers of prosecutors and police. They include:

(1) expanded federal jurisdiction over crimes once considered exclusively within the province of the state;

(2) a significant shift in the types of crimes prosecuted in great measure because of significant funding of the "war on drugs";

(3) mandatory minimum sentences;

(4) sentencing guidelines in state and federal courts; and

(5) in the federal system, a decrease in judicial discretion and the vesting of greater control over the ultimate sentence to prosecutors.

The greater stakes for defendants increase the incentives to cooperate with the government.[4]

---

[3] *See, e.g.*, Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 7-12 (1992); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 97 (1995); Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199 (1997); Christine Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 787 (1990).

[4] G. Adam Schweickert, III, Comment, *Third-Party Cooperation: A Welcome*

There have been a number of calls to study the cooperation process but there exists little data about the process and its effects.[5] There exists a theoretical recognition of the dangers associated with cooperating witnesses and, over time, scholars, judges, and lawyers have made numerous proposals to reduce those dangers. Most of those have gone unheeded. As some have said "our system is imperfect, not flawed." Notably, our system has yet to examine cases in which those dangers were realized to determine the extent to which the process of cooperation was responsible for wrongful convictions.

Significantly, the government of Ontario, Canada has conducted such an inquiry.[6] Guy Paul Morin, who had been convicted of the murder of his nine-year old neighbor, was exonerated by DNA evidence ten years later. In 1996, in addition to a public apology to Mr. Morin, and compensation to him and his family, the government of Ontario ordered a public inquiry into the causes of that miscarriage of justice.[7]

In the first article[8] in this Symposium Steven Skurka, the then-counsel to the Crown in the Morin Inquiry, presents an overview of that extensive inquiry and its recommendations by Fred Kaufman, former Justice of the Quebec Court of Appeals.[9] Skurka, noting that jailhouse informant testimony played a key role in the wrongful conviction, presents the numerous "bold and enlightened" recommendations made in the Kaufman Report regarding jailhouse informant testimony.[10] Skurka presents

---

Addition to Substantial Assistance Departure Jurisprudence, 30 CONN. L. REV. 1445, 1449 (1998) ("The implementation of the United States Sentencing Guidelines and mandatory minimum sentencing has led to a ten-fold increase in cooperation from indicted individuals."); Justin M. Lungstrum, Note, United States v. Singleton, *Bad Law Made in the Name of Good Cause*, 47 U. KAN. L. REV. 749, 752, n.37 (1999) (explaining that after the Sentencing Guidelines, cooperation has increased); Hon. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 424 (1997); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 564 (1999).

[5] I previously conducted interviews with Assistant United States Attorneys in the Southern District of New York to examine the extent of perceived problems with cooperators as well as safeguards and techniques utilized to insure truthfulness. *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 n.9, 18 (1999); *see also* Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, U.S. SENTENCING COMMISSION, Jan. 1998, at 10 (substantial assistance criteria need further study).

[6] *See* MORIN COMMISSION, *supra* note 2.

[7] *Id.*

[8] *See* Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759 (2002).

[9] *See* MORIN COMMISSION, *supra* note 2.

[10] *See* Skurka, *supra* note 8, at 761-63.

common myths about jailhouse informants that were debunked during the Morin Commission. Skurka notes that the Kaufman Report did not recommend outright exclusion of the testimony of all jailhouse informants but notes the changes in the use of such informants in the Ontario justice system.[11] Many of the findings and suggestions in the Kaufman Report have resonance for the use of jailhouse informants in the United States.[12]

Skurka's presentation, part of the Symposium's first panel presenting diverse issues in the role of cooperators and informants, is followed by Professor H. Richard Uviller's article on the prosecution's ability to offer "valuable consideration for helpful testimony."[13] Professor Uviller offers his customarily thoughtful and interesting perspective, and reflects upon the widely discussed case of *United States v. Singleton*,[14] where a panel of the 10th Circuit, in a decision that was quickly reversed, held that the prosecutor's exchange of leniency for testimony of the cooperator was a violation of 18 USC § 201(c)(2), the bribery statute.[15] Professor Uviller first makes the modest proposal that the federal bribery statute be amended to reflect the court's decision that the prosecution's offer of leniency to cooperators is not a violation of the statute.[16] More significantly, Professor Uviller, noting the inability of the defense to offer any valuable consideration to witnesses to insure their testimony, argues that the defense should be entitled to procure judicial immunity from prosecution for such a witness and that federal judges should be permitted to offer downward departures in sentencing for witnesses who offer

---

[11] *See id.* at 763-64.

[12] Recently, and nearly one year after this Cooperating Witness Symposium took place, the Manitoba government conducted an inquiry into the wrongful conviction of Thomas Sophonow. *See* MANITOBA DEP'T OF JUSTICE, THE INQUIRY REGARDING THOMAS SOPHONOW, *available at* http://www.gov.mb.ca/justice/sophonow (last visited Mar. 31, 2002). Two decades after his conviction, the Inquiry, in remarkably strong language, changed the policy toward testimony of jailhouse informants. "The testimony of in-custody informers is inherently suspect. Therefore, except in the unusual circumstances permitted by this policy, in-custody informers should not be called to testify on behalf of the Crown." *Id.* at app. F.

Among the myths about jailhouse informants that were debunked in the Morin and Sophonow inquiries are: 1) It is an indicia of reliability if the informant presents information that only law enforcement and the informant know (demonstrating how informants are remarkably capable of obtaining otherwise confidential information); 2) Jailhouse informants do not act of malice; 3) Jailhouse informants are an integral part of the criminal justice system.

[13] H. Richard Uviller, *No Sauce for the Gander: Valuable Consideration for Helpful Testimony from Tainted Witnesses in Criminal Cases*, 23 CARDOZO L. REV. 771 (2002).

[14] 144 F.3d 1343 (10th Cir. 1998).

[15] *See id.*

[16] *See* Uviller, *supra* note 13, at 790-91.

cooperation to the defense.[17] He proposes amendments to the federal sentencing guidelines.[18] Professor Uviller presents, for future discussion, questions such as whether the bribery statute should be repealed outright and what type of material assistance the government should be permitted to offer to witnesses.[19]

Focusing upon white collar cases, Professor Ellen Podgor discusses the unique issues associated with cooperation in the federal system.[20] Professor Podgor notes the distinctions between white collar cooperators and those in other cases.[21] She points to a number of differences, including the fact that reliability of cooperators in these contexts is often less suspect because of both the source and the nature of the criminal activity and the fact that investigations are often more lengthy than in street crime contexts.[22] She cautions that the level of sophistication of the actors in this context may "add credence to deception" in the courtroom.[23] Professor Podgor focuses upon the typical cases wherein both the corporation and their constituencies are targets of investigation and prosecution. She addresses the difficulties engendered by such cooperation, noting that "pitting the employer against the employee" can often interfere with the fiduciary employment relationship.[24]

Of course, each of these articles presume that the informant or cooperator is known to the prosecution and the defense. Panelist Howard Shapiro, former counsel to the Federal Bureau of Investigation, notes in his commentary on the first panel that the most significant problem for the criminal justice system is not the informants or witnesses who are subject to the adversary system through discovery, investigation, and cross examination, but those informants who work exclusively with police, FBI, and other investigative agencies whose identities are not and never will be known to the prosecution, and certainly not to the defense.[25]

The second panel, *Effective Screening for Truth Telling: Is It Possible*, includes a lively and spirited interchange regarding the ability of lawyers and judges to determine whether cooperators

---

[17] *See id.* at 791.

[18] *See id.*

[19] *See id.* at 791-93.

[20] *See* Ellen S. Podgor, *White Collar Cooperators: The Government in Employer-Employee Relationships*, 23 CARDOZO L. REV. 795 (2002).

[21] *See id.* at 802-07.

[22] *See id.* at 803.

[23] *Id.*

[24] *See id.* at 803-04.

[25] *See* Remarks of Howard Shapiro, at the Cardozo School of Law Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?* (Nov. 30, 2000) (on file with author).

and informants provide truthful information. Research psychologist Saul Kassin provides at least a cautionary note for lawyers and judges who assess truthfulness as a routine matter. Kassin begins with the stark note from years of social psychology work, that "as a general rule people are poor lie detectors."[26] Kassin describes a number of experiments and case studies that challenge common assumptions about the behavior of judges and juries and reports on studies of two critical, interrelated phenomenon which have a direct, if not disturbing, impact on our criminal justice system.[27] The first is the inaccurate belief, shared by most people, that assessment of truth telling is a matter of common sense.[28] The second is that confidence in the ability to discern truth telling is very high.[29] Kassin describes those studies and provides data that demonstrates a disturbing notion: the ability to detect truthfulness is statistically not much more accurate than the flip of a coin.[30] Moreover, those who are most confident about their truth telling judgments are not necessarily accurate. In fact, confidence is often indirectly correlated with accuracy.[31]

Kassin describes studies to demonstrate that judgments about truth telling are often made upon wrong assessments about facial expressions, jittery behavior and other nonverbal cues.[32] Kassin notes that studies establish that while voice may be the most accurate cue, the difference between a true and false confession cannot be accurately determined upon verbal or nonverbal behavior alone, but requires hard data. Kassin's presentation was the subject of animated discussion among all panelists.

Steven M. Cohen, a former federal prosecutor, reflects upon his experience in assessing the reliability of cooperators and points out the difficulties in making such judgments.[33] Echoing Kassin's studies, Cohen describes how common sense notions regarding "lie detecting ability" often belie reality.[34] He points out that cooperator lies are often very subtle, but nevertheless have significant impact on cases. Among the suggestions offered is that prosecutor's offices need to conduct more extensive training to provide the particular skills necessary to conduct a meaningful

---

[26] *See* Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 809 (2002).

[27] *See id.*

[28] *See id.*

[29] *See id.* at 810.

[30] *See id.* at 809.

[31] *See id.* at 810.

[32] *See id.*

[33] Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817 (2002).

[34] *See id.* at 822-24.

debriefing and provide prosecutors with a "better understanding of the psychological factors at play when people lie."[35] Cohen suggests that prosecutor's offices should record and catalog instances where cooperators have lied and use this "vast untapped resource" to gain a better understanding of the causes and frequency of the problem.[36]

Professor Bennett Gershman suggests precautionary measures for what has been called the "dark" secret of the U.S. adversary system: improper witness coaching.[37] Noting that the subject has received modest attention when compared with the perceived significance of the issue, Professor Gershman focuses upon the unique role of the prosecutor in the system of justice and the consequent necessity of insuring that prosecutors do not stray beyond permissible conduct in witness preparation.[38] Professor Gershman reminds us that there is no record of the witness preparation sessions, and points out the incentives of prosecutors, both consciously and unconsciously, to shape facts.[39] He discusses noted instances of improper coaching by prosecutors, the cognitive factors that facilitate improper coaching, and the difficulties in detecting and preventing coaching.[40] He presents thoughtful, if controversial, remedies for prosecutorial improper coaching, including a pretrial taint hearing upon a showing of a basis to believe that a witness's testimony has been improperly influenced by suggestive or coercive interviewing techniques.[41] Professor Gershman suggests that courts should permit experts in cognitive psychology to testify regarding how "memory, language, and communication can produce false, inaccurate, or misleading testimony."[42] Finally, he recommends that all interviews with potential trial witnesses should be electronically recorded either by audio or videotaping.[43]

In the third article in the truth telling panel, Joel Cohen recounts, in dramatic first person style, his experience in 1974 in the State Special Prosecutor's Office attempting to uncover the truth from a notorious detective, who cooperated to provide information about widespread illegal behavior by his coworkers in

---

[35] *Id.* at 825-26.
[36] *Id.* at 826.
[37] *See* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829 (2002).
[38] *See id.*
[39] *See id.* at 848-49.
[40] *See id.* at 847-51.
[41] *See id.* at 859-60.
[42] *Id.* at 860-61.
[43] *Id.* at 861-62.

an elite unit of the NYC Police Department.[44] With the wisdom of years of seasoning both as a prosecutor and defense lawyer, Cohen reflects upon suggested changes in working with cooperators. He concludes that the most useful change to protect against untruthful testimony from cooperators is to require that counsel be present for each and every session with a cooperator.[45]

Finally, in the Third Panel, *Thinking Outside the Box*, the participants presented suggestions for systemic change. Judge Stephen Trott, who has been a trailblazer in public acknowledgment of problems associated with using "criminals as witnesses," provides a practical guide for prosecutors in dealing with informers, jailhouse snitches, and cooperators.[46] With his considerable experience as a prosecutor and federal judge, Judge Trott provides tales of prosecutorial mistakes in dealing with cooperators and guidelines for avoiding such errors.[47] Judge Trott talks about the dangers for young prosecutors in detecting truthfulness and the importance of training programs, excellent supervision, and an office culture that creates receptivity to correct practices in working with criminal informants.[48] Judge Trott reinforces the notion that the attitude of the office toward insuring that "justice is done" rather than "getting the bad guys" is a key toward good practice.[49] He notes that an important tool in teaching prosecutors is videotapes to demonstrate how lying cooperators look truthful.[50]

Professor Rory Little—noting the critical role that prosecutors play in directing or participating in criminal investigations, and the lack of ethics rules to guide that practice—proposes fifteen rules to govern the prosecutor's use of criminal informants.[51] First, Professor Little, correctly points out the significance of language in talking about informants. He suggests that we should replace the term "cooperating witness" with "criminal informant" for those persons who are themselves

---

[44] Joel Cohen, *When Prosecutors Prepare Cooperators*, 23 CARDOZO L. REV. 865 (2002).

[45] *See id.*

[46] Judge Trott has previously published a more extensive version of his Symposium presentation. *See* Honorable Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996).

[47] Remarks of Judge Stephen S. Trott, at the Cardozo School of Law Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?* (Nov. 30, 2000) (on file with author).

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] Remarks of Rory K. Little, at the Cardozo School of Law Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?* (Nov. 30, 2000) (on file with author).

involved in criminal activity and receiving some benefit from the government.[52]

Among the rules Professor Little proposes include: no prosecution should be instituted on the uncorroborated word of a criminal informant; no criminal informant may be used for investigative or testimonial purposes until reliable steps have been instituted to evaluate the informant's credibility; the prosecutor must be "reasonably convinced" that the informant has been truthful; the decision to use the informant is approved through a group, supervised decision making process; the informant's relative culpability has been established; deals with more culpable defendants to "get" less culpable ones should be disfavored; substantial monetary rewards should be disfavored; no secret deals should be made with criminal informants; all bargains with such informants should be revoked if criminal conduct is detected; criminal informants should be monitored after indictment and any unapproved misconduct or deceptive behavior should be reported to the defense. Additional proposals provide a useful set of guidelines for prosecutors to guide ethical practice.[53]

Michael Ross suggests that the disciplinary system is the appropriate and necessary forum in which to address problems of prosecutors inducing or creating false testimony by cooperators.[54] Ross recommends the adoption of safeguards regarding the proffer process that should be embodied in a prosecutor's ethical obligations. He first suggests that prosecutors should not be permitted to tell defendants or their counsel what testimony or information is expected in order to earn leniency.[55] Second, the prosecution or its agent should be required to take accurate and intelligible notes of the information proffered by the defendant and defense counsel and the prosecution must memorialize any subsequent inconsistency, amendment, or alteration of the facts provided by that defendant.[56] Third, Ross argues that the prosecution should turn over to defense counsel, in a timely manner, the notes of any and all proffer sessions.[57] Fourth, he argues that each prosecutor's office should adopt an internal supervisory mechanism to ensure that the aforementioned

---

[52] *See id.*

[53] *Id.*

[54] *See* Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875 (2002).

[55] *See id.* at 884.

[56] *See id.* at 888.

[57] *See id.* at 888-89.

proposals are followed scrupulously.[58] Finally, Ross argues that state and local disciplinary authorities "should begin the task they should have begun years ago—police a practice that would be unacceptable if taken by lawyers in civil practice."[59] Noting the well-recognized lack of disciplinary action against errant prosecutors, Ross concludes that the integrity of the process of obtaining information from cooperating witnesses is directly tied to the ethical rules.[60]

Judge Gerard Lynch provides a significant shift for thinking about systemic changes to address problems with cooperating witnesses. First Judge Lynch highlights important interrelated issues. He recognizes that there is much to learn from social psychologists about our truth telling abilities.[61] He then notes the fact that we are mistaken in focusing attention on trials as our truth telling safeguard because there are so few trials in the criminal justice system.[62] Third, he notes we are similarly mistaken in assuming that a guilty plea from a defendant means that the cooperators in that case were truthful.[63] Judge Lynch then suggests that in our current system, prosecutors are de facto administrative law judges because they decide who is guilty or not, to which cooperator one should attempt to obtain or force a guilty plea, and in effect to impose a sentence by virtue of the position taken regarding sentencing guidelines.[64] Judge Lynch suggests that we should first publicly recognize the administrative power of prosecutors to control the process, and then decide whether we should hold prosecutors accountable for their decisions in the same manner as other administrators or judges.[65]

Professor Daniel Richman focuses his attention upon remedies within the courtroom to insure that the jury learns truthful information from cooperating witnesses, and to improve the prosecution's handling of such witnesses.[66] He argues that it is incumbent upon the system to provide the jury with a deepened understanding of the cooperation process such that they are better

---

[58] *See id.* at 889.

[59] *See id.* at 891.

[60] *See id.*

[61] Remarks of Judge Gerard E. Lynch, at the Cardozo School of Law Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?* (Nov. 30, 2000) [hereinafter Remarks of Judge Lynch] (on file with author); *see also* Hon. Gerard E. Lynch, *Our Administrative System of Justice*, 66 FORDHAM L. REV. 2117 (1998).

[62] *See* Remarks of Judge Lynch, *supra* note 61.

[63] *See id.*

[64] *See id.*

[65] *See id.*

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

informed to adequately make credibility determinations.[67] He carefully assesses the institutional pressures upon prosecutors and notes that "more information about the cooperator's odyssey from target to government witness" is useful not only for the jury, but might improve the prosecution's view of its own function thereby encouraging more professional behavior.[68]

Finally, Professor Barry Scheck provides an excellent summary of the conference and its suggestions.[69] His own groundbreaking work in the field of wrongful convictions is one of the instances where the criminal justice system has scientific data that permits some conclusions regarding the nature of the errors.[70] In that field, use of informants and cooperators is repeatedly cited as one of the top three problems that result in such convictions. Nevertheless, there has been little momentum to scrutinize use of informants and cooperators. Hopefully, the proceedings at this conference will provide some impetus to further exploration of the proper use of informants and other cooperating witnesses.

---

[67] *See id.* at 897.

[68] *Id.* at 898.

[69] Barry Scheck, *Closing Remarks*, 23 CARDOZO L. REV. 899 (2002).

[70] *See* JIM DWYER, PETER NEUFELD, & BARRY SCHECK, ACTUAL INNOCENCE (2000).