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WHY CRIMINAL DEFENDANTS COOPERATE: THE DEFENSE ATTORNEY'S PERSPECTIVE

Jessica A. Roth, Anna D. Vaynman & Steven D. Penrod

ABSTRACT—Cooperation is at the heart of most complex federal criminal cases, with profound ramifications for who can be brought to justice and for the fate of those who decide to cooperate. But despite the significance of cooperation, scholars have yet to explore exactly how individuals confronted with the decision whether to pursue cooperation with prosecutors make that choice. This Article—the first empirical study of the defense experience of cooperation—begins to address that gap. The Article reports the results of a survey completed by 146 criminal defense attorneys in three federal districts: the Southern District of New York, the Eastern District of Virginia, and the Eastern District of Pennsylvania. Our study provides an entirely new and enriching perspective on the cooperation decision, building on prior theories from the cooperation and plea-bargaining literature, and providing for a more nuanced understanding of cooperation and its motivations. In several closed- and open-ended responses, attorneys shared their opinions—at times remarkably consistent, at times strikingly and informatively different—about cooperation practices in their respective districts. The results of this study can be used to further explore the theoretical foundations of cooperation and plea bargaining and can be used to build experimental studies to test causal relationships that are otherwise nearly impossible to determine.

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Daniel Richman, Jenia I. Turner and Ronald Wright for their helpful comments on earlier drafts of this Article. Adam Schuler provided excellent research assistance. We are also grateful to the many federal defense attorneys who participated in this survey, whose anonymity we promised to protect.

INTRODUCTION	1354
I. BACKGROUND.....	1358
A. <i>A Primer on Cooperation</i>	1359
B. <i>The Local Variability of Cooperation Practices</i>	1364
C. <i>Prior Empirical Literature on Cooperation and Plea Bargaining</i>	1368
II. THE PRESENT STUDY	1373
A. <i>District Selection</i>	1373
B. <i>Survey Design</i>	1375
C. <i>Survey Distribution</i>	1376
III. STUDY FINDINGS	1377
A. <i>Participants and Their Dockets</i>	1377
B. <i>Case Types Most Frequently Involving the Opportunity to Cooperate</i>	1379
C. <i>Importance and Frequency of Factors</i>	1382
D. <i>Clients' Interest in Pursuing Cooperation</i>	1390
E. <i>Why Defendants Do Not Get Cooperation Agreements</i>	1391
F. <i>What Is Required to Get Cooperation Agreements or Substantial- Assistance Departures</i>	1393
G. <i>Perceptions of Prosecutorial Practices</i>	1394
H. <i>Method of Rewarding Cooperation</i>	1397
I. <i>Sealing Practices</i>	1400
J. <i>Relationships Among Other Variables</i>	1401
K. <i>Training</i>	1403
L. <i>Perceptions of Fairness</i>	1404
M. <i>Open-Ended Responses</i>	1407
IV. IMPLICATIONS AND AVENUES OF FURTHER RESEARCH	1409
A. <i>Building a Theoretical Model of Cooperation</i>	1410
B. <i>Limitations</i>	1413
C. <i>Areas of Further Study</i>	1414
CONCLUSION	1415
APPENDIX A: LIST OF 27 ITEMS PARTICIPANTS WERE ASKED TO RATE ON SCALES OF IMPORTANCE AND FREQUENCY IN THE COOPERATION DECISION	1416
APPENDIX B: PRINCIPAL COMPONENT ANALYSIS	1417
APPENDIX C: ITEMS GROUPED BY FACTORS, AND STANDALONE ITEMS.....	1419
APPENDIX D: RATINGS OF IMPORTANCE BY IDENTIFIED CASE TYPE, DISTRICT, AND ROLE	1421
APPENDIX E: RATINGS OF FREQUENCY BY IDENTIFIED CASE TYPE, DISTRICT, AND ROLE	1424

“To me, cooperation allowed me to come clean about my crimes and conduct and was an important part of my making amends on a number of levels. . . . [W]hen I started accepting responsibility for my prior behaviors, it was without regard to the consequences, and I knew there was no possibility of a healthy future life without clearing the wreckage of my past. Cooperating gave me that opportunity to truly come clean and take responsibility for my conduct.”

—Richard Bistrong, former cooperator[†]

“Cooperation is a horrible thing for clients. Doing law enforcement’s job and requiring someone to bargain for their freedom encourages an ugly, unfair, and unjust system to become even more so that way.”

—Anonymous federal defense attorney (survey)

“The longer I practice the less I think cooperation makes sense for most of the defendants who are eligible to cooperate.”

—Another anonymous federal defense attorney (survey)

INTRODUCTION

In jurisdictions across the country, hundreds of individuals every year agree to assist prosecutors in the investigation and prosecution of others. It is the rare federal criminal case—especially a complex one—that is built without the assistance of cooperators. The decision to become a “cooperator” can be one of the most momentous decisions an individual will ever make, with profound consequences not only for their liberty, but also potentially for their safety and social standing. Even initiating the cooperation process can have a substantial impact on an accused individual’s interests, effectively precluding them from contesting charges at trial if they fail to obtain a cooperation agreement, and potentially exposing them to retaliation for being perceived as a traitor.

Cooperation decisions also implicate the interests of others beyond individual defendants and their families. Although precise figures are unavailable, defendants who receive cooperation agreements help law enforcement agents and prosecutors build cases against innumerable other individuals and organizations.¹ Cooperators frequently provide the evidence necessary for prosecutors to pursue the most culpable targets.² Those at the top of criminal organizations are often savvy enough to avoid the kinds of

[†] Bistrong cooperated with federal prosecutors for five years. Walter Pavlo, *The Life of a Cooperating Witness: Rewards and Perils*, FORBES (Sept. 28, 2012), <https://www.forbes.com/sites/walterpavlo/2012/09/28/the-life-of-a-cooperating-witness-rewards-and-perils/?sh=518c25935bee> [https://perma.cc/X9T5-6QN9].

¹ Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 748–50 (2016).

² *Id.* at 746 n.51.

activity most susceptible to apprehension. If defendants in possession of valuable information refuse to cooperate, those more culpable targets may go unpunished, and the victims of their crimes without justice. However, if defendants do choose to cooperate but offer false testimony, innocent people may be wrongfully convicted. Courts and scholars have long been concerned about the unreliability of incentivized informant testimony, and prior studies have identified such testimony as one of the leading factors associated with wrongful convictions.³

For these reasons, decisions about cooperation—including who cooperates, how cooperation is rewarded, and what it requires—are highly consequential. However, the field is only lightly regulated; decisions about how to debrief cooperators and how to allocate and structure cooperation agreements are left to the discretion of individual prosecutors' offices and sometimes even individual prosecutors. In the federal system, each U.S. Attorney's Office adopts its own policies regarding cooperation, with little oversight from Department of Justice headquarters in Washington, D.C. or federal judges.⁴ Given the interests implicated by cooperation, that is a rather surprising situation. But it is one of long-standing duration, as is the lack of data about how many people cooperate and under what circumstances. At the state level, such data are not available at all. In the federal system, some data are available, although they are imperfect. When the U.S. Sentencing Guidelines (U.S.S.G. or the Guidelines) went into effect in 1987, most sentencing departures for cooperation were consolidated under a single Guideline such that at least they could be tracked.⁵ Thus, even if state practices surrounding cooperation are meaningfully different, some of the insights provided by the study of federal practices may be useful in evaluating cooperation in the states.

Despite the significance of cooperation, we also know precious little about how individuals make the choice whether to pursue it. To date, what

³ See, e.g., *id.* at 744–45; ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 69–81 (2009). Although prior studies have focused on convictions in state court, there are good reasons also to be concerned about the potential for unreliable cooperator testimony in federal court. See, e.g., Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 918–20 (1999) (noting a dearth of research on federal prosecutors' ability to determine cooperators' truthfulness).

⁴ As Professor Daniel Richman noted several decades ago, “the exchange of cooperation for sentencing leniency is under-regulated and never the subject of systematic empirical investigation.” Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT'G REP. 292, 294 (1996). That statement remains largely true today.

⁵ See KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 76 (1998) (explaining how the Sentencing Guidelines “invite the sentencing judge to depart downward where the defendant has provided ‘substantial assistance’ to law enforcement authorities” (quoting U.S. SENT'G GUIDELINES MANUAL § 5K1.1 (U.S. SENT'G COMM'N 2021))).

we know about cooperation rests largely on individual attorneys' experiences, anecdotal accounts, and statistics published by the U.S. Sentencing Commission about the rates and extent of downward departures for substantial assistance to the government in federal cases. Those sources do not shed light in a systematic way on the cooperation decision. Moreover, despite a now well developed psychological literature about plea bargaining, that literature has overlooked plea agreements that specifically involve a commitment to assist the government.

To be sure, there is considerable overlap between the decision to plead guilty or plea-bargain, on the one hand, and the decision to cooperate, on the other, which typically requires pleading guilty. But there is also enough that is distinct about the cooperation decision to merit focused study. For example, defendants may plead guilty without violating internalized norms about disloyalty, whereas becoming a cooperator may require a defendant to overcome such concerns. Similarly, decisions to plead guilty do not involve the same risks of social stigma and physical harm from others that cooperation frequently entails. Cooperation also typically involves more uncertainty in terms of potential sentencing exposure. To a far greater extent than other plea bargains, cooperation agreements often constitute a "leap into the unknown" for defendants in terms of what their eventual sentence may be, and even whether the prosecutor will recommend a sentencing reduction at all.⁶

This Article—the first empirical study of the defense experience of cooperation—begins to address this gap in knowledge by gathering defense attorneys' perspectives on how individuals make the decision whether to assist prosecutors in the investigation and prosecution of others. There was one big question guiding this work—When it comes to cooperation, what matters to defendants? We report here on the results of a survey sent to defense attorneys in three federal districts which asked about their views of the importance of various factors to their clients' decisions about cooperation and about regional practices potentially relevant to that decision. The survey also elicited attorneys' perceptions of the fairness of the cooperation process and the extent to which it ultimately was beneficial for clients.

We decided to explore defendants' experiences of cooperation through defense attorneys for a few reasons. To begin, it is very difficult to reach defendants, so obtaining a significant sample size would be very challenging. Doing so would also raise ethical concerns requiring careful consideration. Interviewing defendants themselves would provide a fruitful follow-up to

⁶ Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 73 (1995). As a consequence, "the defendant who cooperated in good faith may find himself robbed of his valuable information and branded as a snitch, with nothing to show for his pains but a long prison sentence." *Id.*

the present study. But the defense attorney perspective is valuable as a starting point because defense attorneys are at the heart of the cooperation decision; they are the mediators of the decision, equipped with the legal expertise, and charged with the responsibility, to advise their clients about whether to cooperate. In that role, defense attorneys' understanding of what matters to the cooperation decision provides important insight in and of itself, even if it is necessarily limited, and helps frame questions that might be put to clients in subsequent research.

Our study thus makes a unique contribution to the existing literature on plea bargaining by providing novel insight into the decision to cooperate as a distinct choice from pleading guilty without assisting prosecutors. It also surfaces important differences in the experience of cooperation based on district and case type, including in how cooperation is rewarded and what it requires. Defense attorneys, as repeat players in the system, are particularly well situated to opine on these issues.

Our key findings, based on responses from 146 defense attorneys, include consistent reports that sentencing concerns were of paramount importance to the cooperation decision. Respondents indicated that the most important factors in the cooperation decision were the presence of a statutory mandatory minimum sentence and the anticipated sentencing range absent cooperation, followed closely by anticipated sentencing benefit. Those responses were not surprising. After all, sentencing reductions are the primary levers available to prosecutors in plea negotiations generally, and in negotiating cooperation agreements specifically.

The conventional wisdom among practitioners is that cooperation is driven by sentencing concerns. But conventional wisdom is no substitute for data. Our study was the first to empirically test the importance of sentencing considerations to cooperation decisions, and to dive deeper into which sentencing considerations specifically were important. Our study helps develop a theoretical account of cooperation, which may begin with the centrality of sentencing considerations, but need not end there. The findings confirming the conventional wisdom not only give us confidence in the validity of the results but also lay the groundwork to further study the impact of sentencing on cooperation with more nuance.

Indeed, our study suggests that sentencing considerations do not crowd out other influences entirely. Other factors, such as trust in the defense lawyer, also played a role in clients' decisions about cooperation, as reported by their attorneys. So too did concerns about stigma and safety, which were closely correlated with each other and with the desire to protect family, although we found significant differences in the importance of these factors by case type. These findings can help develop an experimental design in the

future, one in which the specific variables identified by attorneys could be manipulated to measure their true impact on cooperation decisions.

Further, although respondents indicated that they nearly always raised the subject of cooperation with their clients, they also reported that more than half of their clients chose *not* to pursue cooperation with prosecutors. This surprising finding pushes back on the conventional wisdom that defendants jump at the chance to lower their sentence by cooperating. Respondents also reported high levels of success in obtaining cooperation agreements among their clients who did pursue cooperation. But intriguingly, the threshold question of willingness to cooperate varied by district. We suggest that this finding is correlated with differences in local practices surrounding cooperation, including whether defendants are required, as a condition of cooperation, to plead guilty to crimes beyond those with which they are initially charged.

Respondents also surprised us with the relative lack of training they had received about cooperation; attorneys appointed pursuant to the Criminal Justice Act reported significantly less training than public defenders. Attorneys' overwhelmingly negative views about the fairness of the cooperation process also were noteworthy, especially when combined with their relative consensus that clients who cooperated fared better than those who did not. Further, respondents provided insight into the most common reasons why clients who sought cooperation agreements failed to obtain them.

The Parts that follow discuss our study and its findings at greater length. Part I situates our study in the context of the governing legal framework and practices surrounding cooperation, and prior theoretical and empirical literature on cooperation and plea bargaining. Part II explains the survey design. Part III sets forth our findings, including statistically significant differences that we detected between responses based on the metrics we gathered. Part IV discusses the implications of our findings and the avenues of further research they suggest.

I. BACKGROUND

In this Part, we situate our study in the context of the governing legal framework and practices surrounding cooperation, and review prior theoretical and empirical literature on cooperation and plea bargaining. Section I.A provides a brief overview of the legal framework governing defendant cooperation in the United States. Section I.B discusses variations in the practice of cooperation between federal districts. Section I.C reviews prior empirical work on cooperation and plea bargaining to situate our study in the existing literature.

A. *A Primer on Cooperation*

Rewarding defendants for their assistance in the investigation and conviction of others is nothing new. Anglo-American courts have long upheld the practice of exchanging leniency for testimony.⁷ At its best, cooperation enables prosecutors to hold accountable the most culpable offenders, who would otherwise likely escape justice.⁸

Although cooperation has existed in some form for centuries, in the United States, its extent was effectively impossible to measure until the U.S. Sentencing Guidelines went into effect in 1987. The Guidelines, which provided fixed sentencing ranges below which judges had very limited authority to depart, nevertheless expressly authorized downward departures, upon government motion, where a defendant had provided substantial assistance to the government in the investigation and prosecution of others. The Guideline permitting such departures, U.S.S.G. Section 5K1.1, thus provided a marker by which cooperation could be traced—at least when it was successful, in the government’s view.⁹

Because the government does not file a motion pursuant to Section 5K1.1 where the government views cooperating defendants as having breached their cooperation agreements or having failed to provide substantial assistance in the investigation and prosecution of others, the Sentencing Commission’s data does not capture the full universe of cases involving cooperation agreements. In addition to those involving unsuccessful cooperation agreements, it also does not capture cases where cooperation was memorialized in a form that does not require judicial involvement, such as a deferred prosecution agreement or nonprosecution agreement.¹⁰

⁷ See, e.g., *The Whiskey Cases*, 99 U.S. 594, 599 (1879) (discussing the ancient practice of approvement, whereby an individual indicted for treason or a felony could obtain a pardon in exchange for testifying truthfully against an accomplice upon the accomplice’s conviction); *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (“No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.”).

⁸ See John C. Jeffries Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1104 (1995) (claiming that because the leaders of organized crime “rarely do the dirty work,” “successful prosecution of organized crime leaders requires the use of accomplice testimony”); Frank O. Bowman III, *Defending Substantial Assistance: An Old Prosecutor’s Meditation on Singleton, Sealed Case, and the Maxfield-Kramer Report*, 12 FED. SENT’G REP. 45, 47 (1999) (“Bargaining for testimony is said to be necessary to detect and successfully prosecute certain crimes.”).

⁹ U.S. SENT’G GUIDELINES MANUAL § 5K1.1.

¹⁰ In a nonprosecution agreement, prosecutors agree to not file charges in exchange for an individual’s cooperation or fulfillment of other conditions. In a deferred prosecution agreement, prosecutors agree to defer the filing of charges, and ultimately do not file them, in exchange for

Defendants who provide substantial assistance to the government also can obtain a reduction of their sentence pursuant to Federal Rule of Criminal Procedure 35(b), which authorizes a judge to reduce a previously imposed sentence on account of a defendant's cooperation.¹¹

When cooperation follows the filing of charges against a defendant, it generally progresses in the following sequence. Potential cooperators first meet with prosecutors to disclose information that may be useful to the government. Prosecutors then evaluate the information and the defendant's credibility and record and assess whether to proceed. Multiple debriefing meetings may ensue; if prosecutors elect to proceed, they will offer a cooperation agreement, pursuant to which a defendant typically will be required to plead guilty, provide truthful information, and substantially assist the government in the investigation and prosecution of others.¹² The defendant will then plead guilty pursuant to that agreement and—in districts where Section 5K1.1 departures are the primary mechanism for rewarding cooperation—the defendant's sentencing will be adjourned until their cooperation is complete.¹³

At the conclusion of the defendant's cooperation, the government assesses whether the defendant has provided such substantial assistance and met all other conditions of their agreement—including, for example, having committed no further crimes. Then, if the government determines that the cooperator has met all such terms, the government holds up its end of the agreement by filing a motion before the sentencing district judge—pursuant to Section 5K1.1 (and for cases involving a statutory mandatory minimum sentence, also pursuant to 18 U.S.C. § 3553(e), which authorizes a judge to impose a sentence below the mandatory minimum)—requesting that the judge take the defendant's substantial assistance into account in imposing the sentence.

But cooperation does not always follow this sequence. Particularly when proactive cooperation is involved—such as wearing a wire or other investigative activity that occurs outside of custody—individuals may start cooperating with prosecutors before they are charged (and before they are represented by counsel). When Rule 35(b) rather than Section 5K1.1 is the

cooperation or fulfillment of other conditions. Like in cases involving defendants who plead guilty pursuant to cooperation agreements but receive no departure motion, data on these nonprosecution and deferred prosecution cases are not collected. See Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 936 (2009) (noting that the U.S. Sentencing Commission's data do not account fully for all forms of cooperation).

¹¹ FED. R. CRIM. P. 35(b).

¹² See Roth, *supra* note 1, at 753–56.

¹³ See *infra* text accompanying note 38.

mechanism for rewarding cooperation, the defendant will be sentenced before completing their cooperation. When the cooperation is complete, the government will move pursuant to Rule 35(b) for the district judge to adjust the defendant's initial sentence downward to reflect the cooperation. In some cases, a defendant may receive both a Section 5K1.1 departure and a Rule 35(b) adjustment.

The U.S. Sentencing Commission, which collects, analyzes, and publishes data on federal sentencing, reports statistics about Section 5K1.1 departures annually, with rates of Section 5K1.1 departures reported in the aggregate and broken out by circuit, district, and crime category. The Commission also reports the extent of such departures relative to the Guidelines range and trends in Section 5K1.1 departures over time.¹⁴ The Sentencing Commission also collects and publishes data on Rule 35(b) sentence reductions, although separately from data on departures pursuant to Section 5K1.1.

Nationally, cooperation rates have ebbed and flowed over the life of the Sentencing Guidelines.¹⁵ At their peak, rates hovered around 20% in the mid-1990s but came down to 13%–16% in the 2000s.¹⁶ A Task Force appointed by the Administrative Office of the U.S. Courts estimated that approximately 13%–15% of federal defendants cooperated in fiscal years (FYs) 2012–

¹⁴ Because most states, even those that adopted their own sentencing guidelines, do not have an analogue to Section 5K1.1, cooperation at the state level is much more difficult to measure. See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1230 (2005) (observing the “absence of any serious attempt by state guideline systems” to regulate sentencing discounts for cooperation); see also R. Michael Cassidy, “*Soft Words of Hope*”: *Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1148 (2004) (“While the practice in state courts varies from jurisdiction to jurisdiction, it is widely recognized that many plea agreements with cooperating witnesses at the state level are informal and unwritten.”).

¹⁵ Although no data are available, the recollection of many experienced practitioners was that cooperation was considerably less prevalent before the Guidelines went into effect in 1987. See Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 563 n.2 (1999); John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Justices*, 5 J.L. & POL’Y 423, 424 n.9 (1997) (comparing data from the early years of the Sentencing Guidelines, when only 7.5% of cases involved substantial-assistance departures, to subsequent years, when the rate quickly went up, as evidence that the Guidelines increased cooperation).

¹⁶ See U.S. SENT’G COMM’N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2003), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2003/fig-g_0.pdf [<https://perma.cc/ER2B-TUN3>]. From 2004 to 2008, rates of substantial-assistance departures ranged between 15.5% in 2004 and 13.5% in 2008. See U.S. SENT’G COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2008), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2008/figG_0.pdf [<https://perma.cc/EHS2-48GF>]; U.S. SENT’G COMM’N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2005), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2005/fig-g-pre_0.pdf [<https://perma.cc/FEM4-HCNZ>] (showing Section 5K1.1 rates of 15.9% in 2003 going down to 14.4% in 2004 and holding at 14.7% in 2005).

2015.¹⁷ For the past several years, rates have come down to closer to 10%.¹⁸ Thus, approximately 9.6% of federal defendants who were sentenced in 2021 received an adjustment to their sentences based on substantial assistance to the government,¹⁹ a reasonably good proxy for cooperation rates overall. That amounts to approximately 5,493 individuals, who on average received over a 54.5% reduction in their sentence relative to their otherwise-applicable Guideline range.²⁰

The decrease in overall cooperation rates correlates with a shift in the composition of the federal criminal docket, with immigration cases—in which cooperation is rare²¹—becoming more dominant. The vast majority of federal criminal immigration prosecutions are for illegal reentry into the United States. These cases are typically fairly straightforward to prove and involve individual- rather than multi-defendant conduct, making cooperation less salient in this crime category.²² In fiscal year 1998, immigration cases represented only 15.9% of the federal docket,²³ but have steadily climbed since,²⁴ reaching a high of 41% of the docket in 2020.²⁵

¹⁷ See TASK FORCE ON PROTECTING COOPERATORS, ADMIN. OFF. OF THE U.S. CTS., FINAL REPORT 6–7 (2018), <https://www.moed.uscourts.gov/sites/moed/files/documents/AO-TaskForceOnProtectingCooperators-2020.pdf> [<https://perma.cc/F33E-M2FS>]. The Task Force’s calculations, based on information collected by the U.S. Sentencing Commission, included the following “indications of cooperation”: Section 5K1.1 departures, Rule 35(b) sentencing adjustments based on cooperation, and “instances in which cooperation served as a sentencing factor in the absence of a government motion.” *Id.* at 5–6.

¹⁸ See U.S. SENT’G COMM’N, 2021 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 86 fig.9 (2021) [hereinafter 2021 SOURCEBOOK], https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf [<https://perma.cc/TD7P-J99V>] (showing the percentage of federal sentences involving Section 5K1.1 departures for each year from 2012 (11.7%) to 2021 (9.6%)).

¹⁹ *Id.* at 84 tbl.29. In addition, in FY 2021, 658 individuals received Rule 35(b) adjustments, bringing the FY 2021 total of defendants who received either a Section 5K1.1 or Rule 35(b) adjustment based on “substantial assistance” to the government to 6,151. *Id.* at 193 tbl.R.

²⁰ *Id.* at 84 tbl.29, 98 tbl.37.

²¹ In FY 2021, less than 1% (0.9%) of defendants convicted of immigration offenses received downward-departure motions for substantial assistance. *Id.* at 90 tbl.31.

²² See *id.* at 128 fig.I-1.

²³ See U.S. SENT’G COMM’N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 11 fig.A (1998), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1998/FigA_0.pdf [<https://perma.cc/N7TF-4Q35>].

²⁴ See MARK MOTIVANS, U.S. DEP’T OF JUST., NCJ 253116, IMMIGRATION, CITIZENSHIP, AND THE FEDERAL JUSTICE SYSTEM, 1998-2018, at 2 (2019), <https://bjs.ojp.gov/content/pub/pdf/icfjs9818.pdf> [<https://perma.cc/8V7F-TTVZ>] (reporting that the number of people prosecuted for immigration offenses in federal court tripled between 1998 and 2018).

²⁵ U.S. SENT’G COMM’N, 2020 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 45 fig.2 (2020) [hereinafter 2020 SOURCEBOOK], <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf> [<https://perma.cc/2VMD-WB9N>].

The decrease in cooperation rates in recent years also correlates with the change wrought by the U.S. Supreme Court's decision in *United States v. Booker*, which held that the Guidelines were unconstitutional to the extent that they were mandatory, and that they would be advisory only going forward.²⁶ As *Booker* has been absorbed by the federal courts—and its full import explicated in subsequent decisions that made clear the extent of federal district judges' new authority to depart from the Guidelines—the percentage of defendants sentenced below the applicable Guidelines range without a government motion has increased.²⁷

But even though defendants in many instances may receive a below-Guidelines sentence without a government motion based on cooperation, cooperation still plays an important role in federal sentencing. In crime categories on which *Booker* had limited effect—including crimes carrying statutory mandatory minimum sentences such as some drug crimes and some firearm offenses or crimes of violence—the downward-departure rates based on substantial assistance have remained consistently high. Thus, for example, in drug-trafficking cases, the rate of downward departures for substantial assistance in FY 2021 was 19.8%, accounting for the largest number of all departures on that basis nationally (more than half),²⁸ even though drug-trafficking offenses accounted for 30.7% of the federal docket.²⁹

However, in other crime categories too, substantial-assistance departure rates have held relatively firm. In FY 2021, the second largest number of defendants receiving downward departures for substantial assistance were those convicted of fraud, theft, or embezzlement (12.3% of all such defendants), even though such crimes typically do not carry a mandatory minimum sentence.³⁰ Antitrust and bribery offenses also have persistently high rates of cooperation, even though there are no statutory mandatory

²⁶ 543 U.S. 220, 266–67 (2005).

²⁷ See U.S. SENT'G COMM'N, THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING: FEDERAL SENTENCING OUTCOMES, 2005-2017 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf#page=22 [<https://perma.cc/GEL5-7RSV>].

²⁸ See 2021 SOURCEBOOK, *supra* note 18, at 90 tbl.31 (illustrating that drug-trafficking crimes represented 3,487 substantial-assistance departures, more than half of all such departures).

²⁹ *Id.* at 46 tbl.4. This high rate of cooperation may also reflect the frequent use of proactive cooperation in drug investigations and the conditioning of law enforcement agents, prosecutors, and defense lawyers to expect cooperation in drug cases.

³⁰ See *id.* at 90 tbl.31. Identity theft is one of the few fraud offenses for which a mandatory minimum penalty is authorized, pursuant to 18 U.S.C. § 1028(A). For a breakdown of the types of offenses most frequently involving application of a mandatory minimum penalty, see U.S. SENT'G COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY20.pdf [<https://perma.cc/5RB7-TK7E>].

minimum sentences for such crimes.³¹ As noted in one prior study of cooperation that found similarly high rates for these crimes, the rates may reflect that these crimes, such as drug trafficking, “are more prone to conspiracy (‘multi-defendant’) behaviors, [so] defendants charged with these offenses should have greater opportunities to provide details about a co-participant in those behaviors.”³²

The foregoing statistics paint only a partial portrait of the significance of cooperation to federal law enforcement. Necessarily, a downward departure for substantial assistance reflects prosecutors’ determination that an individual’s information was useful in the investigation and prosecution of *others*. It is the rare federal criminal case that is built without the assistance of cooperators—especially so for complex cases.³³ Thus, although precise figures are unobtainable, cooperation affects not only the slice of the federal docket that consists of cooperating defendants, but large swaths of other cases where those defendants appeared as witnesses or otherwise assisted federal prosecutors and law enforcement agents in holding other (ideally more culpable) individuals accountable. The number of cooperators is merely the tip of the iceberg capturing the full impact of cooperation on the federal system.

B. The Local Variability of Cooperation Practices

The national figures discussed above reveal only the general picture of cooperation in the United States. There are important regional differences in how cooperation is practiced. One measure of these differences can be found in the rates for substantial-assistance departures collated by the U.S. Sentencing Commission: some federal districts have substantial-assistance departure rates well above the national average, whereas others report rates far below.³⁴ These rates tend to be relatively consistent over time, reflecting

³¹ See 2021 SOURCEBOOK, *supra* note 18, at 90 tbl.31; QUICK FACTS: MANDATORY MINIMUM PENALTIES, *supra* note 30. In FY 2021, defendants sentenced for antitrust offenses had a 66.7% rate of downward departures for substantial assistance. 2021 SOURCEBOOK, *supra* note 18, at 90 tbl.31. For bribery or corruption offenses, the rate was 32.8%. *Id.* Although these offenses constitute a minor fraction of the federal courts’ docket, their cooperation rates (i.e., the percentage of defendants convicted of such offenses who receive downward departures for substantial assistance) are the highest recorded by the Sentencing Commission. *See id.*

³² See Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, 11 FED. SENT’G REP. 6, 13 (1998).

³³ See Roth, *supra* note 1, at 750; Steven M. Cohen, *What Is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 817 (2002).

³⁴ See 2021 SOURCEBOOK, *supra* note 18, at 87 tbl.30 (reporting rates of departures by district based on substantial assistance that vary widely, from a low of under 1% to a high of over 38%).

the distinctive culture and norms surrounding cooperation in each office,³⁵ as well as the types of cases constituting their dockets. Cooperators in some districts also fare significantly better than cooperators in others, measured by the extent of the departure from their otherwise-applicable sentencing range.³⁶

There are also important differences between districts regarding which legal mechanism is predominantly used to reward cooperation, which affects the sequencing of events. In most districts, cooperators are not sentenced at all until their cooperation is complete, when the government will file a motion for a downward departure pursuant to Section 5K1.1 (and, if a statutory mandatory minimum applies, 18 U.S.C. § 3553(e)). But in a minority of districts, cooperators are sentenced before their cooperation is complete, and their sentence is subsequently adjusted pursuant to Rule 35(b) to reflect cooperation.³⁷ Either way, prosecutors withhold the filing of the requisite motion so as to maintain maximum leverage to avoid cooperators renegeing on their commitments.³⁸ Districts also vary considerably in the extent to which information referencing cooperation is discussed in open court or filed on the public docket rather than kept under seal.³⁹

These differences reflect two salient features of cooperation. First, the broad discretion of prosecutors to determine how to structure cooperation in their districts. Second, the broad discretion of federal judges in handling cooperation—including in whether they will adjourn sentencing pending completion of cooperation—the extent of their departures based on cooperation, and their sealing practices. Although all federal prosecutors and judges are bound by a common set of legal rules governing cooperators, those rules are sufficiently underspecified to permit a great deal of variation. For example, as the authors of one early study of cooperation observed, the

³⁵ Scholars have long observed that the practices in a particular court are shaped in large part by the social world or community of actors who compose it. Through its shared workplaces and repeated interdependent professional relationships, this community develops a distinct culture defined in part by its policies and processes. *See, e.g.*, JAMES EISENSTEIN, ROY FLEMING & PETER E. NARDULLI, *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* (1988); Jeffrey T. Ulmer, *The Localized Use of Federal Sentencing Guidelines in Four U.S. District Courts*, 28 *SYMBOLIC INTERACTION* 255, 260–61 (2005) (applying the concept of court culture to federal district courts).

³⁶ *See* Ulmer, *supra* note 35, at 271 (reporting differences between districts in the “generosity” of downward departures based on substantial assistance).

³⁷ *See* 2021 SOURCEBOOK, *supra* note 18, at 193 tbl.R; KEVIN BLACKWELL & JILL BAISINGER, U.S. SENT’G COMM’N, *THE USE OF FEDERAL RULE OF CRIMINAL PROCEDURE 35(B)*, at 1 (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/Rule35b.pdf> [<https://perma.cc/RD6P-Y4F6>].

³⁸ *See, e.g.*, Richman, *supra* note 6, at 96 (“The most efficient way for the government to keep some hold over the defendant is to postpone sentencing until after his cooperation.”); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 *VAND. L. REV.* 1, 18–19 (2003).

³⁹ *See* TASK FORCE ON PROTECTING COOPERATORS, *supra* note 17, at 17.

governing statute and Sentencing Guidelines leave many important standards unaddressed, including what counts as “substantial” assistance.⁴⁰

This local variability is long-standing. For example, in their study of three federal districts published in 1992, Ilene Nagel and Professor Stephen Schulhofer found that the districts had different criteria for what constituted substantial assistance.⁴¹ In one district, prosecutors applied relatively stringent criteria, such as requiring that a defendant’s information lead to the arrest of another or that the defendant be prepared to testify against others if needed.⁴² In another district, prosecutors applied a more generous standard, sometimes filing substantial-assistance motions even where there was no such concrete result from the defendant’s information. The authors concluded that prosecutors in that district were selectively altering the threshold for substantial-assistance departures in order to mitigate the harshness of the Sentencing Guidelines for sympathetic defendants, while still appearing to be in full compliance with the Guidelines.⁴³ In the third district, prosecutors were found effectively to have *no* standard for assessing substantial assistance (and consequently had a downward-departure rate that was more than twice the national average).⁴⁴

Subsequent studies have documented that this substantial variation in how districts approach cooperation persists. In their study for the U.S. Sentencing Commission published in 1998, Linda Maxfield and John Kramer found that there was significant interdistrict disparity in what kinds of assistance were deemed “substantial” enough to prompt prosecutors to file a Section 5K1.1 motion.⁴⁵ Through a survey and interviews of prosecutors around the country, the authors determined that, although certain kinds of cooperation were deemed sufficient in every office—such as participating in an undercover investigation or testifying—certain other conduct, notably

⁴⁰ Maxfield & Kramer, *supra* note 32, at 3–4 (noting also that the legal regime does not define the extent to which a judge should depart based on the level of a defendant’s assistance). Although prosecutors also are governed by a common set of internal policy statements promulgated by the Department of Justice, these policy statements leave a great deal of discretion to individual offices. *See* U.S. Dep’t of Just., Just. Manual § 9-27.420 (2018) (instructing prosecutors to consider “the nature and value of the cooperation offered and whether the same benefit can be obtained without having to make the charge or sentence concession that would be involved in a plea agreement”).

⁴¹ Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 551 (1992) (reviewing between 50 and 150 case files in each district studied and interviewing U.S. Attorneys and Assistant U.S. Attorneys, the Chief Federal Defender, several private defense attorneys, the Chief Probation Officer, and judges).

⁴² *Id.* at 541.

⁴³ *Id.* at 522–24.

⁴⁴ *See id.* at 531, 555–56.

⁴⁵ *See* Maxfield & Kramer, *supra* note 32, at 9.

providing information solely about a defendant's own criminal conduct, was considered sufficient in some offices but not others.⁴⁶ Similarly, in his study of four districts published in 2005,⁴⁷ Professor Jeffrey Ulmer found that while providing information deemed useful was sufficient in some districts, other districts were more demanding, in effect requiring that cooperating defendants put themselves "in a position of risk" to qualify.⁴⁸

There are also significant differences among districts in the standard terms of the cooperation agreements. For example, one study of the six federal districts within the Second Circuit found that the U.S. Attorneys' offices in the Southern and Eastern Districts of New York required defendants to disclose all of their crimes as a condition of cooperation, whereas prosecutors in other districts only required such disclosures if the government specifically asked about them or only for specific offenses.⁴⁹ The specificity of the promises of leniency that prosecutors made also varied considerably. While some offices agree to recommend a particular sentence or sentencing discount, others make no such representation, leaving it entirely up to the sentencing judge.⁵⁰

As discussed further below, our study adds to this literature regarding inconsistencies between districts in practices surrounding cooperation by providing an updated, granular account—the first in nearly two decades—of

⁴⁶ *Id.* at 8–9, 26 (reporting that 100% of districts considered testimony under oath to constitute sufficient substantial assistance; 98.9% considered participation in the investigation of another, or providing information relevant to the prosecution of others, to be sufficient; 92% considered providing information about criminal activity of others sufficient; and 48.9% considered providing information about the defendant's own activity sufficient).

⁴⁷ See Ulmer, *supra* note 35. The Ulmer study was based on a total of 128 semistructured, open-ended interviews with federal prosecutors, defense lawyers, judges, and probation officers in four federal districts. *Id.* at 261–62.

⁴⁸ *Id.* at 264–65; see also U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 105 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [<https://perma.cc/U3HY-AFPJ>] (observing differences between districts as to whether information provided only about an offender's own conduct was deemed substantial assistance); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 125–27 (1994) (comparing different policies in the Central District of Illinois and the District of Columbia); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 588–91 (1998) (comparing the District of Massachusetts and the District of Connecticut).

⁴⁹ See Alan Vinegrad, *Proffer, Plea and Cooperation Agreements in the Second Circuit*, N.Y. L.J., Aug. 7, 2003 (reporting the results of a June 2003 study by the Federal Bar Council's Committee on Second Circuit Courts).

⁵⁰ See *id.* (observing that only one U.S. Attorney's office in the Second Circuit agreed to make a recommendation of a sentencing reduction of a specific number of Guideline levels); Nagel & Schulhofer, *supra* note 41, at 532 (describing how one district in the survey had a practice of recommending specific sentences for cooperators, but the other two did not); Richman, *supra* note 6, at 100 n.109 (collecting cases where cooperation agreements specified that prosecutors would recommend a particular percentage discount from the otherwise-applicable Guidelines range).

cooperation in three federal districts. Not only did respondents to our survey report differences in the mechanisms used to reward cooperation—e.g., Section 5K1.1 motions versus Rule 35(b) motions—but also other differences in practices, including: the extent to which defendants were required to plead guilty to previously uncharged crimes or prosecutors were willing to fact- or charge-bargain; the specificity of prosecutors’ recommendations to the sentencing judge; and the sealing of documents referencing cooperation. We also explored the relationship between these variables to determine the extent to which they were correlated with one another.

C. *Prior Empirical Literature on Cooperation and Plea Bargaining*

It is often posited that defendants cooperate to avoid or mitigate harsh sentencing penalties that they otherwise would face if convicted.⁵¹ However, not all defendants facing harsh sentences pursue cooperation, even when the prosecution is interested in their information. And some defendants who face relatively low sentencing penalties *will* pursue cooperation. While we did not doubt that defendants’ desire to avoid harsh sentences played a considerable role in their cooperation decisions, our investigation of the motivations of cooperation obliged us to identify some of the other variables potentially involved based on existing literature on plea bargaining.

For example, the growing plea-bargaining literature suggests that two factors play primary roles in the plea-bargaining decision: guilt status⁵² and

⁵¹ See, e.g., Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL’Y 247, 287 (1997) (noting that “the threat of lengthy incarceration may be used to induce an offender to cooperate”); Jeffries & Gleeson, *supra* note 8, at 1119–21 (1995) (positing that cooperation with the government is often the only way to reduce a long sentence); cf. U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 89 (2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_05.pdf [<https://perma.cc/MP4L-TGYU>] (summarizing the long-standing position of the Department of Justice that mandatory minimum penalties are “an ‘essential’ and ‘critical tool’ in obtaining ‘cooperation from members of violent street gangs and drug distribution networks’” (quoting *Public Hearing Before the U.S. Sent’g Comm’n* 29 (May 27, 2010) (statement of Sally Yates, Assistant U.S. Attorney, Northern District of Georgia), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Hearing_Transcript.pdf [<https://perma.cc/K9Z6-42AY>])).

⁵² See, e.g., Miko M. Wilford, Gary L. Wells & Annabelle Frazier, *Plea-Bargaining Law: The Impact of Innocence, Trial Penalty, and Conviction Probability on Plea Outcomes*, 46 AM. J. CRIM. JUST. 554, 554 (2021) (using a cheating paradigm to explore plea decisions and finding that guilty participants were significantly more likely to accept pleas than innocent participants, with the reasons for pleading guilty differing based on guilt status).

evidence strength.⁵³ It has also recently been suggested that defense attorneys' recommendations play a significant role, recommendations that are highly informed by judgments of the strength of a case and the likelihood of conviction at trial.⁵⁴ In the context of cooperation, we anticipated that attorney recommendations would play a significant role, since a client's decision even to speak with prosecutors can have serious negative repercussions. As David Patton, Executive Director and Attorney-in-Chief for the Federal Defenders of New York, has written, there are "myriad ways in which the decision to speak to prosecutors can harm a client's case," and if the defendant fails to obtain a cooperation agreement, it may make it extremely difficult to defend the case.⁵⁵ Agreements governing defendants' meetings with prosecutors typically provide only minimal protection against future use if the defendant were to go to trial.⁵⁶

The plea-bargaining research further indicates that multiple social pressures encourage defendants—guilty and innocent—to accept plea bargains.⁵⁷ In one such work, Professor Allison Redlich and her colleagues explored the application of psychological principles in plea bargaining. Like all people, defendants are sensitive to various common psychological principles. These include *social validation*, whereby people compare their offers to those of others and rely on others' (such as attorneys') evaluations of the offer; *scarcity*, whereby people tend to act quickly if they worry the offer will disappear quickly; and *authority*, whereby people tend to comply

⁵³ See, e.g., Hunter A. McAllister & Norman J. Bregman, *Plea Bargaining by Prosecutors and Defense Attorneys: A Decision Theory Approach*, 71 J. APPLIED PSYCH. 686, 686 (1986). The study authors manipulated the probability of conviction and sentence severity if convicted. They found that, as both increased, defense attorneys became more willing to plea-bargain, suggesting that evidence strength influences defense attorneys' plea recommendations. See also Greg M. Kramer, Melinda Wolbransky & Kirk Heilbrun, *Plea Bargaining Recommendations by Criminal Defense Attorneys: Evidence Strength, Potential Sentence, and Defendant Preference*, 25 BEHAV. SCI. & L. 573, 580 (2007) (surveying criminal defense attorneys and finding that factors important to attorney plea recommendations included expected penalty, evidence strength, client preference, and judge assigned to the case).

⁵⁴ See, e.g., Kelsey S. Henderson & Lora M. Levett, *Plea Bargaining: The Influence of Counsel*, 4 ADVANCES PSYCH. & L. 73, 85–87 (2019) (exploring the influence of defense attorneys' recommendations on plea decision-making and noting the connection between the likelihood of a case's success and attorneys' plea recommendations); see also Kelsey S. Henderson & Lora M. Levett, *Investigating Predictors of True and False Guilty Pleas*, 42 LAW & HUM. BEHAV. 427, 434–38 (2018) (finding a correlation between an individual's actual guilt, an advocate's recommendation, and the individual's decision whether to plead guilty).

⁵⁵ David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2593 n.79 (2014).

⁵⁶ *Id.*

⁵⁷ See, e.g., Lindsay C. Malloy, Elizabeth P. Shulman & Elizabeth Cauffman, *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 LAW & HUM. BEHAV. 181, 189 (2014) (finding based on interviews with incarcerated youths that attorney pressure is a predictor of self-reported false guilty pleas).

with requests from authority figures.⁵⁸ And like all people, defendants have a preference for short-term relief (such as release from jail) over considerations of long-term consequences (such as developing a criminal record and suffering collateral consequences).⁵⁹ These findings support the hypotheses set forth by Judge Stephanos Bibas and by Redlich that plea-bargaining decisions are not solely explained by the “shadow of trial” model of strategic behavior but are far more complex and have the potential to be swayed by social influences.⁶⁰

Given the unique aspects of cooperation that distinguish it from other forms of plea bargaining, we also were interested in investigating the role of remorse, trust in prosecutors, and concerns about safety and stigma in reaching a cooperation decision. While some commentators and courts have suggested that remorse plays a role in the decision to cooperate,⁶¹ that hypothesis has not been empirically tested. Moreover, while trust in law enforcement actors has been studied previously in the context of witnesses’ cooperation with police,⁶² it has not yet been studied in the context of

⁵⁸ Allison D. Redlich, Stephanos Bibas, Vanessa A. Edkins & Stephanie Madon, *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCH. 339, 345 (2017).

⁵⁹ See *id.* at 339 for a thorough discussion of the psychological factors at play for defendants in the plea-bargaining process. See also Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCH. PUB. POL’Y & L. 204, 209, 212 (2018) (finding that communicating collateral consequences did not have a large impact on defendants’ decisions to plead guilty).

⁶⁰ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466–67 (2004) (suggesting that the “shadow of trial” model does not fully capture the plea-bargaining process, and that other factors including information deficits, attorney incentives, and defendants’ risk preferences also play an important role); see also A SYSTEM OF PLEAS: SOCIAL SCIENCE’S CONTRIBUTIONS TO THE REAL LEGAL SYSTEM (Vanessa A. Edkins & Allison D. Redlich eds., 2019); Shawn D. Bushway & Allison D. Redlich, *Is Plea Bargaining in the “Shadow of the Trial” a Mirage?*, 28 J. QUANTITATIVE CRIMINOLOGY 437 (2012) (finding that plea-bargain decision-making may not occur in the shadow of the trial); Kenneth S. Bordens & John Bassett, *The Plea Bargaining Process from the Defendant’s Perspective: A Field Investigation*, 6 BASIC & APPLIED SOC. PSYCH. 93, 99–100 (1985) (identifying factors significant to defendants in deciding whether to accept a plea bargain, based on interviews with more than sixty defendants).

⁶¹ See, e.g., Simons, *supra* note 38, at 3–4 (arguing that, although the utilitarian view of cooperation is “intuitively appealing and largely accurate,” it is incomplete and leaves out important “retributive components,” including that “for some cooperators, cooperation can be a vehicle through which the defendant experiences atonement”); Gleeson, *supra* note 15, at 453 (noting prosecutors’ belief that “cooperation with the government reveals something positive about a defendant’s moral worthiness, contrition and prospects for rehabilitation”); *United States v. Agu*, 949 F.2d 63, 66 (2d Cir. 1991) (accepting that cooperation can constitute “evidence of contrition” that is relevant to sentencing).

⁶² Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 262 (2008) (finding in a study of New York City residents that perceptions of the legitimacy of the police—specifically whether police treated community members justly and made decisions fairly—shaped willingness to cooperate with police); Stephen Clayman & Layla Skinns, *To Snitch or Not to Snitch? An Exploratory Study of the Factors*

defendants' cooperation with prosecutors. Nor has there been much empirical investigation of the extent to which threats to physical safety or concerns about social stigma impact the cooperation decision, although both are frequently posited as self-evident considerations.⁶³ The sole report that we found on this subject was a 2016 study prepared for the Judicial Conference of the United States, the governing body of the federal judiciary, which collected data on incidents of harm to cooperating witnesses. This study surveyed federal district judges, prosecutors, federal public defenders, Criminal Justice Act (CJA)⁶⁴ panel attorneys, and chief probation and pretrial services officers in all ninety-seven federal districts.⁶⁵ The authors found significant incidents of physical harm to cooperators, especially while these individuals were in some form of custody.⁶⁶ They also reported that concerns about physical safety motivated hundreds of defendants to refuse to cooperate or to withdraw prior offers of cooperation.⁶⁷

Influencing Whether Young People Actively Cooperate with the Police, 22 POLICING & SOC'Y 460, 467 (2012) (reporting that a relationship of trust with individual police officers "was an important element to future cooperation"); JULIE L. WHITMAN & ROBERT C. DAVIS, NAT'L CTR. FOR VICTIMS OF CRIMES, SNITCHES GET STICHES: YOUTH, GANGS, AND WITNESS INTIMIDATION IN MASSACHUSETTS 46 (2007) (finding that youths' relationship with law enforcement may be "the single most important factor in . . . willingness to report crime").

⁶³ Weinstein, *supra* note 15, at 583–84 (noting that a "common disincentive [to cooperation] is fear of physical retaliation against the cooperator or his or her family"); *see also* Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 924 (2009) (discussing the risks of exposure as a cooperating defendant); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2281 (2014) (noting the "uniquely onerous burden" that the threat of violence places on victims, witnesses, and cooperating defendants).

⁶⁴ The Criminal Justice Act requires that each federal district court adopt a plan for "furnishing representation for any person financially unable to obtain adequate representation." 18 U.S.C. § 3006A(a). Although federally funded public defender organizations represent a significant portion of such individuals, the statute provides that private attorneys also "shall be appointed in a substantial proportion of the cases." *Id.* § 3006A(a)(3). Attorneys in private practice are selected to participate in a panel known as the "CJA Panel" for the district and are paid by the court at an hourly rate set by statute, usually well below market rates for attorneys' fees. *Id.* § 3006A(b), (d)(1). Members of the CJA panel typically also handle cases that are not assigned by the court. CJA panel attorneys typically have a regularly scheduled day when they are on duty for the panel in federal court and will be assigned cases on that day, including for example, when the federal defender's office has a conflict. CJA attorneys also may be assigned cases sporadically on other days.

⁶⁵ MARGARET S. WILLIAMS, DONNA STIENSTRA & MARVIN ASTRADA, FED. JUD. CTR., SURVEY OF HARM TO COOPERATORS: FINAL REPORT 2 (2016), <https://northerndistrictpracticeprogram.org/wp-content/uploads/2017/05/Survey-of-Harm-to-Cooperators-Final-Report.pdf> [<https://perma.cc/MFG3-9ZYU>].

⁶⁶ *Id.* at 20.

⁶⁷ *Id.* at 23–25, 30. The survey also found that defendants were so concerned about the harms associated with being perceived as cooperators that they "requested court documents to prove they were not a cooperator over 1,900 times in the past three years." *Id.* at 30. A subsequent study commissioned

Finally, we were interested in attorneys' perceptions of the role that clients' demographic characteristics, including race and gender, play in the cooperation decision. Several studies have documented disparities in the distribution of substantial-assistance departures based on these characteristics. For example, the 1998 Maxfield and Kramer report, discussed above, found that "legally irrelevant factors" such as gender, race, ethnicity, and citizenship were statistically significant in explaining Section 5K1.1 departures.⁶⁸ More recently, other studies, including those by Professor Cassia Spohn, have suggested that such factors may play a significant role in who receives a downward-departure motion.⁶⁹ Overall, the research suggests that female defendants receive substantial-assistance departures at higher rates than male defendants, and that the extent of the departures for females is greater. Similar effects have been reported for white defendants over nonwhite defendants, and defendants with more education over those with less. One important question that those studies do not address, however, is whether defendants' demographic characteristics have any impact on their *willingness* to cooperate with prosecutors.⁷⁰

by the Administrative Office of the U.S. Courts further documented harms to cooperators, or perceived cooperators, in prison, although it recognized that "it is impossible to quantify the individuals who are harmed in prison because of their cooperator status given that the [Federal Bureau of Prisons] does not maintain any data based on cooperator status." ADMIN. OFF. OF THE U.S. CTS., INTERIM REPORT OF THE TASK FORCE ON PROTECTING COOPERATORS AND RECOMMENDATIONS REGARDING THE BUREAU OF PRISONS 31 (2018), <https://www.moed.uscourts.gov/sites/moed/files/documents/AO-TaskForceOnProtectingCooperators-2020.pdf> [<https://perma.cc/UBG3-XXCY>].

⁶⁸ Maxfield & Kramer, *supra* note 32, at 21. Maxfield and Kramer found a particularly low rate of Section 5K1.1 departures for Hispanic defendants, and for those Hispanic defendants who did receive such departures, the extent of their sentencing reduction was significantly less than that of non-Hispanic defendants. *See id.* at 14 (reporting that "a Hispanic defendant was seven percentage points less likely than a non-Hispanic defendant to receive a substantial assistance departure"); *id.* at 19 n.41 (noting that departures for non-Hispanic defendants for substantial assistance were on average five percentage points greater than for Hispanic defendants).

⁶⁹ *See, e.g.,* Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS. 75 (2013); Richard D. Hartley, Sean Maddan & Cassia C. Spohn, *Prosecutorial Discretion: An Examination of Substantial Assistance Departures in Federal Crack-Cocaine and Powder-Cocaine Cases*, 24 JUST. Q. 382 (2007). It is exceptionally difficult to control for the myriad of possible confounding factors that could be underlying the effects found in these studies, making it challenging to interpret those effects. The difficulty of attributing causation for disparities in criminal justice outcomes is endemic to the field of criminology. *See, e.g.,* Christopher Robertson, Shima Baradaran Baughman & Megan S. Wright, *Race and Class: A Randomized Experiment with Prosecutors*, 16 J. EMPIRICAL L. STUD. 807 (2019); Spohn, *supra*, at 103 (noting how these issues interrelate and it is overly simplistic to think about any of them in isolation).

⁷⁰ *See* Hartley et al., *supra* note 69, at 404 (suggesting that differing attitudes about "the appropriateness of cooperating with law-enforcement officials" that are "linked to class, race/ethnicity, and culture" may explain some of the differences in rate of downward departures based on these characteristics). For a discussion of how race and gender may impact defendants' willingness to plead guilty generally, see Alexander Testa & Brian D. Johnson, *Paying the Trial Tax: Race, Guilty Pleas, and Disparity in Prosecution*, 3 CRIM. JUST. POL'Y REV. 500, 519–22 (2020).

II. THE PRESENT STUDY

Our study was designed to begin to address gaps in information about cooperation. It relies on a survey we distributed to defense attorneys in three federal districts eliciting their experiences with cooperation over the past five years. The survey asked attorneys about three principal areas of interest: factors the lawyers perceived as most significant to their clients in deciding whether to pursue cooperation; the practices regarding cooperation in their districts; and lawyers' views on the fairness of cooperation. Respondents did not disclose and were not asked to share any privileged information or information that might identify cases. We asked attorneys to identify how many cases they had handled that involved cooperation agreements and, further, to identify the type of case that, in their experience, most frequently involved the *opportunity to cooperate*. We defined "the opportunity to cooperate" to include either side—prosecution or defense—expressing interest in cooperation, even if a cooperation agreement did not result.

We asked attorneys to answer most of the ensuing questions only with respect to the type of case that in their own experience most often involved the opportunity to cooperate, which enabled us to detect significant differences based on case type. We also asked attorneys to indicate the district in which they primarily practiced and the role in which they practiced—federal defender, CJA panel attorney, or private practice attorney—and whether they had previously worked as a prosecutor.⁷¹

A. District Selection

For this study, we chose three large districts on the East Coast: the Southern District of New York (SDNY), the Eastern District of Pennsylvania (EDPA), and the Eastern District of Virginia (EDVA). Despite the similarities between these districts based on the size and the mix of their criminal dockets, the data provided by the Sentencing Commission suggests important differences in how these jurisdictions approach cooperation. For

⁷¹ Recent research suggests that the type of defense counsel has a significant effect on client outcomes, with clients represented by public defenders faring better (as measured by sentence length) than clients represented by other types of attorneys. See KELLY ROBERTS FREEMAN, BRYCE PETERSON & RICHARD HARTLEY, COUNSEL TYPE IN FEDERAL CRIMINAL COURT CASES, 2015-18, at 22 (2022), <https://bjs.ojp.gov/library/publications/counsel-type-federal-criminal-court-cases-2015-18> [<https://perma.cc/PN8Q-QCEP>] (reporting that individuals represented by private and CJA panel attorneys received 4%–8% longer sentences than those who used a public defender, and suggesting that federal public defenders are "more likely to encourage their clients to take plea deals" but also are better at securing more favorable sentencing outcomes); see also James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 183–84 (2012) (finding that, in a study of murder cases brought in state court in Philadelphia, indigent clients represented by public defenders fared considerably better than those represented by private, court-appointed counsel, as measured by length of prison sentence imposed).

FY 2021 (October 1, 2020 to September 30, 2021), SDNY reported 943 individuals sentenced (cases), constituting 1.6% of the overall federal docket of 57,287 cases, with a guilty plea rate in the district of 95.9%. For the same year, EDPA reported 446 cases (0.8% of the federal docket) and a guilty plea rate of 93.7%. EDVA reported 968 cases (1.7% of the federal docket) and a guilty plea rate of 96.4%. The mix of cases in each district also was roughly similar, with drug crimes accounting for the largest category of cases in all of them (SDNY = 37.1%, EDPA = 28.7%, EDVA = 30.5%), followed by fraud, theft, or embezzlement (SDNY = 18.9%, EDPA = 22.4%, EDVA = 15.4%), and firearms (SDNY = 10.5%, EDPA = 12.6%, EDVA = 10.2%).⁷²

Relative to the two other districts, EDVA makes far greater use of Federal Rule of Criminal Procedure 35(b), which authorizes sentencing adjustments for cooperators *after* the initial sentence has been imposed, than of Section 5K1.1 of the Guidelines, which authorizes adjustments *before* sentencing. In FY 2021, there were a total of 658 reductions in federal sentences pursuant to Rule 35(b). EDVA accounted for 76 of those, roughly 11.5% of the total. In SDNY and EDPA, there were only 4 such reductions in each district, with each of those two districts thus contributing just over 0.6% to the national total.⁷³

EDVA's practice of relying primarily on Rule 35(b) is long-standing.⁷⁴ EDVA has long been known as the "rocket docket," on account of the federal

⁷² See 2021 SOURCEBOOK, *supra* note 18, at 193 tbl.R, 35 tbl.1, 56 tbl.11; U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET FISCAL YEAR 2021: SOUTHERN DISTRICT OF NEW YORK 1 fig.A (2021), <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2021/nys21.pdf> [<https://perma.cc/QR27-WA23>]; U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET FISCAL YEAR 2021: EASTERN DISTRICT OF PENNSYLVANIA 1 fig.A (2021), <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2021/pae21.pdf> [<https://perma.cc/P3NW-X47Z>]; U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET FISCAL YEAR 2021: EASTERN DISTRICT OF VIRGINIA 1 fig.A (2021), <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2021/vae21.pdf> [<https://perma.cc/Q4NV-CDW4>]. (However, EDVA also reports that 26.2% of its cases fall into the category of "other," whereas the other two districts put far fewer cases in that undifferentiated category.)

To access the U.S. Sentencing Commission's federal sentencing statistics reports for every district, see the central webpage at *2021 Federal Sentencing Statistics*, U.S. SENT'G COMM'N (Apr. 2022), <https://www.uscc.gov/research/data-reports/geography/2021-federal-sentencing-statistics> [<https://perma.cc/2929-ZMSF>].

⁷³ See 2021 SOURCEBOOK, *supra* note 18, at 193 tbl.R.

⁷⁴ See BLACKWELL & BAISINGER, *supra* note 37, at 9–10 (reporting that, in a study of federal sentences imposed during FY 2009 through FY 2014, EDVA granted 13.7% of all nationwide Rule 35(b) motions, more than any other district, and granted such motions in more than 75% of cases in which a defendant provided substantial assistance to the government).

judges' preference in that district for moving cases promptly.⁷⁵ Whereas judges in other districts are more willing to defer sentencing until cooperation is complete, the judges in the EDVA are not. That explains why Rule 35(b) predominates over Section 5K1.1 motions in the EDVA. Once a sentence is imposed, the only mechanism available to adjust the sentence on account of cooperation is Rule 35(b).

In addition, although cooperation rates in both EDPA and SDNY are consistently above the national average, rates in the former are notably higher. For FY 2021, when the national average of substantial-assistance departures pursuant to Section 5K1.1 was 9.6%, SDNY had a downward-departure rate for substantial assistance of 12.1%. In EDPA, it was 23.8%. In EDVA, it was 4.1% (but effectively 12% if Rule 35(b) departures were added to the Section 5K1.1 departures).⁷⁶ These distinctions raised questions for us about what other aspects of the cooperation process might be different in these districts and what, if any, impact these differences might have on cooperation more broadly.

B. Survey Design

The survey began with several biographical questions eliciting the extent of respondents' experience as criminal defense attorneys and with cooperation specifically. We then asked the attorneys to rate the *importance* of 27 items that may affect a defendant's decision to cooperate on a scale of one to nine, with one being least important and nine being most important. These items were drawn from prior literature on cooperation and plea bargaining, as well as the authors' own experience and conversations with attorneys who have worked with cooperators. Respondents were given the opportunity to list and explain any other factors not enumerated in the list that, in their view, were important to clients in the cooperation decision.

Among the items we asked attorneys to rate were sentencing considerations, including whether a statutory mandatory minimum sentence applies and the anticipated sentencing range without cooperation. The list

⁷⁵ See Daniel C. Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 FED. SENT'G REP. 75, 75 & 77 n.4 (1998).

⁷⁶ See 2021 SOURCEBOOK, *supra* note 18, at 87 tbl.30, 193 tbl.R. These distinctions have been relatively consistent over the past several years. For example, for FY 2020, when the national average of substantial-assistance departures pursuant to Section 5K1.1 was 8.2%, SDNY had a downward-departure rate for substantial assistance of 17.6%. In EDPA, it was 23.2%. In EDVA, it was 4.1% (but effectively 20.3% when Rule 35(b) adjustments based on substantial assistance were added in). See 2020 SOURCEBOOK, *supra* note 25, at 87 tbl.30, 193 tbl.R. For FY 2019, when the national average for substantial-assistance departures based on Section 5K1.1 was 9.6%, SDNY had a rate of 15.9%, EDPA had a rate of 26%, and EDVA had a rate of 4.5% (but with 150 Rule 35(b) adjustments added, an effective rate of 16.85%). See U.S. SENT'G COMM'N, 2019 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 87 tbl.30, 193 tbl.R (2019).

also included a defendant's bail status, the magnitude and certainty of anticipated sentencing benefit, and concerns about exposure for uncharged criminal conduct. It also included psychosocial items such as concerns about physical safety, stigma, financial considerations, and remorse; considerations prompted by prior studies of plea bargaining⁷⁷ and procedural justice such as trust in the defense attorney, the prosecutor, and the sentencing judge; and defendant demographic characteristics such as age, race, gender, and education level.⁷⁸ We also asked attorneys to rate the *frequency* with which these items came up during their discussions with clients about cooperating.

We hypothesized that sentencing considerations would be very high on the list of factors that attorneys rated as most important to the cooperation decision. We further expected that the importance of some factors would vary depending on the type of case. For example, we expected that mandatory minimum sentences would play a bigger role in some types of cases (such as drug trafficking) where mandatory minimum sentences regularly apply, but not in others (such as fraud) where they are generally inapplicable. Similarly, we anticipated that concerns about physical safety would be most significant for defendants in cases involving drugs or crimes of violence, and less significant in nonviolent cases. We also hypothesized that financial considerations would be most significant in cases involving property crimes or public corruption, where defendants were more likely to be paying for their own lawyer or concerned about paying fines or restitution as part of any criminal sentence.

Cognizant of the local nature of sentencing practices, we also asked attorneys to answer a series of questions about how prosecutors and judges approach cooperation in the district in which they primarily practiced. All attorneys were asked about what, if any, training they had received on cooperation and, if none, what shaped how they handled cooperation. An additional set of questions probed attorneys' perception of the fairness of cooperation and how they viewed their professional obligation to discuss cooperation with clients.

C. Survey Distribution

Starting in June 2021, we distributed the survey via email through the cloud-based platform Qualtrics to federal public defenders; members of the CJA panel; and attorneys in private practice in SDNY, EDPA, and EDVA. In each instance, the recruitment email contained information about the

⁷⁷ See *supra* Section I.C.

⁷⁸ The full list of 27 items appears in Appendix A.

content of the survey, an explanation of the steps taken to preserve participants' anonymity, and a link to the survey.

We distributed the survey to federal public defenders through the heads of those offices, who distributed it on our behalf. We also sent it individually to federal defenders whose email addresses were either listed on Federal Defender websites, provided to us through direct outreach to those offices, or available through Bloomberg Law docket searches. We followed a similar approach in sending the survey to members of the CJA panels, with the heads of the CJA panels circulating the survey on our behalf in the first instance, followed by individual emails to attorneys on the panel to the extent we were provided contact information or were able to discern attorney membership on the panels through Bloomberg Law.

To generate a list of attorneys in our third category, private practice, we utilized the Bloomberg Law database to conduct a search of all criminal cases filed in the three districts from February 1, 2018 to February 29, 2020. We then extracted defense attorney names from this list, and eliminated duplicate names, CJA attorneys, and federal defenders. In EDVA, where there was a significant number of nonfelony cases, we removed those cases from the list.⁷⁹

III. STUDY FINDINGS

A. *Participants and Their Dockets*

Data collection began in June 2021 and was completed in November 2021. A total of 146 federal defense attorneys between the ages of 33 and 76 (average age was 57.63) responded to our survey. Public defenders ($M = 46.96$) were significantly younger than CJA attorneys ($M = 59.45$) and private attorneys ($M = 60.40$).⁸⁰

⁷⁹ A memorandum explaining in greater detail the methodology of selecting attorney names for this third category is on file with the authors. Additional analyses of our data not included in this Article are available from the authors upon request.

⁸⁰ $F(2,80) = 7.85, p < 0.01, \eta_p^2 = 0.16$. For the purposes of succinctness and readability, we have not reported all test statistics for post hoc analyses. However, our characterizations and descriptive statistics are all supported by those post hoc analyses. In the footnotes of many of the following analyses, we will frequently report F values, p -values, and effect sizes such as η_p^2 and R^2 . The “F” is a test statistic with a known probability distribution, used to test differences between group means. The test statistic is always followed by a p -value, which indicates how likely it is that the effect we see happened by chance. A lower p -value indicates a higher likelihood of a true effect. When the p -value is below 0.05 (i.e., the likelihood that the effect happened by chance is less than 5%), the effect is considered significant. Finally, we report the effect size η_p^2 (eta squared), which measures the strength of the effect. The p -value may tell us whether an effect is significant, but η_p^2 tells us the meaningfulness of that effect. Commonly, $\eta_p^2 = 0.01$ is considered a small effect size, $\eta_p^2 = 0.06$ is considered a medium effect size, and $\eta_p^2 = 0.14$ is considered a large effect size.

NORTHWESTERN UNIVERSITY LAW REVIEW

Of the participants who identified their gender, eighty-nine identified as male and twenty-six identified as female. Among those who indicated race, one identified as Asian, six identified as Black or African American, ninety-six identified as white, and nine identified as Other.⁸¹

To explore differences in cooperation practice, we asked participants to indicate the district (SDNY, EDPA, EDVA, Other) and role (CJA attorney, private law firm, public defender) in which they primarily practice. Although we targeted our study to attorneys practicing primarily in the three federal districts identified in our study, we recognized that some of the CJA attorneys and other attorneys whose names we extracted from the Bloomberg database might practice primarily in another district. These attorneys selected “Other” as their district of primary practice. Table 1 below outlines the breakdown of our participant group by district and role.

TABLE 1: BREAKDOWN OF PARTICIPANTS BY DISTRICT AND ROLE

		District					Total
		SDNY	EDPA	EDVA	Other	No Response	
Role	CJA Attorney	40	13	27	4	1	85
	Private Attorney	5	6	6	4	1	22
	Public Defender	3	3	6	2	0	14
	No Response	0	0	0	0	25	25
Total		48	22	39	10	27	146

On average, participants reported handling 72.45 criminal cases over the past five years, with an average of 18.73 (or roughly 25%) of those cases involving cooperation agreements. The number of cases involving cooperation agreements differed significantly based on role, such that private attorneys reported handling a significantly lower number of cases during that time involving cooperation (8.11) than public defenders (21).⁸² However, in comparing the *percentage* of cases involving cooperation agreements, there

⁸¹ “Other” included one Arab/Middle Eastern, two Hispanic, one “Human,” one Jewish, one Latino, one Puerto Rican, one Sicilian, and one South Indian American. According to the American Bar Association (ABA) 2021 National Lawyer Population Survey, 63% of lawyers identified as male while 37% identified as female. AM. BAR ASS’N, PROFILE OF THE LEGAL PROFESSION 12 (2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf> [https://perma.cc/W2YS-LHRR]. With respect to gender demographics, the ABA report notes: “Most state bars and state licensing agencies track gender in the [legal] profession, but not all do. In 2021, 44 states reported the number of male and female lawyers—up from 42 states in 2011.” *Id.* The same survey indicated that 85.4% of U.S. lawyers identify as white. *Id.* at 13. The demographics for attorneys who participated in our report were primarily aligned with those in the ABA report, though men are slightly overrepresented in the defense attorney sample, compared to attorneys overall.

⁸² ANOVA (analysis of variance): $F(2,107) = 3.15, p = 0.05, \eta_p^2 = 0.06$.

was no difference across role. That suggests that federal public defenders handle a significantly larger number of cases involving cooperation agreements than do private attorneys primarily because of the relative size of their federal criminal dockets.⁸³ The percentage of cases involving cooperation agreements differed across district, with participants from EDVA reporting a significantly higher percentage of cases involving cooperation agreements (52.68%) than those from EDPA (30.09%), SDNY (21.52%), or Other districts (24.33%).⁸⁴

Participants had an average of 29.16 years of experience as criminal defense attorneys. Unsurprisingly given their younger reported age bracket, public defenders reported practicing for significantly fewer years ($M = 20.71$) than CJA attorneys ($M = 30.11$) and private attorneys ($M = 31.00$).⁸⁵ Thirty-nine participants had previously worked as prosecutors, with an average of 6.53 years of prosecutorial experience. There were no significant differences in prosecutorial experience across districts.

Race, gender, and age distribution did not significantly differ across districts. To protect the anonymity of participants, we are not reporting their specific demographics by district.

Unlike most empirical studies that try to survey a roughly equal number of participants from all participating groups, this study had larger sample sizes from some districts than others. Given the sizes of the jurisdictions we are studying, however, this is not surprising; this distribution is roughly representative of the relative docket sizes of each district.⁸⁶

B. Case Types Most Frequently Involving the Opportunity to Cooperate

Our respondents identified the following case types that, in their experience, most frequently involved the opportunity to cooperate, defined as either the prosecution or defense expressing interest in cooperation. Their responses were as follows, with “ n ” being the number of attorneys identifying each case type as the one most frequently involving the

⁸³ $F(2,106) = 2.18, p = 0.12$.

⁸⁴ $F(3,103) = 10.60, p < 0.01, \eta_p^2 = 0.24$. These percentages exceed the rates of substantial-assistance departures in these districts reported by the U.S. Sentencing Commission. *See supra* Section II.A (reporting that, for FY 2021, SDNY had a downward-departure rate for substantial assistance of 12.1%, EDPA had a rate of 23.8%, and EDVA, an effective rate of 12% when Rule 35(b) adjustments were added to Section 5K1.1 departures). *See* 2021 SOURCEBOOK, tbls.30 & R. The discrepancies may be attributable to the fact that our respondents were asked about cases involving cooperation agreements, whereas the Sentencing Commission’s data reflects only cases where a substantial-assistance departure or adjustment was granted. *See supra* note 10 and accompanying text (discussing how the Sentencing Commission’s data do not capture the full universe of cases involving cooperation agreements).

⁸⁵ $F(2,116) = 4.40, p < 0.05, \eta_p^2 = 0.07$.

⁸⁶ *See supra* note 18 and accompanying text (discussing docket size in the respective districts).

opportunity to cooperate: drugs/narcotics ($n = 102$), violent crimes/murder ($n = 21$), fraud ($n = 9$), firearms ($n = 5$), property offenses ($n = 5$), conspiracy ($n = 1$), theft/embezzlement ($n = 1$), and public corruption ($n = 1$). For the purposes of our analysis, we combined the identified cases into three groups: drugs ($n = 102$), violent crimes ($n = 20$), and nonviolent/white collar crimes not involving drugs ($n = 16$) (including fraud, property offenses, theft/embezzlement, and public corruption, hereinafter nonviolent crimes).⁸⁷ Once they identified the case type, attorneys were asked to respond to most of the questions in the survey only in relation to that specific case type.

FIGURE 1: NUMBER OF PARTICIPANTS IDENTIFYING EACH CASE TYPE AS MOST FREQUENTLY INVOLVING THE OPPORTUNITY TO COOPERATE

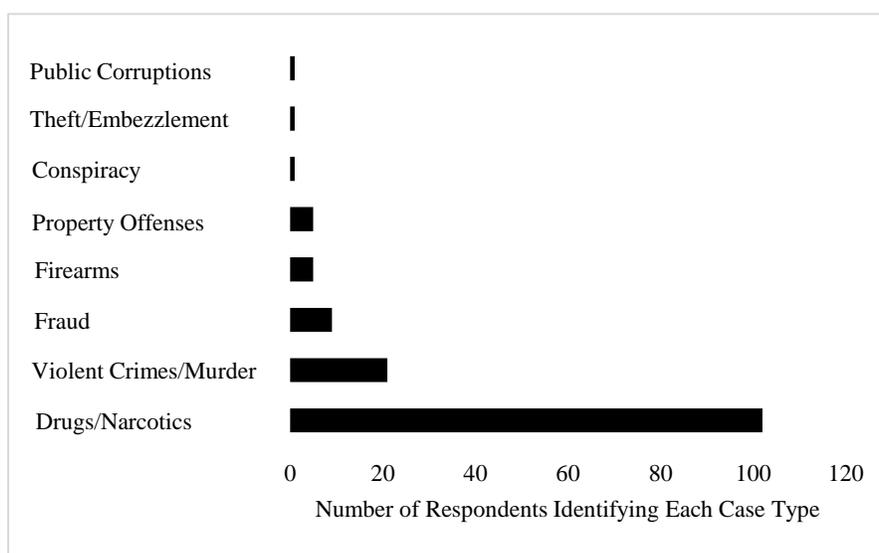


Figure 1 above contains a breakdown of case types, and Table 2 below provides a breakdown of case type by district and role. For example, 61.70% of SDNY attorneys indicated that drug crimes most frequently involved the opportunity to cooperate.

⁸⁷ One respondent listed “terrorism” as the case type most frequently involving the opportunity to cooperate, which we originally categorized as “violent crimes/murder.” However, in combining cases into our final three groups (i.e., drugs, violent crimes, and nonviolent crimes), we decided to exclude this case from the “violent crimes” grouping given the substantial differences between terrorism cases and the more typical violent crimes case. We excluded the five respondents who indicated “firearms” and the single respondent who indicated “conspiracy” from any of the groups because we could not discern the extent of overlap with the other categories.

TABLE 2: PERCENTAGE CASE TYPES BY DISTRICT AND ROLE

	District					Role			
	No Response	SDNY	EDPA	EDVA	Other	No Response	CJA Attorney	Private Attorney	Public Defender
Total Number	23	47	21	37	9	22	83	21	12
Drug Crimes	87.96%	61.70%	85.71%	81.08%	62.50%	86.36%	74.70%	47.62%	91.67%
Violent Crimes	4.35%	27.66%	0%	13.51%	12.50%	4.55%	20.48%	4.76%	8.33%
Nonviolent Crimes	8.70%	10.64%	14.29%	8.11%	37.50%	9.09%	4.82%	47.62%	0%

The majority of participants in every district identified drug cases as most frequently involving the opportunity to cooperate. This result is consistent with the U.S. Sentencing Commission's data showing that drug-trafficking cases account for more than half of all downward departures for substantial assistance.⁸⁸

Fewer private attorneys identified drug cases as most frequently involving the opportunity to cooperate (10) than CJA attorneys (62).⁸⁹ More private attorneys identified nonviolent crimes as involving the opportunity to cooperate (10) than public defenders (0) and CJA attorneys (4).⁹⁰ Attorneys from SDNY (13) more often indicated that violent crime cases most frequently presented the opportunity to cooperate than attorneys from EDPA (3).⁹¹

The forthcoming analysis explores two aspects of the data. First, we explore federal defense attorneys' beliefs about the motivations of cooperation overall. The goal is to understand what defense attorneys believe—based on their personal experiences handling cooperation cases—motivates federal defendants to cooperate. And second, we analyze

⁸⁸ See *supra* note 28 and accompanying text.

⁸⁹ An analysis of variance (ANOVA) with follow-up least significant difference (LSD) revealed a significant difference in frequency of case type based on role: $F(2,118) = 10.52, p < 0.01, \eta_p^2 = 0.15$.

⁹⁰ A multivariate analysis of variance (MANOVA) revealed that case type significantly differed by role: $F(2,113) = 11.66, p < 0.01, \eta_p^2 = 0.17$.

⁹¹ In this analysis, you will notice that the average for EDVA is not reported. This is because there was no significant difference between the average for EDVA and any other district. It is common practice not to report the means for nonsignificant results. Throughout this Article, we only report the descriptive statistic for the districts between which there is a significant difference, except when including nonsignificant results in a table or figure for comparison's sake. The ANOVA for district differences was: $F(3,115) = 3.20, p < 0.05, \eta_p^2 = 0.08$.

differences in experiences and beliefs about cooperation based on case type, district, and role.

C. Importance and Frequency of Factors

Participants were asked to consider 27 items that may affect a defendant's decision to cooperate with federal prosecutors. They were asked to rate the importance of each item in a defendant's decision to cooperate on a scale of 1 (unimportant) to 9 (very important). Ratings on these items would help us understand what attorneys believe motivates a defendant's decision to cooperate.

With the importance ratings on the 27 items, we conducted a principal component analysis, a reduction technique used to group many individual items into fewer variables, called factors.⁹² A consistent high correlation between ratings on certain items would result in grouping those items into one underlying factor. For example, ratings on "defendant gender," "defendant race," and "defendant education level" were consistently highly correlated and were therefore grouped into one factor, which we labeled "demographic characteristics." The high correlation of ratings of these items allowed us to conclude that those items addressed the same underlying concept or factor.⁹³

In the end, we identified seven factors that accounted for twenty items and 59.82% of the variance. This left another seven items as "standalone" items, meaning that there was no meaningful correlation between ratings on any of them. Each one of those items occupied its own conceptual space and did not contribute to the measurement of an underlying construct.⁹⁴ The seven factors were:

- (1) Cultural, family, and safety concerns⁹⁵
- (2) Demographic characteristics
- (3) Trust in prosecutor
- (4) Bail status
- (5) Defendant characteristics with potential impact on sentence and deportation
- (6) Pressure from defense attorney and defendant's circle
- (7) Anticipated sentencing benefits

⁹² See *infra* Appendix A for a list of all 27 items, their mean ratings of importance, and their loading scores on each factor.

⁹³ The details of the principal component analysis are outlined *infra* Appendix B.

⁹⁴ See *infra* Appendix C for a list of which items were included in which factors, and a list of standalone items.

⁹⁵ Our factor analysis suggests that concerns about physical safety are not isolated but are closely related to broader concerns about social stigma and the influence of family and culture.

The seven standalone items were:

- (1) Remorse
- (2) Anticipated sentencing range without cooperation
- (3) Type of cooperation required
- (4) Concern about exposure for uncharged criminal conduct
- (5) Whether a statutory mandatory minimum sentence applies
- (6) Trust in me as their lawyer
- (7) Financial incentives

On ratings of importance, each participant received a scale score for each factor. The scale score was computed by adding only the high-loading items for the factor and dividing by the number of items. For example, factor 1 included five items, so we added the rating on each of the five items and divided by 5. The resulting number was the scale score for that factor.

Using the scale scores, we analyzed which *factors* were rated as most important in the cooperation decision. Overall, the most important factor was “whether a statutory mandatory minimum sentence applies,” with a mean rating of 8.39. This was followed closely by “anticipated sentencing range without cooperation,” with a mean rating of 8.33. Tables 1D, 2D, and 3D in Appendix D provide a breakdown of how the ratings of importance differed by case type, district, and role.

Participants were also asked to rate the frequency with which each item was part of the cooperation decision on a scale of 1 to 9. Each participant then received a frequency scale score for each factor.⁹⁶ Overall, the factor that participants rated as most frequently being part of the cooperation decision was “anticipated sentencing range without cooperation,” with a mean frequency rating of 8.23.

1. General Findings

Overall, average frequency ratings were lower than average importance ratings. The two most highly rated items on both scales related to sentencing concerns. The three lowest rated on both scales were “demographic characteristics,” “remorse,” and “financial incentives.” One item with very different ratings on the scales was “defendant characteristics with potential impact on sentence and deportation,” which was rated fifth in importance ($M = 5.75$) but ninth in frequency ($M = 4.26$). This suggests that such characteristics do not come up often but are significant in those cases in

⁹⁶ Frequency scale scores were assigned using the same technique described above for the importance ratings: by adding only the high-loading items for the factor and dividing by the number of items.

which they are relevant. Table 3 lists each factor’s importance and frequency ratings.

TABLE 3: MEAN RATINGS OF IMPORTANCE AND FREQUENCY OF FACTORS IN COOPERATION DECISION

Factor	Mean Importance Rating	Mean Frequency Rating
Whether a statutory mandatory minimum sentence applies	8.39	7.88
Anticipated sentencing range without cooperation	8.33	8.23
Anticipated sentencing benefit	7.59	6.38
Trust in me as their lawyer	6.92	6.67
Defendant characteristics with potential impact on sentence and deportation	5.75	4.26
Type of cooperation required	5.65	5.50
Cultural, family, and safety concerns	5.54	4.28
Trust in prosecutor and judge	5.4	4.50
Concern about exposure for uncharged criminal conduct	5.39	5.29
Bail status	5.07	4.07
Pressure from defense attorney and defendant’s circle	4.14	3.28
Demographic characteristics	3.16	2.34
Remorse	2.77	2.80
Financial incentives	2.21	2.41

The ratings on the fourteen factors overall had a median of 5.45, with a standard deviation of 2.00. The only factors that were rated at least one standard deviation above the median (7.45 or greater) were those related to sentencing considerations. However, there were four additional factors above the median, including “trust in the defense lawyer,” which was rated most highly after sentencing considerations, followed by “defendant characteristics with potential impact on sentence and deportation,” the “type of cooperation required,” and “cultural, family, and safety concerns.” Three additional factors were just below the median: “trust in prosecutor and judge”; “concern about exposure for uncharged criminal conduct”; and “bail status.”

These results supported our hypothesis that sentencing considerations are the most important factor in the cooperation decision. However, consistent with what the literature on plea bargaining suggests, they are not the only considerations. For example, several factors significant to plea bargaining, such as attorney recommendations, bail status, and social pressures, also appear to play a role in cooperation decisions. But additional factors not studied in the context of plea bargaining—because they are less relevant—also are at play in the cooperation decision, including the type of cooperation required, safety concerns, and concern about uncharged criminal conduct.

2. Results by Case Type

The results also supported our hypothesis that the significance of factors would vary depending on case type; the ratings on the following four factors differed across case types:

- (1) Remorse,⁹⁷ which was rated as significantly more important in violent crime cases ($M = 4.06$) than in drug cases (2.46) and nonviolent/white-collar cases (3.60).
- (2) Whether a statutory mandatory minimum sentence applies,⁹⁸ which was rated as significantly less important in nonviolent cases (7.29) than in drug cases (8.54) and violent crime cases (8.58).
- (3) Financial incentives,⁹⁹ which was rated as significantly more important in nonviolent crimes (5.21) than in drug cases (1.80) and violent crime cases (1.89).
- (4) Cultural, family, and safety concerns,¹⁰⁰ which was rated significantly more important in violent crime cases (6.54) than in drug cases (5.43) and nonviolent-crime cases (5.03).

These differences across case types confirmed some of our prior hypotheses—for example, defendants charged with fraud or other white-collar cases (coded as nonviolent in our study) would be more concerned with financial incentives than other defendants. For the nonviolent cases, financial incentives rose above the midpoint of 5 on our 9-point ratings scale (rating 5.21), whereas they were rated as relatively unimportant (2.21) when all case types were included in the analysis. It also makes sense that mandatory minimum sentences would be less salient for defendants charged with nonviolent crimes, for which such sentences usually are not applicable.

⁹⁷ $F(2,124) = 6.57, p < 0.01, \eta_p^2 = 0.10$.

⁹⁸ $F(2,124) = 4.92, p < 0.01, \eta_p^2 = 0.07$.

⁹⁹ $F(2,113) = 19.10, p < 0.01, \eta_p^2 = 0.25$.

¹⁰⁰ $F(2,121) = 3.90, p < 0.05, \eta_p^2 = 0.06$.

Our finding that concerns about physical safety are closely correlated with concerns about social stigma, culture, and the desire to protect family (as evidenced by their grouping into one factor because of the high correlation between ratings on all 4 items) is also notable, adding nuance to previous reports about the significance of safety concerns for potential cooperators. This finding supports the relatively commonsense proposition that safety concerns relate, in some meaningful way, to cultural norms and social pressures, in the sense that potential cooperators are concerned not just about danger to themselves but also danger to and ostracization of family members. It is also notable that these considerations were rated by our respondents as relatively important in *all three* categories of cases (violent crime, drug, and nonviolent), but perhaps unsurprising that they were deemed most important in cases involving violent crime (6.54) compared to drug (5.43) and nonviolent crime (5.03) cases.

We did not anticipate that the significance of remorse would vary depending on case type. Although remorse was ranked near the bottom of our composite scores (2.77) and did not clear the midpoint of 5 on our scale in any crime type, it was nevertheless rated significantly higher in cases involving violence (4.06) than in drug cases (2.46) and nonviolent cases (3.6). Thus, remorse does not appear to be a significant factor motivating cooperation but may play a minor role in cases involving violence.

3. *Results by Demographic Characteristics*

Notably, demographic characteristics such as the defendant's race, gender, age, and education level were rated as relatively unimportant across the board (3.16 on our ratings, with no significant differences by case type, district, or attorney role). This was the third-lowest ranked factor, more highly rated than only remorse and financial incentives. Even though prior studies have suggested that cooperation benefits are not proportionately distributed based on race, gender, and education level, our respondents reported that these characteristics did not play a significant role in their clients' decisions whether to cooperate.¹⁰¹

This seeming misalignment has a few potential explanations. First, it is possible that these factors play a smaller role in the allocation of cooperation benefits than prior studies suggest. Further research can help parse out demographic effects to support or reject this possibility. Second, perhaps these factors play a role not at the junction of a defendant's decision whether to cooperate, but at an earlier point in the process. For example, they may influence prosecutors' discretionary decisions about which defendants they will offer cooperation agreements to and when they will file motions for

¹⁰¹ See *supra* notes 68–70.

downward departures based on substantial assistance. These factors also may influence judges' decisions on the extent of the downward-departure motions they grant. Third, these ratings may reflect defense attorneys' *perception* that—despite whatever the reality of disparities in benefits may be—those demographic characteristics are not important in the cooperation decision. Finally, attorneys may have interpreted the question as asking whether *they* act differently in counseling clients about cooperation based on clients' demographic characteristics and understandably have reported that they do not.

4. Results by District

The ratings on only one factor differed across districts: “trust in me as their lawyer.”¹⁰² Participants from SDNY (7.49) rated this as significantly more important than participants from EDVA (6.18). Although one might anticipate that lawyers would view clients' trust in them as important (and perhaps be biased to overestimate the extent of client trust), that tendency does not explain why attorneys in one district would rate this factor more highly compared to those in another district.

One possible explanation for this difference may be found in other differences between districts discussed below, such as SDNY's practice of requiring defendants, as a condition of cooperating, to plead guilty to additional crimes that were not initially charged. This practice, which is not the norm in the other two districts—and is required only by local custom rather than any positive law—increases the level of risk associated with cooperation. Defendants who pursue cooperation in SDNY take the usual risks associated with cooperation—including that their attempt will “backfire” by failing to earn them a cooperation agreement and simultaneously rendering the odds of a successful defense of the case “remote.”¹⁰³ They also take the risk, even if they succeed in obtaining a cooperation agreement, that doing so will increase their sentencing exposure—elevating the baseline from which a judge will depart—with no guarantee that the government will make a motion for a downward departure or, if they do, what the extent of any such departure will be. Cooperators in SDNY generally come out ahead because judges are familiar with the practice and take it into account in sentencing. Nevertheless, in such circumstances, trust in the defense attorney's recommendation would be even more critical.¹⁰⁴

¹⁰² $F(3,114) = 3.03, p < 0.05, \eta_p^2 = 0.07$.

¹⁰³ Patton, *supra* note 55, at 2593.

¹⁰⁴ See Richman, *supra* note 6, at 111 (“[F]or the defendant contemplating cooperation, an assessment of the extent to which the government can be trusted will perhaps be the most important contribution the attorney can make.”).

It is striking that the importance of all the other factors did not vary significantly across districts, suggesting a great deal of consistency in defense attorneys' experiences counseling their clients about cooperation.

5. *Results by Attorney Role*

The lack of any reported difference between case types or role of the importance of trust in the attorney also is notable, given that recent research suggests that defendants privileged by race and class are more likely to defer to their attorneys than less-privileged clients.¹⁰⁵

The ratings on three factors differed across role:

- (1) Whether a statutory mandatory minimum sentence applies¹⁰⁶ was rated significantly less important by private attorneys (7.48) than CJA attorneys (8.56).
- (2) Financial incentives¹⁰⁷ was rated significantly more important by private attorneys (4.36) than CJA attorneys (1.79) and public defenders (1.43).
- (3) Cultural, family, and safety concerns¹⁰⁸ was rated significantly less important by private attorneys (4.72) than CJA attorneys (5.77) and public defenders (6.23).

These differences are likely attributable to differences in the types of cases most frequently handled by attorneys in different roles. As reported earlier, the importance of statutory mandatory minimum sentences varies based on case type; it rated significantly more important in drug cases and crimes of violence than in other cases, whereas the opposite is true of financial incentives. Cultural, family, and safety concerns are more important in cases involving violence than in other cases. Because the private attorneys who completed our survey reported handling more cases involving nonviolent crimes (47.62% of their cooperation cases) compared to federal defenders (0%) and CJA attorneys (4.82%), the differences in how they rated the significance of the foregoing factors is not surprising.

¹⁰⁵ See MATTHEW CLAIR, *PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT* 7 (2020); see also Christopher Campbell, Janet Moore, Wesley Maier & Mike Gaffney, *Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of Their Public Defenders*, 33 BEHAV. SCIS. & L. 751, 764 (2015) (finding that differences in class and race between defendants and public defenders contributed to distrust); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 42 (2001) ("Lawyers and clients who do not share the same culture face special challenges in developing a trusting relationship in which genuine and accurate communication can occur.").

¹⁰⁶ $F(2,117) = 4.59, p < 0.05, \eta_p^2 = 0.07$.

¹⁰⁷ $F(2,117) = 16.32, p < 0.01, \eta_p^2 = 0.22$.

¹⁰⁸ $F(2,117) = 3.88, p < 0.05, \eta_p^2 = 0.06$.

6. *Open-Ended Questions Regarding Importance of Factors*

After rating the importance of the 27 items on our scale, participants were asked if there were any other factors important to clients in the cooperation decision. To analyze their open-ended responses, we identified emerging themes and coded accordingly. After internal consultation among the authors and subsequent recoding, we identified eight themes discussed in the open-ended responses. Table 4 below displays the relevant frequency of these themes.

TABLE 4: FREQUENCY TABLE OF THEMES IDENTIFIED IN PARTICIPANTS' OPEN-ENDED RESPONSES TO QUESTION ASKING WHAT OTHER ITEMS ARE IMPORTANT

Theme	Total
Sentencing-related (including exposure for uncharged criminal conduct) ¹⁰⁹	19
Evidence strength ¹¹⁰	7
Safety for self, family, and friends ¹¹¹	7
Internal/external pressure, stigma, and cultural aversion ¹¹²	7
Cooperation process, experience, expectations, and requirements ¹¹³	6
Defendant's personality and history ¹¹⁴	6
System-related issues (including experience with police, attorneys, judges, etc.) ¹¹⁵	5
Pretrial detention and bail ¹¹⁶	3

Some respondents mentioned more than one theme. For example, one wrote “[w]hether a certain sentence is guaranteed; safety when designated after sentencing and when released; concern about family safety,” while others

¹⁰⁹ For example: “Mandatory sentencing constraints”; “The most important factor by far is the desire to avoid imposition of a mandatory minimum sentence”; “This is baked into the law and always decisive if a person is acting rationally”; “Length of potential sentence is a critical factor in the cooperation decision”; and “The longer the potential or likely sentence range the greater the potential benefit.”

¹¹⁰ For example: “The relative strength of the government case, and corresponding lack of ability to effectively defend, or even realistically talk about defending”; “The strength of the prosecution’s case against the client is the first and most important factor to consider.”

¹¹¹ For example: “Client is afraid that his family will be harmed if he cooperates. He is also afraid that he will be killed while incarcerated if he cooperates.”

¹¹² For example: “Gang affiliation is a negative factor in cooperation due to concerns over stigma.”

¹¹³ For example: “The decision to cooperate turns on how much time a client is facing and how long the cooperation process will take.”

¹¹⁴ For example: “Clients with cognitive deficits can . . . more easily be subject to influence by peers re not to cooperate”; “The client’s ego and his/her belief that he/she is ‘smarter’ than any lawyer.”

¹¹⁵ For example, “One of the most common things clients discuss when considering whether to cooperate is how they were treated by the agents/police when they were arrested. This is particularly true in cases with target letters.”

¹¹⁶ For example: “Whether he/she is incarcerated or released on bail. Those out on bail do not want to go back in and look for a way to avoid it. [H]owever, they sometimes feel the pressure from the neighborhood not to cooperate.”

mentioned only one theme, including “[t]he primary factor is how defensible is the case at trial?”

The theme of evidence strength was mentioned significantly more often by attorneys in EDPA (4) than those in SDNY (0), EDVA (2), and Other districts (0).¹¹⁷ Evidence strength was also mentioned significantly more often in nonviolent-crime cases (3) than in drug cases (3) or violent crime cases (0).¹¹⁸

As the themes suggest, sentencing emerged yet again as the most important issue in the cooperation decision. Although participants had the opportunity to (and did) indicate the importance of sentencing in the list of 27 items presented in the survey, nineteen of them highlighted the issue again in the open-ended question, emphasizing that attorneys view sentencing as by far the most important issue at play when defendants decide whether to cooperate with federal prosecutors. This lies in sharp contrast to the importance ratings of remorse and demographic characteristics—both of which were not mentioned even once in the open-ended questions and were rated very low in the list of 27 items.

D. Clients' Interest in Pursuing Cooperation

On a scale of 1 (never) to 9 (always), participants rated raising the subject of cooperation with their clients an average of 7.94. Nevertheless, they reported that in 49.98% of the cases in which they discussed cooperation, the client declined to cooperate with prosecutors. In other words, although attorneys report that they nearly always discuss the possibility of cooperation, they also report that half of their clients choose not to cooperate.

Some of those decisions may reflect a determination by clients, after consultation with their attorneys, that they lack information likely to be useful to prosecutors, while others may reflect a decision not to cooperate despite being in possession of information that they believe may be useful to cooperators. However, we found significant differences in willingness to pursue cooperation based on district and attorney roles. Participants from EDVA indicated a much lower percentage of cases in which clients declined cooperation (35.58) than those from EDPA (53.04) and SDNY (60.27).¹¹⁹

¹¹⁷ $F(3,115) = 3.91, p < 0.05, \eta_p^2 = 0.09$.

¹¹⁸ $F(3,142) = 3.35, p < 0.05, \eta_p^2 = 0.07$. Although some reported n 's are the same here, the numbers represent a different proportion of each group, given differing sample sizes. ANOVAs take the differing sample sizes into account when analyzing differences between groups.

¹¹⁹ $F(3, 107) = 7.16, p < 0.01, \eta_p^2 = 0.17$.

Private attorneys also indicated a much lower percentage of cases in which clients declined cooperation (32.26) than CJA attorneys (54.43).¹²⁰

Our respondents indicated that, among the 50.02% of clients who *did* express an interest in cooperating, most of them—83.7%—were able to successfully secure a cooperation agreement. A cooperation agreement was not secured in only 16.30% of the cases in which clients tried to cooperate. Thus, if a client did not receive a cooperation agreement, it was more likely because that individual chose not to pursue cooperation than because the prosecutor did not offer a cooperation agreement.

There are several possible explanations for this counterintuitive finding. First, prosecutors may be less selective in their offers of cooperation agreements than one might expect. Second, defense attorneys may be playing a significant screening role in determining which clients are most likely to obtain a cooperation agreement, and benefit from cooperation, before their clients meet with prosecutors to initiate the cooperation process. Third and relatedly, defense attorneys, having already screened their clients before pursuing cooperation, may be preparing those clients with the guidance necessary to help them succeed. Nevertheless, our findings suggest that who becomes a cooperator is driven to a considerable extent by decision-making on the defense side, albeit within the constraints of a sentencing framework and cooperation practices over which defendants and their attorneys have limited control—although as discussed further below in Section III.G, defendants involved in nonviolent-crime cases, those represented by private attorneys, and defendants in EDVA appear to have more control in negotiating cooperation than do clients in the other categories.

E. Why Defendants Do Not Get Cooperation Agreements

Participants were asked to explain why they believed clients who tried to cooperate with prosecutors were unsuccessful in receiving cooperation agreements. We coded the open-ended responses and found eleven emerging themes.

By far the most frequently mentioned reasons for not receiving cooperation agreements were issues related to the information provided by the defendant: either the information was deemed by the prosecutor to be insufficient or unhelpful or the defendant lied. Table 5 below is a frequency table of the codes.¹²¹

¹²⁰ $F(2, 110) = 6.14, p < 0.01, \eta_p^2 = 0.10$; nonsignificant on case type.

¹²¹ Although there may appear to be overlap between some of the codes, we elected to keep categories separate to reflect distinctions in how respondents characterized their answers. For example, we coded respondent answers stating that the client lied (which suggest that the respondent made that

NORTHWESTERN UNIVERSITY LAW REVIEW

TABLE 5: FREQUENCY TABLE OF THEMES IDENTIFIED IN OPEN-ENDED RESPONSES AS TO WHY CLIENTS DID NOT RECEIVE COOPERATION AGREEMENTS

Theme	Total
Defendant’s information was insufficient, unhelpful, or contradictory to prosecutor’s evidence	50
Defendant lied, did not tell the whole story, or minimized	20
Prosecutor did not believe defendant	10
Prosecutor was unfair, lazy, untruthful, or had all the power	9
Defendant committed new crimes, feared exposure for uncovered crimes, or violated terms of cooperation agreement	5
Defendant was not interested in cooperation or did not sufficiently benefit from it	5
Defendant was fearful of safety and stigma consequences, or refused for ethical reasons	4
Defendant did not trust law enforcement or defense attorney, or didn’t listen to defense attorney’s advice	3
Defendant was too late to cooperate	3
Defendant was too culpable relative to others to cooperate	3
Politics within/among districts	2

There were significant differences across case types in how often two themes were mentioned. First, “prosecutor did not believe defendant”¹²² was mentioned significantly more often in nonviolent crimes (18.75%) than in drug cases (3.92%). And second, “defendant’s information was insufficient, unhelpful, or contradictory to prosecutor’s evidence”¹²³ was mentioned significantly more often in violent crimes (60.00%) than in drug cases (30.39%).

There was also a significant difference across roles in how often the theme “defendant committed new crimes, feared exposure for uncovered crimes, or violated terms of cooperation agreement” was mentioned,¹²⁴ such that CJA attorneys mentioned this theme significantly less frequently (1.18%) than public defenders (14.29%).

There were no significant differences based on district in responses to the question about why clients did not receive cooperation agreements.

determination) differently from answers stating that the prosecutor appeared to not believe the defendant (which do not similarly suggest that the defense attorney reached the same conclusion).

¹²² $F(2,135) = 3.40, p < 0.05, \eta_p^2 = 0.05$.

¹²³ $F(2,135) = 3.37, p < 0.05, \eta_p^2 = 0.05$.

¹²⁴ $F(2,118) = 3.56, p < 0.05, \eta_p^2 = 0.06$.

*F. What Is Required to Get Cooperation Agreements
or Substantial-Assistance Departures*

Participants were asked about what was required of defendants to receive cooperation agreements and the sentencing benefits that flow from a defendant complying with its terms. They reported that in 86.80% of their cooperation cases, defendants had to testify or be prepared to testify against others if necessary. In 80.71% of their cooperation cases, defendants were required to disclose uncharged criminal conduct in a proffer session. In 43.34% of their cooperation cases, defendants were required to plead guilty to previously uncharged criminal conduct. And in 8.73% of their cooperation cases, defendants had to wear a wire or other recording device. This is consistent with findings in prior studies regarding the types of assistance most frequently required of cooperators.¹²⁵

There was a significant district difference in the percentage of cases in which a client must plead guilty to previously uncharged criminal conduct¹²⁶ such that participants from SDNY reported a significantly higher percentage (71.51%) than those in EDPA (19.18%), EDVA (9.97%), or Other (46.89%). There were no significant differences in responses to these questions based on role.

Our findings regarding the SDNY practice of requiring cooperating defendants to plead guilty to additional crimes is consistent with prior accounts of the district's practices.¹²⁷ As noted in those accounts, the practice is believed (at least by prosecutors) to enhance cooperators' reliability and credibility by putting their full criminal past before the judge and jury, demonstrating that they accept full responsibility for their crimes and have not withheld anything from prosecutors. It also increases the stakes for cooperators if they do not comply with the terms of their cooperation agreements, including the requirement that they provide only truthful testimony on the stand. We are not aware of any prior published accounts establishing that the other two districts in our study do not similarly impose such a requirement. This is a meaningful difference in practice that can dramatically impact the defendant's cooperation decision, since pleading

¹²⁵ See *supra* notes 41–50 and accompanying text.

¹²⁶ $F(3, 98) = 33.76, p < 0.01, \eta_p^2 = 0.51$.

¹²⁷ See, e.g., Yaroshefsky, *supra* note 3, at 928 (reporting that SDNY prosecutors expected potential cooperators “to tell the government about all of their criminal conduct throughout their lifetime as a precondition to a cooperation agreement” and required cooperators to “plead guilty to serious conduct that they reveal to the government”); Vinegrad, *supra* note 49; see also Jeffries & Gleeson, *supra* note 8, at 1122–23; Simons, *supra* note 38, at 15–19 (2003) (providing an account by a former SDNY Assistant U.S. Attorney stating that “[i]n some districts, a cooperator is required to plead guilty not only to the criminal conduct for which he was arrested, but also to any other serious criminal conduct that is revealed during the proffer sessions”).

guilty to additional conduct can greatly increase a defendant's sentencing exposure, with no guarantee that the sentencing discount for cooperation will be concomitantly increased to compensate for that additional exposure.

As discussed above, we believe that this practice may explain why we found a significant difference in the attorney ratings of the importance of "trust in me as their lawyer."¹²⁸ Participants from SDNY (7.49) rated this factor as significantly more important than participants from EDVA (6.18). It also may help explain why respondents primarily practicing in the SDNY indicate a higher percentage of their clients who *declined* to pursue cooperation (60.27%) than in other districts (compared to EDVA (35.58%) and EDPA (53.04%)).¹²⁹

G. Perceptions of Prosecutorial Practices

To understand the practices surrounding cooperation—from the defense attorney's perspective—participants were asked a series of questions about their experiences with and observations of prosecutors in the participants' cooperation cases. They reported that prosecutors were open to fact and/or charge bargaining in 35.73% of their cooperation cases and were willing to set limits on the extent of the client's required cooperation (for example, excluding cooperation against family members) in 26.29% of their cooperation cases. Prosecutors initiated cooperation agreements in 61.34% of their cooperation cases, made specific sentencing recommendations to the judge in 36.28% of their cooperation cases, told the judge the type of assistance provided by the client in 91.15% of their cooperation cases, and told the judge if the client pled guilty to additional crimes that were not initially charged in 69.88% of their cooperation cases.

Tables 6, 7, and 8 below contain breakdowns of responses by case type, district, and role.

¹²⁸ $F(3,114) = 3.03, p < 0.05, \eta_p^2 = 0.07$.

¹²⁹ See *supra* text accompanying note 119.

TABLE 6: MEAN RESPONSES: PERCEPTIONS OF PROSECUTORIAL PRACTICES BY CASE TYPE

Percentage of Cooperation Cases in Which:	Drugs	Violent Crimes	Nonviolent Crimes
Prosecutors were open to fact and/or charge bargaining	34.83%	19.56%	58.27%
Prosecutors were willing to set limits on the extent of the client's required cooperation	27.38%	19.33%	29.18%
Prosecutors initiated cooperation agreements	64.96%	44.33%	55.36%
Prosecutors made specific sentencing recommendations to the judge	40.83%	5.38%	35.67%
Prosecutors told the judge the type of assistance provided by the client	90.23%	95.00%	95.71%
Prosecutors told the judge if the client pled guilty to additional crimes that were not initially charged	65.00%	87.44%	71.27%

Prosecutors' reported willingness to bargain varied significantly by crime type. Specifically, participants reported that prosecutors were significantly more open to fact and/or charge bargaining for cooperating defendants charged with nonviolent crimes (58.27%) than for cooperating defendants charged with violent (19.56%) or drug (34.83%) crimes. Thus, prosecutors appear to be more open to negotiating with cooperating defendants charged with nonviolent crimes than other crime categories.

TABLE 7: MEAN RESPONSES:
PERCEPTIONS OF PROSECUTORIAL PRACTICES QUESTIONS BY DISTRICT

Percentage of Cooperation Cases in Which:	SDNY	EDPA	EDVA	Other
Prosecutors were open to fact and/or charge bargaining	21.14%	26.89%	53.88%	47.50%
Prosecutors were willing to set limits on the extent of the client's required cooperation	16.59%	28.06%	33.29%	49.00%
Prosecutors initiated cooperation agreements	58.50%	73.68%	58.84%	60.90%
Prosecutors made specific sentencing recommendations to the judge	15.06%	35.74%	58.18%	38.71%
Prosecutors told the judge the type of assistance provided by the client	99.17%	96.00%	75.74%	95.00%
Prosecutors told the judge if the client pled guilty to additional crimes that were not initially charged	90.61%	76.00%	17.88%	88.33%

Four aspects of prosecutorial practices surrounding cooperation varied significantly by district, according to participants' responses:

- (1) “[P]rosecutors [were] open to fact and/or charge bargaining”¹³⁰: participants from EDVA gave significantly higher responses (53.88%) than participants from SDNY (21.14%) and EDPA (26.89%). Additionally, participants from Other districts gave significantly higher responses (47.50%) than participants from SDNY.
- (2) “Prosecutors made specific sentencing recommendations to the judge”¹³¹: participants from EDVA gave significantly higher responses (58.18%) than those from EDPA (35.74%) and SDNY (15.06%). Additionally, participants from EDPA gave significantly higher responses than those from SDNY.
- (3) “Prosecutors told the judge the type of assistance provided by the client”¹³²: participants from EDVA gave significantly lower responses (75.74%) than participants from SDNY (99.17%), EDPA (96.00%), and those from Other districts (95.00%).
- (4) “Prosecutors told the judge if the client pled guilty to additional crimes that were not initially charged”¹³³: participants from EDVA gave significantly lower responses (17.87%) than participants from SDNY (90.61%), EDPA (39.84%), and those from Other districts (88.33%).

These findings highlight important differences in the practices between districts, with substantial impact on the experience of cooperation. Together, the data suggests that cooperation in EDVA is a more predictable and circumscribed process from the defense perspective than it is in SDNY or EDPA. In EDVA, as reported by respondents, prosecutors are open to fact and/or charge bargaining as a condition of cooperation and will make specific sentencing recommendations for cooperators most of the time. By contrast, in the other two districts, prosecutors typically are unwilling to do either.

Relatedly, as reported above, we found that defendants in EDVA must plead guilty to previously uncharged conduct as a condition of cooperation far less often than in EDPA or SDNY. Perhaps it is not surprising, then, that we found that a significantly higher percentage of defendants in EDVA were interested in pursuing cooperation than in the other two districts, as noted above.

¹³⁰ $F(3,102) = 9.48, p < 0.01, \eta_p^2 = 0.22$.

¹³¹ $F(3,87) = 8.97, p < 0.01, \eta_p^2 = 0.24$.

¹³² $F(3,111) = 8.77, p < 0.01, \eta_p^2 = 0.19$.

¹³³ $F(3,91) = 34.49, p < 0.01, \eta_p^2 = 0.53$.

TABLE 8: MEAN RESPONSES: PERCEPTIONS OF PROSECUTORIAL PRACTICES BY ROLE

Percentage of Cooperation Cases in Which:	CJA	Private Attorneys	Public Defenders
Prosecutors were open to fact and/or charge bargaining	32.12%	59.94%	29.36%
Prosecutors were willing to set limits on the extent of the client's required cooperation	27.89%	28.61%	13.18%
Prosecutors initiated cooperation agreements	58.95%	62.95%	73.29%
Prosecutors made specific sentencing recommendations to the judge	34.37%	40.53%	39.91%
Prosecutors told the judge the type of assistance provided by the client	91.16%	95.15%	85.36%
Prosecutors told the judge if the client pled guilty to additional crimes that were not initially charged	72.96%	59.86%	62.73%

There was a significant difference in responses based on role to the question “in what percentage of your cooperation cases were prosecutors open to fact and/or charge bargaining,”¹³⁴ such that private attorneys gave significantly higher responses (59.94%) than CJA attorneys (32.12%) and public defenders (29.36%). Although this suggests that private attorneys may be more effective in negotiating with prosecutors than attorneys in other capacities, this difference could also be attributable to case type. As reported earlier, we found a significant difference based on case type in prosecutors' willingness to fact and/or charge bargain, with a greater willingness to do so in nonviolent cases, which are more frequently handled by private attorneys.¹³⁵

H. Method of Rewarding Cooperation

Participants were asked about the mechanism by which cooperation was brought to the attention of the district court or otherwise rewarded. They reported that 68.72% of their cooperation cases involved a Section 5K1.1 motion or 18 U.S.C. § 3553(e) motion, 36.49% involved Rule 35(b) motions, 14.42% involved a nonprosecution agreement, 6.66% involved a deferred prosecution agreement, and 8.20% involved an informal cooperation agreement.

There were significant differences across districts in the percentage of cases involving Section 5K1.1 motions or § 3553(e) motions¹³⁶: participants

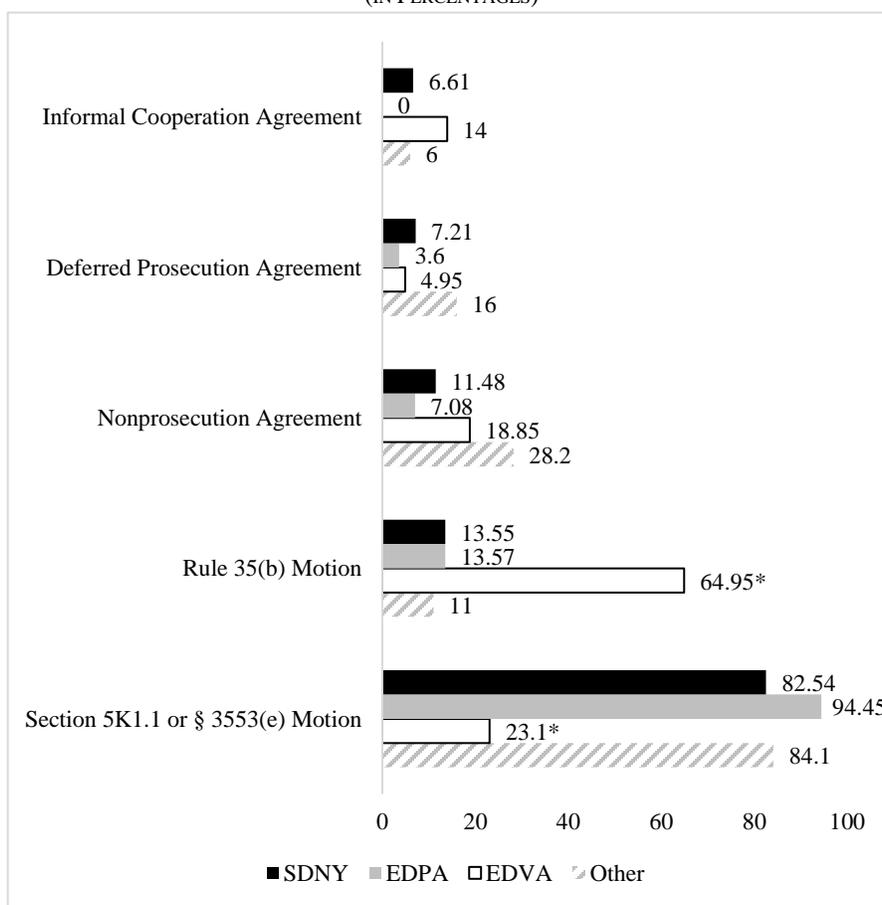
¹³⁴ $F(2,105) = 4.72, p < 0.05, \eta_p^2 = 0.08$.

¹³⁵ *Supra* Table 6.

¹³⁶ $F(3,107) = 51.57, p < 0.01, \eta_p^2 = 0.59$; asterisks (*) on Figures indicate significance.

from EDVA gave significantly lower responses (23.10%) than those from SDNY (82.54%), EDPA (94.45%), and those from Other districts (84.10%). There were also significant differences across districts in the percentage of cases involving Rule 35(b) motions¹³⁷: participants from EDVA gave significantly higher responses (64.95%) than SDNY (13.55%), EDPA (13.57%), and those from Other districts (11.00%) (see Figure 2). These results are consistent with the data reported by the U.S. Sentencing Commission on the relative use in each district of downward departures pursuant to Section 5K1.1 and Rule 35(b).¹³⁸

FIGURE 2: MEAN RESPONSES: METHOD OF REWARDING COOPERATION BY DISTRICT (IN PERCENTAGES)



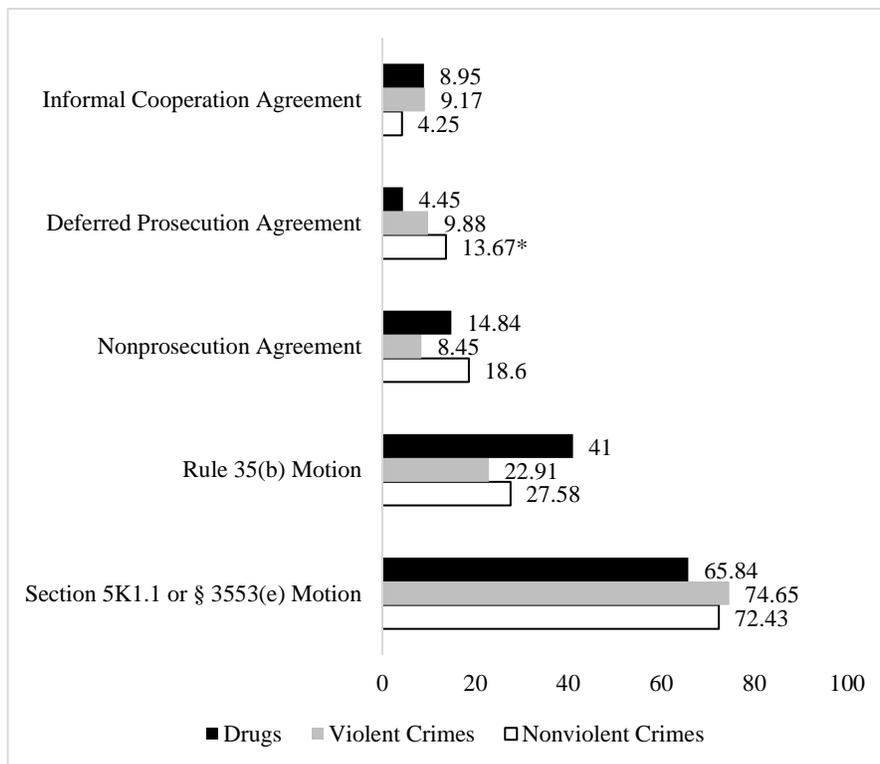
Note. The asterisks (*) on the labels indicate significance.

¹³⁷ $F(3,82) = 25.44, p < 0.01, \eta_p^2 = 0.48$.

¹³⁸ See *supra* notes 73–75 and accompanying text.

There were no significant role differences on any of these questions.¹³⁹ However, there was a significant difference in the percentage of cases that involved a deferred prosecution agreement based on case type,¹⁴⁰ such that in nonviolent crimes, participants gave significantly higher responses (13.67%) than in drug crimes (4.45%) (see Figure 3). This finding, especially when combined with our finding that prosecutors were more open to fact and/or charge bargaining in cases involving nonviolent crimes (see Table 6), lends support to the common observation that defendants charged with crimes not involving drugs or violence receive relatively more lenient treatment from prosecutors.¹⁴¹

FIGURE 3: MEAN RESPONSES: METHOD OF REWARDING COOPERATION BY CASE TYPE
(IN PERCENTAGES)



Note. The asterisks (*) on the labels indicate significance.

¹³⁹ $F(2,109) = 2.80, p = 0.07, \eta_p^2 = 0.05$.

¹⁴⁰ $F(2,61) = 5.99, p < 0.01, \eta_p^2 = 0.16$.

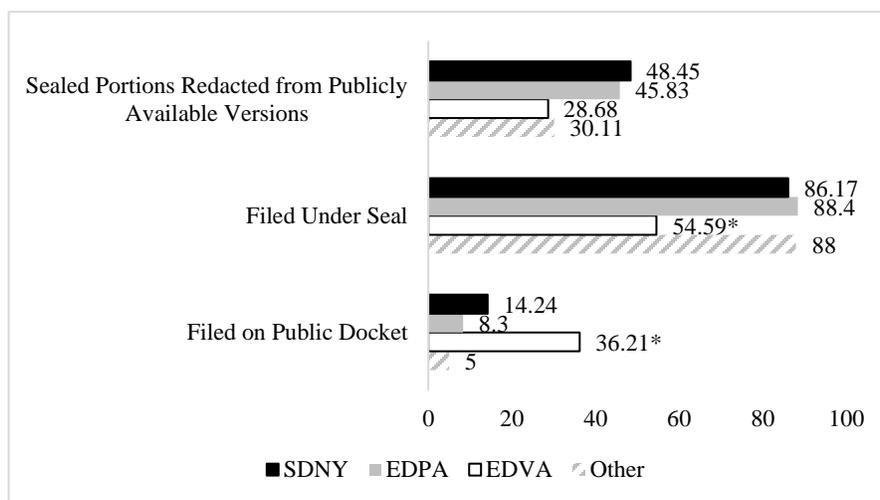
¹⁴¹ See, e.g., *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 46 (D.D.C. 2015) (“The Court respectfully requests the Department of Justice to consider expanding the use of deferred-prosecution

I. Sealing Practices

Respondents also were asked about sealing practices regarding documents referencing cooperation. They reported that in 21.32% of cooperation cases, documents referencing cooperation were filed on the public docket; in 77.07% documents referencing cooperation were filed under seal; and in 40.40% documents referencing cooperation were filed partly under seal, with the sealed portions redacted from the publicly available versions.

On two of the questions, there were significant differences based on district. In reporting the percentage of cases in which documents referencing cooperation were filed on the public docket, participants from EDVA reported significantly more (36.21%) than those from EDPA (8.30%), SDNY (14.24%), and Other (5.00%).¹⁴² And in reporting the percentage of cases filed under seal, EDVA reported significantly fewer (54.59%) than those in EDPA (88.40), SDNY (86.17%), and Other (88.00%). Figure 4 below reports sealing practice by district.¹⁴³

FIGURE 4: MEAN RESPONSES TO SEALING QUESTIONS BY DISTRICT (IN PERCENTAGES)



Note. The asterisks (*) on the labels indicate significance.

agreements and other similar tools to use in appropriate circumstances when an individual who might not be a banker or business owner nonetheless shows all of the hallmarks of significant rehabilitation potential.”); see also Richman, *supra* note 6, at 98 (noting that “[s]pecial circumstances or the demands of a particular defendant with substantial bargaining power” can lead to an atypical cooperation agreement, such as the one prosecutors gave financier Michael Milken).

¹⁴² $F(3,68) = 4.62, p < 0.01, \eta_p^2 = 0.17.$

¹⁴³ $F(3,106) = 10.03, p < 0.01, \eta_p^2 = 0.22.$

These findings suggest that judges in EDVA seal documents related to cooperation significantly less often than do judges in other districts.¹⁴⁴ As noted above, however, respondents in EDVA reported that their clients were willing to cooperate at a higher rate than in the other two districts, suggesting that the relative lack of sealing in EDVA historically does not appear to be depressing defendants' interest in cooperation.

J. Relationships Among Other Variables

As seen in Figure 2 above, participants from EDVA indicated a much higher percentage of cases involving Rule 35(b) motions. This is a long-standing distinction of EDVA, which is known as the “rocket docket” because of its judges' preference for resolving cases expeditiously.¹⁴⁵ We were interested in whether the use of Rule 35(b) motions correlated with other variables relating to procedural experiences. The below correlation matrix in Table 9 shows the relationships among the variables of interest and their correlations with the use of Rule 35(b) motions.¹⁴⁶

¹⁴⁴ Subsequently, practices in EDVA may have shifted, consistent with recommendations of the Administrative Office of the U.S. Courts issued in 2018 encouraging districts to seal cooperation materials more regularly. See TASK FORCE ON PROTECTING COOPERATORS, *supra* note 17, at 10–19 (noting Task Force recommendations concerning docketing and access to cooperation materials).

¹⁴⁵ See Richman, *supra* note 75, at 75 (discussing EDVA's “rocket docket” reputation).

¹⁴⁶ A correlation matrix shows the strength of the correlation between two items—that in the row and that in the column.

TABLE 9: CORRELATION MATRIX FOR COOPERATION PRACTICE AND RULE 35(B) MOTION

	35(b)	District	Case Type	Physical Safety	Social Stigma	Client Declines	Specific Sentencing Recommendations	Disclose Uncharged Crimes	Seal
Rule 35(b)	1								
District	0.48**	1							
Case Type	-0.14	-0.04	1						
Physical Safety Concerns	-0.10	-0.10	-0.16	1					
Social Stigma Concerns	-0.22*	-0.23*	0.09	0.39**	1				
Client Declines to Cooperate	-0.31**	-0.35**	-0.07	0.13	0.38**	1			
Prosecutor Makes Specific Sentencing Recommendation to Judge	0.57**	0.42**	-0.08	-0.07	-0.24*	-0.14	1		
Clients Disclose Uncharged Criminal Conduct in Proffer	-0.41**	-0.24*	0.09	-0.01	-0.05	0.06	-0.13	1	
Cooperation Documents Filed Under Seal	-0.23*	-0.26**	-0.08	0.19*	0.08	0.26*	-0.14	0.20*	1

Note. Correlations marked with * indicate significance at the $p < 0.05$ level. Correlations marked with ** indicate significance at the $p < 0.01$ level.

There are significant correlations between the use of Rule 35(b) as the primary mechanism for rewarding cooperation and several other aspects of the cooperation process. Specifically, Rule 35(b) use was positively correlated with prosecutors making specific sentencing recommendations to the judge. It was negatively correlated with social stigma concerns, a client's desire not to cooperate, a client's disclosure of previously uncharged criminal conduct in a proffer, and documents reflecting cooperation being filed under seal. This pattern of relationships was similar across districts. And although one may have expected a correlation between use of Rule 35(b) and case type, this correlation was not significant ($r = -0.14$).

We expected that concerns about physical safety and case type would be correlated with filing under seal, but as shown in Table 9 above, that correlation was not significant ($r = 0.19$). Rather, our data suggests that district, rather than concerns about safety or case type, is the most important factor in determining frequency of sealing of documents surrounding cooperation.

K. Training

We asked attorneys about the training they received on cooperation and what had shaped their practices with respect to cooperation. Of those who responded, 43.2% indicated that they had received training, and 56.8% indicated they had not. There was no difference in likelihood of receiving training based on district (see Table 10), but there was a difference based on role, such that CJA attorneys reported receiving significantly less training (37.6%) than public defenders (78.6%).¹⁴⁷

TABLE 10: PERCENTAGE OF PARTICIPANTS IN EACH DISTRICT RECEIVING TRAINING IN COOPERATION PRACTICES

	Percentage Reporting They Received Training
SDNY	40.4%
EDPA	57.1%
EDVA	36.8%
Other	50.0%

Those who indicated that they had received training were asked to describe that training. We did not find any significant differences in the type of training attorneys received by district or role. Table 11 below is a frequency table indicating how many participants listed each theme in their open-ended responses.

¹⁴⁷ $F(2,104) = 3.97, p = 0.02, \eta_p^2 = 0.07$.

NORTHWESTERN UNIVERSITY LAW REVIEW

TABLE 11: NUMBER OF PARTICIPANTS WITH TRAINING LISTING EACH THEME

Theme	Total Number of Participants Identifying Theme
CLEs	25
Mentorship and on-the-job learning	18
Seminars or conferences	7
Internal office training	7
Research	3
Other ¹⁴⁸	1

Those who indicated that they had not received formal training were asked what has shaped their cooperation practices. Table 12 below is a frequency table indicating how many participants without formal training listed each theme in their open-ended responses. Notably, a number of attorneys listed “experience” or “mentorship” in response to the question of what shaped their cooperation practices, whether or not they had received training. We also did not detect any significant differences in type of informal training based on district or role.

TABLE 12: NUMBER OF PARTICIPANTS WITHOUT FORMAL TRAINING LISTING EACH THEME

Theme	Total Number of Participants Identifying Theme
Experience	51
Mentorship	28
Best interests of the client	6
Personal beliefs and abilities	5
Observation	3
Research	2
Local policy	1
Other ¹⁴⁹	1

L. Perceptions of Fairness

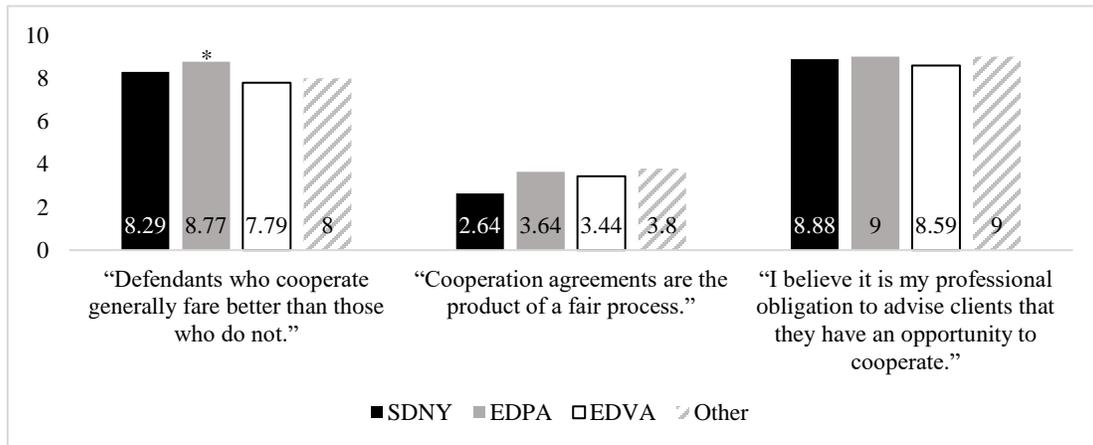
Participants were asked to rate on a scale of 1 to 9 their agreement with statements designed to elicit their views on the fairness of cooperation. The first statement was “defendants who cooperate generally fare better than those who do not,” which received an average rating of 8.21. The second statement was “cooperation agreements are the product of a fair process,”

¹⁴⁸ One participant wrote that they received training “during tenure as AUSA” but did not detail the type of training.

¹⁴⁹ One participant responded: “The two door rule: you win on every count or you agree to cooperate, you decide.”

with an average rating of 3.17. Such a low average indicates that federal defense attorneys who participated in this study felt that cooperation agreements are *not* the product of a fair process. And the third statement was “I believe it is my professional obligation to advise clients that they have an opportunity to cooperate,” which received an average rating of 8.82. Figures 5, 6, and 7 below show a breakdown of these questions by district, role, and case type.

FIGURE 5: MEAN RESPONSE TO FAIRNESS QUESTIONS BY DISTRICT



Note. The asterisks (*) above the labels indicate significance.

FIGURE 6: MEAN RESPONSE TO FAIRNESS QUESTIONS BY ROLE

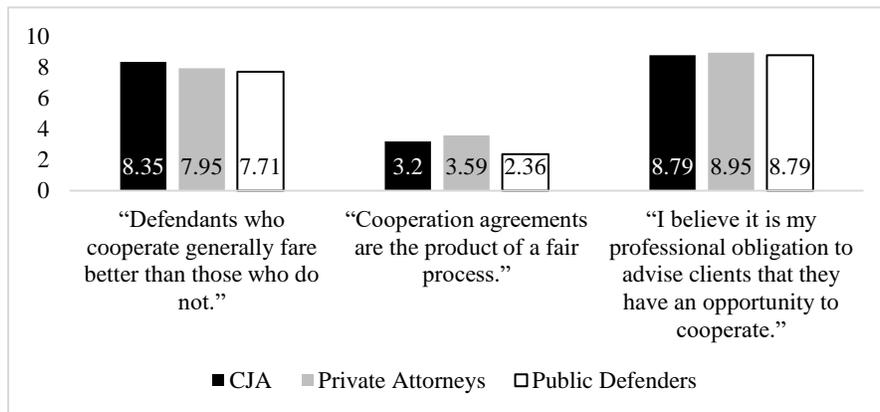
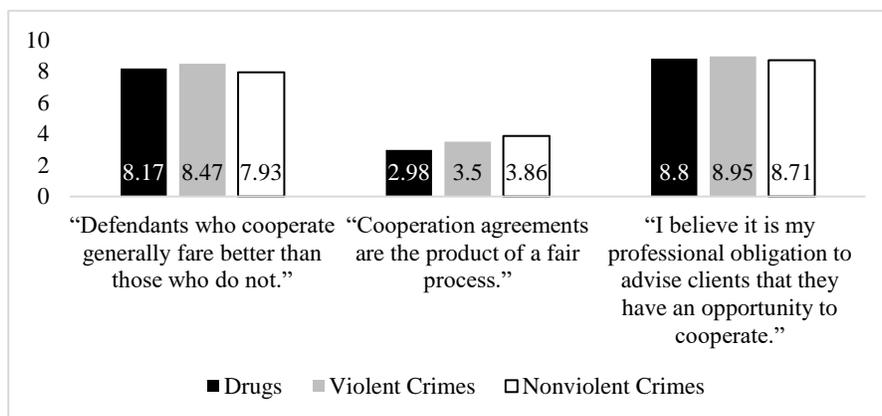


FIGURE 7: MEAN RESPONSES TO FAIRNESS QUESTIONS BY CASE TYPE



There was no significant difference in responses to fairness questions across case type and role. However, there was one significant difference based on district in response to the statement "defendants who cooperate generally fare better than those who do not"¹⁵⁰: participants from EDPA gave significantly higher responses (8.77) than those from EDVA (7.79).

Next, we analyzed whether attorney views on the fairness of cooperation varied depending on whether the attorney had previously worked as a prosecutor. We found a significant difference between attorneys who did and did not have previous experience as prosecutors on the rating of the question "cooperation agreements are the product of a fair process"¹⁵¹: those with prosecutorial experience gave significantly higher ratings (4.00) than those without prosecutorial experience (2.67). This suggests that prosecutors' likely more favorable view of cooperation carries over to a certain extent to their subsequent careers as defense lawyers. It is also possible that these attorneys enjoy better relationships with prosecutors or are viewed by prosecutors as more reasonable and willing to compromise, and thereby have a different experience of the cooperation process than do defense attorneys without that prior experience. But even lawyers with prior prosecutorial experience gave relatively low ratings.

We did not specifically ask respondents to explain the basis for their views about the fairness of the cooperation process, but their responses to our general open-ended questions, discussed below, shed some light onto why they viewed cooperation as unfair. For example, a few respondents

¹⁵⁰ $F(3,115) = 2.82, p < 0.05, \eta_p^2 = 0.07$.

¹⁵¹ $F(1,116) = 10.26, p < 0.01, \eta_p^2 = 0.08$.

suggested that rewarding cooperators is a form of the trial penalty.¹⁵² Others discussed how the discretion afforded to prosecutors makes cooperation decisions unfair. And still others expressed that the lack of uniformity in practice leaves room for disparity.

The open-ended responses we received—which were consistent with prior accounts¹⁵³—suggest avenues for future research to explore perceptions of fairness in the cooperation process. They suggest that attorneys’ perceptions here may reflect their views of the criminal legal system and plea bargaining more broadly, against which these same criticisms are frequently lodged. Further research would help disentangle attorneys’ perceptions of the fairness of cooperation from their perception of other aspects of the system and identify any ways in which cooperation—and specific practices surrounding cooperation—are uniquely viewed as unfair.

M. Open-Ended Responses

Finally, participants had the opportunity to share any additional thoughts about the cooperation process and experience in a final open-ended question. Many did. Among the most common themes that emerged were complaints about the extent of the discretion afforded to prosecutors in deciding whether to file a Section 5K1.1 or Rule 35(b) motion¹⁵⁴ and the difficulty of getting prosecutors to follow up with such motions or other assistance for cooperating clients.¹⁵⁵

¹⁵² For a discussion of the concept of the “trial penalty,” see Lucian E. Dervan, *Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty*, 31 FED. SENT’G REP. 239, 241–45 (2019); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 79 (2005).

¹⁵³ See, e.g., Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 464–68 (2004). Professor Etienne interviewed attorneys who practiced primarily in two federal districts. Although cooperation was not the focus of the Etienne study, some respondents touched on the subject. Some stated that cooperation was beneficial because prosecutors, eager to obtain their clients’ information, were sometimes more open to concessions of Guidelines calculations. See *id.* at 466. But others had a dimmer view of cooperation, including one attorney who stated cooperation “makes me sick” and is “a necessary evil.” See *id.* at 467–68.

¹⁵⁴ For example, one respondent stated: “The government holds four aces, and your client can only hope to catch the AUSA feeling generous.” Another stated: “Cooperation is one sided with the government controlling all facets of the process. The defendant has no options or control of anything since the government decides whether the defendant has cooperated and whether a 5K or Rule 35 motion will be filed.” Another respondent similarly decried prosecutors’ “absolute ability to decide everything regarding a client’s cooperation.” Still another: “It is a travesty that the government controls the entire process through judicial nonchalance and absurdly high sentencing guidelines.”

¹⁵⁵ For example, one respondent stated: “There are just some prosecutors who don’t follow through. Once they get what they want from the client, they forget about them and often won’t even answer phone calls or emails.” Another stated that prosecutors “love getting the cooperation, but getting them to follow

Several respondents discussed the lack of safeguards against untrue or distorted information working its way into the process. For example, one respondent noted that prosecutors “never double check or investigate the witnesses’ statements or allegations” such that “people who are familiar with the system are able to manipulate the prosecutors.” Another said that

the biggest problem with cooperation is the way the statements are contemporaneously recorded by the agent—I have sat in many proffers where any favorable information was not written down by government agents or was massaged before being written down. Also, prosecutors believe the first story they hear—there is a huge confirmation bias problem.

Another attorney stated that the practice of cooperation “encourages exaggeration, misrepresentations and lying because of the substantial sentences clients face, especially in drug cases.” Another stated that cooperation “encourages and rewards dishonesty.”

Many attorneys emphasized the role of mandatory minimum sentences in driving cooperation, noting that they ordinarily do not view cooperation as advantageous for their clients in the absence of such statutes.¹⁵⁶ And many respondents expressed deep ambivalence about participating in a process that they viewed as intertwined with an unjust criminal legal system and sentencing regime. One lawyer stated that “the cuts for cooperation are too large and cause judges to inflate initial sentences when they expect to reduce later for cooperation.”¹⁵⁷ Another respondent stated, “Cooperation feels awful. You are helping your client but in the back of your mind you know you are also helping to prosecute someone else.” Another stated, “Cooperation is a horrible thing for clients. Doing law enforcement’s job and

through with a motion in a timely matter is a real problem.” Another respondent similarly described problems when the prosecutor who signed up a cooperator had left the U.S. Attorney’s Office and “the cooperation appears to have been forgotten.” One attorney noted that the discretion given to individual prosecutors as to whether and when to file a motion for substantial assistance should be curtailed, suggesting that “the issue of cooperation among the districts should be more uniform” and there should be a “centralized committee” to review situations when cooperators’ sentencing was delayed. One attorney did report, however, that the prosecutors in their district were “honorable in their dealing” and that a Rule 35 motion “will be made if the agreement is kept.”

¹⁵⁶ One respondent stated: “The #1 thing that makes the cooperation process unfair is mandatory minimum sentences—especially with drug cases. Because cooperation is often the only way a client can avoid the mand[atory minimum sentence], the prosecution has all the leverage and sole discretion.” Another stated: “If there were no mandatory minimums, and if there was no trial penalty, I would have recommended more trials, and more pleas without cooperation.” However, another respondent suggested that mandatory minimum statutes do not play such a definitive role, stating: “In my experience, the threat of mandatory minimums does not really drive the decision to cooperate; rather, it turns more on their lived experiences, family situation, whether they have children, etc. It’s far more complicated than just trying to avoid a statutory minimum penalty.”

¹⁵⁷ The same respondent stated that “there is no difference in ‘reducing’ a sentence for cooperation and increasing it for failing to do so Cuts for cooperation are another component of the trial penalty.”

requiring someone to bargain for their freedom encourages an ugly, unfair, and unjust system to become even more so that way.”¹⁵⁸

Although several respondents indicated that cooperation was the best course for some clients in some circumstances,¹⁵⁹ most expressed skepticism about the process and emphasized the need for attorneys to carefully prepare clients and evaluate the potential risks and benefits.¹⁶⁰ As one attorney stated, “Most clients [start] thinking that it is a[n] easy yellow brick road to freedom and they have to be informed that it is anything but.” One of the concerns highlighted was the impact of prosecutors requiring cooperators to plead guilty to other uncharged conduct. As one attorney stated, “If I have a client who is not facing a man[datory] min[imum] on a drug case, he will end up pleading to a man[datory] min[imum] . . . I will discourage cooperation unless s/he is facing serious time because of priors or other enhancement factor.” Another stated, “Be very careful about offering information outside of the charged crime. Offering information on weapons, while the client is charged with fraud will probably not get the client any benefit.” Another attorney observed, “The longer I practice, the less I think cooperation makes sense for most defendants who are eligible to cooperate.”

IV. IMPLICATIONS AND AVENUES OF FURTHER RESEARCH

The 146 defense attorneys who participated in this study drew a picture of the cooperation experience in federal court that is remarkably consistent in many respects. Their responses also were consistent with much of the data published by the U.S. Sentencing Commission on substantial-assistance departures, giving us a degree of confidence that the defense attorneys’ responses were, to a certain extent, reflective of reality. They also pointed to some significant differences between districts and case types and raised serious concerns about the fairness and integrity of the process.

¹⁵⁸ Other respondents characterized cooperation as “a necessary evil” and “a despicable practice which is not a search for the truth, but a search for convictions. Once my clients become cooperators AUSAs all of a sudden are sympathetic to the difficult lives my clients have led.”

¹⁵⁹ For example, one respondent characterized cooperation as a “great way to proceed with the right client.” Another stated: “My cooperating clients have done well with sentencing . . . on the basis of their cooperation.”

¹⁶⁰ For example, one respondent offered that the defense attorney should “always be present during the proffer and debriefing sessions,” “document interviews [and] ask your client to document his/her contact with agents,” and otherwise be “prepared to ask helpful questions at debriefs that will elicit cooperation information from client when agents do not ask.” Several respondents highlighted the need to emphasize with clients the necessity that they tell the truth.

A. Building a Theoretical Model of Cooperation

Our study lays the groundwork for a theoretical model of cooperation that is long overdue. Although conventional wisdom abounds, there has been no prior empirical study of the cooperation decision from the defense perspective. We hope that our findings initiate that important work. Overall, our respondents confirmed what is frequently posited: the most significant factors in a defendant's decision to cooperate are sentencing considerations, including the length of the sentence to which a defendant is exposed, the existence of a statutory mandatory minimum sentence, and the anticipated sentencing benefit of cooperation. However, our study also found that the cooperation decision is informed by a myriad of other considerations as well, some of which vary in importance based on the type of case, and at least one—trust in the defense lawyer—which varies in importance based on district. We further found that defendants *generally decline to cooperate*. However, their willingness to cooperate varies by district, a difference that we postulate is related to the practices surrounding cooperation in those districts.

Thus, a model that focuses solely on the quantum of punishment authorized or mandated for a crime as the determinant of whether individuals charged with that crime will cooperate would be too simplistic. The persistently high cooperation rates in case types that do not involve particularly severe sentences or mandatory minimums underscore this point.¹⁶¹ A robust model also must consider the interaction among variables and specific practices surrounding cooperation, including whether cooperators must plead guilty to additional crimes, the timing of when cooperation benefits are distributed (for example, whether cooperators are sentenced before or after their cooperation is complete), and sealing practices. Moreover, to the extent any such model is used to inform sentencing policy and charging decisions, there are a multitude of considerations that should guide those choices—not just their effect on cooperation—including whether the sentences authorized or sought are just and proportionate.

Further research into the relationship between cooperation practices and the *quality* of cooperator testimony also is necessary. As some of our respondents suggest in their open-ended answers discussed above, coercive penalties may have a negative effect on the quality of cooperation, producing unreliable information in the same way that coercive interrogation tactics can

¹⁶¹ See *supra* notes 30–31 and accompanying text.

induce false confessions¹⁶² and extreme trial penalties can induce false guilty pleas.¹⁶³ Other cooperation practices also may be associated with gains or losses in the reliability of testimony. Thus, a model of cooperation that considers only quantity of cooperation produced without considering quality would be incomplete and would undermine the legitimate aims of cooperation.¹⁶⁴ So, too, it would be valuable to study the relationship between various cooperation practices and defendants' perceptions of the fairness of the process.

Even without a fully developed model, we hope that prosecutors—who more than any other institutional actor dictate the practices surrounding cooperation—question *why* they employ the practices that they do and whether those practices in fact serve their aims significantly better than others would, and at what cost. Although there is much to be said for consistency and continuity of practice within a district—because it permits attorneys to know what to expect and better prepare their clients—stasis for its own sake should not close off the possibility of innovation. Judges should also be interested in the project, as they play a role in overseeing some aspects of cooperation, such as when sentencing occurs relative to the completion of cooperation, the extent of the sentencing benefits afforded to cooperators, and sealing practices.

Reliance on past practices, without an evidence-based understanding of their impact of the quality and quantity of cooperation, and the perceived legitimacy of cooperation, seems suboptimal. State prosecutors—especially those who are newly in office and value data-driven reform—also may be interested in our findings and the questions we pose as they consider what policies and practices to put into place surrounding cooperation and how to evaluate their efficacy going forward.¹⁶⁵ Our study also will be beneficial for

¹⁶² See, e.g., Saul M. Kassin, *The Social Psychology of False Confessions*, 9 SOC. ISSUES & POL'Y REV. 25, 25 (2015) (reviewing studies of the conditions that will cause innocent people to falsely confess); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1058 (2010) (discussing the “dangers of coercion during interrogations”).

¹⁶³ A growing body of plea-bargaining literature suggests that where the discrepancy between the sentence offered in a plea is so astoundingly more lenient than the sentence exposure at trial, anyone—guilty or innocent—will accept the plea. See, e.g., Jenia I. Turner, *Plea Bargaining*, in 3 REFORMING CRIMINAL JUSTICE: TRIAL AND PRE-TRIAL PROCESSES 73, 82 (Erik Luna ed., 2017); McCoy, *supra* note 152, at 90.

¹⁶⁴ See Roth, *supra* note 1, at 788–90 (calling for additional research on the effect of various incentives structures on the reliability of cooperator testimony).

¹⁶⁵ See, e.g., Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 766 (2020) (noting that many self-styled “progressive prosecutors” have pledged to collect data and make evidence-based judgments about their policies); David A. Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 31 (2017) (suggesting that progressive prosecutors collect data to measure what they care about).

countries contemplating the adoption of cooperation agreements modeled in part on the U.S. federal scheme.¹⁶⁶

Our findings, and the further research we suggest, also should be of interest to defense attorneys, many of whom surprised us with their responses indicating a relative lack of training on cooperation. As attorney competence in plea bargaining has come into focus for courts¹⁶⁷ and scholars,¹⁶⁸ a growing literature has emphasized the need to train attorneys on plea bargaining and other areas of practice beyond trials.¹⁶⁹ Training on cooperation should be part of that movement to use research to inform practice.¹⁷⁰ While personal experience and mentorship are valuable, there is always the risk that those experiences are idiosyncratic and fail to capture the themes that emerge through analysis of many attorneys' experiences across different types of

¹⁶⁶ See, e.g., Sakura Murakami, *Japanese-Style Plea Bargaining Debuts but Authorities Fear Spread of False Testimony*, JAPAN TIMES (May 31, 2018), <https://www.japantimes.co.jp/news/2018/05/31/national/crime-legal/japanese-style-plea-bargaining-debuts-authorities-fear-spread-false-testimony/> [<https://perma.cc/XCP5-5FJ2>] (describing a new Japanese procedural mechanism “resembl[ing] what is known as plea bargaining in the West”); Fundação FHC, *Plea Bargaining – a Comparison Between the United States and Brazil*, MEDIUM (Dec. 4, 2017), <https://medium.com/funda%C3%A7%C3%A3o-fhc/plea-bargaining-a-comparison-between-the-united-states-and-brazil-55a59c80220f> [<https://perma.cc/L2WD-Q4EP>] (describing the more restricted Brazilian approach to plea bargaining).

¹⁶⁷ See *Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Missouri v. Frye*, 566 U.S. 134, 138 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

¹⁶⁸ See, e.g., Cynthia Alkon, *Plea Bargain Negotiations: Defining Competence Beyond Lafler and Frye*, 53 AM. CRIM. L. REV. 377, 377 (2016) (discussing how courts have responded to *Frye*); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2651 (2013) (applying the constitutional right to competent representative to plea bargaining); Jeffrey Bellin, *Attorney Competence in an Age of Plea Bargaining and Econometrics*, 12 OHIO ST. J. CRIM. L. 153, 154 (2014) (discussing a study on defenders' abilities to convince their clients to take plea deals). Other scholars also have explored what it means to provide competent representation in other areas of practice. See, e.g., John B. Meixner Jr., *Modern Sentencing Mitigation*, 116 NW. U. L. REV. 1395, 1401 (2022) (discussing competence in presenting mitigating evidence at sentencing).

¹⁶⁹ See, e.g., Ronald F. Wright, Jenny Roberts & Betina Cutiaia Wilkinson, *The Shadow Bargainers*, 42 CARDOZO L. REV. 1295, 1299–1300 (2021) (articulating a “shadow of the client” model of negotiation for defense attorneys that focuses on the clients “wants and needs”); Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1471–72 (2016) (advocating that defense attorneys undergo negotiation training).

¹⁷⁰ As Professor Jeffrey Bellin has observed in the context of guilty pleas, the ability to persuade a client to accept a plea that the lawyer believes is in the client's best interest is an important skill, and a greater facility for doing so may explain why one prior study found that public defenders obtained more favorable sentencing outcomes for their clients than court-appointed attorneys. See Bellin, *supra* note 168, at 159 (reviewing the Anderson and Heaton study of Philadelphia murder cases, *see supra* note 71, and suggesting that their data “points to the conclusion that PD's relative advantage is overcoming client resistance to pleading guilty”). On the other hand, as David Patton has suggested, a critical component of attorney competence is the ability to dissuade clients from pursuing a course of action, including cooperation, when they do not fully appreciate the risks of doing so. See Patton, *supra* note 55, at 2592–93 (noting that clients “who are at all risk averse will jump at the chance to cooperate” but often must decide whether to do so “without much time for reflection, much less an investigation or a review of discovery material”).

cases. Our study, along with the findings of future studies, should be used to develop methodological, data-driven training for attorneys. Such training would provide the opportunity to focus on what considerations matter most to defendants in the cooperation decision in a variety of contexts, the most common reasons why defendants fail in their efforts to cooperate, the extent to which they ultimately benefit from cooperation, and defendants' experience of the fairness of the process.

B. Limitations

As with all empirical research, no methodology or analysis is perfect. It is only in the convergence of findings across studies that true effects can be fully appreciated. As such, we wish to acknowledge some limitations of our work. First, the attorneys who responded to our survey presumably self-selected because they were interested in the subject and willing to speak with outside researchers. Because the study was focused on cooperation, and our respondents indicated a wide range of experiences in terms of the frequency and number of cases they had handled involving cooperation, those with little or no experience with cooperation may have elected not to participate.¹⁷¹ Attorneys ideologically opposed to cooperation in all circumstances also may have elected not to participate,¹⁷² potentially skewing our respondent pool to those at least willing to engage in the cooperation process in some cases. For example, one attorney who received the email with the link to the survey wrote to one of the authors directly to state that this attorney did not represent cooperators and therefore would not participate in the study. We responded and encouraged this attorney to complete the survey nevertheless.

Second, the limitations inherent in any survey that relies upon self-reporting are present here, too. We did not review case files or collect other material that might have corroborated respondents' accounts of the volume or case mix of their dockets, the number or percentage of their cases involving cooperation, or any number of the other matters that we asked about. Doing so would have been difficult to undertake given our commitment to maintaining respondents' anonymity. It also would have vastly increased the time and resources necessary to complete the study and would not necessarily have added significant value to the primary objectives of our study, which were to understand the influences on the cooperation

¹⁷¹ In fact, several attorneys who received the link to the study wrote the authors directly to state that they were not participating because they had minimal experience with cooperation. We responded and encouraged those attorneys to complete the survey nevertheless because we were still interested in their perspectives.

¹⁷² See Richman, *supra* note 6, at 117–19 (discussing some defense attorneys' ideological resistance to cooperation).

decision, differences in districts' practices, and attorneys' perceptions of the fairness of the process. Moreover, the close correspondence between much of the information provided by our respondents and data collected by the U.S. Sentencing Commission suggests that our respondents' experiences are in many ways reflective of the broader reality in their districts. We hope that the anonymity afforded to participants allowed them to be completely honest in their responses.

There is the further limitation that, in some sections of the study, attorneys were asked to report their perceptions of which factors mattered most to their clients. People are often not aware of why they do or do not do something. In this case, that unreliability was potentially compounded by the fact that defendants' experiences were filtered through the perceptions of their lawyers. Nevertheless, we use attorney perceptions as a proxy for defendants' motivations because defense attorneys are better positioned than anyone else to provide information on a decision-making process that is inherently opaque. In fact, defense attorneys play such a critical mediating role in the cooperation decision that it would be difficult—and perhaps nonsensical—to attempt to study the processes involved in that decision without their participation.

Third, our study was limited to attorneys who practice primarily in three federal districts. It is not necessarily reflective of the experience in every federal district. In fact, our findings suggest that there may be significant differences in other districts—the responses that we grouped into “Other” districts because respondents reported practicing primarily in a district other than the three districts that were the focus of our study suggest such differences in fact are likely. Our findings also are not necessarily reflective of the experience of defendants and defense attorneys in state court, including those within the same geographic areas as the districts in our study. Federal practice and state practice differ in so many ways that experiences in one often are not transferable to the other. Moreover, every state court has its own practices and culture.

C. Areas of Further Study

These limitations offer additional areas for further research beyond those already identified above, such as a study focused on individuals who have themselves made the decision about whether to cooperate. A future survey could be distributed to attorneys in other federal districts (ideally, in all federal districts) to further document differences in practices and could inquire about attorneys' perceptions of the factors important to the cooperation decision, perceptions of fairness, and the relationships between these subjects. It also would be worthwhile to distribute the survey to

prosecutors to determine if prosecutors' answers to the very same questions would differ from those of defense attorneys in the same districts. We imagine that such a prosecutor-focused study would reveal a good deal of commonality in the answers, but that significant differences would emerge as well. Similarly, a study focused on defense attorneys, prosecutors, or both in one or more state courts would help test to what extent any of our findings are generalizable to state court processes surrounding cooperation.

To complement the survey design, experimental studies that manipulate variables identified as relatively important or unimportant in our study would provide an excellent opportunity for causal reasoning. Measuring attorneys' cooperation recommendations and perceptions of fairness in cases in which the conditions and rewards for cooperating differ, for instance, would allow one to analyze whether and how those factors may in fact influence cooperation recommendations and fairness perceptions. Certainly, the finding that so many attorneys who participate in the cooperation process nevertheless consider the process so unfair begs more study, including which aspects of the process are perceived as unfair and what can be done to remediate this perception. The finding also invites further inquiry into whether this perception is shared by cooperators, prosecutors, judges, and laypeople.

CONCLUSION

Although cooperation is a deeply ingrained and endemic feature of criminal prosecutions in the United States, it has rarely been subjected to empirical study. Even as scholars and courts have increasingly turned their focus away from trials and toward plea bargaining, bargains that include a commitment to cooperate in the investigation and prosecution of others have largely been ignored. Until now we have had very little data about what matters to criminal defendants in deciding whether to cooperate with federal prosecutors. Even as vast regional differences in the practices surrounding cooperation have long been acknowledged, efforts to document and analyze those differences have been dormant for several decades. No doubt this is at least in part because the information has been difficult to obtain.

This Article sheds new light on these subjects, adding considerable texture to current understandings of cooperation. We are grateful to the defense attorneys who participated in our survey for sharing their experiences with us, thus enabling future defense attorneys to benefit from the insights of this study about how defendants in a variety of circumstances respond to the choice about whether to cooperate. The information provided herein, including about regional differences regarding cooperation, also will be helpful to prosecutors and judges as they evaluate their own methods.

Critically, our findings should prompt future research and deliberation about the aims and methods of cooperation, including how it can be implemented in a way that results in reliable evidence and is perceived as fair. That goal may be elusive, but this work identifies and organizes further questions that, if studied rigorously and genuinely, will inform the conversations necessary to pursue it.

APPENDIX A: LIST OF 27 ITEMS PARTICIPANTS WERE ASKED TO RATE ON SCALES OF IMPORTANCE AND FREQUENCY IN THE COOPERATION DECISION

The mean importance and frequency ratings, respectively, are included in parentheses for each item.

- (1) Whether a statutory mandatory minimum sentence applies ($M = 8.39$; $M = 7.88$)
- (2) Anticipated sentencing range without cooperation (8.33; 8.23)
- (3) Magnitude of anticipated sentencing benefit of cooperation (8.20; 8.13)
- (4) Certainty of sentencing benefit of cooperation (6.98; 6.96)
- (5) Concern about exposure for uncharged criminal conduct (5.39; 5.29)
- (6) Bail status (4.54; 4.21)
- (7) Desire to avoid any prison time (6.70; 6.30)
- (8) Remorse (2.77; 2.80)
- (9) Concern about physical safety (5.99; 5.55)
- (10) Concern about social stigma (4.47; 4.33)
- (11) Desire to protect family, close associates, or friends (6.25; 5.81)
- (12) Cultural aversion to cooperation (5.36; 4.82)
- (13) Personal aversion to cooperation (5.55; 5.10)
- (14) Type of cooperation required (for example, wearing a wire, testifying) (5.65; 5.50)
- (15) Trust in me as their lawyer (6.92; 6.67)
- (16) Trust in prosecutor (5.41; 5.63)
- (17) Trust in assigned judge (5.39; 5.64)
- (18) Pressure from prosecutor (3.94; 4.06)
- (19) Pressure from defense attorney (3.78; 3.83)
- (20) Pressure from family, associates, or friends (4.50; 4.38)
- (21) Financial incentives (2.21; 2.41)
- (22) Defendant's age (4.85; 4.81)
- (23) Defendant's race (2.85; 2.92)
- (24) Defendant's gender (2.75; 2.68)
- (25) Defendant's criminal history (7.02; 7.01)
- (26) Defendant's education level (3.93; 3.67)
- (27) Defendant's immigration status (5.39; 4.93)

APPENDIX B: PRINCIPAL COMPONENT ANALYSIS

We ran a principal component analysis because the goal was to identify and compute composite scores for factors underlying the 27 items about which we had asked participants. We excluded cases pairwise to preserve the responses of participants who did not rate all 27 items.

Initially, we examined the factorability of all 27 items. The Kaiser–Meyer–Olkin measure of sampling adequacy was 0.67, above the commonly recommended value of 0.60. Bartlett’s test of sphericity was significant ($\chi^2(351) = 845.09, p < 0.01$). The communalities were all above 0.30, indicating that each item shared some common variance with other items. As such, we determined that principal component analysis was appropriate with all 27 items. Factor loadings < 0.45 were suppressed to find the best structure for our data, and so that items do not cross-load too highly between factors. Initially, ten factors were identified with an eigenvalue above 1.¹⁷³ The first four factors (with eigenvalues above 1.5) explained 40.17% of the total variance, and the first ten factors (including all eigenvalues above 1.0) explained 66.83% of the total variance.

Four items did not meet the minimum criteria of factor loading above 0.45 and were thus eliminated. The item “type of cooperation required” had factor loadings of 0.34, 0.38 and 0.40 on factors 2, 6 and 8, respectively. The item “concern about exposure for uncharged criminal conduct” had factor loadings of 0.31 and 0.32 on factors 2 and 3, respectively. The item “whether a statutory mandatory minimum sentence applies” had factor loadings of -0.33 and -0.38 on factors 8 and 9, respectively, and a factor loading of 0.43 on factor 3. Finally, the item “trust in me as their lawyer” had factor loadings of 0.37 and 0.38 on factors 2 and 6, respectively.

Once we eliminated the four items that did not load strongly enough to be included, we conducted a principal component analysis with the remaining twenty-three items using varimax rotation, at which point one more item was removed because at this point it did not meet the minimum criteria of factor loading above 0.45. The item “financial incentives” had factor loadings of 0.42 and 0.43 on factors 3 and 6, respectively.

For the final stage of our analysis, we ran a principal component analysis of the remaining twenty-two items. The first three factors (with eigenvalues above 1.5) explained 36.21% of the variance, and the first nine factors (with eigenvalues above 1.0) explained 69.67% of the variance. See Table 1B for factor loadings and communalities based on the principal component analysis with varimax rotation for twenty-two items. The last two

¹⁷³ Eigenvalues are measures of how much variance is explained by that factor. Eigenvalues over 1 indicate that that particular factor explains or includes more than one item.

NORTHWESTERN UNIVERSITY LAW REVIEW

factors identified only included one item, so we excluded those from our factor list.

TABLE 1B: FACTOR LOADINGS AND COMMUNALITIES BASED ON THE PRINCIPAL COMPONENT ANALYSIS WITH VARIMAX ROTATION FOR TWENTY-TWO ITEMS

	Loadings									Communality
	Factor 1	Factor 2	Factor 3	Factor 4	Factor 5	Factor 6	Factor 7	Factor 8	Factor 9	
Cultural Aversion to Cooperation	0.825									0.730
Personal Aversion to Cooperation	0.752									0.640
Concern About Social Stigma	0.703									0.622
Concern About Physical Safety	0.641									0.604
Desire to Protect Family, Friends, and Close Associates	0.614									0.515
Defendant's Gender		0.849								0.758
Defendant's Race		0.745								0.751
Defendant's Education Level		0.617								0.662
Trust in Prosecutor			0.867							0.819
Trust in Assigned Judge			0.819							0.795
Bail Status				0.777						0.683
Desire to Avoid Any Prison Time				0.764						0.681
Pressure from Prosecutor				0.500						0.615
Defendant's Age					0.727					0.727
Defendant's Criminal History					0.721					0.672
Defendant's Immigration Status					0.625					0.684
Pressure from Defense Attorney						0.788				0.716

TABLE 1B (continued)

	Loadings									Community
	Factor 1	Factor 2	Factor 3	Factor 4	Factor 5	Factor 6	Factor 7	Factor 8	Factor 9	
Pressure from Family, Friends, or Associates						0.674		-0.462		0.721
Certainty of Sentencing Benefit of Cooperation							0.794			0.702
Magnitude of Anticipated Sentencing Benefit of Cooperation							0.771			0.674
Anticipated Sentencing Range Without Cooperation								0.852		0.745
Remorse									0.890	0.812
Eigenvalue	4.138	2.160	1.667	1.406	1.348	1.287	1.153	1.100	1.068	
% of Total Variance	18.809	9.819	7.578	6.392	6.128	5.849	5.242	4.999	4.855	
Total Variance									69.67%	

APPENDIX C: ITEMS GROUPED BY FACTORS, AND STANDALONE ITEMS

Factor 1: Cultural, family, and safety concerns

- Cultural aversion to cooperation
- Personal aversion to cooperation
- Concern about social stigma
- Concern about physical safety
- Desire to protect family, friends, and close associates

Factor 2: Demographic characteristics

- Defendant's gender
- Defendant's race
- Defendant's education level

Factor 3: Trust in Prosecutor

- Trust in prosecutor
- Trust in assigned judge

Factor 4: Bail status

- Bail status
- Desire to avoid any prison time
- Pressure from prosecutor

Factor 5: Defendant characteristics with potential impact on sentence and deportation

- Defendant's age
- Defendant's criminal history
- Defendant's immigration status

Factor 6: Pressure from defense attorney and defendant's circle

- Pressure from defense attorney
- Pressure from family, friends, or associates

Factor 7: Anticipated sentencing benefits

- Certainty of sentencing benefit of cooperation
- Magnitude of anticipated sentencing benefit of cooperation

Standalone 1: Remorse

Standalone 2: Anticipated sentencing range without cooperation

Standalone 3: Type of cooperation required

Standalone 4: Concern about exposure for uncharged criminal conduct

Standalone 5: Whether a statutory mandatory minimum sentence applies

Standalone 6: Trust in me as their lawyer

Standalone 7: Financial incentives

**APPENDIX D: RATINGS OF IMPORTANCE
BY IDENTIFIED CASE TYPE, DISTRICT, AND ROLE**

**TABLE 1D: MEAN RATING OF IMPORTANCE OF FACTORS IN COOPERATION DECISION
IN DESCENDING ORDER BY IDENTIFIED CASE TYPE**

Factor	Drugs	Violent Crimes	Nonviolent Crimes
Whether a statutory mandatory minimum sentence applies	8.54	8.58	7.20
Anticipated sentencing range without cooperation	8.23	8.89	8.00
Anticipated sentencing benefit	7.60	7.95	7.03
Trust in me as their lawyer	6.66	7.61	7.36
Defendant characteristics with potential impact on sentence and deportation	5.67	6.16	5.90
Type of cooperation required	5.47	6.05	6.50
Cultural, family, and safety concerns	5.43	6.54	5.03
Trust in prosecutor and judge	5.20	5.89	6.35
Concern about exposure for uncharged criminal conduct	5.11	6.37	5.67
Bail status	4.97	5.11	5.97
Pressure from defense attorney and defendant's circle	4.12	3.37	5.04
Demographic characteristics	3.20	3.19	3.07
Remorse	2.46	4.06	3.60
Financial incentives	1.80	1.89	5.21

NORTHWESTERN UNIVERSITY LAW REVIEW

TABLE 2D: MEAN RATING OF IMPORTANCE OF FACTORS IN COOPERATION DECISION
IN DESCENDING ORDER, BY DISTRICT

Factor	SDNY	EDPA	EDVA	Other
Whether a statutory mandatory minimum sentence applies	8.63	8.09	8.21	8.40
Anticipated sentencing range without cooperation	8.29	8.59	8.10	8.30
Anticipated sentencing benefit	7.82	7.77	7.32	7.85
Trust in me as their lawyer	7.49	6.86	6.18	6.10
Concern about exposure for uncharged criminal conduct	6.06	4.91	4.85	5.90
Defendant characteristics with potential impact on sentence and deportation	5.89	5.32	5.63	6.67
Cultural, family, and safety concerns	5.85	6.12	5.18	5.36
Type of cooperation required	5.63	6.18	5.49	6.30
Bail status	5.44	4.98	4.35	6.20
Trust in prosecutor and judge	5.14	5.57	5.49	6.40
Pressure from defense attorney and defendant's circle	3.72	4.43	4.20	4.90
Demographic characteristics	3.10	3.32	3.04	3.48
Remorse	2.69	2.18	2.97	3.70
Financial incentives	2.12	1.91	2.56	2.22

TABLE 3D: MEAN RATING OF IMPORTANCE OF FACTORS IN COOPERATION DECISION
IN DESCENDING ORDER BY ROLE

Factor	CJA	Private Attorney	Public Defender
Whether a statutory mandatory minimum sentence applies	8.56	7.48	8.43
Anticipated sentencing range without cooperation	8.42	7.86	8.21
Anticipated sentencing benefit	7.47	7.77	8.29
Trust in me as their lawyer	6.58	7.86	6.86
Cultural, family, and safety concerns	5.77	4.72	6.23
Defendant characteristics with potential impact on sentence and deportation	5.63	6.17	5.93
Type of cooperation required	5.55	6.73	5.36
Concern about exposure for uncharged criminal conduct	5.41	5.68	5.57
Trust in prosecutor and judge	5.17	6.19	6.07
Bail status	4.85	5.87	5.12
Pressure from defense attorney and defendant's circle	3.86	4.67	4.61
Demographic characteristics	3.07	3.36	3.12
Remorse	2.75	3.00	2.36
Financial incentives	1.79	4.36	1.43

NORTHWESTERN UNIVERSITY LAW REVIEW

APPENDIX E: RATINGS OF FREQUENCY
BY IDENTIFIED CASE TYPE, DISTRICT, AND ROLE

TABLE 1E: MEAN RATING OF FREQUENCY OF FACTORS IN COOPERATION DECISION
IN DESCENDING ORDER BY IDENTIFIED CASE TYPE

Factor	Drugs	Violent Crimes	Nonviolent Crimes
Anticipated sentencing range without cooperation	8.13	8.42	8.38
Whether a statutory mandatory minimum sentence applies	7.99	8.47	6.42
Trust in me as their lawyer	6.58	6.72	7.00
Anticipated sentencing benefit	6.33	7.05	6.16
Type of cooperation required	5.37	5.28	6.67
Concern about exposure for uncharged criminal conduct	5.01	5.89	5.69
Trust in prosecutor and judge	4.38	5.73	4.53
Cultural, family, and safety concerns	4.23	5.28	3.80
Defendant characteristics with potential impact on sentence and deportation	4.08	5.72	4.35
Bail status	3.98	4.73	4.44
Pressure from defense attorney and defendant's circle	3.28	3.38	3.53
Remorse	2.45	3.94	3.77
Demographic characteristics	2.33	2.88	2.19
Financial incentives	2.04	2.26	5.42

TABLE 2E: MEAN RATING OF FREQUENCY OF FACTORS IN COOPERATION DECISION
IN DESCENDING ORDER BY DISTRICT

Factor	SDNY	EDPA	EDVA	Other
Anticipated sentencing range without cooperation	7.91	8.35	8.31	8.63
Whether a statutory mandatory minimum sentence applies	8.30	7.90	7.46	7.25
Trust in me as their lawyer	7.00	6.37	6.31	6.25
Anticipated sentencing benefit	6.71	7.23	7.03	6.15
Type of cooperation required	5.25	6.26	5.42	6.50
Concern about exposure for uncharged criminal conduct	5.84	4.40	5.03	4.88
Trust in prosecutor and judge	4.74	5.09	5.69	5.60
Cultural, family, and safety concerns	5.14	4.66	4.54	4.22
Defendant characteristics with potential impact on sentence and deportation	5.27	4.80	5.12	4.87
Bail status	4.73	3.61	4.56	4.77
Pressure from defense attorney and defendant's circle	3.26	3.93	4.37	3.55
Remorse	3.02	1.89	3.16	3.13
Financial incentives	2.45	1.80	2.82	2.14
Demographic characteristics	2.82	2.47	3.14	2.07

NORTHWESTERN UNIVERSITY LAW REVIEW

TABLE 3E: MEAN RATING OF FREQUENCY OF FACTORS IN COOPERATION DECISION
IN DESCENDING ORDER BY ROLE

Factor	CJA	Private Attorney	Public Defender
Anticipated sentencing range without cooperation	8.18	8.21	8.23
Whether a statutory mandatory minimum sentence applies	8.05	7.33	7.46
Trust in me as their lawyer	6.35	7.47	7.00
Anticipated sentencing benefit	6.84	6.50	7.64
Type of cooperation required	5.24	7.11	5.36
Concern about exposure for uncharged criminal conduct	5.14	5.84	5.00
Trust in prosecutor and judge	4.89	5.86	6.11
Cultural, family, and safety concerns	4.80	4.02	5.87
Defendant characteristics with potential impact on sentence and deportation	5.02	5.32	5.38
Bail status	4.30	4.92	4.79
Pressure from defense attorney and defendant's circle	3.79	3.61	3.75
Remorse	2.68	3.74	2.64
Financial incentives	2.06	4.16	2.07
Demographic characteristics	2.64	2.92	3.52