FAIRNESS TO INFORMANTS AND COOPERATORS VS. PUBLIC INTEREST PROTECTION – A COMPARATIVE ANALYSIS OF LEGAL FRAMEWORKS IN THE UNITED STATES AND BRAZIL

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ABSTRACT

This Article offers a comparative analysis of the legal frameworks governing cooperation agreements in the United States and Brazil, focusing on how each system balances the competing imperatives of public interest protection and fairness to informants and cooperators. While both jurisdictions rely on the use of cooperating defendants to prosecute unlawful activities such as cybercrime, political corruption, narcotics offenses, and transnational organized crime, their institutional approaches diverge sharply. The United States—operating within an adversarial, prosecutor-centered tradition—grants prosecutors broad discretion in negotiating and enforcing cooperation agreements, with minimal judicial oversight. This discretion reflects a utilitarian logic that prioritizes prosecutorial efficiency and the expedient administration of justice, often at the risk of coercion, opacity, and the instrumentalization of defendants. In contrast, Brazil's inquisitorial, judge-centered system—particularly following the enactment of Law No. 12.850/2013—emphasizes procedural transparency, judicial oversight, and constitutional guarantees. Cooperation is structured as a legal entitlement, governed by formalized procedures and enforceable safeguards aimed at preserving the dignity and rights of the cooperator. While this model may constrain prosecutorial agility, it also tends to introduce significant procedural formalism and bureaucratic complexity, narrowing the strategic latitude of prosecutors and, at times, impeding the timely and effective disruption of complex criminal schemes. This Article contends that both systems pursue similar goals but embody fundamentally different normative commitments: the American model privileges the protection of public interest through prosecutorial pragmatism, whereas the Brazilian framework reflects a deeper institutional concern with fairness, legal certainty, and individual dignity. The comparison illustrates how the locus of authority—prosecutorial discretion versus judicial supervision—profoundly shapes the character and legitimacy of criminal cooperation regimes.

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I. INTRODUCTION

The growing reliance on cooperation agreements in criminal proceedings signals a global recalibration of criminal justice systems toward negotiated justice as a principal mechanism of enforcement.[1] Across both common law and civil law traditions, the strategic use of cooperating defendants—individuals who provide inculpatory information in exchange for sentencing or procedural concessions—has become indispensable in cracking large, multi-defendant frauds and conspiracies,[2] particularly those involving drugs and narcotics,

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[1] Gabriele Paolini, Elena Kantorowicz-Reznichenko & Stefan Voigt, *Plea Bargaining Procedures Worldwide: Drivers of Introduction and Use* 1 (Universität Hamburg, Working Paper No. 75, 2023), https://www.econstor.eu/bitstream/10419/279472/1/ile-wp-2023-75.pdf [https://perma.cc/896K-5ZM9].

[2] Jessica A. Roth, Anna D. Vaynman & Steven D. Penrod, *Why Criminal Defendants Cooperate: The Defense Attorney's Perspective*, 117 NW. UNIV. L. REV., 1351, 1360 (2023).

violent crimes and murder, and fraud.[3] Yet, despite its widespread utility, the practice remains normatively contested and procedurally diverse.[4] This Article offers a comparative analysis of the cooperation regimes in the United States ("U.S.") and Brazil—jurisdictions that, while sharing similar institutional structures and constitutional commitments, diverge markedly in their legal traditions. By examining these contrasts, the Article sheds light on the distinct normative logics that underpin cooperation as a mode of criminal adjudication in each system.

In the U.S., cooperation is deeply embedded within an adversarial model that privileges prosecutorial discretion and pragmatic utility. From the outset, cooperation is initiated through informal proffer sessions—commonly memorialized by so-called "Queen for a Day" letters—which afford defendants limited protections while enabling prosecutors to gauge the strategic value of the information offered.[5] Should the cooperation prove useful, prosecutors may elect to seek sentence reductions under Section 5K1.1 of the U.S. Sentencing Guidelines ("USSG") or Rule 35(b) of the Federal Rules of Criminal Procedure, though such relief remains wholly contingent upon the government's subjective determination of "substantial assistance." It is imperative to highlight that judicial oversight at these procedural junctures is practically nonexistent, while prosecutorial authority is characterized by expansive discretionary power—authority that is ordinarily not subject to *ex ante* judicial scrutiny.

This institutional configuration reflects a broader American utilitarian ethos in criminal justice: one that values efficiency, intelligence gathering, and outcome-maximization, sometimes at the expense of procedural symmetry and individual autonomy.[6] The cooperating defendant, in this model, is frequently instrumentalized as a means to an end—used to obtain convictions, dismantle criminal hierarchies, or bolster prosecutorial leverage. While such cooperation may yield tangible enforcement gains, it raises significant normative concerns from a Kantian perspective, particularly insofar as the dignity of the cooperator—as a moral and legal subject—is subordinated to institutional imperatives. The risks of coercion, false testimony, and asymmetries of power are not merely theoretical; they are endemic features of a structure in which prosecutorial discretion often eclipses judicial oversight.

By contrast, Brazil's cooperation regime reflects its inquisitorial heritage and constitutional commitment to judicially managed criminal procedure. Anchored in Law No. 12.850/2013—which is applicable throughout the entire country, encompassing both federal and state-level cases—Brazil has developed a

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[3] *Id.* at 1380.

[4] *Id.* at 1405-09.

[5] Benjamin A. Naftalis, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules*, 37 COLUM. J.L. & SOC. PROBS., 1, 2 (2003); *see* Robert I. Smith III, *Fair Play and Criminal Justice: Drafting Proffer Agreements in Light of Total Waiver of Rule 410*, 66 S.C. L. Rev. 809, 812 (2015).

[6] Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV., 183, 183 (2014).

formalized, codified system in which cooperation agreements are subject to judicial homologation (ratification) and strict procedural controls.[7]

All stages of the negotiation must be recorded; judicial authorization is required for the agreement to acquire legal effect; and the fulfillment of the cooperator's obligations is judicially evaluated, not determined by prosecutors. The benefits of cooperation—whether in the form of sentence reduction, immunity, or procedural leniency—are framed not as acts of prosecutorial grace but as legally enforceable entitlements, conditioned on demonstrable and corroborated results.

Crucially, Brazilian courts are not passive arbiters of form. They are constitutionally tasked with ensuring that cooperation agreements comply with principles of legality, proportionality, and due process. The judiciary must evaluate not only whether the cooperation was effective, but whether the terms of the agreement comport with the fundamental rights of the defendant. Corroboration is mandatory, and statements made during negotiation cannot be used against the cooperator if the agreement fails to materialize. While these safeguards may limit prosecutorial expediency, they reflect a deeper normative commitment to fairness, legal transparency, and the dignity of the cooperating defendant as a rights-bearing actor within the criminal process.

These two systems—one privileging prosecutorial efficacy, the other judicially safeguarded procedural equity—exemplify the competing values that underpin modern cooperation regimes. The American model has proven extraordinarily effective in dismantling criminal enterprises and expediting complex prosecutions, but its informality and opacity invite concerns over fairness, coercion, and evidentiary reliability. The Brazilian model, by contrast, emphasizes procedural legitimacy, judicial control, and normative constraint, even if it risks reducing prosecutorial flexibility and investigative speed.

As the discussion deepens, Part II of this Article provides a detailed examination of plea bargaining and cooperation agreements in both the U.S. and Brazil, analyzing their respective legal frameworks, institutional structures, and the challenges they present. In the U.S., plea bargaining is a central feature of the criminal justice system, resolving the vast majority of cases, yet it remains highly controversial due to concerns over constitutional rights, prosecutorial discretion, and the potential for coercion. This section explores the various forms of plea agreements, including cooperation agreements, which are crucial in complex criminal investigations but also raise significant ethical and legal questions. In contrast, Brazil's approach to plea bargaining is more circumspect, treating it as a supplementary mechanism with strict legal constraints. Cooperation agreements in Brazil, though inspired by the American model, remain more regulated and have been pivotal in high-profile cases such as Operation Car Wash. Nevertheless, the Brazilian model presents serious concerns, chief among them the danger that early-stage cooperation agreements

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[7] *Brazil: New Law Defines "Criminal Organization" and Provides for Investigatory and Other Procedures*, LIBR. OF CONG. (Aug. 12, 2013), https://www.loc.gov/item/global-legal-monitor/2013-08-12/brazil-new-law-defines-criminal-organization-and-provides-for-investigatory-and-other-procedures/ [https://perma.cc/XLT7-ZDAL].

may solidify untested or unreliable accounts and prematurely guarantee benefits to cooperators through binding contractual terms, thereby undermining prosecutors' ability to extract more complete or accurate information as the investigation unfolds. This comparative analysis thus illuminates the respective strengths and vulnerabilities embedded within each jurisdiction's approach to cooperation.

Building upon this comparative foundation, Part III shifts focus to the operational dynamics of cooperation in practice. Part III.A will examine the preliminary phase of cooperation through the lens of proffer sessions, contrasting the informal and unrecorded "Queen for a Day" practice in the U.S. with Brazil's formally documented negotiation procedures, which are underpinned by principles of good faith and structured to safeguard the interests of the potential cooperator. Part III.B will explore the legal nature and enforceability of cooperation agreements, emphasizing the unilateral discretion afforded to American prosecutors and the binding, judicially homologated contracts mandated in Brazil. In Part III.C, the concept of "substantial assistance" in the U.S. and "effective collaboration" in Brazil will be analyzed, with a focus on evidentiary thresholds, corroboration mandates, and safeguards against perjury. Finally, Part III.D will address sentencing consequences, contrasting the American model—where leniency is contingent upon a prosecutorial motion—with Brazil's more autonomous system of judicially determined sentence reductions grounded in statutory criteria and fulfilled obligations.

As will be explored in greater detail, this Article contends that cooperation agreements in criminal proceedings function at the intersection of two potentially conflicting legal principles: the protection of the public interest and the preservation of procedural fairness for informants and cooperating defendants. In this context, it argues that the legal regimes of the U.S. and Brazil reflect fundamentally different approaches to balancing these aims. By examining the doctrinal, institutional, and normative foundations of each system, this comparative study ultimately demonstrates that the American model generally prioritizes the public interest—specifically in terms of prosecutorial efficiency and the prevention of crime—while the Brazilian framework more explicitly aligns with a commitment to the fair and equitable treatment of cooperators, within the broader objectives of criminal justice.

II. AN OVERVIEW OF BARGAINING AND COOPERATION SYSTEMS

This Part provides a comprehensive overview of plea bargaining and cooperation agreements in the U.S. and Brazil. It meticulously outlines the constitutional, legal, and jurisprudential foundations of both systems, facilitating a critical understanding of the subject in each jurisdiction. In the subsection dedicated to the U.S., the significance of plea bargaining within the American legal system is initially explored, positioning it as a central mechanism in criminal investigations. The concept of plea bargaining is then analyzed, focusing on the waiver of constitutional rights, while also addressing the benefits and drawbacks of the system's adoption.

Subsequently, the analysis distinguishes various forms of plea bargaining from those geared toward cooperation agreements. This distinction is further clarified by scrutinizing the underlying concept, its legal ramifications, including the prosecutor's discretion, and the ethical considerations involved in the use of informants and cooperators. The discussion includes key cases that have successfully dismantled criminal organizations, as well as instances where abuses have occurred, thus necessitating a thorough critical examination. Additionally, mechanisms that raise significant ethical and legal concerns are also evaluated, offering insights into the complexities of these practices.

The subsection on Brazilian criminal law offers a comparative overview, mirroring the content and analytical approach of the preceding subsection on the U.S. The objective is to align the two systems as closely as possible, given that, in the final analysis, they represent two sides of the same coin. Put differently, although the systems of bargaining and cooperation are common to both countries, there are substantial differences inherent in each jurisdiction that, when subjected to comparative examination, may have significant implications and provide new perspectives for the refinement of the issue at hand.

In light of the shared legal context present in both jurisdictions, the concept of plea bargaining is addressed, emphasizing its role as a peripheral instrument within the Brazilian legal framework, in contrast to its central function in the American system. The study then turns to the constitutional framework, considering the flexibility of fundamental rights, and explores the legislative precautions that have shaped the adoption of plea bargaining within Brazil's inquisitorial system. The examination also considers the challenges and potential advantages that plea bargaining may introduce into the Brazilian criminal justice system.

An essential aspect of this discussion is the distinction between the various forms of plea bargaining and cooperation agreements, following the framework established in the American system. Building on this, the concept of cooperation agreements and their legal implications within Brazil are scrutinized in detail. Relevant case law is referenced, highlighting instances where cooperation agreements have yielded tangible benefits for investigations, alongside the potential for abuses that raise significant ethical and privacy concerns for the individuals under investigation—issues that also manifest within the U.S. system. In light of the foregoing, this Part provides a broad overview of plea bargaining and cooperation agreements, engaging in a comparative analysis of the two legal systems, as well as laying the foundation for the legal controversies to be explored in greater depth in Part III.

A. The United States

First of all, it is appropriate to present a crucial observation about plea bargaining: it remains one of the most contentious yet enduring features of the American criminal justice process, as it persists despite widespread concerns regarding its constitutionality,[8] coupled with ongoing calls for deep re-

[8] *See* Brady v. United States, 397 U.S. 742, 751-52 (1970) (upholding the constitutionality of plea bargaining and establishing its legitimacy within the framework of the U.S. criminal

examination,[9] with guilty pleas constituting the vast majority of criminal dispositions.[10] Despite all the trials and tribulations, the truth is that plea bargaining remains intact and consolidated in American law. The constitutional framework surrounding plea bargaining has been shaped by several pivotal U.S. Supreme Court cases that address its various complexities.[11] The Supreme Court has recognized that American justice is a "system of pleas, not a system of trials."[12] The statistics substantiate this assertion: approximately "[ninety-seven] percent of federal convictions and [ninety-four] percent of state convictions are the result of guilty pleas[,]"[13] a phenomenon that engenders criticism regarding

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justice system) (Brennan, J., concurring) (agreeing with the outcome but noting that the Court's reasoning on the voluntariness of guilty pleas under the threat of the death penalty was unclear and emphasizing that voluntariness must be evaluated in light of all pressures on the defendant, including co-defendant confessions and the strength of the evidence, rather than focusing solely on the risk of the death penalty); Ava Chen, *The Unconstitutionality of Modern Plea Bargaining: Curbing Prosecutorial Vindictiveness*, 3 PRINCETON LEGAL J. (2024), https://legaljournal.princeton.edu/the-unconstitutionality-of-modern-plea-bargaining-curbing-prosecutorial-vindictiveness/ [https://perma.cc/7ZHJ-E9GU].

[9] *See generally The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1398 (1970) (observing that departures from constitutional norms should be subjected to careful examination); *see also* Emilio C. Viano, *Plea Bargaining in the United States: A Perversion of Justice*, 83 REVUE INTERNATIONALE DE DROIT PÉNAL [INT'L REV. CRIM. L.] 109, 143-44 (2012) (Fr.) (expressing cautious optimism that sustained scrutiny of plea bargaining may prompt meaningful reform).

[10] *Restructuring the Plea Bargain***,** 82 YALE L.J. 286, 286 (1972); Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023, 5:00 AM), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice [https://perma.cc/38N4-SWNX].

[11] *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962) (holding that prosecutorial discretion in selecting charges from among legislative options does not violate the Constitution unless exercised on the basis of impermissible criteria such as "race, religion, or other arbitrary classifications"); McCarthy v. United States, 394 U.S. 459, 467 (1969) (requiring that a guilty plea must be made voluntarily, knowingly, and with an understanding of the nature of the charge and the consequences of the plea); *Brady*, 397 U.S. at 747 (upholding the constitutionality of plea bargaining and establishing that a plea is valid if entered into voluntarily and intelligently under the circumstances); North Carolina v. Alford, 400 U.S. 25, 37 (1970) (permitting a defendant to enter a guilty plea while maintaining innocence, as long as the plea represents a voluntary and informed choice among alternatives); Santobello v. New York, 404 U.S. 257, 262 (1971) (emphasizing that a prosecutor's promise made during plea negotiations must be honored, and recognizing the due process implications of breaching such agreements); Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (holding that a prosecutor may threaten to bring additional charges during plea negotiations, provided the defendant is not coerced and the threat does not violate due process); United States v. Mezzanatto, 513 U.S. 196, 210 (1995) (allowing defendants to waive certain rights under the Federal Rules of Evidence, including the use of plea-related statements for impeachment purposes); United States v. Ruiz, 536 U.S. 622, 633 (2002) (holding that due process does not require prosecutors to disclose impeachment evidence prior to a guilty plea, provided the plea is voluntary and informed).

[12] Missouri v. Frye**,** 566 U.S. 134, 143 (2012) (quoting Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012)).

[13] *Id.* at 135.

the elevated rate of overcriminalization,[14] wrongful convictions,[15] and also frequently cited as a key factor contributing to the U.S. having the largest prison population in the world.[16]

In general terms, plea bargaining fundamentally constitutes the procedural mechanism by which the prosecution and the defendant negotiate the terms of a plea agreement, during which the prosecution may propose the dismissal or reduction of charges against the defendant in exchange for the defendant's guilty plea and waiver of rights.[17] The rights renounced upon entering a guilty plea include trial by jury,[18] the right to decide whether to testify,[19] the privilege against self-incrimination,[20] the right to confront accusers,[21] the right to enter a plea of "not guilty," the right to demand that the prosecution prove guilt beyond a reasonable doubt through a unanimous verdict,[22] the right to compel witnesses who may provide favorable testimony,[23] and the right to present any available defenses during the trial.[24] Importantly, once a guilty plea is entered, the ability to contest the conviction or appeal the case on the grounds that these rights were not respected is extraordinarily limited.[25]

Notwithstanding the waiver of rights, plea bargaining operates within a fundamentally pragmatic framework, and its advantages can be articulated briefly as follows: legislators achieve greater enforcement of their laws at lower

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[14] *See generally* Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON & POL'Y 645, 645-46 (2011) (arguing that modern plea bargaining encourages increased rates of overcriminalization).

[15] *See generally* Alexandra Natapoff, *Negotiating Accuracy: DNA in the Age of Plea Bargaining, in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 85, 1, 4 (Daniel Medwed ed., 2017) (discussing the limitations of plea bargaining in ensuring factual accuracy, even in the context of exculpatory DNA evidence).

[16] *See, e.g.*, ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 6-7 (2d ed. 2022).

[17] *See* Tina Wan, Note, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 UNIV. S. CAL. REV. L. & SOC. JUST. 33, 36 (2007).

[18] U.S. CONST. amend. VI; Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that the Sixth Amendment guarantees a trial by jury in state criminal prosecutions).

[19] U.S. CONST. amend. VI; Rock v. Arkansas, 483 U.S. 44, 52 (1987) (confirming the defendant's right to decide whether to testify).

[20] U.S. CONST. amend. V; Miranda v. Arizona, 384 U.S. 436, 460 (1966) (establishing the privilege against self-incrimination).

[21] U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 68-69 (2004) (clarifying the scope of the confrontation right).

[22] U.S. CONST. amends. VI, XI, § 1; Ramos v. Louisiana, 590 U.S. 83, 90 (2020) (holding that the Sixth amendment requires a unanimous guilty verdict); *In re* Winship, 397 U.S. 358, 364 (1970) (holding that the Fourteenth amendment requires a standard of proof beyond a reasonable doubt for criminal convictions); Bryan Hull & Syed Wasim, *Plea Bargaining*, in A JAILHOUSE LAWYER'S MANUAL 1414, 1416 (Christopher Cox ed., 13th ed. 2020).

[23] *Id.*

[24] *Id.*

[25] *Id.*

cost, while judges mitigate docket congestion and lower the likelihood of appeals.[26] Moreover, this mechanism facilitates efficient case resolution, allowing police and prosecutors to manage caseloads effectively, defendants to evade harsher penalties, and witnesses and victims to attain finality in judgments, thereby illustrating the pervasive impact of plea bargaining across the legal landscape.[27]

On the other hand, the primary criticism of plea bargaining is its tendency to pressure innocent defendants into pleading guilty due to the prosecutor's broad discretion in charge selection and the imposition of significant sentencing disparities.[28] This dynamic can lead to overcharging[29] and the use of threats, compelling risk-averse defendants to accept plea deals for more lenient sentences instead of facing potentially harsh penalties at trial.[30] In other words, constitutional challenges argue that plea bargaining can be inherently coercive, thereby leading to a "chilling effect" on a defendant's rights under the Fifth and Sixth Amendments, which protect against self-incrimination and guarantee the right to a fair trial.[31] Critics also contend that this process "undermines the integrity of the criminal justice system" by allowing the government to bypass essential due process standards, effectively transforming prosecutors into judge and jury.[32]

From the arguments presented, it may be concluded that defendants are allowed to obtain a more lenient punishment while alleviating the government's financial burden of a trial and reducing the risk of acquittal for those it believes

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[26] Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. 539, 548-49 (2023).

[27] *Id.* at 549. Some scholars argue that plea bargaining, beyond its pragmatic benefits, can foster more thoughtful and tailored outcomes. *See, e.g.,* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2125-26 (1998) (contending that the negotiative nature of plea deals may conduce to resolutions more responsive to the facts and circumstances of each case than formal trials often permit).

[28] *See* Wan, *supra* note 17, at 40.

[29] *See Restructuring the Plea Bargain*, *supra* note 10, at 293-94 (asserting that when a defendant's criminal conduct involves multiple identical offenses, prosecutors typically file several counts, and by charging at the statutory maximum, they create incentives for a plea bargain—a strategy known as "overcharging"—which facilitates negotiations to dismiss multiple counts or accept a plea to a lesser charge without incurring the risk of acquittal).

[30] *See* Wan, *supra* note 17, at 40. This phenomenon is commonly referred to as the "trial penalty" and denotes the substantial disparity in sentencing outcomes between defendants who accept plea bargains and those who exercise their constitutional right to a trial. Defendants who opt for trial often face harsher sentences due to factors like mandatory minimum sentences and the aggregation of charges. This creates a strong incentive for defendants to plead guilty, even if they are innocent, in exchange for a lighter sentence. Prosecutors often use this leverage by adding charges or invoking harsh sentencing laws, pressuring defendants to accept plea deals and limiting their ability to exercise their right to a trial. *See* Shana Knizhnik, *Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator's Dilemma*, 90 N.Y.U. L. REV. 1722, 1737-38 (2015).

[31] Mary E. Vogel, *Plea Bargaining under the Common Law*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 729, 737 (Darryl K. Brown et al. eds., 2019).

[32] Wan, *supra* note 17, at 41.

to be guilty.[33] In this balance of interests, plea bargaining operates as a pragmatic compromise for defendants, and can become a necessary evil—offering potential leniency at the cost of foregoing a full trial.[34] Sentences resulting from guilty pleas in the federal system are, on average, sixty percent lower than those imposed after trials, leading many defendants to conclude—especially given that around roughly ninety percent of trials result in convictions—that they have little choice but to plead guilty.[35] However, plea bargaining acknowledges that defendants are not obligated to plead guilty, as they enjoy a presumption of innocence and the government bears the burden of presenting admissible evidence to establish guilt beyond a reasonable doubt.[36]

In considering a plea in a criminal case, defendants encounter a range of options that extend beyond the binary choices of "guilty" or "not guilty." Within the framework of plea bargaining, several distinct types of pleas can be identified, each serving specific legal and strategic purposes, such as *charge bargaining*,[37] *sentence bargaining*,[38] and *fact bargaining*.[39] *Charge bargaining* may involve either the dismissal of one or more charges or an agreement to a conviction for a lesser offense, thereby reducing the potential consequences for the defendant.[40] *Sentence bargaining* seeks to secure "a more lenient sentence, which can cover both [the] type of sanction—custodial or community-based—and [the] length."[41] Lastly, *fact bargaining* enables the parties to adopt an agreed-upon narrative that excludes particular facts, insulating the defendant from facing higher statutory penalties.[42] Together, these elements illustrate the strategic interplay between prosecution and defense, highlighting the complex and multifaceted nature of plea negotiations.

American law, however, draws a distinction between two primary concepts: plea bargaining and types of plea agreements, with cooperation agreements

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[33] Brief for Law Professors as Amici Curiae Supporting Petitioner at 8, Mansfield v. Williamson County, 30 F.4th 276 (2022) (No. 22-186), 2022 WL 5007948, at *8 [hereinafter Brief for Law Professors].

[34] Moise Berger, *The Case Against Plea Bargaining,* 62 A.B.A. J. 621, 621-22 (1976).

[35] Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 229-30 (2006); *see also* U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2023 (U.S. Courts 2023), https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2023.pdf [https://perma.cc/TTP9-QW2L].

[36] *See* Brief for Law Professors, *supra* note 33.

[37] Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1306 (2018).

[38] Richard Lorren Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. REV. 1047, 1054 (2021).

[39] *Id.* at 1055.

[40] RAM SUBRAMANIAN ET AL., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 2 (2020); Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. UNIV. L. REV. 465, 518 n.228 (1998).

[41] SUBRAMANIAN ET AL., *supra* note 40.

[42] *Id.*

classified as a specific subtype of the latter. The phrase *plea bargaining* functions as a general umbrella term covering several distinct practices used at different stages of investigating, prosecuting, and adjudicating criminal liability.[43] Such complexity demands a systemic breakdown of the mechanisms often subsumed under this concept, paired with an exploration of their essential traits and a critical evaluation of their tradeoffs.[44] It is also not uncommon to encounter conceptual ambiguities surrounding the terms *charge bargaining*, *sentence bargaining*, *fact bargaining*, and bargaining for the purpose of reaching a cooperation agreement.[45] To avoid any potential misunderstanding, it is important to emphasize that the standard form of plea bargaining does not fundamentally require cooperation; it merely necessitates the acceptance of personal responsibility as consideration for reduced punishment.[46]

Cooperation agreements, in turn, function as investigatory instruments that balance the development of evidence against other individuals—often co-conspirators—with the defendant's full admission of guilt.[47] A defendant confronted with serious criminal charges who possesses direct knowledge of the wrongdoing of others is generally in a more advantageous position than would otherwise be the case, due to the leverage provided by such information.[48] Should the defendant choose not to cooperate with the government, they may either proceed to trial or take advantage of the sentencing reduction typically granted to those who plead guilty.[49] In sum, this investigative tool exemplifies the strategy of using "'the little fish to catch the big fish,'" while in some jurisdictions, such as the U.S., it may also involve leveraging larger defendants to apprehend lesser offenders, thereby expanding the reach of law enforcement.[50]

In this context, the informant deal is a form of the guilty plea, distinguished by heightened deregulation and secrecy, wherein the informant's criminal liability is resolved in exchange for information.[51] Similar to plea bargaining, the terms are negotiated privately, typically between law enforcement and the defendant or their attorney.[52] This particular form of plea bargain may necessitate cooperation over an extended duration, and the resolution of the case

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[43] Robert R. Strang, *Plea Bargaining, Cooperation Agreements, and Immunity Orders*, *in* 92 RES. MATERIAL SERIES 30, 30 (U.N. Asia & Far E. Inst. ed., 2014).

[44] *Id.*

[45] *See* Hull & Wasim, *supra* note 22, at 1420-21.

[46] Strang, *supra* note 43.

[47] *Id.* at 32.

[48] Daniel Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 77 (1995) [hereinafter Richman, *Cooperating Clients*].

[49] *Id.*

[50] Strang, *supra* note 43, at 32-33.

[51] Daniel Richman, *Informants and Cooperators*, *in* 2 REFORMING CRIMINAL JUSTICE 279, 280-81 (Erik Luna ed., 2017) [hereinafter Richman, *Informants and Cooperators*]; *see* NATAPOFF, *supra* note 16, at 4, 101.

[52] *See* NATAPOFF, *supra* note 16, at 27.

may be contingent upon the fulfillment of the obligations outlined in the agreement.[53]

Thus, not only the standard plea bargaining, but also cooperation agreements and informant deals, serve as the cornerstone of investigations within the American legal system,[54] and it may be applied to all crimes.[55] It is evident that these plea agreements constitute a powerful tool that not only assists in unraveling seemingly straightforward crimes but, more importantly, those that are inherently complex and difficult to uncover. This includes offenses such as drug trafficking, white-collar crimes, cybercrimes, and transnational offenses perpetrated by organized criminal groups.[56] The investigative utility of these agreements lies in their ability to penetrate the core of criminal enterprises, providing critical information that, through traditional investigative methods—such as wiretapping or search and seizure—would be unlikely to yield any meaningful results.[57] It is no coincidence that a well-known maxim in American law enforcement succinctly encapsulates the importance of this tool: "'[G]ood informant, good case. Bad informant, bad case. No informant, no case.'"[58]

Historically, the dismantling of major criminal organizations—whether in the Mafia or corporate scandals—often hinges on the cooperation of insiders. For example, Sammy "the Bull" Gravano played a pivotal role in the downfall of the Gambino crime family, while Joseph Massino similarly brought down the Bonanno family.[59] In the corporate sphere, figures like Andy Fastow and Scott Sullivan were instrumental in exposing the CEOs of Enron and WorldCom, respectively.[60] The Galleon Group's insider trading scandal, one of the largest of its kind, was also unraveled through the testimony of several cooperators.[61] Likewise, it was cooperator testimony that led to the conviction of over a dozen individuals involved in the Bernard Madoff Ponzi scheme.[62] These examples underscore a broader principle: criminal enterprises, whether in organized crime or corporate corruption, are often brought down not solely by external

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[53] Hull & Wasim, *supra* note 22, at 1420.

[54] *See* Roth, Vaynman & Penrod, *supra* note 2, at 1351, 1354.

[55] NATAPOFF, *supra* note 16, at 27.

[56] *See*, *e.g.*, Richman, *Informants and Cooperators*, *supra* note 51, at 282-83; *see also* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 2 (1992).

[57] *See* JON SHANE, CONFIDENTIAL INFORMANTS: A CLOSER LOOK AT POLCE POLICY 3 (M.R. Haberfeld ed., 2016).

[58] NATAPOFF, *supra* note 16, at 31-32. The phrase "'[G]ood informant, good case. Bad informant, bad case. No informant, no case[,]'" refers to police informants who assist during the investigative phase, typically before charges are filed. Cooperators, by contrast, are charged defendants who enter formal agreements with prosecutors. While distinct in role and legal status, both are central to the effective prosecution of complex crimes. *See generally* Richman, *Informants and Cooperators*, *supra* note 51.

[59] PREET BHARARA, DOING JUSTICE: A PROSECUTOR'S THOUGHTS ON CRIME, PUNISHMENT, AND THE RULE OF LAW 94 (2019).

[60] *Id.*

[61] *Id.*

[62] *Id.*

investigations, but by individuals from within the organizations—usually former leaders or associates seeking to mitigate their own liability.

On the other hand, it is imperative that criticism be leveled. Considering the adversarial system, which inherently intensifies the competition between prosecution and defense,[63] coupled with the absence of transparency and the significant discretionary power afforded to prosecutors,[64] the cooperation agreement in the U.S. assumes distinctive and sometimes troubling features. Unlike inquisitorial systems, which incorporate judicial oversight to regulate police investigations and curb prosecutorial discretion, it creates significant potential for abuse.[65]

Professor Alexandra Natapoff identifies interesting cases that underscore the ethical and legal complexities inherent in the use of informants.[66] In Florida, Rachel Hoffman, a young woman who was coerced into serving as an informant to avoid imprisonment, tragically lost her life after being exposed as an undercover operative in a sting operation targeting a relatively minor drug trafficking offense.[67] Similarly, in a particularly egregious example, Amy Gepfert, a first-time offender, was threatened with a forty-year sentence for drug distribution.[68] In exchange for avoiding prosecution, the authorities offered to drop all charges if she engaged in sex with a third party, allowing them to charge him with prostitution.[69] Ms. Gepfert complied, and no charges were filed against her.[70] Finally, Henry, a high school student who cooperated with law enforcement by informing on his MS-13 gang in exchange for protection, was subsequently handed over to U.S. Immigration and Customs Enforcement ("ICE") and deported to El Salvador, where he faced an imminent risk of death.[71]

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[63] Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 13 (1975); *see* STEPAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 1 (1984) (describing the origins and structure of the U.S. adversarial model based on contending parties and a neutral fact finder).

[64] *See* Daniel S. McConkie, Jr., *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 69 (2015); Kenneth J. MeUlli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. Rev. 669, 682-83 (1992) (discussing the concentration of discretionary power in prosecutors and the limited institutional mechanisms for oversight in the adversarial system).

[65] Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 241-42 (1977). Scholars have long warned that broad prosecutorial discretion in the U.S., combined with minimal judicial involvement in plea negotiations, risks coercive bargains and undermines the fairness of outcomes. *See*, *e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2469-75 (2004).

[66] *See* NATAPOFF, *supra* note 16, at 2, 5, 42.

[67] *This Week on Brian Ross Investigates*, ABC NEWS, (July 16, 2010, 12:20 PM), https://abcnews.go.com/Blotter/brian-ross-investigates-rachel-hoffmans-murder-spurs-confidential/story?id=11288735 [https://perma.cc/5QD7-JH8Z].

[68] Alexander v. DeAngelo, 329 F.3d 912, 914-15 (7th Cir. 2003).

[69] *Id.*

[70] *Id.* at 915.

[71] Hannah Dreier, *Former MS-13 Member who Secretly Helped Police is Deported*, PROPUBLICA (Jan. 22, 2019, 5:00 AM), https://www.propublica.org/article/ms-13-member-

These cases serve as a stark illustration of the dangers inherent in a system that operates with an investigative blank check and grants vast unchecked authority to law enforcement.

At this juncture, another significant concern lies in the potential for abuse stemming from the discretionary grounds upon which a cooperation agreement may be terminated. Specifically, the evaluation of whether a cooperator has provided *substantial assistance* rests solely with the prosecutor.[72] When compliance determinations are made without meaningful judicial oversight, prosecutors' unilateral authority generates an asymmetrical system of rights and duties that places cooperators in a position of dependence and weakens equality between the parties.[73] This imbalance is compounded by the often questionable reliability of *snitch* testimony, which, while worthy of consideration, does not mitigate the disproportionate power held by the prosecutor. Under these circumstances, the cooperation agreement can often be characterized as "a leap into the unknown,"[74] leaving substantial ground for legal uncertainty regarding the cooperating party.

It is also crucial to strike a balance within the investigative process to avoid the excessive use of controversial legal mechanisms aimed at flipping a suspect into a cooperating witness. These practices extend well beyond the confines of the criminal process. They can vary significantly and, in some instances, may corrupt the investigative process into a form of neo-inquisition, where any means are justified to achieve an end. Examples of such procedures include the employment of the *buy, bust, flip* technique,[75] the *wired plea* strategy,[76] the

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who-secretly-helped-police-is-deported [https://perma.cc/LH2S-M4BK].

[72] Richman, *Cooperating Clients*, *supra* note 48, at 101-02.

[73] *Id.* at 73.

[74] *Id.*

[75] The *buy, bust, flip* technique pressures defendants to provide information in exchange for leniency, with risk of unreliable testimony. *Cf.* NATAPOFF, *supra* note 16, at 4, 20-21. While the technique aims to dismantle criminal networks, it carries risks of abuse, particularly in the *flip* phase. Coercion may occur if defendants are pressured into providing information, sometimes leading to false confessions, fabricated evidence, or the wrongful implicating of others. *See id.* at 87, 90.

[76] The *wired plea* uses inducements for cooperation, sometimes extending benefits to third parties, raising concerns of coercion. *Id.* at 53. Essentially, it allows various inducements—reduced sentences or benefits for others—to be used as leverage to secure cooperation. This practice raises concerns about the potential for coercion and the integrity of the information provided. *Cf.* United States v. Bennett, 332 F.3d 1094, 1100-01 (7th Cir. 2003) (explaining that wired pleas "present unique opportunities for coerced pleas"); NATAPOFF, *supra* note 16, at 90 (explaining that steep consequences for non-compliance create incentives for confidential informants to provide false information).

working off a charge method,[77] the practice of *phantom affidavits*,[78] and the exploitation of vulnerable informants—such as individuals with substance abuse issues, minors, those with mental disabilities, or even jailhouse informants.[79]

Despite the aforementioned dysfunctions, it is important not to demonize cooperation agreements, their procedure, or law enforcement and prosecutors, as if the deviations and failures were the rule rather than the exception. The process requires recognizing that prosecutors assume significant risk in depending on cooperators, who may function as either assets or liabilities. Cooperators may lie, fabricate details, and alienate the jury.[80] Thus, prosecutors are obligated to meticulously corroborate and critically evaluate the information presented by cooperators.[81] Every detail must be independently verified, and prosecutors must remain cautious of potential self-dealing and betrayal.[82] Note also that, especially other co-defendants, can face devastating consequences due to fraudulent testimony by cooperators. Such testimonies have the potential to not only ruin the lives of those involved, resulting in wrongful convictions and irreparable harm, but also to undermine the credibility of the justice system.

Real-world examples starkly illustrate this troubling reality. In 2008, for instance, fourteen men in Cleveland, Ohio, pled guilty to charges that were later proven to be false charges brought by a Drug Enforcement Administration ("DEA") informant.[83] The first defendant in the case, a mother of three, maintained her innocence, opted to go to trial, and was wrongfully convicted, receiving a ten-year sentence.[84] The remaining fourteen defendants, seeking more lenient sentences, pled guilty in exchange for reduced penalties.[85] Similarly, in Hearne, Texas, several innocent individuals pled guilty after being accused by informant Derrick Megress, who was subsequently exposed as a liar.[86] In a comparable case in Tracy City, Tennessee, two individuals pled guilty based on the false testimony of Tina Prater, who falsely claimed to have

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[77] *Working off a charge* allows defendants to reduce charges or delay cases through cooperation, which may incentivize pressured or unreliable testimony. NATAPOFF, *supra* note 16, at 22. However, this process can be abused, as prosecutors may pressure defendants into cooperation by threatening more serious charges if they refuse. *Id.* at 53. This can lead to coerced or unreliable testimony, raising concerns about due process and the risk of wrongful convictions. *Id.* at 87.

[78] *Phantom affidavits* involve officers swearing to information from informants they do not personally know, risking the use of unverified evidence. *Id.* at 106. Instead, the officer relies on secondhand information from another officer. This practice raises serious concerns, as it allows for the use of unreliable information to obtain warrants, bypassing accountability and potentially leading to wrongful searches or violations of constitutional rights. *See id.*

[79] *Id.* at 4, 41, 43 (highlighting an example of a fifteen-year-old being recruited to become an informant).

[80] BHARARA, *supra* note 59, at 95.

[81] *Id.*

[82] *See id.*

[83] NATAPOFF, *supra* note 16, at 97.

[84] *Id.*

[85] *Id.*

[86] *Id.*

purchased drugs from them, despite not having done so.[87] These cases highlight the severe consequences of unreliable testimony, causing unjust harm to innocent individuals and undermining the integrity of the judicial process.

For all the reasons articulated, the critiques and considerations do not aim to advocate for the abolition of plea bargaining, nor to endorse an overly reductionist view of informants deal and cooperation agreements within the American legal system. Conversely, Professor Daniel Richman argues that the use of informants should be bounded by the requirement that it never erodes procedural fairness or the integrity of the adjudicative process.[88]

Therefore, this subsection seeks to provide a comprehensive overview and stimulate critical dialogue by engaging with the legal controversies that arise within the U.S. criminal justice system. As will be further examined and contrasted with the Brazilian system in the following subsection, as well as in Part III, the main goal is to identify best practices that promote the protection of human rights, ensure transparency, and enhance the reliability of evidence. In doing so, the analysis aims to offer valuable insights for a more nuanced reflection on the use of informant deals and cooperation agreements in the American legal system.

B. Brazil

More than a decade ago, in the case of *Frye*, former U.S. Supreme Court Justice Anthony Kennedy stated that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system."[89] However, in the Brazilian criminal system, it can be asserted, without hesitation, exactly the opposite: plea bargaining is an adjunct to the criminal justice system; it is not the criminal justice system itself.[90] Hence, it is important to note that, in Brazil, there are three recognized types of plea bargaining,[91] aside from those negotiations specifically aimed at reaching cooperation agreements, namely: the *transação penal* (criminal settlement),[92] the *suspensão condicional do processo* (conditional suspension of process),[93] and *acordo de não persecução* (non-

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[87] *Id.*

[88] Richman, *Informants and Cooperators*, *supra* note 51, at 293.

[89] 566 U.S. at 144 (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

[90] *See* Fundação FHC, *Plea Bargaining — A Comparison Between the United States and Brazil,* MEDIUM (Feb. 20, 2018), https://medium.com/fundação-fhc/plea-bargaining-a-comparison-between-the-united-states-and-brazil-55a59c80220f [https://perma.cc/UZ6F-W832].

[91] Maiquel Ângelo Dezordi Wermuth & Bruna Caregnato Roloff, *Importação dos Institutos Jurídicos Negociais para o Processo Penal Brasileiro: Considerações Críticas* [*Importation of Business Legal Institutes into the Brazilian Criminal Procedure: Critical Considerations*], 8 REVISTA DIREITOS SOCIAIS E POLÍTICAS PÚBLICAS [UNIFAFIBE] 436, 445 (2020) (Braz.).

[92] Lei No. 9.099, de 26 de Setembro de 1995, Diário Oficial da União [D.O.U.], art. 76, Setembro 1995 (Braz.) [hereinafter Law No. 9.099].

[93] *Id.* art. 89.

prosecution agreements).[94] Each of these mechanisms is governed by distinct legal requirements as established in the relevant legislation. Unlike in the U.S., plea bargaining is not applicable to all crimes but is instead restricted to those with low or moderate potential for harm.[95]

In contrast to the established frameworks observed in America, the negotiation mechanisms within the Brazilian criminal justice system are relatively nascent.[96] By assimilating procedural elements reminiscent of those employed in the U.S.,[97] the Brazilian criminal process has undergone a modest transformation over time, embracing a paradigm that prioritizes *concordia* (agreement) between the parties over traditional *litigatio* (litigation).[98] In this sense, it is pivotal to underscore that the implementation of plea bargaining in Brazil required not only a shift in the entrenched legal culture shaped by the inquisitorial system but, more significantly, the overcoming of constitutional barriers.

In other words, Brazilian legislators exercised considerable caution in transplanting negotiation models, recognizing the necessity of adhering to legal and constitutional limits. In this regard, the introduction of plea bargaining necessitates a reconsideration of certain foundational principles such as the principles of publicity, presumption of innocence, and due process of law—alongside its corollaries, namely the principles of *contraditório* (right to be heard and to contest evidence) and full defense.[99] Such modifications highlight the complexities involved in harmonizing negotiation practices with established legal norms in Brazil.

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[94] Lei No. 3.689, de 3 de Outubro de 1941, Código de Processo Penal [C.P.P.], art. 28(a), Outubro 1941 (Braz.) [hereinafter Law No. 3.689].

[95] The criminal settlement, as provided by law, may only be entered into in cases where the alleged offense carries a maximum penalty not exceeding two years. *See* Law No. 9.099, *supra* note 92, art. 61. The conditional suspension of prosecution is available only when the offense carries a minimum penalty of one year or less. *See id.* art. 89. Similarly, the non-prosecution agreement may be applied solely to offenses for which the minimum penalty does not exceed four years or less. *See* Law No. 3.689, *supra* note 94.

[96] In Brazilian legislation, the Criminal Settlement and the Conditional Suspension of Process were introduced in 1995. *See* Law No. 9.099, *supra* note 92. Subsequently, Cooperation Agreements were established in 2013, followed by the Agreement for Non-Prosecution in 2019. *See* Lei No. 12.846*,* de 1 de Agosto de 2013, D.O.U., art. 16, Agosto 2013 (Braz.); Lei No. 13.964, de 24 de Dezembro de 2019, D.O.U., art. 28(a), Abril 2021 (Braz.).

[97] *See* Rosmar Antonni Rodrigues Cavalcanti de Alencar, *Natureza Jurídica da Transação Penal e Efeitos Decorrentes* [*Legal Nature of the Plea Bargain and its Resulting Effects*]*,* 18 TRF-1 42, 43 (2006) (Braz.).

[98] *See generally* Luís Carlos Dias Torres & Andrea Vainer, *Plea Agreements in Brazil: Concept, Procedures and Impact on Corruption Cases*, FINANCIER WORLDWIDE (Feb. 2017), (describing Brazil's adoption of plea agreements and cooperation mechanisms that functionally parallel U.S. plea bargaining and reflect procedural shifts in the criminal process).

[99] *See* Wermuth & Roloff, *supra* note 91, at 446; *see also* AFONSO RIZZO BRASIL, DELAÇÃO PREMIADA: UMA ANÁLISE EM RELAÇÃO À REGULAMENTAÇÃO ESPECÍFICA NO DIREITO PROCESSUAL PENAL BRASILEIRO [PLEA BARGAINING: AN ANALYSIS IN RELATION TO SPECIFIC REGULATIONS IN BRAZILIAN CRIMINAL PROCEDURAL LAW] 22-29 (Dialética ed., 2023) (Braz.).

Notwithstanding the constitutional boundaries, the adoption of negotiation mechanisms has gained acceptance. This model shift is underpinned by clear objectives: to diminish the caseload burden on the judicial system,[100] lower the costs associated with the administration of justice,[101] enhance the efficiency of case resolution,[102] mitigate the risk of excessive penalization,[103] particularly in matters of lower or moderate offensive potential, and streamline criminal procedure.[104] The reforms reflect a broader trend toward alternative dispute resolution mechanisms within the criminal justice system, aiming to balance the interests of justice with the pragmatic realities of an overburdened legal system, while promoting a shift away from Brazil's prevailing punitive culture through minimal, incarceration-reducing, and restorative penal intervention.

Despite legislative efforts, the reforms have yet to yield tangible results. A closer examination of data from the federal district for the year 2020 shows that out of 108,678 police inquiries[105] received by prosecutors, only 1,925 cases resulted in a non-prosecution agreement[106] while a mere 1,696 cases involved a criminal settlement[107] out of 111,523 circumstantial terms,[108] a pattern that reflects a broader national trend. This clearly underscores that the criminal justice system continues to be overwhelmed by a substantial caseload. Moreover, mass incarceration remains a persistent issue, with Brazil possessing

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[100] *See* LUIS GERALDO SANT'ANA LANFREDI ET AL., FORTALECENDO VIAS PARA AS ALTERNATIVAS PENAIS: UM LEVANTAMENTO NACIONAL DA APLICAÇÃO DO ACORDO DE NÃO PERSECUÇÃO PENAL NO BRASIL [STRENGTHENING PATHWAYS TO ALTERNATIVE PENALTIES: A NATIONAL SURVEY OF THE APPLICATION OF NON-PROSECUTION AGREEMENTS IN BRAZIL] 1, 53 (2023) (Braz.) (arguing that the incorporation of the "non-prosecution agreement" into the legislation will produce tangible effects in alleviating the caseload within the judicial criminal system).

[101] *Id.* at 64.

[102] *See* Law No. 9.099, *supra* note 92, art. 2 ("[P]roceedings shall be guided by the principles of orality, simplicity, informality, procedural economy, and speed, always seeking, whenever possible, conciliation or settlement.").

[103] *See* Afrânio Silva Jardim, *Juizados Especiais Criminais (Lei Nº 9.099/95)* [*Special Criminal Courts (Law No. 9.099/95)*], 5 REVISTA DO MINISTÉRIO PÚBLICO 33, 34 (1997) (Braz.).

[104] Alencar, *supra* note 97, at 42.

[105] *Anuário do Ministério Público Brasil* [*Brazilian Public Prosecutor's Office Yearbook*], MINISTÉRIO PÚBLICO DO DISTRITO (2021-2022), at 125 (Braz.) [hereinafter *Brazilian Public Prosecutor's Office Yearbook*], https://anuario.conjur.com.br/pt-BR/profiles/78592e4622f1-anuario-da-justica/editions/anuario-do-ministerio-publico-brasil-2021-2022/pages [https://perma.cc/68Q2-T5VF]. The *inquérito policial* (police inquiry) is an investigation conducted by the police to gather information about the perpetrator and the details of a typically complex crime, aimed at assisting the prosecutor in deciding whether to bring a criminal action in court. *See* Law No. 3.689, *supra* note 94, art. 4.

[106] *Brazilian Public Prosecutor's Office Yearbook*, *supra* note 105, at 124-25.

[107] *Id.* at 125.

[108] *Id.* The *termo circunstanciado* (*circumstantial term*) is a document employed in the Brazilian criminal process to record the occurrence of a crime of lesser offensive potential. It is prepared by police and includes detailed information regarding the facts, the parties involved, and witnesses. This procedure is notably more streamlined and expeditious than a traditional police inquiry. *See* Law No. 9.099, *supra* note 92, art. 69.

the third-largest prison population in the world, surpassed only by the U.S. and China.[109]

Having addressed the classic forms of plea bargaining in Brazil, it is essential to emphasize that the negotiation mechanisms discussed above must not be treated as synonymous with cooperation agreements. Against this backdrop, while Brazil operates under an inquisitorial system, the cooperation model it employs closely mirrors the American approach, serving equivalent investigative objectives. In the Brazilian criminal justice system, cooperation agreements are predicated on the principle of mutual benefit, wherein offenders who provide substantial assistance in investigations are granted leniency, often in the form of sentence reductions.[110] Thus, they establish a strategic partnership between authorities and offenders to investigate crimes committed by third parties.[111] The rationale for cooperation agreements is also deeply rooted in the principle of public interest, as the benefits extended to a cooperator are only justifiable if it leads to a tangible reduction in investigative burdens and enhances the state's ability to effectively prosecute and penalize other individuals.[112]

From a legal standpoint, the cooperation agreement was only formalized with the enactment of the Organized Crime Act in 2013.[113] Prior to this legislation, while Brazilian laws provided for benefits for cooperating offenders, these benefits were granted unilaterally by judges without formal written agreements.[114] The Heinous Crime Act of 1990 and subsequent laws allowed for sentence reductions for cooperators but did not establish formal contracts outlining the cooperators' obligations and the benefits to be granted.[115] The Organized Crime Act of 1995 expanded cooperation benefits to cover a broader range of crimes, but still lacked formal agreements.[116] It was only in 2003, during an international money laundering investigation, that the Federal Public Prosecution Office initiated Brazil's first written cooperation agreement, despite the absence of specific legal provisions for such contracts.[117] Although this

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[109] *Highest to Lowest - Prison Population Total*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All [https://perma.cc/7H92-U348] (last visited Jan. 26, 2026) (reporting the following inmate populations: 1. United States of America: 1,833,700; 2. China: 1,690,000; 3. Brazil: 909, 067).

[110] *See* NEFI CORDEIRO, COLABORAÇÃO PREMIADA: ATUALIZADA PELA LEI ANTICRIME [AWARD-WINNING COLLABORATION: UPDATED BY THE ANTI-CRIME LAW] 235 (2020) (Braz.).

[111] FRANCISCO SCHERTEL MENDES, LENIENCY POLICIES IN THE PROSECUTION OF ECONOMIC CRIMES AND CORRUPTION: CONSENSUAL JUSTICE AND SEARCH FOR TRUTH IN BRAZILIAN AND GERMAN LAW 288 (2021).

[112] *Id.* at 297.

[113] *Id.* at 41.

[114] *Id.*

[115] *Id.* at 42.

[116] *Id.*

[117] MENDES, *supra* note 111, at 43; *See* TRF-4, Apelação Criminal No. 2003.70.00.056661-8/PR, Relator: Des. Fed. Márcio Antônio Rocha, 27.07.2010, Diário Eletrônico [D.E.], 13.08.2010, 1,7-9 (Braz.).

agreement was upheld by the judiciary, it did not become widely adopted due to the lack of a supporting statutory framework to legitimize such arrangements.[118]

Therefore, the cooperation agreements introduced under Brazilian legislation since 2013 have led to significant advancements in investigative practices over the past decade. The most prominent example of the use of these agreements is the landmark *Operação Lava Jato* (Operation Car Wash). Initiated in March 2014, this operation became the largest anti-corruption investigation in Brazil's history, exposing a vast network of corruption within the state-owned oil company Petrobras, implicating politicians from various political parties, as well as numerous public and private entities.[119] To illustrate the scale of its impact, by 2019, a total of over *R*$ four billion (equivalent to approximately 759 million USD)[120] had been recouped through cooperation agreements, and other asset recovery mechanisms employed by the operation's task force.[121] By 2024, when the operation concluded, a total of 399 cooperation agreements had been formalized, marking them as the primary investigative tool utilized by law enforcement officers and prosecutors in the investigation.[122]

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[118] MENDES, *supra* note 111, at 43. Regardless of the existence of a formal, judicially homologated agreement between the cooperating party and the government, Brazilian law has long contemplated the mechanism of plea bargaining—wherein the accused confesses to the crime and provides testimony against others—in certain specified circumstances. This anticipatory framework is reflected in various legislative provisions, including Lei No. 9.807, de 13 de Julho de 1999, D.O.U., art. 14, Julho 1999 (Braz.); Lei No. 9.613, de 3 de Março de 1998, D.O.U., art. 1, § 5, Março 1998 (Braz.) (concerning money laundering); Lei No. 9.269, de 2 de Abril de 1996, D.O.U., art. 1, Abril 1996 (Braz.) (amending article 159, section 4, which addresses extortion through kidnapping); Lei No. 7.492, de 16 de Junho de 1986, D.O.U., art. 25, § 2, Junho 1986 (Braz.) (concerning sentence reduction); and Lei No. 11.343, de 23 de Agosto de 2006, D.O.U., art. 41, Agosto 2006 (Braz.) (the Drug Law, concerning sentence reduction). In this particular form of plea bargaining, the term "unilateral cooperation" is employed, in contrast to "bilateral cooperation," which requires a prior agreement between the cooperating party and the government. *See*, *e.g.*, S.T.J., Embargos de Declaração no Agravo Regimental no Recurso Especial No. 1.765.139/PR [EDcl no AgRg No. 1.765.139/PR], Relator: Min. Felix Fischer, 23.04.2019, Diário da Justiça Eletrônico [D.J.e], 09.05.2019 (Braz.).

[119] *See* VLADIMIR NETTO, LAVA JATO: O JUIZ SERGIO MORO E OS BASTIDORES DA OPERAÇÃO QUE ABALOU O BRASIL [LAVA JATO: JUDGE SÉRGIO MORO AND THE BEHIND-THE-SCENES STORY OF THE OPERATION THAT SHOOK BRAZIL] 62-66 (Virginie Leite ed., 1st ed. 2016) (Braz.).

[120] *Valor Devolvido Pela Lava Jato já Ultrapassa os R$ 4 bilhões* [*The Amount Recovered by Lava Jato has Already Exceeded R$ 4 Billion*], MINISTÉRIO PÚBLICO FEDERAL (Mar. 11, 2019) (Braz.), https://combateacorrupcao.mpf.mp.br/feeder_novo/lava-jato/ece8f4ba84ad6efee82530addb57bd3a [https://perma.cc/NPD8-RJ2G].

[121] *Lava Jato Chega aos Cinco Anos em Momento Decisivo* [*Lava Jato Reaches its Fifth Anniversary at a Decisive Moment*], MINISTÉRIO PÚBLICO FEDERAL (Mar. 11, 2019) (Braz.), https://legismap.com.br/conteudos/artigos-e-noticias/lava-jato-chega-aos-cinco-anos-em-momento-decisivo [https://perma.cc/Z4BX-85UX]. Over the course of five years of operation, in the state of Paraná alone, a total of 1,196 search and seizure warrants were executed, along with 310 arrest warrants issued by the Federal Court for pre-trial detention, targeting 267 individuals. *Id.* Additionally, 91 criminal charges were filed against 426 persons. By the end of this period, there were a total of 242 convictions. *Id.*

[122] According to data provided by the Ministério Público Federal, Polícia Federal,

Another pertinent example of the effective application of cooperation agreements is the case of city councilor Marielle Franco, whose assassination not only elicited widespread national outrage but also garnered significant attention due to her outspoken activism against the influence of militias in Rio de Janeiro.[123] In 2019, former police officers Rony Lessa and Elcio Queiroz were arrested for carrying out the murder, but the motives and masterminds were unclear.[124] Years later, Lessa entered into a cooperation agreement and implicated the Brazão brothers, politicians from Rio de Janeiro, whom he accused of having militia affiliations and being the ringleaders behind the crime.[125] According to Lessa, the Brazão brothers ordered the murder in retaliation for Marielle Franco's outspoken opposition to the militia groups.[126] While the Brazão brothers have denied the allegations, Lessa's testimony proved instrumental, offering crucial leads that have significantly advanced the investigation, ultimately leading to their prosecution and conviction.[127] In February 2026, Brazil's Supreme Federal Court unanimously sentenced both to seventy-six years and three months of imprisonment, along with additional convictions of other co-conspirators involved in the criminal scheme .[128]

Supremo Tribunal Federal, and SBT News—Edition of March 16, 2024. *See* Carlos Catelan & Ricardo Brandt, *10 Anos de Lava Jato: Fatos e Resultados da Operação que Mudou a Política Brasileira* [*10 Years of Lava Jato: Facts and Results of the Operation that Changed Brazilian Politics*], SBT NEWS (Mar. 17, 2024, 10:03 PM) (Braz.), https://sbtnews.sbt.com.br/noticia/politica/10-anos-de-lava-jato-fatos-e-resultados-da-operacao-que-mudou-a-politica-brasileira [https://perma.cc/296V-C6S7].

[123] Philip Reeves, *Brazilians Protest After Black Human Rights Activist is Murdered*, NPR (Mar. 15, 2018, 3:21 PM), https://www.npr.org/sections/thetwo-way/2018/03/15/594005158/brazilians-protest-after-black-human-rights-activist-is-murdered [https://perma.cc/V6XH-NC7D].

[124] Julia Jones & Caitlin Hu, *Ex-Officers Arrested After the Killing of Popular Brazilian Councilwoman*, CNN (June 21, 2019, 6:34 PM), https://www.cnn.com/2019/03/12/americas/marielle-franco-murder-suspects-police-intl [https://perma.cc/MTH5-B7YQ].

[125] Tiago Rogero, *Marielle Franco Murder: Ex-Police Jailed for Decades Over Crime that Shook Brazil*, THE GUARDIAN (Oct. 31, 2024, 7:38 PM), https://www.theguardian.com/world/2024/oct/31/marielle-franco-brazil-murder-former-police-officers-sentenced [https://perma.cc/4DNT-7EMB].

[126] Mateus Coutinho, *Step by Step: How Marielle Franco's Murder was Planned and Carried Out, According to Brazil's Federal Police*, BRASIL DE FATO (Mar. 26 2024, 8:34 PM), https://www.brasildefato.com.br/2024/03/26/step-by-step-how-marielle-franco-s-murder-was-planned-and-carried-out-according-to-brazil-s-federal-police/ [https://perma.cc/9HF7-BL8K].

[127] *See* S.T.F., Inquérito No. 4.954/RJ, Relator: Min. Alexandre de Moraes, 17.05.2024, D.J.e, 20.05.2024 (Braz.).

[128] *Id.*; *See* S.T.F., Ação Penal No. 2.434/RJ, Relator: Min. Alexandre de Moraes (due to the recent decision, there is not yet a specific timeline for the publication of the judgment); *See* STF Dondena Irmãos Brazão a 76 Anos de Prisão pelo Assassinato de Marielle Franco e Anderson Gomes, SUPREMO TRIBUNAL FEDERAL (Feb. 25, 2026, 4:53 PM), https://noticias.stf.jus.br/postsnoticias/stf-condena-irmaos-brazao-a-76-anos-de-prisao-pelo-assassinato-de-marielle-franco-e-anderson-gomes/ [https://perma.cc/6S9A-V26J].

Lastly, it is important to acknowledge the informant deal, which carries significant national implications, entered into by Mauro Cid, former aide-de-camp to former-President Jair Bolsonaro.[129] Cid's testimony implicated Bolsonaro in several serious criminal activities, including his involvement in a coup attempt in Brazil, the fraudulent entry of data into vaccination cards, and the illicit sale of jewelry received as gifts from the government of Saudi Arabia.[130] This deal has had a substantial impact on the ongoing investigations, resulting in the formal indictment of Bolsonaro by the Federal Police.[131] Highlighting the seriousness of the charges, Cid's agreement proved pivotal in the Supreme Court's decision to authorize criminal proceedings against Bolsonaro, based on the Attorney General's accusations of attempted coup, violent abolition of the democratic rule of law, and destruction of protected public property.[132] Moreover, amid concerns about flight risk, a court order seized the passports of Bolsonaro and associates, and Cid's agreement significantly advanced the investigation, ultimately contributing to Bolsonaro's conviction and twenty-seven year prison sentence.[133]

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[129] Ranier Bragon, *Informant Says Michelle and Eduardo Bolsonaro Were Part of the Most Radical Wing of the Coup Plot*, FOLHA DE S.PAULO (Jan. 27, 2025, 1:54 PM) , https://www1.folha.uol.com.br/internacional/en/brazil/2025/01/informant-says-michelle-and-eduardo-bolsonaro-were-part-of-the-most-radical-wing-of-the-coup-plot.shtml [https://perma.cc/8KZ6-G3MG].

[130] *Brazil's Bolsonaro Formally Accused Over Saudi Gifts, Sources Say*, REUTERS (July 4, 2024, 7:41 PM), https://www.reuters.com/world/americas/brazils-bolsonaro-formally-accused-over-saudi-gifts-sources-say-2024-07-04/ [https://perma.cc/74SF-9BVT] [hereinafter *Brazil's Bolsonaro Formally Accused*] (reporting on the formal criminal accusations and factual background underlying the investigation); *see* S.T.F., Petição No. 12.100/DF, Relator: Min. Alexandre de Moraes, 02.12.2024, D.J.e, 03.12.2024 (Braz.) [hereinafter Petition No. 12.100/DF] (addressing the procedural posture and evidentiary basis of the investigation); S.T.F., Petição No. 10.405/DF, Relator: Min. Alexandre de Moraes, 28.04.2025, D.J.e, 29.04.2025 (Braz.) [hereinafter Petition No. 10.405/DF] (analyzing related investigatory measures and judicial authorization).

[131] *Bolsonaro Indicted by Brazil's Police for Money Laundering Linked to Undeclared Diamonds*, PBS NEWS (July 5, 2024, 1:57 PM), https://www.pbs.org/newshour/world/bolsonaro-indicted-by-brazils-police-for-money-laundering-and-criminal-association-sources-say [https://perma.cc/WDT5-8CAB].

[132] *See* Ruth Green, *Rule of Law: Bolsonaro Conviction Signals Brazil's Democratic Resilience*, IBA (Oct. 1, 2025), https://www.ibanet.org/Bolsonaro-conviction-signals-Brazils-democratic-resilience [https://perma.cc/3LCL-UDEC]; *Brazil's Bolsonaro Formally Accused*, *supra* note 130; Petition No. 10.405/DF, *supra* note 130.

[133] Lisandra Paraguassu, Ricardo Brito & Gabriel Stargardter, *Net Tightens on Bolsonaro as Police Seize Passport in Coup Probe*, REUTERS (Feb. 8, 2024, 4:07 PM), https://www.reuters.com/world/americas/brazil-police-target-bolsonaro-allies-probe-into-coup-attempt-2024-02-08/ [https://perma.cc/6ZQA-WP9J] (discussing the seizure of Bolsonaro's passport as a flight-risk precaution); Mauricio Savarese & Gabriela sá Pessoa, *Brazilian Supreme Court Panel Sentences Bolsonaro to More Than 27 Years in Prison for Coup Attempt*, AP NEWS (Sept. 12, 2025, 1:14 AM), https://apnews.com/article/brazil-bolsonaro-supreme-court-trial-coup-attempt-f95765c36dbbdc3355ad3af0b70eacf6 [https://perma.cc/F85Z-LD7U] (reporting Bolsonaro's conviction and roughly twenty-seven year prison sentence); *see* Petition No. 10.405/DF, *supra* note 130 (discussing passport surrender and travel restrictions imposed as pretrial precautionary measures against

While cooperation agreements and informant deals are undoubtedly powerful tools, it would be misleading to characterize them as the cornerstone of criminal investigations in Brazil, as they are considered in the American system. It is important to highlight that both the Federal Supreme Court and the Superior Court of Justice have established that the use of cooperation agreements is not confined to crimes committed by criminal organizations.[134] Rather, it suffices for there to be joint participation in the criminal act by two or more individuals, as provided by Article 29 of the Penal Code.[135]

Nonetheless, in practice, law enforcement and prosecutors do not typically engage in overt efforts to flip a suspect into an informant or cooperating witness as is commonly seen in the U.S. More often than not, such cooperation arises when the suspects themselves express a willingness to cooperate, and through legal counsel, approach the police or the prosecutor. In fact, the law requires that a cooperation agreement can only be negotiated in the presence of defense counsel.[136] In rare instances, where the initiative originates with the law enforcement officers or prosecutors, such actions are met with considerable skepticism, particularly when the suspect is in custody.[137] In these cases, concerns arise regarding the voluntariness and integrity of the testimony, potentially undermining its reliability.

At this juncture, potential abuses may arise and the Federal Supreme Court has remained attentive to the risks of coercing cooperation agreements while an individual is in pre-trial detention.[138] A notorious case, covered in the media, involved Marcelo Miller, a former federal prosecutor who was part of the task force in Operation Car Wash. Miller was accused by detainees under arrest of

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investigated associates).

[134] S.T.J., Habeas Corpus No. 582.678/RJ [HC No. 582.678/RJ], Relator: Min. Laurita Vaz, D.J.e, 21.06.2022, 18-19 (Braz.) (holding that cooperation agreements are permissible in crimes involving multiple participants and are not limited to offenses committed by criminal organizations). There are several examples of Brazilian courts applying cooperation agreements outside traditional organized-crime prosecutions. *See* S.T.F., Inquérito No. 3.982/DF, Relator: Min. Edson Fachin, 07.02.2017, D.J.e, 07.03.2017, 1-2 (Braz.); S.T.F., Inquérito No. 4.011/DF, Relator: Min. Ricardo Lewandowski, 23.05.2019, D.J.e, 03.06.2019, 1 (Braz.); S.T.F., Ação Penal No. 694/MG [AP No. 694/MG], Relator: Min. Rosa Weber, 02.05.2017, D.J.e, 3 (Braz.).

[135] Gustavo Previdi Vieira de Barros & Larissa Sitta Rodrigues da Silva, *Colaboração Premiada e o Princípio da Presunção de Inocência: uma Análise da Lei nº 12.850/2013* [*Plea Bargaining and the Principle of Presumption of Innocence: An Analysis of Law no. 12.850/2013*], ÂMBITO JURÍDICO (Feb. 1, 2017) (Braz.), https://ambitojuridico.com.br/colaboracao-premiada-e-o-principio-da-presuncao-de-inocencia-uma-analise-da-lei-n-12-850-2013/ [https://perma.cc/6WFQ-7EPQ].

[136] Lei No. 12.850, de 2 de Agosto de 2013, D.O.U., art. 4 § 6, Agosto 2013 (Braz.) [hereinafter Law No. 12.850].

[137] Antonio Henrique Graciano Suxberger & Gabriela Starling Jorge Vieira de Mello, *A Voluntariedade da Colaboração Premiada e sua Relação com a Prisão Processual do Colaborador* [*The Voluntary Nature of Plea Bargaining and its Relationship with the Pretrial Detention of the Cooperating Party*] 3 REVISTA BRASILEIRA DE DIREITO PROCESSUAL PENAL 189, 189-90 (2017) (Braz.).

[138] S.T.F., HC No. 127.483/PR, Relator: Min. Dias Toffoli, 27.08.2015, D.J.e, 04.02.2016, 25 (Braz.) [hereinafter Habeas Corpus No. 127.483/PR].

coercing them into agreements by threatening that, without cooperation, their release from prison would be indefinitely delayed.[139] The cooperator Emílio Odebrecht publicly disclosed the threats and methods employed by the task force: "First, there was the pre-trial detention of the individuals under investigation, with no prospect of release. Second, there was continuous psychological pressure exerted on those in custody to compel them to implicate others and secure further arrests."[140] In response to such harsh methods, the Federal Supreme Court has firmly stated that using pre-trial detention to pressure a detainee into accepting an agreement that is legally required to be voluntary violates core constitutional protections and resembles an outdated and deeply unjust practice inconsistent with the standards of a civilized legal system.[141]

Another high-profile case that attracted substantial media and political attention unfolded in 2016, within the framework of the Operation Car Wash investigation. In this instance, Sérgio Machado, the former president of *Transpetro*, under pressure from the task force, surreptitiously recorded conversations with José Sarney, the former president of Brazil. One of the recordings, made while Sarney was convalescing from an illness, captured a conversation later introduced as corroborative evidence in the framework of a cooperation agreement.[142] In the recording, Sarney is heard discussing issues related to the political landscape, along with vague conversations that were subsequently interpreted by the Attorney General, Rodrigo Janot, as attempts to obstruct the progress of Operation Car Wash.[143]

However, the audio recordings of the conversations were insufficient to justify the initiation of criminal proceedings before the court, as well as to deny the requests for pre-trial detention and search and seizure against Sarney.[144] As a final point, it should be emphasized that the manner in which the recording was made gave rise to significant controversy, particularly considering that

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[139] *See*, *e.g.*, Mônica Bergamo, *Ex-Procurador Marcelo Miller era Tido como 'Duro' com Delatores Presos* [*Former Prosecutor Marcelo Miller was Considered "Tough" with Imprisoned Informants*], FOLHA DE S.PAULO (Sept. 5, 2017, 2:00 AM) (Braz.), http://www1.folha.uol.com.br/colunas/monicabergamo/2017/09/1915811-ex-procurador-marcelo-miller-era-tido-como-duro-com-delatores-presos.shtml [https://perma.cc/74RG-FGTW].

[140] EMÍLIO ODEBRECHT, UMA GUERRA CONTRA o BRASIL: COMO a LAVA JATO AGREDIU a SOBERANIA NACIONAL, ENFRAQUECEU a INDÚSTRIA PESADA BRASILEIRA e TENTOU DESTRUIR o GRUPO ODEBRECHT [A WAR AGAINST BRAZIL: HOW LAVA JATO ATTACKED NATIONAL SOVEREIGNTY, WEAKENED BRAZILIAN HEAVY INDUSTRY. AND TRIED TO DESTROY THE ODEBRECHT GROUP] 63-64 (2023) (Braz.) (note this is a direct translation of the text from Portuguese to English).

[141] S.T.F., HC No. 127.186/PR, Relator: Min. Teori Zavascki, 28.04.2015, D.J.e, 06.05.2015, 18 (Braz.).

[142] RODRIGO JANOT, JAÍTON DE CARVALHO & GUILHERME EVELIN, NADA MENOS QUE TUDO: BASTIDORES DA OPERAÇÃO QUE COLOCOU O SISTEMA POLÍTICO EM XEQUE [NOTHING LESS THAN EVERYTHING: BEYOND THE SCENES OF THE OPERATION THAT PUT THE POLITICAL SYSTEM IN CHECK] 133 (2019) (Braz.).

[143] *Id.* at 130.

[144] *See* S.T.F., Inquérito No. 4.326/DF, Relator: Min. Edson Fachin, 14.08.2023, D.J.e, 24.08.2023 (Braz.).

Sarney was in a compromised state of health, thereby raising substantial ethical concerns and questions about the respect for privacy rights.

In 2017, a similarly delicate situation emerged within the framework of Operation Car Wash, when Joesley Batista, the billionaire owner of the JBS conglomerate, recorded a conversation with then-President Michel Temer, triggering a significant political scandal in Brazil.[145] Under pressure to obtain corroborative evidence, Batista succeeded in recording a vague conversation with Temer regarding an alleged need to maintain the scheme, which was interpreted as an attempt to silence former congressman Eduardo Cunha, who was incarcerated in connection with Operation Car Wash.[146]

Nevertheless, the forensic analysis revealed substantial defects in the recording. In addition, the content of the conversation, characterized by significant imprecision, led the federal court to rule in Temer's favor, resulting in his acquittal due to the inadmissibility of the evidence.[147] The covert recording of an eccentric dialogue between a sitting president and a businessman raised profound legal and political questions regarding the legitimacy of such investigative tactics, particularly within the context of cooperation agreements. The recording drew widespread criticism for reinforcing the narrative surrounding the cooperation agreement process, not only rattling the country's political order but also hampering its economic recovery and was perceived by the government as a deliberate attempt to manipulate public opinion and destabilize the nation's highest office.[148]

Observe that the examples outlined above, along with the pathologies associated with them, reveal the potential for distortions that may arise in the context of cooperation agreements in Brazil, particularly given the urgency to secure evidence and the pressure exerted on the cooperator. Nevertheless, the admissibility of an agreement obtained through such means must invariably be subjected to judicial scrutiny, as the judge holds the responsibility for overseeing the investigation to ensure its integrity.[149] It is noted that a form of monitored

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[145] Jonathan Watts, *Brazil: Explosive Recordings Implicate President Michel Temer in Bribery*, THE GUARDIAN (May 17, 2017, 11:23 PM), https://www.theguardian.com/world/2017/may/18/brazil-explosive-recordings-implicate-president-michel-temer-in-bribery [https://perma.cc/H3EZ-YD8M].

[146] TRF-1, Apelação Criminal No. 1013633-17.2019.4.01.3400, Relator: Des. Ney Bello, 13.07.2022, Processo Judicial Eletrônico [P.J.e.], 14.07.2022, 1, 1 (Braz.); *see* Jonathan Watts, *Brazil: Explosive Recordings Implicate President Michel Temer in Bribery*, THE GUARDIAN (May 17, 2017, 11:23 PM), https://www.theguardian.com/world/2017/may/18/brazil-explosive-recordings-implicate-president-michel-temer-in-bribery [https://perma.cc/2JN4-SKXV].

[147] Arkady Petrov, *Judge Clears ex-President Temer in Case Linked to Joesley Batista Recording*, THE RIO TIMES (Oct. 17, 2019), https://www.riotimesonline.com/judge-clears-ex-president-temer-in-case-linked-to-joesley-batistas-recording/.

[148] *Temer Diz que Gravação foi Manipulada e que Delatores 'Quebraram o Brasil e Ficaram Ricos'* [*Temer Says Recording was Manipulated and that Whistleblowers 'Bankrupted Brazil and Got Rich'*], BBC NEWS BRASIL (May 20, 2017) (Braz.), https://www.bbc.com/portuguese/brasil-39988331 [https://perma.cc/Z5BC-TRG4].

[149] The jurisprudential guidance of this Supreme Court is that the activity of judicial

leeway has been granted to prosecutors to exercise discretion in plea negotiations. Despite the presence of judicial oversight, this does not eliminate completely the potential for abusive investigative practices. Such misconduct, which undermines the informant's voluntariness, may arise particularly because judicial oversight is only implemented after the cooperation agreement has been formalized.[150]

Another important issue pertains to the terms of cooperation agreements, which often place defendants in a vulnerable position, as they must rely on the prosecutor's discretion to assess what constitutes *substantial assistance* to obtain the benefits of their cooperation. Unlike the U.S., however, prosecutors in Brazil operate under a system of regulated or controlled discretion,[151] meaning their decisions are completely bound by legal parameters. In other words, the actions of the institution do not entail unfettered discretion; rather, they must adhere to pre-established legal norms that constrain their decision-making authority.

In Brazil, once a cooperation agreement is homologated by the judge, the cooperator is entitled to a sentence reduction, provided they fulfill their obligations—namely, telling the truth and fully disclosing relevant information. While the agreement may propose the terms of leniency, including the extent of the reduction, the final decision rests with the judge, who assesses whether the cooperator has met the agreed-upon conditions.[152] Note that the prosecutor assumes a significant risk, as once the agreement is homologated by the judge after the negotiation sessions, the judicial granting of benefits become an ethical and legal obligation, grounded in both the principles of legal certainty and trust, as articulated in the opinion of Justice Celso de Mello of the Federal Supreme Court.[153]

Thus, it is essential to recognize that this system can lead to unintended collateral consequences, as illustrated by Operation Car Wash, which impacts not only cooperating individuals and their targets but also undermines the role of prosecutors and, by extension, the broader public interest. These issues stem from the cooperation process itself, which, in Brazil, can result in prosecutors obtaining unreliable or questionable information. In other words, prosecutors may have unwittingly acquired a "pig in a poke"—purchasing information without fully understanding its reliability or value. When such an occurrence

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supervision must be constitutionally exercised throughout the entire course of the investigations, from the initiation of the investigative procedures to the eventual decision on whether or not to file an indictment by the prosecutor. *See* S.T.F., Questão de Ordem em Inquérito No. 2.411-2/MG [Quest. Ord. em Inquérito No. 2.411-2/MG], Relator: Min. Gilmar Mendes, 10.10.2007, D.J.e, 25.04.2008, 2 (Braz.). *See, e.g.*, BERNARDO FENELON, A COLABORAÇÃO PREMIADA UNILITERAL [UNLITERATERAL PLEA BARGAINING] 59 (Alexandre G. M. F. de Moraes Bahia et al. eds., 2022).

[150] Law No. 12.850, *supra* note 136, art. 4, §§ 6, 7.

[151] Alencar, *supra* note 97, at 46.

[152] *See*, *e.g.*, S.T.F., Petição No. 7.003/DF, Relator: Min. Edson Fachin, 11.05.2017, D.J.e, 1, 4 (Braz.) [hereinafter Petition No. 7.003/DF].

[153] S.T.F., Ação Direta de Inconstitucionalidade No. 5.508/DF, Relator: Min. Marco Aurélio, 26.06.2018, D.J.e, 05.11.2019, 1, 17 (Braz.) [hereinafter Direct Action of Unconstitutionality No. 5.508/DF].

takes place, the informants benefit significantly from the terms of the agreement. However, the information and corroborative evidence gathered are often weak and unsubstantiated, leading to a situation where the alleged corrupt individuals are able to avoid prosecution, as the cases are dismissed for lack of sufficient grounds.[154]

Therefore, given the legal issues presented, the principal objective of this subsection—further examined in Part III—was to offer a comprehensive overview and, more critically, to address the legal challenges associated with bargaining and cooperation agreements in Brazil. This analysis, by comparing and contrasting the Brazilian system with that of the U.S., aims to establish a foundation for a more thorough exploration of potential legal solutions, ultimately seeking to promote a process that is not only fair and transparent for informants and cooperators but also serves to advance the broader societal interests at stake.

III. THE COOPERATION PROCESSES IN BOTH JURISDICTIONS

This Part examines how cooperation is structured and operationalized in both the U.S. and Brazil, focusing on the stages through which prosecutors extract and evaluate information, ensure compliance, and formalize leniency. The discussion will center on how each legal system approaches cooperation agreements, including the role of prosecutorial discretion, judicial oversight, and the legal mechanisms used to secure and assess cooperation. Relevant issues will be addressed, such as the preliminary phase of cooperation—often referred to in the U.S. as a *Queen-for-a-Day* session—which enables prosecutors to evaluate the utility of a defendant's information while preserving their leverage through sentence reduction. Although no direct analogue exists in Brazil, the pre-agreement phase is subject to judicial control and mandatory recording, reflecting a commitment to transparency and legal accountability.

This part also explores how formal cooperation agreements are concluded, highlighting key differences in procedural safeguards and institutional roles. In the U.S., agreements are negotiated predominantly at the discretion of prosecutors, with limited judicial intervention.[155] By contrast, in Brazil, formalization requires judicial homologation, ensuring both legality and

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[154] *See Vem aí Outra Megadelação* [*Another Mega-Sitch Scandal is Coming*], VEJA, Jan. 18, 2017, at 20 (Braz.) (interview with Maurício Moscardi Grilo, Federal Police coordinator for Operation *Lava Jato*, in which he criticizes the political nature and vagueness of certain plea bargain testimonies, stating: "Do you think there are cooperations of a purely political nature? The testimonies of the former *Transpetro* president, Sérgio Machado, former senator Delcídio do Amaral, and Nestor Cerveró seem to me examples of testimonies without sustainable legal foundations. Some of the statements made by them were forwarded to the Federal Police for the initiation of an investigation, but they didn't go anywhere because there was no evidence of a crime. One cannot start an investigation simply because the cooperator claims to have heard that such a person might have received a bribe. Much of what is in these three testimonies is nothing more than hearsay.").

[155] Roth, Vaynman & Penrod, *supra* note 2, at 1355.

fairness.[156] The principle of substantial assistance will also be examined as a condition for leniency. In the U.S., prosecutorial evaluation plays a central role in determining whether cooperation has materially advanced an investigation. In Brazil, however, judicial discretion—not the prosecutor's assessment—ultimately governs the determination of benefits granted to cooperating defendants. A final section will be devoted to examining the consequences of cooperation in terms of sentencing reductions. In the U.S., such outcomes are typically governed by prosecutorial motions under the USSG[157] or Rule 35 of the Federal Rules of Criminal Procedure.[158] In Brazil, sentence mitigation is determined independently by the judiciary, which applies statutory criteria to assess the effectiveness and proportionality of the cooperation rendered.[159] By comparing these two systems, this analysis highlights the trade-offs between prosecutorial flexibility and procedural safeguards, offering broader insights into how cooperation agreements can be structured to balance enforcement objectives with due process protections.

A. Queen for a Day

In the American legal system, there are two types of proffer sessions: the attorney proffer, where the defense and government present a "'hypothetical' version of events[,]" and the client proffer, where the client is interviewed by the prosecutor and possibly other agents involved in the investigation.[160] The latter modality, in which "proffering" is conducted, serves as a procedural mechanism in criminal investigations, where an individual agrees to provide detailed information relevant to the case in exchange for potential legal benefits, such as immunity, the decision not to prosecute, or a cooperation plea agreement, under which the individual agrees to plead guilty and assist in the prosecution of others.[161]

A "Queen-for-a-Day Letter", in turn, is a written letter from the U.S. Attorney's office, signed by both the attorney and the client before the interview, which outlines the terms of the session and, crucially, specifies the limitations on how the government may use the information disclosed during the interview.[162] It is curious to note that the term is borrowed from a popular 1950s television game show where women competed to be crowned "queen for a day" and received prizes and trips, briefly fulfilling their fantasy of royal status.[163]

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[156] Petition No. 7.003/DF, *supra* note 152.

[157] U.S. SENT'G GUIDELINES MANUAL § 5K1.1 (U.S. SENT'G COMM'N 2024).

[158] FED. R. CRIM. P. 35(b).

[159] C.P. arts. 59, 65, 66, 68 (Braz.).

[160] JODI L. AVERGUN & DOUGLAS COHAN, EXPLAINING THE INEXPLICABLE: THE PERKS AND THE PERILS OF PROFFER SESSIONS AND BEST PRACTICES FOR EXPLAINING IT ALL TO YOUR CLIENT A-15 (2015).

[161] Michael J. Engle & Adam J. Petitt, *'Queen for a Day' — Assessing the Risks and Rewards of a Proffer Agreement*, 31 WESTLAW J. WHITE-COLLAR CRIME, Apr. 2017, at 1, 1.

[162] AVERGUN & COHAN, *supra* note 160.

[163] *See* DENNIS G. FITZGERALD, INFORMANTS, COOPERATING WITNESSES, AND UNDERCOVER INVESTIGATIONS: A PRACTICAL GUIDE TO LAW, POLICY, AND PROCEDURE 141

Therefore, the nomenclature underscores the temporary and conditional nature of the privilege granted during this negotiation process, which, much like the show, offers the participant a momentary elevation in exchange for cooperation.

In light of this, the essential feature of the proffer is that it allows the individual to provide potentially incriminating information to the government without the risk that their statements will later be used against them in a criminal prosecution.[164] The agreement effectively offers a limited form of immunity, protecting the person from the use of their own admissions in future legal proceedings, except in certain circumstances, such as if they are found to have lied or obstructed justice during the session.[165]

The proffer session itself is typically an oral presentation where the target, accompanied by their attorney, meets with the federal prosecutor and the case agent overseeing the investigation.[166] This session serves as an opportunity for the prosecution and investigators to assess the target's credibility and determine whether the information they offer has sufficient value to justify further cooperation.[167] The target's willingness to be forthcoming and transparent during the session plays a crucial role in the government's decision on whether to pursue a formal cooperation agreement.[168]

It is important to clarify that the proffer session is not a "tell-all" session; rather, it is a structured opportunity for the target to provide selected, valuable pieces of information that could assist in the prosecution of others or further the investigation into broader criminal activities.[169] The information shared during this session could include, for example, details about the scope and operation of a criminal enterprise, the identities of co-conspirators, or the mechanisms used to conceal illegal activities. In cases involving multiple defendants, it is typically in the best interest of each defendant to cooperate at the earliest opportunity, as the utility of their information to the government diminishes over time.[170] As a result, a "'race to the station house'" often ensues among co-conspirators, with

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(2d ed. 2015).

[164] *See* Steven Glaser, *Proffer Agreements: To Execute or Not to Execute?*, N.Y.L.J., July 17, 2008, LEXIS (Proffer agreements "typically preclude the government from offering the statements made during the interview directly against the individual in a future prosecution.").

[165] *See id.* ("The primary exception is for prosecutions for false statements or obstruction of justice; that is, if the individual lies during the proffer session, the statements made by the individual can be offered against him or her.").

[166] FITZGERALD, *supra* note 163, at 120.

[167] *See* BRIAN A. JACOBS & NICOLE L. BUSEMAN, *Navigating the Cooperation Process in a Federal White Collar Criminal Investigation*, Westlaw Practical Law (database updated 2023).

[168] *See* FITZGERALD, *supra* note 163, at 121 ("[A proffer session] is a chance for the target to offer her audience pieces of valuable information.").

[169] *Id.*

[170] *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 929 (1999) ("The longer a defendant waits to cooperate, the less likely he is to have information that is still useful to the government.").

each defendant striving to provide the most valuable and novel information to secure favorable treatment.[171]

If the prosecutor and the case agent find the information provided to be credible and sufficiently useful, they may proceed to the next phase of cooperation. This typically involves the negotiation of a plea agreement or immunity agreement, where the target agrees to cooperate in exchange for a reduction in charges or sentence, or, in some cases, complete immunity from prosecution based on the information they provide.[172] However, if no agreement is reached during the proffer session, the individual is free to leave, and while the disclosed information cannot be used against them at a future trial, it remains available for the government to use in furthering the investigation.[173] A frequently cited example is that if an individual confesses to the murder of John Doe and to burying the victim's body in their backyard, the government is precluded from calling an investigator who overheard the confession to testify about it. Nonetheless, the government may lawfully proceed to the individual's backyard, exhume the body of Mr. Doe, and use the discovery of the body, along with any other evidence derived from the individual's admissions during the interview, as part of its case.[174]

Therefore, note that, even if no deal is struck, the government is free to act on any leads or evidence derived from the proffer, and the target could still face indictment at a later date if the investigation uncovers sufficient evidence of criminal conduct.[175] Another point that warrants emphasis is that proffer agreements generally contain provisions that limit the "direct" use of statements made during the session; however, they often include "door-opening" clauses that substantially erode these protections.[176]

A typical provision allows the government to use the individual's statements during cross-examination if the defendant subsequently testifies, and his or her testimony contradicts prior statements.[177] In *Mezzanatto*,[178] the Supreme Court, in an opinion written by Justice Clarence Thomas, held that, pursuant to a negotiated agreement, the government may use a defendant's statements made during plea discussions to impeach the defendant's trial testimony, so long as the testimony is inconsistent with those prior statements.[179]A broader provision, found in some proffer agreements, permits the government to introduce the

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[171] *Id.*

[172] FITZGERALD, *supra* note 163, at 121.

[173] *Id.*; *see* FED. R. EVID. 410(a) ("[A] statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea" is "not admissible against the defendant" in "a [future] civil or criminal case"). A defendant's statements can, however, be introduced.

[174] *See* Glaser, *supra* note 164.

[175] *See* FITZGERALD, *supra* note 163, at 121.

[176] *See* Glaser, *supra* note 164.

[177] *Id.*

[178] 513 U.S. at 196.

[179] *Id.* at 203-04 (holding agreements to waive exclusionary force of Fed. R. Evid. 410(a) are valid and enforceable); *see* Robert G. Morvillo & Robert J. Anello, *Allowing Use of Proffer Statements at Trial*, N.Y.L.J., June 1, 2004, at 1.

individual's statements if the defense counsel advances any argument or statement that conflicts with the individual's earlier admissions, whether in opening statements, during witness examination, or at sentencing.[180]

Finally, it is important to highlight that proffer sessions are typically not recorded in the American criminal system, with members of the prosecution team taking notes and preparing memoranda, which, along with any rough notes, may be shared with the defense when a cooperating witness testifies.[181] Thus, it becomes imperative for the defense to meticulously document the proceedings in order to identify and address potential inconsistencies when confronting the government's notes.[182] Given that the proceedings are held in closed sessions, it is also indispensable to acknowledge that the lack of recordings has given rise to significant criticism.

Proponents of a recording rule present three primary arguments in favor of its adoption. First, mandating the recording of interviews with cooperating witnesses could enhance the accuracy of jury verdicts, thereby reducing the risk of wrongful convictions.[183] Second, such a rule would help ensure that prosecutors adhere to the ethical standards outlined in the Model Rules of Professional Conduct, promoting greater consistency in prosecutorial behavior.[184] Third, a recording requirement could alleviate concerns regarding the appearance of impropriety associated with secretive pretrial meetings with cooperators, thereby strengthening public trust in the criminal justice system.[185]

On the other hand, there are four primary arguments against the adoption of a recording rule. First, mandatory recording of all interviews with cooperating witnesses would provide the defense with an abundance of potentially irrelevant or trivial impeachment material, which could lead the jury to undervalue the testimony of cooperators.[186] Second, such a rule could hinder the use of credible

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[180] Morvillo & Anello, *supra* note 179; *see, e.g.*, United States v. Gomez, 210 F.Supp.2d 465, 469 (S.D.N.Y. 2002) ("[T]he Government may use statements made by [Defendant] at the meeting . . . to rebut any evidence or arguments offered by or on behalf of [Defendant] . . . at any stage of the criminal prosecution (including bail, trial, and sentencing), should any prosecution of [Defendant] be undertaken.").

[181] *See* JACOBS & BUSEMAN, *supra* note 167 (noting a prosecutor's "*Brady*" obligation may require disclosure of cooperation agreements); *see* Giglio v. United States, 405 U.S. 150, 154 (1971) (holding "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting [that witness'] credibility" must be disclosed to the defense (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959))).

[182] JACOBS & BUSEMAN, *supra* note 167.

[183] Sam Roberts, note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257, 289 (2005); *cf.* Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985) (noting recording of custodial interrogations by law enforcement protects defendant's right to a fair trial).

[184] Roberts, *supra* note 183; *see* MODEL RULES OF PRO. CONDUCT R. 3.8 (A.B.A. 1983) (describing the "[s]pecial [r]responsibilities of a [p]rosecutor"); *cf.* State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994) ("A recording requirement [during custodial interrogation] also discourages unfair and psychologically coercive police tactics and thus results in more professional law enforcement.").

[185] Roberts, *supra* note 183.

[186] *Id.* at 295.

cooperating witness testimony in criminal trials, as mandatory recordings might jeopardize the safety of cooperators and discourage open communication among them.[187] Third, by making all pretrial statements made by cooperating witnesses publicly available, a recording rule could enable defendants to tailor their testimony to effectively contradict the incriminating statements of the cooperating witness.[188] Lastly, a recording rule might prove ineffective, as prosecutors and their agents could easily circumvent it.[189]

For these reasons, it is evident that the U.S. process protects prosecutors from being placed at a disadvantage during proffer sessions, while also ensuring that potential cooperators and their defense teams assume the inherent risks of participation, particularly through the prohibition of mandatory recordings, which places greater emphasis on public order safeguards than on defense interests.[190] This practice gives rise to considerable concerns regarding the right to a fair trial, particularly as it impedes the defense's capacity to conduct a comprehensive cross-examination of cooperating witnesses.[191] In the absence of a recorded record of the proffer session, the defense is constrained in its ability to scrutinize the credibility and reliability of the cooperator's statements. This limitation heightens the risk of unjust conclusions being drawn, undermining the fairness of the proceedings.

In Brazil, the terms "Queen-for-a-Day Letter" and "proffer sessions" are not used. However, the procedural framework shares similarities with that of the U.S., though with important distinctions. The process begins with the submission of a proposal to formalize a cooperation agreement, which marks the initiation of negotiations and simultaneously establishes a confidentiality obligation.[192] Disclosing these preliminary discussions or any document formalizing them constitutes a breach of confidentiality, undermines trust, and violates good faith, until such confidentiality is lifted by a judicial ruling.[193]

A proposal for a cooperation agreement may be summarily rejected, with appropriate justification provided to the individual under investigation.[194] For example, the prosecutor may determine that the evidence initially presented to support the cooperation is insufficient, that the potential cooperator is concealing facts, or that the facts outlined in the proposal lack investigative value.[195] The requirement for due justification in the refusal or denial of a cooperation

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[187] *Id.*

[188] *Id.*

[189] *See id.* at 297 (noting "[p]rosecutors could bypass" a mandatory recording rule by "hold[ing] unrecorded charging discussions with would-be cooperators' attorneys, who would then relay the prosecution's 'needs' to the witnesses[,]" or by "choos[ing] not to follow the recording rule, and continu[ing] to conduct unrecorded meetings with cooperators . . . .").

[190] *Id.* at 260-61.

[191] *See id.* at 260 ("Because the cooperator's testimony is developed in secret and without documentation, his polished, incriminating account is largely unassailable on cross-examination." (footnotes omitted)).

[192] Law No. 12.850, *supra* note 136, art. 3-B.

[193] *Id.*

[194] *Id.* § 1.

[195] *See* Cordeiro, *supra* note 110, at 30; MENDES, *supra* note 111, at 64.

proposal reflects the legislative intent to restrict the Public Prosecutor Office's discretion, ensuring compliance with constitutional standards, subject to judicial review and potential challenge by the defendant.[196] If the proposal is not summarily rejected, the parties must sign a confidentiality agreement in order to continue the negotiations.[197] This agreement binds the involved authorities to the process and prevents the unjustified rejection of the proposal at a later stage.[198]

No negotiation of a cooperation deal may take place without the presence of a duly appointed lawyer or public defender,[199] unlike in the U.S., where such a requirement is not mandatory during proffer sessions.[200] According to Brazilian law, it is the responsibility of the defense to properly document the proposal and its attachments, ensuring that all relevant facts are accurately described, with all pertinent circumstances outlined, and to identify the evidence and corroborating elements.[201] In the context of the discussions, the defendant is required to disclose all illicit acts in which they participated and that have a direct connection to the facts under investigation.[202]

The judge, in turn, does not engage in the negotiations between the parties to formalize the cooperation agreement.[203] Such negotiations occur between the police officer, the defendant, and the defense attorney, with the indirect involvement of the Public Prosecutor's Office, or, depending on the circumstances, the defendant, their attorney and just the Public Prosecutor's office.[204] It is important to note that throughout all stages of negotiation, confirmation, and execution of the cooperation, the defendant must be

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196 FENELON, *supra* note 149, at 64.

197 Law No. 12.850, *supra* note 136, art. 3-B, § 2.

198 *Id.*

199 *Id.* art. 3-C, § 1.

200 While it is both standard practice and strongly recommended for a defense attorney to be present during a client's proffer session, U.S. courts have consistently ruled that the Sixth Amendment does not mandate the presence of counsel until the initiation of formal adversarial proceedings against a defendant. *See, e.g.,* Kirby v. Illinois*,* 406 U.S. 682, 689 (1972) (plurality opinion) (holding the Sixth Amendment right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"); United States v. Gouveia, 467 U.S. 180, 187 (1984) ("[A] person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him."); United States v. Morrison, 515 F. Supp. 2d 340, 341, 349 (E.D.N.Y. 2007) (same). Moreover, a defendant's right to counsel "is offense specific[,]" that is "it does not attach until a prosecution is commenced" for a particular offense. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). Thus, while the advice of counsel can be crucial in navigating the complexities of a proffer session, where the cooperating witness is not under indictment for the crime being investigated, absence of defense counsel does not violate constitutional rights under prevailing legal standards.

201 Law No. 12.850, *supra* note 136, art. 3-C, § 4.

202 *Id.* art. 3-C, § 3.

203 *Id.* art. 4, § 6.

204 *Id.*

represented by legal counsel,[205] failure to do so may render the agreement invalid. Once the negotiation stages have been concluded and the parties have reached a consensus, the procedure moves to the next phase: the formalization of the cooperation agreement.

Considering the foregoing, when examining the initiation and progression of the procedure, two critical issues warrant closer scrutiny during the negotiation phase when compared to the American system: first, whether the information and evidence provided to prosecutors or law enforcement can be used against the potential cooperator or other co-defendants; and second, whether the discussions between prosecutors or law enforcement and the would-be cooperator are subject to recording. Regarding the first issue, the law clearly provides that the parties may withdraw from the proposal, in which case any self-incriminating evidence provided by the potential cooperator cannot be used solely to their detriment.[206] In other words, the would-be cooperator retains the right to walk from negotiations with the authorities without concern that their statements provided will be used to harm their position. However, such retraction is only permissible until the agreement is finalized, that is, until it is judicially homologated (approved).[207] Once the proposal is approved by the judge—as will be further discussed—the state agreement becomes binding on the parties, akin to any other bilateral contract.[208]

Nevertheless, the legal framework undergoes a substantial transformation when evaluating the use of derivative information. The law makes it clear that cooperation itself does not constitute direct evidence; rather, it serves as a mechanism for obtaining evidence. In essence, the goal of cooperation is to uncover additional information and corroborative evidence to shed light on the facts under investigation. Consequently, the law dictates that if the agreement is not finalized due to the initiative of the prosecutors or law enforcement, they are barred from derivative use of any information submitted by the potential cooperator in good faith.[209] However, if the would-be cooperator withdraws, information provided to the prosecutors may not be used derivatively against him, but may be admissible against other co-defendants.[210]

In this regard, scholars have criticized the derivative use of information provided in good faith by the potential cooperator, arguing that until the cooperation agreement is signed—during the mere negotiation phase—all information submitted is solely for the purpose of negotiation (with each party

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[205] *Id.* art. 3-C, § 1.

[206] *Id.* art. 4, § 10.

[207] *See* Fredie Didier Jr. & Daniela Bomfim, *Colaboração Premiada (Lei nº 12.850/2013): Natureza Jurídica e Controle da Validade por Demanda Autônoma – um Diálogo com o Direito Processual Civil* [*Plea Bargaining (Law No. 12.850/2013): Legal Nature and Control of Validity by Autonomous Demand – a Dialogue with Civil Procedural Law*], 62 REV. DO MINISTÉRIO PÚBLICO DO RIO DE JANEIRO 23, 40-41 (2016) (Braz.) (discussing views on retractability of agreements before homologation).

[208] *See id.* at 34, 40-41.

[209] Law No. 12.850, *supra* note 136, art. 3-B, § 6.

[210] *Id.* art. 4, § 10.

seeking to persuade the other of the agreement's utility).[211] If the would-be cooperator provides information in good faith but ultimately is not convinced of the agreement's utility, the negotiation process must not result in incriminating effects against other co-defendants.[212] It is only through the formal agreement, as opposed to the negotiations, that the authorities legitimately obtain evidentiary material.[213] Moreover, just as the Public Prosecutor's Office can withdraw from the agreement without consequence, the potential cooperator should also be entitled to withdraw without producing any legal effect,[214] based on the principle of procedural equality.

In examining the issue, it is evident that, generally, both Brazil and the U.S. approach it in a similar manner: statements made during a proffer session are typically inadmissible against the potential cooperator, except in specific circumstances such as perjury. However, there is a notable divergence concerning the derivative use of such information. In the U.S, statements disclosed during a proffer session may be used derivatively against the would-be cooperator himself and other co-defendants.[215]

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[211] *See* André Luís Callegari & Raul Linhares, *A Colaboração Premiada Após a Lei "Anticrime"*, [*The Plea Bargain Following the "Anti-Crime" Law*]**,** CONSULTOR JURÍDICO (Mar. 4, 2020, 6:31 AM) (Braz.), https://www.conjur.com.br/2020-mar-04/opiniao-colaboracao-premiada-lei-anticrime/ [https://perma.cc/UY72-2DP5].

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] For example, in *United States v. Rutkowski*, the Eleventh Circuit held Federal Rule of Criminal Procedure 11(e)(6) (as it then existed) did not prohibit using derivative evidence obtained from statements made during plea negotiations. 814 F.2d 594, 599 (11th Cir. 1987) (per curiam). The court noted that the legislative history of these provisions reveals no intent by Congress to extend their protection to derivative evidence and thus concluded that such evidence is not shielded by the rule. *See id.* ("It is clear [from the rule's legislative history] that Congress never considered including derivative evidence in the prohibition.") United States v. Cusack, 827 F.2d 696, 697-98 (11th Cir. 1987) ("[T]he language of Rule 11(e)(6)(D) and the legislative history behind the Rule []" make "clear that Congress never considered including derivative evidence in [Rule 11(e)(6)'s] prohibition." (quoting *Rutkowski*, 814 F.2d at 599)). At least one other circuit followed the 11th Circuit's approach. *See* United States v. Millard 235 F.3d 1119, 1120 (8th Cir. 2000) ("[Rule 11(e)(6)] excludes only statements that a defendant makes during negotiations and does not include the 'fruit' of those statements." (citing *Cusack*, 827 F.2d at 697-98)). The rule interpreted in *Rutkowski*, *Cusack*, and *Millard* (Fed. R. Crim. P. 11(e)(6)) has since been redesignated rule 11(f) and amended to incorporate Fed. R. Evid. 410. *See* FED. R. CRIM. P. 11 advisory committee's note to 2002 Amendment ("[R]evised Rule 11(f), which addresses the issue of admissibility or inadmissibility of pleas and statements made during the plea inquiry, cross references Federal Rule of Evidence 410."). Courts have continued to admit derivative evidence under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410. *See, e.g.*, United States v. Reaves, No. 1:08–cr–00025, 2009 WL 1423907, at *1 (N.D. Fla. May 15, 2009) ("Rule 11(f) does not explicitly prohibit the use of evidence derived from statements protected under the rule, and the Eleventh Circuit has held that, absent such an explicit prohibition, Rule 11(f)'s exclusionary rule does not apply to derivative evidence."); United States v. Stein, No. CR. 04-269-9, 2005 WL 1377851, at *14 (E.D. Pa. June 8, 2005) ("Neither the language nor the legislative history of these statutes shows any evidence that Congress ever contemplated, much less intended, that FRE 410 and FRCrP 11(f) would apply to derivative evidence.").

In Brazil, however, an important caveat applies: if the prosecutor or law enforcement decides not to pursue the agreement during the negotiations, the statements cannot be used to the detriment of the potential cooperator himself and other co-defendants.[216] This creates a significant limitation on the prosecutor's discretion, safeguarding against potential bad faith actions. In other words, it prevents a prosecutor from withdrawing from the negotiation for strategic reasons and then using the would-be cooperator's disclosures to further investigate or build a case in accordance with one's own interests. This distinction, by contrast, lacks a direct counterpart in the U.S. legal system, where the prosecutor's ability to utilize such information is not constrained by similar protections.[217]

As a final point, unlike in the U.S., Brazilian legislation mandates the recording of the entire negotiation phase. The law determines that all negotiations and acts of cooperation be documented using methods such as magnetic recording, stenography, digital formats, or similar techniques, including audiovisual recordings.[218] These methods are specifically designed to ensure greater accuracy and fidelity in capturing the exchanged information, with a copy of the recordings being made available to the cooperator.[219]

Moreover, the law explicitly requires that not only the recordings but also any corroborative evidence provided by the cooperator be made accessible to the other accused parties, contingent upon prior judicial authorization.[220] The Brazilian Federal Supreme Court has affirmed that the accused should be granted full access to all evidence generated through cooperation agreements, including any audiovisual documentation of cooperative acts, so that they can meaningfully contest the validity and reliability of such evidence.[221] This provision guarantees transparency, safeguarding the accused's right to confront and challenge the evidence presented against them.

The principal arguments advanced by certain American scholars against mandatory recordings lack support within the Brazilian legal framework, where such practices have become indispensable tools for ensuring transparency and

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[216] Law No. 12.850, *supra* note 136, art. 3-B, § 6.

[217] In the U.S., proffer meetings—often referred to as "Queen for a Day" agreements—frequently incorporate limited-use immunity clauses, which prevent the government from using a defendant's statements against them should the agreement not materialize, except in instances of falsehood or breach of the agreement. *See* Naftalis, *supra* note 5, at 2 n.5 (describing "Queen for a Day" agreements). For an example of a "Queen for a Day" agreement, *see* Attachment D to Government's Response in Opposition to Defendant's Motion to Dismiss ¶¶ 6-7, United States v. Thrush, No. 1:20-cr-20365 (E.D. Mich. Aug 19, 2020), Dkt. 228-4. While not codified in law, these informal safeguards are widely respected and serve a critical function in preserving the trust between defense counsel and prosecutors. *Cf.* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice"*, 13 COR. J. L. & PUB. POL'Y 167, 194-95 (2004) (describing institutional benefits to enforcing informal Department of Justice guidelines).

[218] Law No. 12.850, *supra* note 136, art. 4, § 13.

[219] *Id.*

[220] *Id.* art. 7, § 2.

[221] S.T.F., Agravo Regimental na Reclamação No. 30.742/SP [Ag. Reg. na Rcl. No. 30.742], Relator: Min. Ricardo Lewandowski, 04.02.2020, D.J.e, 04.05.2020, 1, 1 (Braz.).

promoting the pursuit of truth in criminal proceedings.[222] The concern that defense counsel may exploit discrepancies to undermine a witness's credibility, though valid, is not exclusive to recorded interviews.[223] This challenge is inherent in any case involving witness testimony. It is the judge's responsibility to ensure that impeachment evidence is carefully managed, and its introduction appropriately limited to prevent undue prejudice.[224]

It is essential to emphasize that, contrary to issues regarding the safety of cooperating witnesses, the law establishes a comprehensive system of protections for individuals who choose to cooperate with the authorities.[225] Additionally, there is no evidence suggesting that the recording process inhibits open communication between defendants and prosecutors during the negotiation process.[226] Conversely, the documentation serves to encourage potential cooperators to present themselves more candidly from the outset of the sessions, as they are aware that their statements are being recorded and may be utilized in subsequent stages of the process, thereby fostering a stronger commitment to truthfulness.[227]

Moreover, the recording serves as objective evidence of the content of the discussions, strengthening confidence in the cooperation process and mitigating potential allegations of manipulation or distortion of the matters discussed and written down during the sessions. Further, it should not be overlooked that the use of recordings unquestionably imposes psychological burdens on potential cooperators, while providing prosecutors with the opportunity to conduct a thorough evaluation of whether to proceed with the cooperation agreement. The use of recordings also allows prosecutors to repeatedly assess the naturalness of the testimony and any signs of hesitation, nervousness, evasiveness, or falsehoods. Thus, a would-be cooperator who is truthful and confident in their testimony benefits from the recording, as it enhances their credibility, thereby aiding the prosecution in presenting a more compelling case. In this regard, the recording also serves as a tool for the prosecutor to exclude unreliable potential cooperators.

Another concern, namely that defendants may adjust their testimony to directly contradict the incriminating statements made by cooperators,[228] is largely unfounded. Well-selected cooperators, who express confidence in their recorded statements, make it more challenging for the defense to undermine their

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[222] Roberts, *supra* note 183, at 295.

[223] *See* Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 153-54 (2017) ("[I]n the federal and all state systems, special impeachment rules permit a witness's credibility to be attacked with evidence of prior convictions, reputation or opinion testimony, or testimony about prior bad acts, most of which would not otherwise be admissible.").

[224] Law No. 3.689, *supra* note 94, art. 400, § 1.

[225] Law No. 12.850, *supra* note 136, art. 5 (listing protections).

[226] Roberts, *supra* note 183, at 300.

[227] *See id.* ("Credible cooperators will be less likely to make false or inconsistent statements at any point in the proffer sessions, especially when they know that all their statements will be recorded and disclosed.").

[228] *Id.* at 297.

credibility.[229] Rather than serving as an impediment, audiovisual recordings have proven to be an invaluable tool within the Brazilian criminal justice system, providing an additional layer of transparency that fortifies the fair and accurate presentation of evidence.

Last but not least, the argument that the recording rules could be circumvented[230] is tenuous, resting on a purely hypothetical scenario that does not reflect the actual practices of the majority of prosecutors and law enforcement officials in Brazil.[231] Moreover, the Brazilian legal system incorporates robust mechanisms of oversight, including audits,[232] internal supervision,[233] and accountability measures,[234] to ensure compliance with procedural rules. Any violation of these rules would not only invite disciplinary sanctions[235] but could also undermine the integrity and validity of the entire cooperation process.

Even if prosecutors were to hold informal, off-the-record discussions with potential cooperators or their lawyers, such exchanges could never fully replace the transparency provided by audiovisual recordings. In Brazil, forensic practice has shown that recorded interactions offer clear and indisputable evidence of what was said between prosecutors and cooperators—something that private, unrecorded conversations simply cannot match when it comes to shaping testimony. These observations align with standard procedural practices in Brazil, and there is no indication that prosecutors or law enforcement have objected to the use of such recordings.

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[229] *See id.* at 299 (discussing evidentiary hurdles to impeaching a testifying cooperating witness).

[230] *See id.* at 297 ("[P]rosecutors could hold unrecorded charging discussions with would-be cooperators' attorneys, who would then relay the prosecution's 'needs' to the witnesses."); George C. Harris*, Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 67 (2000) ("Would prosecutors simply agree informally not to charge a would-be cooperator, or bring reduced charges only after satisfactory trial testimony?").

[231] *See* Fabio Ramazzini Bechara & Leandro Piquet Carneiro, *The Brazilian Prosecutor's Office*, 62 DPCE ONLINE 149, 154-55 (2024), https://www.dpceonline.it/index.php/dpceonline/article/view/2076 [https://perma.cc/5FU7-HMJM] (describing the continuous "internal and external" oversight of the Public Prosecutor's Office).

[232] Francisco Campos da Costa et al., *Enhancing Good Governance and Combating Corruption in Brazil: Assessing the Feasibility, Potential, and Limitations of New Technologies*, 14 BEIJING L. REV. 1484, 1490-91 (2023) ("[T]he auditing process . . . . is indispensable for identifying the origins and systemic deficiencies that facilitate illicit and corrupt activities . . . .").

[233] Maria Tereza Sadek, *The Public Prosecutor's Office and Legal Change in Brazil*, 32 IDS BULL. 65, 71-72 (2001).

[234] *See* Sérgio Praça & Matthew M. Taylor, *Inching Toward Accountability: The Evolution of Brazil's Anticorruption Institutions, 1985–2010*, 56 LATIN AM. POL. & SOC'Y 27, 42-43 (2014).

[235] Andrey Borges de Mendonça, *The Prosecutor in the Brazilian Legal System*, 62 DPCE ONLINE 169, 177 (2024), https://www.dpceonline.it/index.php/dpceonline/article/view/2077 [https://perma.cc/H8YB-44VL].

In conclusion, this subsection underscores the notable differences between the measures implemented in Brazil to curtail prosecutors' ability to benefit from cooperators and those employed in the U.S. While the Brazilian framework limits prosecutorial discretion and affords substantial rights to potential cooperators, it is crucial to acknowledge that this structure, in certain instances, may allow cooperators to reap the benefits of cooperation without providing meaningful assistance to the investigation. In contrast, the U.S. system—by making proffers costly for defendants—offers a more robust safeguard for public order.

As a result, the risks borne by Brazilian prosecutors are markedly higher than those encountered by their U.S. counterparts. This distinction is particularly evident in the prosecutor's decision to engage in negotiation sessions, as their unilateral withdrawal effectively bars the use of any derivative information, not only against the cooperator himself but also with respect to co-defendants, thereby limiting the scope of prosecutorial leverage. Additionally, this difference is also apparent in the challenges presented by recorded sessions, which may prompt a defendant to request a sentence reduction by arguing that the government bears full responsibility for buying the information provided during the proffer sessions, regardless of whether the assistance provided aligns with the prosecution's expectations during cross-examination at trial.

B. Cooperation Agreements

In the U.S. system, subsequent to the proffer sessions, the next critical phase in the cooperation process is the formalization of the agreement. This document operates as a contractual instrument between the defendant and the government, detailing the mutual promises and obligations of both parties.[236] In contrast to standardized plea agreements, which can be analogized to contracts of adhesion,[237] cooperation agreements are more detailed and tailored, requiring the defendant to waive constitutional rights[238] and take on significant responsibilities.[239] Therefore, if a defendant successfully convinces the prosecutor to formalize their cooperation based on the information provided during the proffer sessions, it "is not the end of the game[,]" but rather its

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[236] *See* Hughes, *supra* note 56, at 3-4 (describing contractual nature of cooperation agreements). With respect to the nature of the plea agreement, "the Supreme Court and all federal circuit courts, along with state supreme courts across the country, have found that plea agreements are governed or strongly influenced by contract law. . . ." Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31, 39-40 (2018) (footnote omitted). In *Santobello*, the Court held that when a plea is substantially based on a promise or agreement made by the prosecutor, such that it constitutes part of the inducement or consideration, the promise must be honored. 404 U.S. at 262; *see* Julie Gyurci, note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV. 1253, 1268 (1994).

[237] *See* Knizhnik, *supra* note 30, at 1740.

[238] *See* Gyurci, *supra* note 236, at 1267.

[239] *See* Hughes, *supra* note 56, at 3 (a cooperator's responsibilities "will at least include interviews and debriefings and may involve undercover action or observation and reporting back.").

beginning.[240] Put another way, cooperation agreements are based on the defendant's continuing obligations to the prosecution, which often involve a lengthy process of debriefing sessions, intensive witness preparation, and, ultimately, public testimony.[241]

In the federal system, the prosecution, in turn, will agree to notify the court of the defendant's cooperation through a Section 5K1.1 motion, provided that: "(1) the defendant complies with his obligations under the agreement (including testifying truthfully), and (2) the prosecution determines that the defendant's assistance was 'substantial.'"[242] In certain districts, the cooperation agreement may also specify the scope of the potential sentencing reduction or the prosecution's recommendation regarding the defendant's sentence.[243] It is worth mentioning that all cooperation agreements must be endorsed by the appropriate authority, specifically through personal and written approval from prosecutors.[244] In contrast to the Brazilian criminal justice system, which will be discussed in greater detail below, the U.S. system lacks judicial oversight to ensure the legality and voluntariness of the agreement at the time it is entered into between the defendant and the prosecutor.

In this context, while decisions regarding cooperation—encompassing the determination of who cooperates, the approach to handling negotiations, the manner in which cooperation is rewarded, and the specific obligations imposed on cooperators—carry substantial legal and practical consequences, the field remains only minimally regulated.[245] Responsibility for decisions regarding the debriefing of cooperators, as well as the allocation and structuring of cooperation agreements, is primarily delegated to the discretion of individual U.S. Attorney's Offices and, in certain cases, to the judgment of the prosecutors themselves.[246] As Professor Daniel Richman observed over decades and as remains true today, "the exchange of cooperation for sentencing leniency is under-regulated and never the subject of systematic empirical investigation . . . ."[247]

Particularly in the federal system, each U.S. Attorney's Office is responsible for formulating its own policies concerning cooperation, operating with minimal oversight from the Department of Justice in Washington, D.C. or from federal judges, thereby granting substantial autonomy to individual offices in

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[240] *See* Knizhnik, *supra* note 30, at 1743.

[241] Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 18 (2003).

[242] *Id.* at 17.

[243] *Id.* at 17-18.

[244] *See*, *e.g.*, Memorandum from Stuart Rabner, N.J. Att'y Gen., to Dir., Div. Crim. Just. & Cnty. Prosecutors 6 (May 31, 2007), https://www.nj.gov/oag/dcj/pdfs/guidelines-pros-pub-officials.pdf [https://perma.cc/6ZSX-KH8H].

[245] *See* Roth, Vaynman & Penrod, *supra* note 2, at 1355.

[246] *Id.*

[247] Daniel Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT'G REP. 292, 294 (1996) [hereinafter Richman, *Cooperating Defendants*].

determining the scope and terms of cooperative agreements.[248] In light of this, while the Department of Justice and federal judges offer guidance and oversight at particular stages—chiefly when significant policy issues emerge or during the sentencing phase—they do not exercise direct or systematic control over the day-to-day decisions made by U.S. Attorney's Offices concerning cooperation. In general, judges play a crucial role in supervising some aspects, including determining the appropriate timing of sentencing in relation to the completion of cooperation, assessing the scope of sentencing benefits granted, and overseeing the implementation of sealing procedures.[249]

Given the aforementioned, federal prosecutors operate with limited external oversight, and it is incumbent upon them to exercise self-restraint in their discretion. They must uphold ethical standards and adhere to their internal compliance policies[250] to preserve the integrity of the prosecutorial process. Theoretically, this duty not only safeguards the legality of the agreement but also requires prosecutors to prevent any coercion or undue pressure on the defendant.[251] In practice, the door is left open for the tyranny of good intentions by unethical prosecutors. Thus, it is hardly novel that the driving force behind the escalation of abuse is the unrestricted discretion granted to prosecutors, which has been a constant point of criticism.[252] Despite scholarly calls for increased judicial oversight, standard judicial mechanisms have proven ineffective in curbing the expansion of prosecutorial power, as federal judges continue to unquestioningly approve cooperation.[253]

In this vein, it is imperative to recognize that the absence of meaningful judicial oversight diminishes the protection of the public interest for three fundamental reasons: First, as previously discussed, judicial supervision plays a critical role in deterring potential misconduct by unethical prosecutors. Consequently, such oversight serves as an essential safeguard against false testimony from cooperating witnesses, thereby mitigating the risk of wrongful convictions of innocent co-defendants.[254] Second, it facilitates accountability

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[248] *See* Roth, Vaynman & Penrod, *supra* note 2, at 1355.

[249] *Id.* at 1365.

[250] U.S. Attorneys' offices have policies requiring review or approval for cooperation agreements and court notifications, often involving the U.S. Attorney, a supervisory assistant, or a review committee. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 UNIV. PA. L. REV. 959, 1006 (2009). However, these written policies are ineffective without enforcement, and less than half of U.S. Attorneys' offices fully comply with them, with at least a dozen offices failing to comply altogether. *See id.*

[251] Preet Bharara states that "[t]he strategy for flipping someone is not so different from the strategy of smart interrogation. Histrionics and drama are not necessary, and probably counterproductive. The best agents and prosecutors don't threaten or browbeat. They use a tone that is firm and matter-of-fact." BHARARA, *supra* note 59, at 97-98.

[252] *See*, *e.g.*, John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J. L. & Pol'y 423, 424-25 (1997).

[253] *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 872, 907 (2009).

[254] It is crucial to acknowledge that false testimony by cooperators is not solely attributable to unethical conduct by prosecutors, such as intimidation or threats. *See* Ellen Yaroshefsky, *The Independent Counsel Investigation, the Impeachment Proceedings, and President*

and ensures fairness. Third, judicial oversight fosters transparency in the process, thereby enhancing the legitimacy of cooperation agreements.

With respect to this latter aspect, note that while the increased exposure of decisions related to plea agreements offers benefits—such as enhanced oversight and accountability—it also entails certain costs.[255] For instance, disclosing cooperation agreements just to fellow prosecutors, defense attorneys, or judges may not raise significant concerns regarding retaliation against cooperating defendants.[256] However, while extending such disclosures to the broader public introduces potential risks, it requires that the level of transparency be meticulously calibrated in particular contexts to ensure the protection of individual safety and privacy interests.[257]

Notwithstanding the arguments outlined above, judicial oversight of prosecutorial decisions is subject to significant limitations, and the resistance to embracing such supervision within the American criminal justice system remains a prevailing reality, with a discernible preference for utilitarian principles as the guiding framework for cooperative practices.[258] In this sense, judges typically cite the overwhelming caseload and the concomitant necessity of expediting the judicial process as justifications, contending that the introduction of judicial oversight could exacerbate these challenges, thereby undermining the efficiency of the system.[259] Additionally, judicial review is often considered inappropriate for decisions that involve intricate law enforcement strategies, deterrence, and case priorities.[260] Moreover, many prosecutorial decisions are driven by pragmatic factors, such as budget

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Clinton's Defense: Inquiries into the Role and Responsibilities of Lawyers, Symposium, Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 FORDHAM L. REV. 917, 952 (1999). Rather, multiple factors contribute to this phenomenon. A particularly significant factor is the tendency of cooperators to seek approval by providing information they believe aligns with the expectations of prosecutors, often at the expense of truthfulness. *Id.*

[255] *See* Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 1002 (2021).

[256] *Id.*

[257] *Id.*

[258] *See* Simons, *supra* note 241, at 23-26. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1996) (1789) (articulating the principle of utility, which underpins legal systems that prioritize societal welfare and institutional objectives, supporting prosecutorial discretion as a means to achieve greater societal benefits); JOHN STUART MILL, UTILITARIANISM 9 (George Sher ed., Hackett Publ'g Co. 2001) (1863) (defending utilitarianism as a moral theory grounded in maximizing social welfare, which aligns with prosecutorial strategies that prioritize systemic efficiency over individualized fairness); HENRY SIDGWICK, THE METHODS OF ETHICS 384 (7th ed. Macmillan 1907) (1874) (arguing for a rational utilitarian calculus in ethical and political decision-making, supporting institutional preferences for pragmatic and outcome-driven policies). Note: While these works do not directly address prosecutorial discretion, they offer a philosophical foundation for the American system's utilitarian orientation, in which procedural efficiency and institutional priorities often outweigh individualized judicial intervention.

[259] *See* Barkow, *supra* note 253, at 908.

[260] *Id.* at 908-09.

limitations or enforcement strategies, which are inherently difficult to assess.[261] Lastly, the Supreme Court's hands-off stance on prosecutorial discretion remains largely uncontested.[262]

Another frequently raised issue regarding plea agreements is whether a defendant has the right to withdraw from the agreement, and if so, the appropriate timing for such action. In most division cases, plea agreements are typically signed just before formal charges are filed, so withdrawing before charges are filed is usually not a concern.[263] However, if a defendant expresses the intention to plead guilty but the court has not yet accepted the plea, the defendant can withdraw the plea for any reason.[264] Once charges have been filed and the defendant has entered a guilty plea, the defendant may withdraw the plea prior to sentencing only by showing a fair and just reason,[265] with withdrawal generally prohibited after sentencing unless the court rejects the recommended sentence in a "C" plea agreement, rendering the agreement void.[266] From a constitutional standpoint and within the federal system, if a defendant proves the government has breached the plea agreement, the court has discretion to decide the remedy, which may include allowing plea withdrawal, modifying the sentence, or enforcing specific performance of the agreement.[267]

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[261] *Id.* at 908.

[262] *Id.* at 909. *See Bordenkircher*, 434 U.S. at 357, 364-65 (1978); Wayte v. United States, 470 U.S. 598, 607 (1985). In the U.S. legal system, decisions regarding the credibility of cooperating witnesses—specifically the impact of cooperation agreements on their credibility—are reserved exclusively for the jury. United States v. Scheffer, 523 U.S. 303, 313 (1998). Judges do not serve as gatekeepers for such credibility determinations. *Id.* (citing United States v. Bernard, 490 F.2d 907, 912 (1974)). It is the responsibility of the prosecution to disclose the full terms of any cooperation agreement to the jury, as failure to do so may result in the reversal of a conviction based on the cooperator's testimony. *Giglio*, 405 U.S. at 154-55.

[263] Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., *Address Before the OECD Competition Committee Working Party No. 3: The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits for All*, at 9 (Oct. 17, 2006).

[264] *Id.*

[265] In United States v. Hyde, 520 U.S. 670, 671 (1997), the Supreme Court ruled that a defendant cannot withdraw a guilty plea before sentencing unless they provide a "'fair and just reason' under [Federal Rule of Criminal Procedure] Rule 32(e)." The defendant pleaded guilty under a plea agreement, but before the court accepted the agreement, sought to withdraw the plea. *Id.* The court denied the request, and the plea agreement was eventually accepted. *Id.* at 673. The Court of Appeals had ruled that a defendant could withdraw their plea anytime before "the court [accepts] both the plea and the agreement." *Id.* The Supreme Court disagreed, emphasizing that a defendant must show a valid reason to withdraw the plea and that the acceptance of the guilty plea and plea agreement can be separate in time. *Id.* at 674. The ruling reinforced the stability of the judicial process in plea agreements.

[266] FED. R. CRIM. P. 11(e); Hammond, *supra* note 263.

[267] Richman, *Cooperating Clients*, *supra* note 48, at 92-93; *see*, *e.g.*, United States v. Hayes, 946 F.2d 230, 236 (3d Cir. 1991) (in cases of plea agreement breach, the court may remand for withdrawal of the plea or resentencing); United States v. Jeffries, 908 F.2d 1520, 1527 (11th Cir. 1990); United States v. Parker, 895 F.2d 908, 914 (2d Cir.) ("The remedy for a breached plea agreement is either to permit the plea to be withdrawn or to order specific performance of the agreement").

In conclusion, while the defendant's right to withdraw from a plea agreement must be safeguarded, it must be subject to strict limitations and grounded in legitimate, substantiated reasons.[268] The right to withdrawal should not be construed as an absolute entitlement, but rather as a mechanism to rectify situations where the integrity of the process has been compromised. From the perspective of societal interests, maintaining the stability and predictability of the justice system necessitates that plea withdrawals be the exception, not the norm, in order to preserve the efficacy of plea agreements. A well-balanced legal framework must carefully reconcile these competing considerations, ensuring a judicial process that is both just and efficient, for the benefit of the defendant and the broader societal order.

Lastly, it bears emphasis that when a cooperator violates any term of a cooperation agreement, that violation may be deemed a breach sufficient to excuse the government from performing its reciprocal obligations, consistent with the reasoning in the Government's Refusal to Make a Substantial Assistance Motion.[269] "Cooperation agreements typically include language that prevents the defendant from withdrawing their guilty plea, even if the government rescinds the cooperation agreement due to the defendant's breach . . . [t]his creates the possibility that a cooperator pleads guilty but does not obtain any benefits from cooperating."[270] It is not uncommon for the government to assert that a cooperator has breached the agreement by providing false or incomplete testimony, thus undermining the foundational expectations of the cooperation.[271] In such cases, the government is generally not required to prove the breach; rather, the burden rests on the cooperator if they later claim that the government has violated the plea agreement.[272]

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[268] A clear illustration of this principle arises when a defendant, upon further reflection on the consequences of the agreement or upon recognizing that the initial decision was made precipitously, seeks to reconsider their choice. *Hyde*, 520 U.S. at 676-77. Similarly, withdrawal may be warranted if the defendant identifies deficiencies in the process, such as omissions or manipulations by the prosecution, or other factors that materially affect their decision-making. Ferrara v. United States, 456 F.3d 278, 289 (1st Cir. 2006). In such instances, permitting the defendant to retract the plea ensures that they are not subjected to disproportionate penalties for a decision that, at the outset, may have been made under flawed or incomplete circumstances. Commonwealth v. Claudio, 484 Mass. 203, 204 (2020).

[269] JACOBS & BUSEMAN, *supra* note 167.

[270] *Id.*

[271] *Id.*; *see*, *e.g.*, United States v. Brechner, 99 F.3d 96, 96-100 (2d Cir. 1996). In this case, Milton Brechner, awaiting sentencing for tax evasion, contacted the government to offer his cooperation in exchange for a "5K1.1 motion" against a corrupt bank officer he had bribed. *Id.* at 97-98. After a proffer session, Brechner entered into a cooperation agreement and recorded conversations with the bank officer for over a year. *Id.* at 98. When the prosecutor planned to indict the banker, a debriefing session was scheduled with Brechner, who initially denied receiving kickbacks but later admitted to it after a brief discussion with his attorney. *Id.* Despite this correction, the Assistant U.S. Attorney declined to file the 5K1.1 motion and the Court of Appeals upheld the decision, rejecting the argument that Brechner's immediate correction made the breach immaterial and supporting the prosecutor's judgment that the lapse in credibility undermined Brechner's potential as a witness. *Id.* at 99-100.

[272] United States v. Calabrese, 645 F.2d 1378, 1390 (10th Cir. 1981).

Despite the breach, the government retains the right to file a substantial assistance motion to fully inform the court of the cooperator's conduct, highlighting both the positive and negative aspects to enable an informed decision.[273] Such practice may raise concerns about the potential for abuse of governmental power, which could lead to unfair practices or the elicitation of false testimony, as individuals may feel pressured to meet governmental expectations in exchange for benefits. However, it should be noted that the leverage exercised by the government is primarily aimed at ensuring accountability, thereby promoting an efficient and effective justice system that contributes to public safety. Further details will be addressed in the following sub-topic.

In Brazil, the legal classification of cooperation agreements aligns closely with that of the U.S., exhibiting no substantial distinctions between the two legal systems. Given that such agreements constitute bilateral legal transactions between the government and the cooperator,[274] they must be recognized as possessing a contractual nature.[275] The bilateral aspect underscores the mutual obligations[276] and the consensual framework[277] within which the parties engage. At the time of negotiation, there exists an inherent imbalance of power between the government and the would-be cooperator. This does not imply that the process merely involves the cooperator's passive acceptance of a standard adhesion contract. Instead, the negotiation process entails reciprocal concessions: the government agrees to a sentence reduction or complete pardon of the sentence in exchange for the provision of additional information and new evidence,[278] while the potential cooperator forfeits fundamental rights, including the presumption of innocence and the right to remain silent, by acknowledging guilt and providing substantial assistance to the government, such as identifying additional suspects.[279]

In the context of this negotiation, the government is bound by constitutional principles, specifically the principle of impersonality, which prohibits actions driven by personal interests or bad faith.[280] Such conduct would constitute a violation of the constitutional safeguards governing administrative actions. In other words, the government is required to act without personal bias, ensuring

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[273] JACOBS & BUSEMAN, *supra* note 167.

[274] S.T.J., AgRg no Recurso Especial No. 1.875.477/PR [AgRg no REsp No. 1.875.477/PR], Relator: Min. Reynaldo Soares da Fonseca, 22.06.2021, D.J.e, 28.06.2021 (Braz.).

[275] WALTER BARBOSA BITTAR, DELAÇÃO PREMIADA: DIREITO ESTRANGEIRO, DOUTRINA E JURISPRUDÊNCIA [LENIENCY AGREEMENTS: FOREIGN LAW, LEGAL DOCTRINE, AND CASE LAW] 57 (2020) (Braz.).

[276] S.T.J., AgRg no Recurso em HC No. 153.360/CE, Relator: Min. Jesuíno Rissato, 26.04.2022, D.J.e, 03.05.2022 (Braz.).

[277] Direct Action of Unconstitutionality No. 5.508/DF, *supra* note 153, at 11.

[278] HERÁCLITO ANTÔNIO MOSSIN & JÚLIO CÉSAR O.G. MOSSIN, DELAÇÃO PREMIADA: ASPECTOS JURÍDICOS [LENIENCY AGREEMENTS: LEGAL ASPECTS] 31-32 (2d ed. 2016) (Braz.).

[279] FREDERICO VALDEZ PEREIRA, DELAÇÃO PREMIADA, LEGITIMIDADE E PROCEDIMENTO [COOPERATION AGREEMENTS, LEGITIMACY, AND PROCEDURE] 38-39 (3d ed. 2016) (Braz.).

[280] *See* Cordeiro, *supra* note 110, at 77-80.

that the agreement remains within constitutional limits and upholds procedural fairness. Conversely, the cooperator is bound by the terms of the agreement, with failure to adhere to the contractual obligations resulting in revocation of the benefits granted.[281] Should this occur, any corroborative evidence provided by the cooperator may be still admissible against third parties in subsequent legal proceedings.[282]

Among the contractual obligations imposed upon the cooperator, they are required to support criminal investigations by disclosing information about criminal schemes, providing pertinent evidence, and testifying truthfully in both investigations and legal proceedings. They must attend hearings at relevant authorities' offices, such as the Public Prosecutor's Office or the Federal Police, to participate in activities like document reviews, person identification, and giving testimony. In addition, the cooperator must submit any documents, records, or other materials that may help clarify the criminal activities being investigated and must refrain from engaging in any criminal conduct during the cooperation.[283]

The cooperator must also promptly inform the Public Prosecutor's Office if approached by members of the criminal organizations under investigation. To ensure thorough examination of digital evidence, they must provide access credentials, such as passwords and account details, for devices and accounts linked to the criminal conduct. They are expected to cooperate fully with all relevant authorities, including international counterparts, to aid in the ongoing investigations. Finally, the cooperator must deliver testimony in open court, where they will be subject to cross-examination, ensuring that the legal process remains transparent, and accountable.[284]

As previously noted, it is important to highlight that Law 12.850/2013 does not grant prosecutors exclusive authority to execute cooperation agreements. The law also allows police officers to formalize such agreements independently, without requiring the approval of the prosecutor's office.[285] Once the cooperation agreement is signed by both parties, it does not yet have any legal validity, as it still requires the homologation[286] of the agreement by the judge.[287]

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[281] VINICIUS GOMES DE VASCONCELLOS, COLABORAÇÃO PREMIADA: NO PROCESSO PENAL [COOPERATION AGREEMENTS: IN CRIMINAL PROCEEDINGS] 375-76 (5th ed. 2023) (Braz.).

[282] *See* Cordeiro, *supra* note 110, at 53-54.

[283] *See, e.g.*, Petition No. 7.003/DF, *supra* note 152, at 2; S.T.F., Petição No. 6.138/DF, Relator: Min. Teori Zavascki, 24.05.2016, D.J.e, at 6 (Braz.) [hereinafter Petition No. 6.138/DF].

[284] *See generally* Petition No. 7.003/DF, *supra* note 152.

[285] Law No. 12.850, *supra* note 136.

[286] In Brazilian law, judicial homologation of a cooperation agreement is the judge's approval of a deal between the defendant and the Public Prosecutor's Office, ensuring it meets legal standards and is voluntarily entered into before becoming legally binding. Rachel Brewster & Andres Ortiz, *Never Waste a Crisis: Anti-Corruption Reforms in South America*, *in* THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW 106, 131 (Régis Bismuth et al. eds., 2021) (permitting defendants to enter cooperation agreements with prosecutors, approved by a judge after review for legality).

[287] *See, e.g.*, S.T.F., Petição No. 7.509/DF, Relator: Min. Edson Fachin, 03.04.2018, D.J.e,

The homologation does not imply the judge has assessed the cooperator's statements as credible or truthful, nor does it permit the court to make a value judgment on the information provided or evaluate the appropriateness of the agreement.[288] As noted by Justice of the Supreme Court Dias Toffoli in his opinion, this homologation merely functions as a procedural step to grant efficacy to the cooperation agreement. Without judicial homologation, the agreement may exist and be considered valid, but it will not produce legal effects, as it lacks the enforceability necessary to give effect to the parties' intended obligations.[289]

In contrast to the U.S. criminal justice system, judicial oversight plays a central role in this process. The judge is tasked with ensuring the regularity and legality of the agreement, evaluating the appropriateness of the negotiated benefits, verifying the alignment of the cooperation's outcomes, and, ultimately, confirming the voluntariness of the defendant's consent.[290] Once the cooperation agreement is homologated, conferring it with legal efficacy, its terms will be reviewed after the trial during the case's adjudication to determine whether the cooperator has fulfilled the obligations set forth in the agreement.[291] This review aims to determine whether the corresponding reward sanction should be granted.[292]

Therefore, judicial oversight, through the process of homologation, serves to ensure that any agreements containing illegal or unconstitutional provisions are not incorporated into the contract between the parties. Additionally, it provides judicial confirmation of the rights of the cooperators, thereby enhancing legal certainty and curtailing the discretionary authority of prosecutors. At the same time, it serves as a deterrent against any attempts by the cooperators to modify, in court, the obligations that were previously agreed upon in the contract or to

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14.05.2018, 1, 1(Braz.).

[288] S.T.J., Recurso em HC No. 119.555/SC, Relator: Min. Sebastião Reis Júnior, 26.11.2019, D.J.e, 09.12.2019, 1, 1, 4 (Braz.); S.T.J., Rcl. No. 31.629/PR, Relator: Min. Nancy Andrighi, 20.09.2017, D.J.e, 28.09.2017, 1, 1 (Braz.)

[289] Habeas Corpus No. 127.483/PR, *supra* note 138, at 2-4. The Sixth Panel of the Superior Court of Justice ("S.T.J") , under the rapporteurship of Justice Rogerio Schietti, held that an *apelação* (*appeal*) is the appropriate remedy to challenge a judge's refusal to homologate a cooperation agreement. *Da Colaboração Premiada II* [*On Cooperation Agreements II*], S.T.J. (Jun. 17, 2022) (Braz.), https://www.stj.jus.br/docs_internet/jurisprudencia/jurisprudenciaemteses/Jurisprudencia%20em%20Teses%20194%20-%20Da%20Colaboracao%20Premiada%20II.pdf [https://perma.cc/2H36-NCYK]. In the absence of express legal regulation on the matter, the court applied a systematic interpretation of procedural law to uphold due process and ensure the availability of appellate review. *See* S.T.J., REsp No. 1.834.215, Relator: Min. Rogerio Schietti Cruz, 27.10.2020, D.J.e, 12.11.2020 (Braz.).

[290] Law No. 12.850, *supra* note 136, art. 4, § 7.

[291] Rodrigo Capez, *A Sindicabilidade do Acordo de Colaboração Premiada e as Modificações do Pacote Anticrime (Lei nº 13.964/19)* [*The Judicial Reviewability of Plea Bargaining Agreements and the Modifications Introduced by the Anti-Crime Package (Law No. 13.964/19)*], *in* JURISPRUDÊNCIA DO STF COMENTADA [STF JURISPRUDENCE WITH COMMENTARY] 197 (2021) (Braz.).

[292] Direct Action of Unconstitutionality No. 5.508/DF, *supra* note 153, at 1-2.

challenge its legality. Moreover, the Superior Court of Justice, in a *per curiam* decision, held that an individual implicated in a cooperation agreement has the right to access the recordings of both the negotiations leading to the agreement and the hearing in which the agreement was homologated by the judge.[293] This enables the third-party implicated to verify not only the legality and procedural regularity of the cooperation agreement, but also the voluntariness of the cooperator in executing it.

However, the judge's homologation of the agreement, by conferring legal efficacy to it, may produce unintended consequences, notably diminishing the prosecutor's leverage over the cooperator. In other words, by providing legal certainty through homologation, the cooperator is only bound to fulfill the precise terms of the contract, thereby shielding them from any excessive inducement by the prosecutor to elicit additional cooperation. In practical terms, this may lead to a diminished level of cooperation from the cooperator as the case progresses, especially during the trial phase when they are required to testify in court.

Furthermore, if the prosecutor fails to conduct a thorough assessment during the negotiation stage and enters into a flawed agreement, they will have limited control over the cooperator's actions during the case. This was evident during Operation Car Wash, where cooperators entered into agreements with federal prosecutors early in the investigation, which were subsequently homologated by the reporting judge of the Supreme Court.[294] However, when the Second Chamber of the Supreme Court considered whether to refer the case for trial, it ultimately declined, citing the insufficiency of the corroborating evidence provided by the cooperators.[295] As a result, while the cooperators benefited from their agreements, the accused individuals were able to avoid punishment.

In sum, the interplay between the cooperator's rights and the public interest in cooperation agreements presents a delicate balancing act. Judicial oversight through homologation serves to protect both the cooperator and the integrity of the legal process, ensuring fairness, transparency, and accountability. However, this oversight also carries risks, including reduced prosecutorial leverage and the potential for insufficient or unbalanced agreements. As such, while the system offers important safeguards, it also requires careful consideration of how cooperation agreements are negotiated and enforced, in order to ensure that they ultimately serve the public interest and contribute to effective justice.

It is crucial to emphasize that, prior to judicial homologation, the prospective cooperator retains the right to withdraw.[296] In such an event, any self-incriminatory evidence provided by the would-be cooperator shall not be

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[293] S.T.J., REsp No. 1.954.842/RJ, Relator: Min. Rogerio Schietti Cruz, 20.05.2024, D.J.e, 23.05.2024, 1, 1 (Braz.).

[294] Marcos Zilli, *Plea Agreements in Brazilian Law: The Operation Car Wash Experience*, *in* LESSONS OF OPERATION CAR WASH 68, 69 (Fabio Ramazzini Bechara & Paulo C. Goldschmidt eds., 2020).

[295] *See, e.g.*, S.T.F., Inquérito No. 3.985/DF, Relator: Edson Fachin, 06.09.2024, D.J.e, 09.09.2024 (Braz.).

[296] Law No. 12.850, *supra* note 136, art. 4 § 10.

admissible solely to their detriment.[297] However, once judicial homologation has been granted, the cooperation agreement may only be revoked, which, depending on the specific circumstances, could result in the forfeiture of any benefits that had previously been conferred to the cooperator.[298] Such revocation may be initiated by the state, represented by its prosecutors or the police chief.[299] The prosecution may only seek revocation of the agreement if the cooperator fails to comply with the terms that were judicially homologated.[300]

In the absence of new evidence showing valid grounds for revocation, the prosecution is barred from arbitrarily revisiting or altering a legitimately executed and court-homologated agreement based on the information available at the time it was made.[301] In fact, Law 12.850/2013 addresses the potential revocation of the agreement in two instances: first, in Section 17 of Article 4, which provides that the homologated agreement may be revoked if the cooperator deliberately omits facts relevant to the cooperation; and second, in Section 18 of the same Article, which allows for revocation if the cooperator fails to cease their involvement in illicit activities related to the subject matter of the cooperation.

In Brazil, two high-profile cases have brought up the question of whether a cooperation agreement can be revoked. The first case pertains to cooperator Sandra Inês, the first appellate judge in Brazil to enter into a cooperation agreement as a defendant.[302] The Justice Og Fernandes of the Superior Court of Justice remarked that, after executing the agreement and receiving initial benefits, such as the modification of their pre-trial detention conditions, Sandra Inês and her son "'ceased to effectively cooperate with public authorities in the investigation of the reported facts' and demonstrated 'unjustified resistance'" in fulfilling their agreed-upon obligations.[303] According to the court's ruling, the evidence submitted by both the judge and her son remains admissible and can be utilized against them.[304] As a result of the revocation, both individuals forfeited the benefits they had secured, including any amounts already paid in fines.[305]

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[297] *Id.*

[298] VASCONCELLOS, *supra* note 281, at 375-76; *see* Law No. 12.850, *supra* note 136, art. 4 §§ 17-18.

[299] *See* Law No. 12.850, *supra* note 136, art. 4 §§ 17-18.

[300] *See* VASCONCELLOS, *supra* note 281, at 375.

[301] *Id.*

[302] Rayssa Motta, *Ministro do STJ Rescinde Acordo de Delação de Desembargadora na Operação Faroeste* [*STJ Minister Rescinds Plea Bargain Agreement of Judge in Operation Faroeste*], TERRA (Nov. 17, 2024, 4:16 PM) (Braz.), https://www.terra.com.br/noticias/brasil/politica/ministro-do-stj-rescinde-acordo-de-delacao-de-desembargadora-na-operacao-faroeste,badd0510a68a1a9c700f8b5cf20eea8cbnhynj3k.html [https://perma.cc/RXH6-FZZE].

[303] *Id.*

[304] *Id.*

[305] Rayssa Motta, *STJ Rescinde Delação de Desembargadora da BA* [*STJ Rescinds Plea Bargain of Judge from Bahia*], O ESTADO DE S. PAULO (Nov. 18, 2024) (Braz.),

The second case involves the billionaire Batista brothers.[306] According to Rodrigo Janot, the Attorney General, they hired prosecutor Marcelo Miller as their lawyer while they were negotiating a plea agreement.[307] Janot contends that by bringing on a member of the *Lava Jato* task force—who was actively involved in the investigation against them—the Batistas were deliberately trying to circumvent the law.[308] This conduct is considered particularly serious, as instead of demonstrating a genuine effort to atone for their past crimes, the Batistas are accused of perpetuating their illegal behavior by exploiting someone within the Public Prosecutor's Office to further their own interests.[309]

Conversely, there are instances where the breach of an agreement may be attributed to the prosecutors, which, in turn, violates the foundational principles of legality. In this context, it is instructive to refer to a passage from the opinion of Justice Luís Roberto Barroso of the Supreme Court, where he cautioned that when the State enters into a cooperation agreement through its prosecutorial authorities and subsequently fails to uphold its promises, it infringes constitutional duties of good faith and legal certainty, thereby jeopardizing the legitimacy of the cooperation mechanism.[310] In essence, rescinding the judicial approval of a cooperation agreement should not eliminate the benefits owed to a defendant who has fulfilled their obligations in good faith.[311] As a result, in such cases, it is essential to impose stringent sanctions for abusive prosecutorial

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https://www2.senado.gov.br/bdsf/handle/id/662108 [https://perma.cc/U9WW-P8BD].

306 Reuters, *Brazil Police Detain JBS CEO Batista on Suspicion of Insider Trading*, VOA NEWS (Sept. 13, 2017, 10:28 AM), https://www.voanews.com/a/brazil-police-detain-jbs-ceo-batista-on-suspicion-of-insider-trading/4027059.html [https://perma.cc/H55G-MN8P].

307 Laryssa Borges, *MPF Diz Que Miller Ajudou Delatores Quando Acordo era Negociado* [*Federal Prosecutors Say Miller Helped Informants When the Plea Bargain was Being Negotiated*], VEJA (Sept. 5, 2017, 11:55 AM) (Braz.), https://veja.abril.com.br/brasil/miller-ajudou-delatores-da-jbs-quando-acordo-ainda-era-negociado/ [https://perma.cc/8ZUU-GM2P].

308 Teo Cury, *Marcello Miller, Joesley Batista e Outros Dois Viram Réus por Corrupção* [*Marcello Miller, Joesley Batista, and Two Others Were Indicted for Corruption*], UOL (June 28, 2018, 3:38 PM) (Braz.), https://noticias.uol.com.br/ultimas-noticias/agencia-estado/2018/06/28/marcello-miller-joesley-batista-e-outros-dois-viram-reus-por-corrupcao.htm [https://perma.cc/FEM5-3WMY].

309 Petition No. 7.003/DF, *supra* note 152, at 30. In September 2019, the Federal Regional Court of the 1st Region ("TRF-1") granted a writ of habeas corpus, thereby terminating the criminal proceedings against Marcelo Miller. *TRF-1 Tranca Ação Penal Contra Ex-Procurador Marcello Miller* [*TRF-1 Dismisses Criminal Case Against Former Prosecutor Marcello Miller*], MIGALHAS (Sept. 18, 2019, 9:14 AM) (Braz.), https://www.migalhas.com.br/quentes/311212/trf-1-tranca-acao-penal-contra-ex-procurador-marcello-miller [https://perma.cc/V9RT-QRM9]. The court found that Miller's conduct did not constitute the crime of corruption. *Id.* In response, the Federal Public Ministry appealed in an effort to reinstate the charges. However, the Sixth Panel of the Superior Court of Justice unanimously rejected the appeal, concluding that it lacked merit. *See* S.T.J., REsp No. 1.883.187/RJ, Realtor: Min. Antonio Saldanha Palheiro, 06.12.2022, D.J.e, 14.12.2022, 1, 2 (Braz.).

310 S.T.F., Questão de Ordem na Petição No. 7.074/DF [QO na Petição No. 7074/DF], Relator: Min. Edson Fachin, 06.06.2017, D.J.e, 04.05.2018, 278 (Braz.).

311 *Id.*

conduct, precluding the use of the defendant's statements and any evidence they may have provided against them, and ensuring the reward is granted if the cooperation was indeed sincere.[312]

Therefore, the revocation of a cooperation agreement may be prompted by either the breach of obligations by the State or faults attributable to the cooperating individual, requiring careful consideration of both sides. On one hand, the disloyalty of the State in failing to fulfill its obligations undermines trust in the cooperation system, and the cooperating individual should not be prejudiced by such failure, especially when their cooperation is in good faith. On the other hand, the possibility of revocation is also justified when the cooperator fails to meet their obligations appropriately, such as in cases of omissions, false statements, or bad-faith behavior, which weakens the cooperation mechanism and necessitates sanctions to preserve the integrity of the agreement, with the possibility that any evidence provided could be used against the defendant. Thus, it is essential that the revocation be guided by a thorough analysis, considering both the loyalty and sincerity of the cooperator as well as the fulfillment of the State's obligations, with a view to ensuring fairness and the effectiveness of the criminal justice process.

C. Substantial Assistance

In the context of both the U.S. and Brazilian criminal justice systems, it is essential to understand that substantial assistance is a key element of the agreement. Simply put, without substantial assistance, the cooperator does not receive the expected benefit, and the government is also unable to achieve its investigative goal of uncovering new facts and/or suspects.[313] It can be confidently asserted that there are no notable differences between the two systems when it comes to the concept. In fact, Brazilian law employs the term who has "effectively collaborated" in reference to the cooperating party, although it is important to highlight that both concepts are legally regarded as synonymous in their substantive meaning. Conversely, it is equally relevant to observe that the formalization of substantial assistance, its effect on sentence reduction, and the leverage exerted by prosecutors over defendants differ significantly between the two legal systems.

In the U.S. system, substantial assistance refers to significant help provided by a defendant. However, the receipt of a sentence reduction depends on the usefulness and relevance of the assistance provided, and is not automatically granted to all who cooperate.[314] This indicates that prosecutors distinguish between merely sharing information and offering details that genuinely

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[312] VASCONCELLOS, *supra* note 281, at 377-78, 383.

[313] *See* FITZGERALD, *supra* note 163, at 112.

[314] U.S. SENT'G GUIDELINES MANUAL § 5K1.1(a) (U.S. SENT'G COMM'N 2011) [hereinafter USGM 2011].

contribute to the investigation,[315] as opposed to empty claims or unsubstantiated allegations about another individual involved in criminal activity.[316]

Substantial assistance, in this context, encompasses actions such as wearing a wire, operating undercover on behalf of government agents, gathering critical evidence that may implicate a co-conspirator, and providing testimony against another criminal defendant.[317] These actions, in contrast to casual cooperation, are pivotal in establishing the level of assistance required. Nonetheless, the consistent application of policies regarding what constitutes substantial assistance remains unresolved. Policies may vary between districts, depending on the jurisdiction and the prosecutor involved, leading to different treatments of a defendant in terms of sentence reduction based on the assistance provided.[318] In some jurisdictions, for example, a defendant's self-incriminating information is not considered sufficient for a sentence reduction, whereas in others, it may be considered, depending on local policy.[319]

Notwithstanding the inherent subjectivity that accompanies the term "substantial assistance," it is crucial to emphasize that, within the federal system, cooperation with the government can indeed result in a reduced sentence, even for serious offenses such as drug trafficking, child pornography, and murder. The federal system incentivizes such cooperation by enabling the government to file a motion requesting a sentence reduction for defendants who provide "substantial assistance."[320] For instance, a defendant charged with distributing twenty-eight grams of crack cocaine, a crime carrying a mandatory minimum sentence of five years, may secure a reduced sentence upon providing substantial assistance to law enforcement.[321]

Furthermore, the USSG offers another pathway for sentence reduction if the government files a motion asserting that the defendant has assisted in the prosecution or investigation of another individual.[322] In general, when the government determines that a defendant has provided sufficient cooperation, the prosecutor will file a motion, commonly referred to as a "5K" motion, to formally recognize the defendant's substantial assistance.[323] The court will then consider this motion when deciding whether to impose a sentence below the range prescribed by the USSG.[324] Additionally, even in the absence of a 5K motion from the government, defendants who have cooperated may still present evidence of their assistance directly to the judge in support of a potential

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[315] LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE, 5 U.S. SENT'G COMM'N (Jan. 1998), at 10.

[316] *See* FITZGERALD, *supra* note 163, at 115.

[317] *Id.*

[318] *See* MAXFIELD & KRAMER, *supra* note 315, at 8.

[319] *Id.* at 9.

[320] 18 U.S.C. § 3553(e).

[321] *See* 21 U.S.C. § 841(b).

[322] USGM 2011, *supra* note 314.

[323] NATAPOFF, *supra* note 16, at 55.

[324] *Id.*

sentence reduction.[325] As will be duly observed, it is important to highlight that the formal acknowledgment of substantial assistance—whether via motion or directly through the defense—constitutes a significant difference between the American and Brazilian legal systems.

The most common form, however, is through a motion filed by the prosecutors, which carries a high degree of discretion.[326] In *United States v. Torres*,[327] for example, the court emphasized that the determination of whether a defendant has provided "substantial assistance" lies primarily within the prosecutor's discretion.[328] The prosecutor defined "substantial assistance" as requiring an arrest and conviction, a common standard. This discretion makes it difficult for defendants to challenge a prosecutor's refusal to file a downward departure motion.[329] In *Wade v. United States*,[330] the Court held that a prosecutor's discretion regarding substantial assistance motions is comparable to the discretion exercised over other prosecutorial decisions.[331] However, the Court concluded that this discretion is subject to judicial review in narrowly defined circumstances, such as instances involving racial or religious bias.[332]

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[325] *Id.*; *see* United States v. Doe, 398 F.3d 1254, 1261 (10th Cir. 2005).

[326] *See* Ross Galin, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245, 1254 (2000); *see generally* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994) (criticizing extent of discretion allowed to prosecutors by Section 5K1.1).

[327] 33 F.3d 130, 132-33 (1st Cir. 1994).

[328] *Id.* at 133 (noting the defendant did not challenge the government's decision on constitutional grounds, and the court recognized the broad scope of prosecutorial authority in evaluating the sufficiency of the assistance provided).

[329] *See* Galin, *supra* note 326, at 1256.

[330] 504 U.S. 181, 185-86 (1992).

[331] *Id.* at 185.

[332] *Id.* at 185-86. In *United States v. Rexach*, the Second Circuit addressed the central question of what standard courts should apply when a prosecutor refuses to file a motion for a sentence reduction based on a defendant's cooperation under Section 5K1.1. 896 F.2d 710, 711 (2d Cir. 1990). Rexach had entered into a cooperation agreement contingent upon the prosecutor's good-faith determination that he had provided substantial assistance. *Id.* at 712. Although Rexach initially offered useful information, the government later found his efforts insufficient, citing unreliability, lack of follow-through, and failure to stay in contact with authorities. *Id.* at 712-13. When the government declined to file the motion, Rexach sought specific performance, alleging breach of contract. The court held that, under principles of contract law, the prosecutor's evaluation is largely subjective—so long as the dissatisfaction is honest, it need not be objectively reasonable. *Id.* at 713-14. Judicial review is only available where a formal cooperation agreement exists, and the defendant can show that the prosecutor's refusal was made in bad faith or was motivated by unconstitutional factors. *Id.* The court emphasized that prosecutorial discretion in this context is entitled to substantial deference, akin to other core prosecutorial functions, though it is constrained by an implied duty of good faith. *See id.* Therefore, unless the defendant can rebut the presumption of good faith with clear evidence of arbitrariness or vindictiveness, the prosecutor's decision stands. *See id.*; Bennett L. Gershman, *The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction*, 5 CRIM. JUST. 2, 6-7 (1990).

Thus, a perilous game unfolds, where the prosecutor endeavors to extract maximum benefit from the cooperating defendant, while simultaneously, a palpable risk of excess in professional conduct looms, leaving the defendant vulnerable, without any assurance that their cooperation will ultimately be rewarded. To mitigate risks, the government conditions a cooperator's sentencing benefit on the substantial performance of their obligations, typically requiring them to plead guilty and testify against all implicated parties before sentencing occurs.[333] Prosecutors use this delay to maintain "maximum leverage" over the cooperator and to limit defense counsel's ability to highlight the potential sentencing benefits.[334] These agreements allow prosecutors to assess the "value" of the cooperator's assistance post-testimony, determining whether to file a substantial assistance motion.[335] While the cooperator's duties are clear (*e.g.*, truthful testimony), the prosecutor's obligations are open-ended, allowing discretion in deciding what constitutes "substantial assistance," thus making it nearly impossible for the prosecutor to breach the agreement.[336] Indeed, the cooperator finds himself undoubtedly in the hands of the prosecutor.

At this juncture, the principal rationale for the leverage exercised over the cooperator is, unequivocally, to extract the truth from their testimony, thereby ensuring that the assistance rendered is genuinely substantial and that the cooperator is rightfully entitled to the benefit. In the final analysis, there is no substantial assistance not based on the truth. In this vein, there exists a significant risk that a cooperator, in their desire for greater leniency, may independently try to be helpful to a prosecutor, thus complicating the task of distinguishing between the truth and what could be considered mere "icing"—exaggerations or fabrications intended to appear more favorable.[337] This sentiment highlights the crucial importance of corroboration in ensuring the accuracy of a cooperator's testimony.[338] Indeed, as former U.S Attorney Preet Bharara emphasized:

> Cooperators can be your ticket but also your greatest baggage. They can lie, make things up, repulse the jury. That's why you must painstakingly corroborate what they say even while you question and challenge all of it. The truthfulness of the testimony must be vetted, every stitch of it corroborated. If the cooperator says it was a rainy day, we pull the weather report. We have all been fed the cautionary tales of cooperator self-dealing and double-crossing.[339]

However, it is also important to say that while the government's desire to secure cooperators in these cases is strong, corroborating an informant's testimony remains a significant challenge. Even with seemingly objective

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[333] United States v. Mejia, 55 F.4th 1, 5-8 (1st Cir. 2022); Gershman, *supra* note 332.

[334] Knizhnik, *supra* note 30, at 1743-44.

[335] *Id.*

[336] *Id.*

[337] Richman, *Cooperating Defendants*, *supra* note 247, at 293.

[338] Yaroshefsky, *supra* note 254, at 932.

[339] *See* BHARARA, *supra* note 59, at 95.

evidence, such as wiretaps or undercover recordings, the informant's role is indispensable in interpreting the nuances of the interaction and providing a coherent narrative.[340] Nonetheless, despite the presence of corroborative evidence, areas exist where cooperators might still manipulate or embellish their accounts, posing risks to the reliability of their testimony.[341] Thus, while corroboration remains essential, it does not wholly resolve the inherent uncertainties associated with the use of cooperating witnesses, particularly in the context of jailhouse informants, whose testimony is often viewed with skepticism due to their motivations for sentence reductions[342] and who, due to their lack of involvement in the defendant's prior criminal conduct, present distinct credibility challenges that require careful scrutiny.

As routine practice, authorities seek independent confirmation of information provided by jailhouse informants to assess their trustworthiness, an assessment that directly affects prosecutorial decisions and trial planning.[343] The primary challenge arises from the fact that, in certain instances, a single informant may provide the central or sole piece of evidence in a case, which is subsequently used to bolster other equally unreliable forensic evidence, thereby creating an illusion of greater strength than the evidence truly possesses.[344] Moreover, informants frequently corroborate one another's fabrications, thereby lending a veneer of plausibility to their false testimonies, which in turn undermines the integrity of the evidence presented.[345]

For these reasons, it is necessary to recognize that corroboration requirements alone are insufficient to prevent the risks inherent in jailhouse snitch testimony.[346] While these requirements are essential, as corroboration often serves as a threshold issue for judges, they may fail to address the fundamental unreliability of such testimony.[347] To effectively counteract these risks, additional safeguards—"such as written disclosures, reliability hearings, and jury instructions"—are necessary to ensure that the corroboration requirement fulfills its intended purpose.[348] Hence, it is evident that, in the context of

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[340] Knizhnik, *supra* note 30, at 1748.

[341] *Id.*

[342] *See* THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 1, 17 (2007), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf [https://perma.cc/V7U8-YJZH].

[343] *Id.* at 2.

[344] *See* NATAPOFF, *supra* note 16, at 10.

[345] *See, e.g.*, *id.* at 5, 10.

[346] *See* Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1418-19 (2014) (arguing that the current corroboration rules offer limited protection against wrongful convictions in cases involving jailhouse informants, such that prosecutors proceed with cases even when the evidence is minimal, allowing the informant's testimony to be admitted despite its inherent weakness).

[347] THE JUSTICE PROJECT, *supra* note 342, at 5.

[348] *Id.*; C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1, 14 (2003) (emphasizing the need for courts to

jailhouse informants, while their testimony does not constitute independent evidence, the risks of wrongful convictions or injustices can be mitigated when such testimony is properly corroborated and accompanied by appropriate safeguards. In this regard, the reliability of the informant's testimony is a fundamental and decisive element in determining substantial assistance, necessitating rigorous verification to ensure both its credibility and integrity within the judicial process.

As a final observation, it must be noted that Rule 35 of the Federal Rules of Criminal Procedure allows for the reduction of a defendant's sentence after sentencing, as a reward for substantial assistance provided to the government.[349] This provision permits a sentence reduction within one year of sentencing if the defendant aids in the investigation or prosecution of another person.[350] If the assistance occurs after one year, a reduction may still be granted under specific conditions, such as when new, previously unknown information becomes useful or when the usefulness of the information could not have been anticipated at the time of sentencing.[351]

Thus, Rule 35 provides an incentive for defendants to cooperate with the government during incarceration in hopes of securing a reduced sentence, a mechanism that accounted for approximately 15.8% of all substantial assistance departures between fiscal years 2009 and 2014.[352] While Rule 35 plays a significant role in the federal sentencing system, its application is more typically seen in post-conviction cooperation, particularly when defendants assist in the prosecution of co-conspirators.[353] Given that Rule 35 is only available for one year following conviction, its use is generally more limited in cases involving jailhouse informants seeking sentence reductions. Despite the potential for fabricated or unreliable information from those seeking leniency, informant testimony continues to play a strategically important role in the federal

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mandate thorough investigations of informants before accepting their testimony and maintain rigorous oversight of prosecutors' decisions to use such testimony, with elevated prosecutorial standards operationalized through specific rules regarding the handling of informant testimony).

[349] FED. R. CRIM. P. 35(b)(1).

[350] *Id.*

[351] *Id.* at 35(b)(2).

[352] Between fiscal years 2009 and 2014, sentence reductions granted under Rule 35(b) declined by 23%, whereas departures based on substantial assistance under Section 5K1.1 experienced a more modest decrease of 3.8%. U.S. SENT'G COMM'N, THE USE OF FEDERAL RULE OF CRIMINAL PROCEDURE 35(B) 8, 35 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/Rule35b.pdf [https://perma.cc/3Y8Z-R9JP]. During the same period, the overall federal sentencing caseload fell by 6.8%. *Id* at 8. In fiscal year 2010, 11.5% of defendants received a substantial assistance departure at the time of their original sentencing. *Id.* However, when subsequent Rule 35(b) reductions are taken into account, the total proportion of defendants who ultimately received a sentence reduction for assisting the government increased to 13.0%. *Id.* at 8-9. These findings underscore the important, ongoing role of Rule 35(b) in incentivizing and acknowledging post-sentencing cooperation—often years after the original conviction. *Id.* at 9.

[353] *Id.* at 1-2.

sentencing system. It is widely recognized by defendants, defense counsel, and prosecutors for its significant influence on sentencing outcomes.[354] The level of cooperation, especially when useful information is provided to the government, often determines the degree of leniency granted, making such testimony a powerful and deeply embedded tool within the broader structure of the federal criminal justice process.[355]

In Brazil, as previously noted, despite the legal terminology of "effective collaboration," there exists no substantive distinction between this and what is commonly understood as "substantial assistance." The Supreme Court has emphasized that cooperation is considered effective only when it yields practical investigative benefits, such as identifying other participants in criminal activity, facilitating the recovery of criminal proceeds, or assisting in locating victims.[356] Therefore, the cooperation must yield a useful result. It is not a prerequisite that cooperation results in pretrial detention or a conviction; rather, the expectation is that it provides robust and persuasive evidence that can comprehensively expose the crime and fully identify its perpetrators.[357]

When assessing whether one cooperator's conduct was effective under the scope of the Drug Law (No. 11.343/2006), the Supreme Court, aligning with the decision of the Federal Regional Court of the 3rd Region, denied the application of the benefit, reasoning the following:

> [The] defendant limited himself to providing vague statements, indicating only the first names of the alleged recruiters, and it is likely that the information he possessed did not correspond to the truth . . . . [The] information provided did not yield any concrete benefit in terms of effectively locating the members of the criminal organization that financed the offense.[358]

Consequently, it is insufficient for a cooperator merely to confess their involvement in the crime. Even if they provide extensive details of the illicit activity and implicate their accomplices, they will only be entitled to the benefits of an agreement if their information is genuinely effective in advancing the resolution of the crime.[359] It is essential that the government conduct a thorough evaluation of the information it is acquiring, to ensure that the consequences of any flawed assessment are not unjustly imposed on the cooperator, who must not be penalized by the denial of the benefit due to such an error. As a result, the judge must carefully scrutinize whether the government has made an erroneous assessment of the information provided or whether the cooperator has genuinely failed to fulfill the terms of effective cooperation.

Therefore, if the cooperation is deemed effective and yields the intended results, the cooperator acquires a subjective right to the benefits outlined in the

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354 *See* NATAPOFF, *supra* note 16, at 56.

355 *See id.*

356 Habeas Corpus No. 127.483/PR, *supra* note 138, at 28.

357 *See id.*

358 S.T.F., HC No. 119.976/SP, Realtor: Min. Luiz Fux, 25.02.2014, D.J.e, 18.03.2014, 5 (Braz.) (translated quote from original Portuguese source).

359 *Id.*

agreement.[360] Should the cooperator fully fulfill their obligations, this right becomes enforceable, allowing him or her to demand the benefit through judicial means.[361] This includes the right to appeal any judgment that fails to recognize the benefit or applies it in a manner inconsistent with the terms of the judicially homologated agreement, under the risk of infringing upon the principles of legal certainty and the protection of legitimate expectations.[362] Consequently, both impose an unequivocal obligation on the state to uphold the commitment made under the cooperation agreement, ensuring the grant of the stipulated benefit as a legitimate counterpart to the cooperator's performance of their obligations.[363]

Unlike the American federal system, Brazilian law does not provide for a motion filed by the government requesting a reduction in the sentence of a defendant who has provided substantial assistance. In the Brazilian context, this right is inherently secured at the moment the defendant enters into a cooperation agreement, which is subsequently judicially homologated.[364] In practice, after the agreement is signed and homologated, the cooperator's entitlement to benefits does not depend on the government's subjective evaluation of their performance. This means that, upon homologating the agreement, the judge is required to adhere to the terms negotiated between the cooperating party and the government.[365] Consequently, provided that all the conditions stipulated in the cooperation agreement are fully complied with, the judge is legally compelled to grant the benefits outlined therein, to which they are irrevocably bound by the decision of homologation.[366]

While the government, prior to the judgment, may request that the benefits be denied, the decision rests solely in the court's hands, which has the exclusive responsibility to determine whether the cooperator has fulfilled their obligations under the agreement.[367] And herein lies a significant distinction between the Brazilian and American systems: in the U.S., the prosecutor wields considerable leverage over the cooperator, influencing the sentencing outcome, through the

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[360] Habeas Corpus 127.483/PR, *supra* note 138, at 2.

[361] *Id.* at 52.

[362] *Id.*

[363] *Id.* at 54.

[364] *See* Law No. 12.850, *supra* note 136, art. 4.

[365] Habeas Corpus No. 127.483/PR, *supra* note 138, at 12.

[366] VASCONCELLOS, *supra* note 281, at. 302-03. The Brazilian Supreme Court emphasized that individuals who enter into cooperation agreements accept considerable personal and familial risks, consciously waiving self-preservation instincts. *See* S.T.F., Habeas Corpus No. 99.736/DF, Relator: Min. Ayres Britto, 27.04.2010, D.J.e, 21.05.2010 (Braz.) (recognizing that cooperating defendants voluntarily expose themselves and their families to heightened risks as a consequence of their cooperation). The Court held that the State must act fairly and in good faith toward such individuals. *See id.* (holding that the denial of agreed-upon benefits or the imposition of unjustified obstacles violates the State's duty of good faith toward cooperators). Denying sentence reductions or imposing undue barriers violates the constitutional principle of morality under Article 37 of the Brazilian Constitution, which requires public officials to act ethically and with integrity, especially when dealing with cooperators exposed to significant threats due to their cooperation. *See* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 37 (Braz.).

[367] Law No. 12.850, *supra* note 136, art. 4. § 7; *See* BITTAR, *supra* note 275, at 197-98.

filing of a 5K motion. In contrast, Brazilian law does not grant the prosecutor such power. As a result, the government must carefully weigh all the corroborative evidence and circumstances presented by the cooperator before entering into a cooperation agreement, ensuring that the decision to cooperate is fully informed and justifiable in the eyes of the court. Thus, upon judicial homologation of the agreement, the requisite legal certainty is firmly established for the cooperator, thereby affording protection against any undue governmental pressures.

Within the Brazilian legal framework, the government is inherently constrained in its ability to exert full pressure on the cooperator. This limitation stems from the fact that the cooperator is legally only obligated to strictly comply with the terms of the signed and homologated cooperation agreement in order to secure the agreed-upon benefits. Due to this, the cooperator is not compelled to provide any information or corroborative evidence beyond what has been explicitly stipulated in the agreement, nor is there any expectation that they share information that falls outside the scope of the terms previously negotiated and formalized. Thus, it is clear that the government's opinion on the effectiveness of the cooperation, as presented in the final arguments before sentencing, is secondary. The responsibility to evaluate the effectiveness of the cooperation rests with the judge, who, if deems it appropriate, may reduce the sentence in accordance with the value and impact of the cooperation demonstrated throughout the course of the proceedings.[368] To sum up, upon the fulfillment of the terms of the cooperation agreement, the cooperator is entitled to the benefit, which is not a matter of judicial discretion but a legal obligation.[369]

While contractual safeguards are in place to shield the cooperator from being leaned on, such provisions cannot be construed as permitting a cursory or disengaged participation in the investigative process. It is crucial to note that mere provision of information regarding the criminal activity or identification of accomplices by the cooperator is insufficient; more importantly, the cooperator must present corroborative evidence that can substantiate the account provided. In Brazil, Article 4, Section 16, of Law 12.850/2013 imposes a crucial limitation on the use of a cooperator's statements within the criminal justice process. Specifically, it mandates that none of the following measures may be decreed or issued solely on the basis of the cooperator's testimony: (I) precautionary measures, whether real or personal;[370] (II) the acceptance of a criminal complaint or indictment;[371] and (III) a criminal conviction. This provision reflects the legislative intent to prevent the overreliance on a single source of evidence, emphasizing the necessity for corroborative elements to substantiate the cooperator's statements.[372]

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[368] *See, e.g.*, S.T.F., HC 129.877/RJ, Relator: Min. Marco Aurélio, 18.04.2017, D.J.e, 01.08.2017, 1, 3 (Braz.).

[369] VASCONCELOS, *supra* note 281, at 302-03.

[370] Law No. 12.850, *supra* note 136, art. 4. § 16.

[371] *Id.*

[372] *Id.*

In this vein, it is essential to underscore that for corroboration to hold legal value, it must be extrinsic in nature.[373] In practical terms, this means that the police, acting on the information provided by the cooperator, must engage in substantive investigative efforts, such as locating seized assets, identifying foreign bank accounts, demonstrating irregularities in wealth accumulation, conducting searches and seizures, and executing phone and electronic surveillance.[374] Additionally, cooperators themselves can play a direct role in assisting law enforcement and prosecutors, for instance, by wearing a wire or operating undercover on behalf of government authorities.[375]

In this context, as the Brazilian Supreme Court has affirmed, it is "insufficient for the element of confirmation of the cooperation to cooperation by another suspect, even if both contain consistent content. In the absence of extrinsic corroborative evidence, both lack probative value and legal significance."[376] Justice Celso de Mello has already stated categorically that "the State cannot use the so-called 'reciprocal or cross corroboration,' that is, it cannot impose a conviction on the defendant solely because there exists, against a defendant, testimony from a cooperating witness that has been confirmed only by other cooperating witnesses."[377] As a result, the practice of "cross-collaboration" or "reciprocal corroboration" is explicitly prohibited by the rulings of the Supreme Court,[378] highlighting a key divergence between the cooperation systems in Brazil and the U.S.[379]

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[373] Sebástian Borges de Albuquerque Mello & Rafaela Alban Cerqueira, *Limites da Renúncia a Direitos nos Acordos de Delação Premiada* [*Limits of Rights Resignation in Plea Bargain Agreements*], *in* 7 REVISTA ENTRE ASPAS [MAGAZINE IN QUOTES] 203, 207 (2020) (Braz.); *see, e.g.,* S.T.F., Ag. Reg. no RE Ordinário em HC No. 207.465/DF, Relator: Min. Roberto Barroso, 09.03.2022, D.J.e, 15.03.2022, at 8-9 (Braz.) [hereinafter Appeal Against Ordinary Decision in Habeas Corpus No. 207.465/DF].

[374] Mello & Cerqueira, *supra* note 373. Intrinsic corroborative elements, such as documents unilaterally created by a cooperator—including notes, informal accounting spreadsheets, or personal electronic agendas—lack any legal validity. Appeal Against Ordinary Decision in Habeas Corpus No. 207.465/DF, *supra* note 373.

[375] *See, e.g.,* S.T.F., Inquérito No. 4.215/DF, Relator: Min. Edson Fachin, 03.12.2019, D.J.e, 18.11.2020, 1, 127 (Braz.).

[376] Appeal Against Ordinary Decision in Habeas Corpus No. 207.465/DF, *supra* note 373 (translated quote from original document in Portuguese). It is important to highlight that the central issue with corroborative evidence lies not merely in its presence, but in its ability to substantively validate the cooperating witness's testimony regarding the defendant's actual criminal conduct, rather than merely confirming the witness's account without independently establishing the facts.

[377] S.T.F., Petição No. 5.700/DF, Relator: Min. Celso de Mello, 22.09.2015, D.J.e, 1, 7-8 (Braz.) [hereinafter Petition No. 5.700/DF] (translated quote from original document in Portuguese).

[378] See, e.g., S.T.F., Ag. Reg. na Rcl. No. 59.231/PR, Relator: Min. Gilmar Mendes, 09.04.2024, D.J.e, 03.06.2024, 1, 11 (Braz.); S.T.F., Inquérito No. 4.118/DF, Relator: Min. Edson Fachin, 08.05.2018, D.J.e, 1, 34 (Braz.); Petition No. 5.700/DF, supra note 377; Habeas Corpus No. 127.483/PR, supra note 138, 52-53 (Braz.).

[379] In the U.S., several states have enacted corroboration requirements for accomplice testimony, acknowledging its unreliability, and have begun extending similar safeguards to jailhouse informant testimony due to its heightened risk of fabrication. Illinois, for example,

Thus, extrinsic corroboration of a testimony must not rely on another testimony due to the high risk of judicial error, and in such cases, the focus must be on protecting liberty by opting to acquit a potentially guilty defendant rather than risk convicting an innocent one, even if cross-corroborated testimonies exist.[380] However, this does not suggest that cooperation is inadmissible, even in cases where the individual is in pre-trial detention. While the cooperation of detainees is permitted,[381] as previously discussed, cross-corroboration remains prohibited. At this point, it must be underscored that for any cooperation to attain legal and evidentiary legitimacy, the accompanying testimony must not only appear credible on its face but must also be firmly anchored in independent, reliable corroborative evidence—untainted by internal inconsistencies or any indicia of fabrication.

Last but not least, a comparative analysis of Rule 35 of the U.S. Federal Rules of Criminal Procedure and Article 3(I)[382] of Brazil's Law No. 12.850/2013

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permits courts to decertify capital cases resting solely on uncorroborated testimony from such sources. THE JUSTICE PROJECT, *supra* note 342, at 4. The California Commission on the Fair Administration of Justice has made comparable legislative recommendations. *Id.* Likewise, the American Bar Association has urged that no prosecution proceed based solely on uncorroborated jailhouse informant testimony. *Id.*

[380] Gustavo Badaró, *O Valor Probatório da Delação Premiada: Sobre o § 16 do Art. 4º da Lei nº 12.850/2013* [*The Evidentiary Value of Plea Bargaining: On § 16 of Article 4 of Law No. 12.850/2013*], REVISTA JURÍDICA CONSULEX, at 6 (2015) (Braz.), https://www.academia.edu/11467576/O_valor_probat%C3%B3rio_da_dela%C3%A7%C3%A3o_premida_sobre_o_16_do_art_4o_da_Lei_n_12850_2013 [https://perma.cc/YS5P-85MN].

[381] The permissibility of cooperation agreements involving incarcerated individuals remains the subject of substantial doctrinal and jurisprudential debate. Pursuant to Article 4 of Law No. 12,850/2013, valid cooperation requires that statements be rendered voluntarily. Law No. 12.850, *supra* note 136, art. 4 § 7. This provision has prompted critical inquiry into whether a detained individual—by virtue of their custodial status—can truly offer testimony free from coercion. Américo Bedê Freire Júnior & Willy Potrich da Silva Dezan**,** *Delação Premiada e Direitos Fundamentais do Sujeito Passivo da Persecução Penal a Partir da Regulamentação Constante na Lei 12.850/2013* [*State's Evidence and Fundamental Rights of the Passive Subject of Criminal Persecution as a Result of the Regulation Inserted in Law 12.850/2013*], 18 REVISTA ELETRÔNICA DE DIREITO PROCESSUAL 42, 59, 64 (2017) (Braz.). Prevailing legal interpretation holds that pre-trial detention is intended to preserve the integrity of criminal proceedings, not to exert pressure or induce cooperation. Adriano Martufi & Christina Peristeridou, *The Purposes of Pre-Trial Detention and the Quest for Alternatives*, 28 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 153, 154-55 (2020). Nonetheless, given the potential for abuse and the structural concerns it raises, Bill No. 4372/2016 is currently under consideration in the Chamber of Deputies; the proposed legislation would bar the judicial homologation of cooperation agreements entered into by defendants while in custody. *Projeto de Lei PL 4372/2016* [*Bill 4372/2016*], CÂMARA DOS DEPUTADOS (Feb. 16, 2016) (Braz.), https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2077165 [https://perma.cc/P7KJ-7GK5].

[382] Law No. 12.850, *supra* note 136, art. 3. At any stage of criminal proceedings, the following methods of evidence collection shall be allowed, in addition to any others already stipulated by law: "I – plea bargaining agreements; II – monitoring of electromagnetic signals, acoustic or optical; III – controlled response; IV – granting of access to phone and computer records, data contained in public or private databases, and commercial and electoral

reveals a significant convergence in their functional purpose: to incentivize defendant cooperation in the prosecution of complex and organized criminal activity. Despite this shared objective, the legal frameworks differ markedly in their procedural configurations and institutional safeguards. The American system authorizes post-sentencing reductions solely at the discretion of the prosecution, thereby centralizing decision-making power within the executive branch and limiting judicial oversight. Conversely, the Brazilian model permits cooperation at any stage of the criminal process, including post-sentencing, and requires judicial homologation of the agreement, thus embedding stronger procedural guarantees and a heightened commitment to due process. While both jurisdictions face persistent concerns over the reliability of informant testimony and the risk of strategic or coerced disclosures, these mechanisms have become structurally entrenched within their respective legal systems.

D. Sentence Reduction

As previously addressed, the U.S. federal sentencing framework grants judges the discretion to determine whether a downward departure from the guideline-recommended sentencing range is justified. This indicates that the judge is not legally obligated to grant the sentencing benefit, and, if inclined to do so, retains full discretion to determine the extent of the reduction.[383] Section 5K1.1(a) of the USSG outlines a framework that courts may use to determine the extent of a downward departure in sentencing based on a defendant's substantial assistance to authorities.

The provision identifies five non-exhaustive factors that guide judicial discretion in this context. First, the court considers the significance and utility of the defendant's cooperation, particularly in light of the government's assessment, which reflects the prosecutorial perspective on the impact of the assistance. Second, the court evaluates the truthfulness, completeness, and

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information; V – interception of telephone and computer communications, according to the terms of specific legislation; VI – removal of the right to financial, banking, and tax secrecy, pursuant to specific legislation; VII – police infiltration during the course of an investigation of a possible crime, under article 11; VIII – cooperation among federal, state, and municipal institutions and agencies in the search for evidence and information of interest for purposes of the criminal investigation or criminal trial." *Id.*

[383] United States v. Booker determined that courts may reduce sentences for substantial assistance, even over the government's opposition. 543 U.S. 220, 259 (2005). In United States v. Beamon, the court considered factors such as the nature of the offense and the disparity between crack and powder cocaine sentences. 373 F. Supp. 2d 878, 885-86 (E.D. Wis. 2005). Similarly, in United States v. Condon, the court upheld a sentence departure beyond the government's recommendation, emphasizing its discretion to account for the defendant's cooperation. Nos. C3-05-04, C3-05-05, 2005 WL 1114841, at *1 (D.N.D. Apr. 25, 2005). In United States v. Jimenez, the defendant, after cooperating under a plea agreement where the government agreed to recommend a 25% Section 5K1.1 departure, raised concerns that the plea may have been coerced. 992 F.2d 131, 132-33 (7th Cir. 1993). Although the government still made the promised recommendation at sentencing, it argued that a greater reduction was unwarranted due to the limited value of the defendant's cooperation. *Id.* at 134. The judge ultimately declined to grant any departure, questioning whether the cooperation had been substantial. *Id.* at 133.

reliability of the information or testimony provided, recognizing that the integrity of the assistance is crucial to its legal and evidentiary value. Third, the scope and nature of the assistance—whether it involves testifying, providing intelligence, or facilitating law enforcement operations—are assessed to measure its breadth and intensity. Fourth, the court may weigh any personal risk or harm endured by the defendant or their family as a result of cooperation, thereby acknowledging the moral and physical costs of providing such aid. Finally, the timeliness of the assistance is considered, emphasizing the procedural value of early and proactive cooperation. Collectively, these factors reflect a balance between incentivizing truthful and meaningful cooperation and safeguarding judicial integrity and fairness in sentencing.

After evaluating the relevant factors outlined in Section 5K1.1, the sentencing judge determines a new sentence situated below the applicable guideline range. Importantly, the USSG does not prescribe a fixed percentage or formulaic method for calculating the extent of the reduction; there is no requirement, for instance, that the court apply a uniform 25% discount.[384] However, this judicial discretion is significantly influenced by the government's role in the process. Even in circumstances where the government is compelled to file a motion acknowledging a defendant's cooperation, it retains the ability to shape the sentencing outcome by signaling to the judge that only minimal leniency is warranted.[385] Given the high likelihood that courts will defer to the government's assessment of such factual matters, the defendant's effort to compel the filing of a motion may ultimately prove pyrrhic.[386]

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[384] Sentencing data drawn from the USSG, Conspiracy Case Joint Coding Review highlights an important and often overlooked aspect of federal sentencing under Section 5K1.1: the considerable variation in the extent of sentence reductions, even among defendants who provided similar forms of substantial assistance. MAXFIELD & KRAMER, *supra* note 315, at 9-10. To illustrate, consider defendants who agreed to participate in undercover investigations. While half of these individuals received sentence reductions of more than forty-eight months, a significant portion—about one quarter—received reductions of fewer than twenty-four months. *Id.* at 17. A similar pattern emerges among defendants who both testified and gave verbal information to authorities: 50% received reductions exceeding forty-eight months, but approximately 37.5% received reductions of less than twenty-four months. *Id.* What do these numbers tell us? First, they make clear that cooperation alone does not guarantee a specific sentencing outcome. Even within the same category of assistance, sentencing outcomes vary widely. This suggests that courts consider more than just the type of assistance provided. Other factors—such as the perceived credibility or usefulness of the assistance, the timing of cooperation, prosecutorial recommendations, and the sentencing judge's own assessment—can all play a critical role. In short, Section 5K1.1 departures are not formulaic; they reflect a complex mix of legal standards, prosecutorial discretion, and judicial evaluation. *See id.* at 9-10, 19, 21.

[385] Richman, *Cooperating Clients*, *supra* note 48, at 104.

[386] *Id.* at 105. It is worth noting that in some jurisdictions—such as the Southern District of New York—cooperation discounts may appear particularly substantial because prosecutors often require defendants to admit and plead to the full scope of their criminal conduct. Yaroshefsky, *supra* note 254, at 928. This observation reflects widely recognized professional practice and common experience among federal defense attorneys and prosecutors, rather than a specific statutory or case-based source. This practice inflates the initial guideline range, thereby amplifying the perceived magnitude of the subsequent reduction following

This entrenched deference effectively endows the government with substantial de facto control over the scope of leniency, thereby limiting the practical autonomy of the judiciary in sentencing decisions.[387] Consequently, while judges may formally retain the power to adjust sentences, the government's influence often dictates the practical limits of judicial discretion, rendering the process heavily skewed in its favor. Thus, this latent power imbalance not only weakens the judiciary's evaluative function but also fosters a prosecutorial strategy in which cooperation is turned into a bargaining chip—offered or withheld not in the name of justice, but in pursuit of institutional goals.

Notwithstanding the foregoing considerations, it is essential to recognize that the Judiciary retains the final authoritative word with respect to the granting of sentence reductions. Although trial courts enjoy broad discretion in sentencing, this authority is not without limits. As established in *United States v. Martin*,[388] when a court departs significantly from the USSG, it must provide an explanation for the departure. In this case, the prosecution filed a Section 5K1.1 motion recommending a sentence of sixty-two months for the defendant, but the district court imposed a sentence of sixty-month probation without offering any rationale for such a substantial departure. The Appellate Court vacated the sentence, reinforcing the principle that, post-*Booker*,[389] a sentencing court must articulate the basis for its decision to depart from the USSG. This requirement ensures the reasonableness of the sentence and facilitates meaningful appellate review. Therefore, while trial courts retain considerable discretion, this discretion must be exercised in a manner that is both reasoned and individualized to the defendant's circumstances.[390]

In *United States v. Pizano*,[391] although the prosecution recommended only a modest 10% reduction under Section 5K1.1, the district court imposed a sentence approximately 75% below the USSG range, prompting the government to appeal on the grounds that such a drastic departure was unreasonable. The Eighth Circuit affirmed the sentence, noting that the trial judge carefully evaluated the relevant Section 3553(a) factors, including the usefulness and significance of the defendant's cooperation, and provided clear reasons for the downward departure. The Appellate Court also emphasized that, although the prosecutor's recommendation deserves serious consideration, the sentencing judge retains independent discretion and is not bound by it.[392]

However, an illustrative example of the judiciary's deference to prosecutorial discretion and the centrality of truthful cooperation in sentence reduction

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cooperation.

[387] Richman, *Cooperating Clients*, *supra* note 48, at 105.

[388] 135 F. App'x 411, 412, 414 (11th Cir. 2005).

[389] *Booker*, *supra* note 383; *see* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. UNIV. L. REV. 693, 736 (2005).

[390] India Geronimo, *"Reasonably Predictable:" The Reluctance to Embrace Judicial Discretion for Substantial Assistance Procedures*, 33 FORDHAM URB. L.J. 1321, 1331 (2006).

[391] 403 F.3d 991, 993-94 (8th Cir. 2005).

[392] *See* Geronimo*, supra* note 390, at 1331-32.

determinations can be found in *United States v. Bermúdez.*[393] The First Circuit upheld the district court's denial of a sentence reduction, finding that the defendant had failed to provide truthful and complete information, as required for safety valve relief. The court emphasized that absent such truthful disclosure, the defendant was ineligible for a reduction, and the government was under no obligation to file a motion for a downward departure under Section 5K1.1. Meanwhile, in *United States v. Dalton*,[394] the District Court imposed a sentence that significantly deviated from the government's recommendation by granting a substantially greater reduction than justified. The district court imposed a sentence 75% below the applicable USSG range, far exceeding the 10% reduction recommended by the prosecution in a Section 5K1.1 motion. The trial judge openly expressed disdain for the USSG. The Eighth Circuit reversed the sentence, finding it unreasonable due to the court's failure to provide adequate reasons for giving significantly greater weight to the defendant's cooperation than recommended by the prosecutor. The court emphasized that extraordinary reductions require extraordinary justification.[395]

Building upon these principles, appellate courts have consistently held that defendants cannot compel the government to file a motion under Section 5K1.1, nor can sentencing courts impose such an obligation absent unconstitutional motives, as demonstrated in *United States v. Daniels*,[396] *United States v. Mullins*,[397] and *United States v. Moore*.[398] Together, these precedents reflect a jurisprudential trend of evaluating sentencing departures through the lens of prosecutorial discretion and procedural integrity, rather than judicial preference alone. While *Booker* encourages sentencing courts to consider the broader factors outlined in Section 3553(a), many appellate decisions suggest a persistent—and at times asymmetrical—application of the reasonableness standard, particularly when reviewing downward departures perceived as favorable to defendants, in contrast to upward deviations favored by the prosecution.[399] Ultimately, the post-*Booker* sentencing framework reveals an ongoing tension between judicial discretion and institutional deference to prosecutorial authority, underscoring that significant sentence reductions must be grounded in clear, objective, and legally sound justifications.

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[393] 407 F.3d 536, 539, 544 (1st Cir. 2005).

[394] 404 F.3d 1029, 1030-32 (8th Cir. 2005).

[395] Geronimo*, supra* note 390, at 1334.

[396] *See, e.g.*, 147 F. App'x 869, 871 (11th Cir. 2005).

[397] *See, e.g.*, 399 F.3d 888, 889-90 (8th Cir. 2005).

[398] *See, e.g.*, 136 F. App'x 284, 286-87 (11th Cir. 2005).

[399] *See* Geronimo*, supra* note 390, at 1335-36. Since *Booker*, sentencing guidelines are advisory rather than mandatory. Gall v. United States, 552 U.S. 38, 46 (2007). As a result, even when the government does not file a motion under Section 5K1.1, a court may still reduce a sentence based on a defendant's cooperation by varying downward under Section 3553(a). *Doe*, 398 F.3d at 1259-60. However, a sentence below a statutory mandatory minimum is only permitted if the government files a motion pursuant to Section 3553(e), based on the defendant's substantial assistance. Melendez v. United States, 518 U.S. 120, 125-27 (1996).

In Brazil, much like in the U.S., the judiciary retains ultimate authority over sentencing, including the discretion to reduce a sentence based on a defendant's cooperation with the government.[400] As previously noted, it falls to the judge to determine whether the cooperation provided was materially significant. This determination hinges on whether the defendant has, in substance, fulfilled the obligations outlined in the cooperation agreement. Importantly, the legal framework does not impose, nor does it assume, that the cooperating defendant must demonstrate an extraordinary level of performance. However, it stands to reason that the greater the defendant's contribution, the more substantial the potential reduction in sentence.

Accordingly, what is required is that the defendant's cooperation be both meaningful in substance and undertaken in good faith.[401] Nonetheless, even limited cooperation—provided it yields tangible progress in the government's investigation—may warrant a modest sentencing reduction. Ultimately, the court retains discretion and will first assess whether the defendant has satisfied the baseline obligations set forth in the cooperation agreement before considering any downward departure at sentencing.[402] However, it is important to reiterate that if the cooperating party engages in deceit—such as lying, deliberately omitting relevant information, or intentionally failing to produce corroborative evidence—the cooperation agreement may be subject to full revocation.

It is also noteworthy to repeat that, although the government may request a minimal or no reduction in the sentence, the judge is not bound by the prosecutor's recommendation. Instead, the judge is strictly guided by the terms of the homologated cooperation agreement. Unlike the American system, where a motion filed with the court holds considerable weight, in Brazil, once the cooperation agreement has been executed, the government's opinion plays a limited role in shaping the sentence reduction. Stated differently, the rights of the cooperating defendant are both defined and safeguarded within the four corners of the cooperation agreement itself, independent of any subsequent position the government may adopt over the course of the proceedings.[403] This structure recharacterizes leniency from a discretionary favor into a contractual entitlement, thereby diminishing the potential for strategic manipulation by the government and, in turn, reinforcing judicial autonomy by insulating adjudicative functions from undue executive influence.

Article 4 of Brazil's Organized Crime Act (Law No. 12.850/2013) inaugurated a sophisticated normative framework whereby judges, upon motion

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[400] Law No. 12.850, *supra* note 136, art. 4.

[401] In this regard, Article 3-B, Section 6 of Law No. 12.850/2013—as enacted by Law 13.964/2019—read in conjunction with Article 4 of the same statute. *Id.* art. 3-B, § 6.

[402] For example, the case against cooperating defendants Edison Krummenauer and Luís Mário da Costa Mattoni (Operation Car Wash). *See* J.F. Paraná, Ação Penal No. 5024266-70.2017.4.04.7000, 13th Fed. Ct. of Curitiba, 01.12.2020 (Braz.) (opinion by Federal Judge Luiz Antonio Bonat).

[403] For instance, in Operation Car Wash, against cooperating defendant Paulo Sérgio Boghossian, the judge granted benefits under the cooperation agreement despite the opposition of federal prosecutors. *See id.*

by the parties, are empowered to confer substantial procedural benefits—including judicial pardons, sentence reductions of up to two-thirds, or replacing incarceration with non-custodial sanctions that impose significant restrictions on individual liberties—to defendants who engage in voluntary and effective cooperation with criminal investigations and prosecutions.[404] This statutory provision evidences a deliberate reorientation of criminal adjudication toward a model of negotiated justice, wherein leniency is conditioned not upon subjective discretion but upon the attainment of specified epistemic and instrumental outcomes.

These include, *inter alia*, the identification of co-perpetrators, disclosure of the organizational structure and operational dynamics of criminal enterprises, prevention of further illicit conduct, asset recovery, and the preservation of victims' physical integrity. Crucially, Section 1 of the same provision imposes a requirement of individualized judicial assessment, demanding that the court weigh the cooperator's personality (in sense of behavior), the nature and gravity of the offense, its societal reverberations, and the tangible utility of the cooperation rendered. In this way, the statute endeavors to reconcile the exigencies of pragmatic enforcement with the normative imperatives of proportionality, fairness, and judicial autonomy, thereby embedding discretionary authority within a constitutionally defensible matrix of legal rationality.

Section 4 of Article 4, as amended by Law No. 13.964 of 2019, represents a notable evolution in the statutory framework governing cooperation agreements in Brazilian criminal procedure. Under this provision, prosecutors are vested with discretionary authority to decline the initiation of criminal charges in cases where the cooperating individual discloses offenses previously unknown to the prosecution. This legislative change reflects a policy judgment favoring incentivized cooperation in the pursuit of broader investigative and prosecutorial objectives. This prosecutorial discretion, however, is not unfettered; it is conditioned upon the satisfaction of two essential criteria. First, the cooperating individual must not occupy a leadership role within the criminal organization. This limitation underscores a normative judgment that distinguishes between high-level orchestrators of criminal conduct and lower-tier participants whose

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[404] The Brazilian Superior Court of Justice has recognized that non-traditional or "atypical" criminal sanctions may be imposed as part of a cooperation agreement. S.T.J., AgRg nos Embargos de Declaração na Petição No. 13.974/DF [AgRg nos EDcl na Petição No. 13.974/DF], Relator: Min. Nancy Andrighi, 05.10.2022, D.J.e, 28.11.2022, 1, 10-12 (Braz.). This acknowledgment does not grant the parties unfettered discretion; rather, any negotiated resolution remains constrained by statutory and constitutional parameters. *Id.* at 12-13. Given that the legal framework already permits the extinguishment of criminal liability through judicial pardon or allows for the substitution of incarceration with alternative sanctions, it follows—arguably with even greater justification—that the imposition of a custodial sentence subject to more favorable conditions of confinement is likewise permissible. For instance, under Brazilian criminal law, a cooperating defendant may be sentenced to a term of imprisonment to be served in a *regime semiaberto* (*semi-open regime*), even where the offense or sentence would ordinarily warrant a more restrictive, *regime fechado* (*closed regime*), provided this concession is part of a valid and judicially approved cooperation agreement. *See id.* at 14-15.

cooperation may be instrumental to dismantling broader criminal enterprises.[405] Second, the cooperator must be the first to provide substantive cooperation, as defined by statute. This requirement reflects a deliberate legislative choice to incentivize early cooperation,[406] acknowledging that a defendant's initial disclosure can be crucial in bringing to light previously unknown criminal activity.[407]

In a complementary move, Section 4-A—also enacted through the 2019 reforms—clarifies the threshold for prosecutorial "prior knowledge," establishing that such knowledge exists once a formal investigative proceeding has been initiated. This provision serves as a safeguard against opportunistic or bad faith claims of novelty. Additionally, Section 5 introduces a degree of flexibility for post-conviction cooperation by authorizing sentence reductions of

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[405] In the Batista brothers' case, the Attorney General initially found that public officials—not the brothers—led the criminal enterprise tied to JBS. Paloma Rodrigues, *Mesmo Sem Ir à CCJ, Janot Responde a Questões Sobre Denúncia* [*Even Without Going to the CCJ, Janot Answers Questions About the Accusation*], PODER 360 (July 13, 2017, 1:19 PM) (Braz.), https://www.poder360.com.br/governo/mesmo-sem-ir-a-ccj-janot-responde-a-questoes-sobre-denuncia/ [https://perma.cc/53GV-HAKD]. This framing justified a 2017 plea deal granting the brothers full immunity, treating them as facilitators rather than principals. Kelli Kadanus, *Conheça as Benesses do Acordo de Delação Premiada de Joesley Batista* [*Discover the Benefits of Joseley Batista's Plea Bargain Agreement*], GAZETA DO POVO (May 22, 2017, 9:39 PM), https://www.gazetadopovo.com.br/politica/republica/conheca-as-benesses-do-acordo-de-delacao-premiada-de-joesley-batista-0m3bh2qssfzi7lvsj2x7fulkd/ [https://perma.cc/8CT5-TX99]; *see generally* Petition No. 7.003/DF, *supra* note 152. The agreement included a resolutory clause allowing revocation of benefits if leadership by the brothers was later proven. Acordo de Leniência Entre J&F Investimentos S.A. e Ministério Público Federal No. 70.200-640 [*Leniency Agreement Between J&F Investimentos S.A. and the Federal Public Prosecutor's Office No. 70.200-640*], 05.06.2017 (Braz.), https://static.poder360.com.br/2020/09/acordo-leniencia-JF-versao-final.pdf [https://perma.cc/W95Q-Q9TE]. In 2020, due to omissions in their testimony, the Attorney General renegotiated the deal: the brothers retained cooperation benefits but accepted new penalties, including a R$ 1 billion fine and house arrest. *See* Petition No. 7.003/DF, *supra* note 152, at 1.

[406] Sérgio Machado, former president of *Transpetro*, secured what has been widely viewed as one of the most lenient cooperation agreements in the context of Operation Car Wash. In exchange for his cooperation, he was granted a form of custodial substitution—house arrest under electronic monitoring—alongside restricted furloughs and protective measures for family members. Agência O Globo, *Acordo de Delação de Sérgio Machado Prevê Multa de R$ 75 Mi e Prisão Domiciliar* [*Sérgio Machado's Plea Bargain Agreement Includes a Fine of R$ 75 Million and House Arrest*], GAZETA DO POVO (June 15, 2016, 8:27 PM) (Braz.), https://www.gazetadopovo.com.br/vida-publica/acordo-de-delacao-de-sergio-machado-preve-multa-de-r-75-mi-e-prisao-domiciliar-4qy6e9iljm8ztn85h2qttr2bm/ [https://perma.cc/UET9-2X84]. The agreement further contemplated a transition to a semi-open regime, allowing for limited employment under state supervision. *Id.* Although later criticized for producing minimal substantive cooperation, the deal exemplifies a prosecutorial calculus that prioritizes incentivizing early cooperation in complex corruption cases, even at the risk of offering substantial concessions with limited investigative return. *See* Petition No. 6.138/DF, *supra* note 283, at 9-10.

[407] *See, e.g.*, S.T.F., Petição No. 7.265/DF, Relator: Min. Ricardo Lewandowski, 11.05.2017, D.J.e, 1, 21-23 (Braz.) (Cooperation Agreement of Renato Barbosa Rodrigues Pereira).

up to 50%, thereby reinforcing the utility of cooperation as a tool for advancing prosecutorial and investigative aims. Taken together, these provisions reflect a legislative effort to expand the strategic value of cooperation while maintaining fidelity to core principles of due process and proportionality.

Finally, it is crucial to emphasize that, under Article 93, Section IX of the Brazilian Federal Constitution, every judicial decision must be articulated with clear and coherent reasoning, or else it risks being declared void. This mandate becomes particularly significant in the context of cooperation agreements, where sentencing reductions awarded to cooperating defendants require a careful evaluative judgment regarding the actual usefulness and quality of their assistance. Within this legal framework, the principle of **"**rational persuasion**"** plays a pivotal role. This principle demands that a judge's conviction be formed through a rigorous and critical examination of the evidence and arguments presented in the record, grounded in objective, logical, and legally sound criteria, rather than on subjective or arbitrary impressions.[408]

Applying this principle is indispensable when determining the appropriate extent of sentence reduction, which must adhere to the overarching principle of proportionality. The judge must weigh the degree to which the defendant's cooperation substantively advanced the investigation or the judicial process, all within the boundaries set forth in the cooperation agreement itself. As Justice Rogerio Schietti of Superior Court of Justice observes, there is a well-established jurisprudential consensus that all judicial rulings—especially those impacting individual liberty—must be explicitly supported by legal reasoning.[409] This underscores the foundational principle that strict adherence to the terms of the cooperation agreement, along with the rational justification of judicial decisions, is essential not only for determining sentence reductions but also for upholding the fairness and legitimacy of criminal proceedings within a constitutional democracy governed by the rule of law.

In sum, while both the U.S. and Brazil provide mechanisms for sentence reduction based on a defendant's cooperation, the systems differ significantly in their structure and underlying philosophy.[410] In the U.S., the grant of sentence

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[408] *See* Alexandre Guimarães Gavião Pinto**,** *Os Mais Importantes Princípios que Regem o Processo Penal Brasileiro* [*The Most Important Principles Governing the Brazilian Criminal Procedure*], 9 REVISTA DA EMERJ 221, 227 (2006) (Braz.).

[409] 13 FREDIE DIDIER JR. ET AL., PROCESSO PENAL [PENAL PROCESS] 334 (Coleção Repercussões do Novo CPC, JusPodivm 2016) (Braz.).

[410] *See generally* JOHN LOCKE, TWO TREATISE OF GOVERNMENT (Peter Laslett ed., 1988) (1690) (discussing the social contract as a foundation for legitimizing state authority, which can conceptually support the U.S. prosecutorial discretion model where institutional objectives may override individual autonomy); IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS (Mary Gregor ed., 1998) (1785) (elaborating a deontological framework grounded in duty and fairness, aligning with Brazil's emphasis on judicial discretion and ethical evaluation in cooperation agreements); JOHN RAWLS, A THEORY OF JUSTICE (1971) (presenting the principle of justice as fairness, which supports Brazil's individualized approach to sentence reductions, aiming to ensure procedural justice and to minimize arbitrary prosecutorial influence). Note: While none of these works directly address contemporary sentencing policy, they offer foundational philosophical principles that inform the normative orientation of each system's institutional design.

benefits largely depends on the prosecutor, who must first authorize judicial consideration through a motion under Section 5K1.1. Although judges retain formal discretion, their role is often constrained by the prosecution's assessments, transforming sentence reduction into a strategic bargaining tool rather than a judicial prerogative grounded in the merits of the cooperation. In contrast, the Brazilian system, particularly under Law No. 12.850/2013, treats the cooperation agreement as a binding legal instrument once it is homologated by the court. It is the judge—rather than the prosecution—who determines the extent of sentence reduction based on the fulfillment of the obligations outlined in the agreement. This framework shifts authority from the executive to the judiciary, fostering greater transparency and legal predictability. In this way, the Brazilian legal system redefines leniency as a legally structured right, not a discretionary consideration, thereby enhancing judicial independence and limiting potential excesses of prosecutorial power.

IV. CONCLUSION

In conclusion, this comparative analysis has revealed that while the U.S. and Brazil share overarching goals in their criminal justice systems—such as advancing the effective prosecution of complex crime while endeavoring to maintain core procedural protections—the methods by which these objectives are pursued diverge sharply. At the heart of these differences is the institutional design of each system: the adversarial, prosecutor-centered approach in the U.S., and the inquisitorial, judge-centered framework in Brazil.

In the U.S., the system is structured around prosecutorial discretion, where cooperation agreements are primarily tools to facilitate the swift dismantling of criminal organizations. Prosecutors possess broad authority to determine the terms of cooperation, with limited judicial oversight. This model prioritizes efficiency and pragmatic crime control over formal procedural safeguards. While it has proven effective in terms of securing convictions and disrupting criminal enterprises, this approach raises significant concerns regarding due process, transparency, and the potential for coercion. The cooperator is frequently treated as a means to an end, instrumentalized to achieve broader law enforcement goals—often at the expense of their dignity and rights.

By contrast, Brazil's judicially supervised inquisitorial system places a stronger emphasis on procedural fairness and individual rights. Cooperation agreements in Brazil are formalized, requiring judicial oversight and adhering to strict standards of transparency and due process. Cooperation is not treated merely as a pragmatic tool for prosecutors but as a legal entitlement, contingent on the fulfillment of specific, demonstrable criteria. Judicial involvement ensures that the terms of cooperation align with constitutional principles, safeguarding the dignity of the cooperator and promoting fairness in the criminal process. While this model offers stronger protections against potential abuses of power, it may also reduce the flexibility and speed with which law enforcement

can operate, potentially complicating efforts to combat crime in an expedited manner.

These two systems, though fundamentally different in approach, both aim to balance the competing priorities of crime control and individual rights. On one hand, the American system, with its focus on prosecutorial discretion, may achieve more rapid outcomes but at the risk of diminished procedural guarantees for the cooperator. On the other hand, the Brazilian system, with its emphasis on judicial oversight and the protection of the cooperator's rights, prioritizes fairness and due process, albeit at the potential cost of prosecutorial efficiency. In essence, the comparative study of these systems underscores the critical role that institutional frameworks play in shaping the way criminal justice systems operate. The degree of judicial involvement and the extent of prosecutorial discretion are not merely procedural details; they fundamentally shape the balance between efficiency and fairness, between the public interest and individual rights. Thus, each system reflects a different set of values—America's prioritization of pragmatic, results-driven justice and Brazil's commitment to due process and the protection of human dignity.

Looking forward, the divergent approaches embraced by the U.S. and Brazil offer a compelling lens through which to examine how democratic legal systems conceptualize the role of the cooperator in the administration of criminal justice. As jurisdictions around the world confront increasingly complex and transnational forms of criminality, institutional frameworks will be called upon to navigate the enduring tension between efficiency, legitimacy, and the protection of fundamental rights. This Article does not advocate for the wholesale adoption of one model over the other; rather, it proposes that thoughtful reform—particularly within hybrid or evolving legal systems—should draw normative insights from both traditions. Prosecutorial pragmatism, while often indispensable to effective enforcement, must be constrained by meaningful procedural safeguards. Likewise, judicial formalism must not become so rigid as to impede responsive and adaptive governance. In the end, the legitimacy of cooperation regimes will hinge not merely on their capacity to deliver results, but on the integrity, transparency, and fairness of the processes through which those results are obtained.