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Like Putting Lipstick on a Pig: Why the History of Crime Control Should Compel the Prohibition of Incentivized Witness Testimony Under Fundamental Fairness Principles

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LIKE PUTTING LIPSTICK ON A PIG: WHY THE HISTORY OF CRIME CONTROL SHOULD COMPEL THE PROHIBITION OF INCENTIVIZED WITNESS TESTIMONY UNDER FUNDAMENTAL FAIRNESS PRINCIPLES

Caleb Linton*

Among Western nations, American courts remain uniquely permissive to the routine law enforcement practice of offering witnesses incentives to testify for the State in criminal trials. Despite laws and ethical rules roundly prohibiting the practice and recurrent skepticism of incentivized testimony in the English common law tradition, American judges have excused the practice based on pragmatism, developing legal fictions to exempt prosecutors from the general prohibition. However, basic common sense, backed by recent empirical scholarship, should alarm participants in the criminal legal system to a severely heightened risk of perjury wherever the prospect of reward compels testimony. Whether law enforcement offers these incentives in the form of cash payments, material rewards, reduced sentencing for co-defendants and so-called "jailhouse informants," or merely relocation, they influence witnesses through unfair inducements. Paradoxically, these inducements are prohibited to the defense and categorically prohibited as bribery in all other legal contexts.

Prosecutors and judges often point to existing safeguards in the legal system, including cross-examination and an illusory disclosure requirement, as sufficient to combat the risk of perjury, appealing to the difficulty of securing convictions in complex cases. However, as DNA testing continues to reveal wrongful convictions based on perjured testimony, such optimism must be viewed as misguided. Prosecutors and judges fail to recognize that

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the system rewards police and prosecutors who shirk their disclosure duties. These failures to disclose are nearly impossible for defendants and their attorneys to uncover once a defendant is convicted. Complicating matters exponentially, the racist and classist history of law enforcement in this country is largely responsible for the underlying reticence of many witnesses to testify in the absence of incentives. Communities of color and immigrant communities, current and historical subjects of abusive police and prosecutorial misconduct, do not trust police and prosecutors to protect their interests. So-called "white-collar" criminals intuit that the system was generally constructed to safeguard capitalist wealth-building—not undermine it. Thus, the State's difficulty in prosecuting many accused individuals is a problem of its own making.

In many areas, criminal law recognizes the extreme burden the State must carry to override the accused's interest in freedom. In fact, the Due Process Clauses of the Fifth and Fourteenth Amendments were drafted largely to illuminate this heavy burden. For much of American history, the Supreme Court couched this burden in the language of "fundamental fairness." Over time, however, the Court began balancing the interests of the State with those of criminal defendants as it moved away from using fundamental fairness as the primary tool for extending protections to the accused. This shift was incorrect from both a logical and historical perspective. Fundamental fairness concerns only the rights of the individual accused—not the interests of the State. Thus, this Comment argues that the Court must revive and correct its fundamental fairness jurisprudence, estopping the State from offering incentives to witnesses in criminal trials. This remedy remains the only one among many proposed to effectively combat the risk of perjury inherent to incentivized testimony while simultaneously restoring fairness concerns to their proper target: the accused. After all, the primary duty of the American prosecutor is to seek justice—not convictions.

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INTRODUCTION

Consider a scenario: A is convicted of felony murder.[1] At trial, the prosecution presents no physical evidence tying A to the crime. The State attempts to tie the murder weapon to A through the alleged written statement of a man, E, who testified at trial that he was suffering from severe drug addiction at the time of his interview. Police allege E told them he saw A looking for the murder weapon—weeks after the crime—in the neighborhood where they both lived. E recants most of the statement at trial, testifying that he does not remember telling police anything relating to A and that he would remember if he did. The State called only two eyewitnesses to the crime,[2] B and C, each of whom received significant incentives. Prosecutors relocated B and he also received leniency for a drug charge. B subsequently perjured himself when asked whether he had received benefits in exchange for his testimony. C, previously arrested for falsifying statements to police, received a $20,000 reward payment just one week after A's conviction in connection with taking "the stand in court and successfully [giving] detailed accounts of the victim's death."[3] The police homicide chief

[1] These facts are all taken from a single case that the author came across while working for a post-conviction organization in 2021. Though the record is public, no names or citations are provided in the interest of protecting the client's confidences.

[2] Many other people who were eyewitnesses were present at the scene, though none of their identities were revealed to the defense. This omission violated *Brady v. Maryland*, 373 U.S. 83 (1963)—a trend among cases where the State incentivizes witnesses to testify—and highlights one of the central problems with a simple disclosure requirement.

[3] This quotation is from the letter written by the city's homicide chief to its police commissioner requesting the payment to C. This letter was obtained from a district attorney office file. C also likely received additional rewards in the form of personal payments from police. The homicide file contained a ledger with C's name and expenditures totaling another several thousand dollars in utility payments, car payments, and mortgage payments.

commissioned the payment as part of a crime reward fund established by that city's mayor years earlier.[4] The prosecution did not disclose this payment to defense counsel until almost seven years later, after a new district attorney took office.[5] The only other evidence the prosecution presented against A was a coerced "confession" that A maintained the police fabricated entirely, promising A—after a forty-five-hour interrogation in which he received no food or water and slept only briefly in a fluorescent-lit room, all while handcuffed to a metal table—that as soon as he signed each page of his "release papers," he could return to his child. While the police covered each page of the document so that A could not see what he was signing, A complied and was sent home for four months before his subsequent arrest and conviction for murder.

This scenario may sound fanciful or beyond plausibility. However, A remains in prison at the time of this writing, over nine years after his conviction. Though the problems in this case were legion, the glue that bound them together and sealed his fate was undoubtedly the introduction of incentivized testimony at trial. Absent that incentivized testimony, the State's case rested on a nearly two-day interrogation that almost certainly would be

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[4] The government does not routinely disclose the monetary cost to taxpayers of informant testimony, but one can safely assume the costs are high. In 1981, New York City spent almost (at least if one assumes not all payments were documented) $500,000 (over $1.42 million today) on informants. Barbara Basler, *City Police Paid $500,000 Last Year for Informants*, N.Y. TIMES (Aug. 31, 1982), https://www.nytimes.com/1982/08/31/nyregion/city-police-paid-500000-last-year-for-informants.html [https://perma.cc/9VBE-K9LN]. Between 2011 and 2015, California paid just two informants over $300,000 for informing on fellow inmates. Parker Yesko, *$100,000 to Snitch? Perks for Jailhouse Informants Come Under Scrutiny*, NPR (June 10, 2017, 5:00 AM), https://www.npr.org/2017/06/10/531721751/-100-000-to-snitch-perks-for-jailhouse-informants-come-under-scrutiny [https://perma.cc/3MWF-DB9V]. The city responsible for A's conviction above established a crime reward fund that authorizes a payment of up to $20,000 for any information leading to the arrest and conviction of any person for any homicide occurring within that city. The directive specifies no outer limit on the number of rewards paid to witnesses.

[5] Though it could be argued that the prosecution may not have been aware of the incentive, under *Kyles v. Whitley*, "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 514 U.S. 419, 437 (1995). The failure to disclose in this instance demonstrates the difficulty of relying on mandated disclosure of witness incentives, discussed *infra* (Part III). It remains unclear whether the witness had been explicitly promised this payment prior to testifying. This also demonstrates a problem with the timing of disclosure; "[b]ecause benefits are often conferred *after* a case goes to trial, prosecutors can assure jurors that no promises have been made." Pamela Colloff & Katie Zavadski, *Convicted Based on Lies*, PROPUBLICA (Mar. 9, 2020), https://features.propublica.org/jailhouse-informant-exonerees/jailhouse-informant-false-testimony-exoneree-portraits [https://perma.cc/779H-GCJS].

excluded but for the corroboration of two incentivized State witnesses willing to inculpate the defendant.

Incentivized testimony presents a unique exception to the typical due process considerations that arise in criminal prosecutions.[6] For well over a century, police and prosecutors have routinely benefited from the ability to use incentives[7] to secure favorable testimony for the State[8] while defendants are categorically banned from offering any inducements for the same.[9] The supposed justification for this asymmetry appears to be rooted in the public policy concern that witnesses may be otherwise unwilling to testify due to a number of factors including: (1) fear of retribution by those against whom they testify;[10] (2) mistrust of police;[11] (3) the concomitant community stigma

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[6] Indeed, almost all law enforcement agents and many commentators have accepted even the most controversial category of incentivized testimony—that given by criminal informants who receive sentence reductions and other benefits during incarceration—as either indispensable or as a necessary evil. *See* Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 84 (1994).

[7] This Comment will often refer to incentives generally and use the support of scholarship focusing specifically on criminal informants (which can include jailhouse informants or accomplice witnesses). This is a limitation of existing scholarship and empirical data on the use of a third type of incentivized witness: cooperating witnesses (the witnesses in the scenario presented above are both cooperating witnesses and jailhouse informant-adjacent witnesses given their own criminal legal exposure). *See* Melanie B. Fessinger, Brian H. Bornstein, Jeffrey S. Neuschatz, Danielle DeLoach, Megan A. Hillgartner, Stacy A. Wetmore & Amy Bradfield Douglass, *Informants v. Innocents: Informant Testimony and Its Contribution to Wrongful Convictions*, 48 CAP. L. REV. 149, 151 (2020).

[8] Incentives for criminal testimony are ubiquitous. One in five federal defendants receives a sentencing reduction for "substantial assistance" to the government, just one of many types of compensation available and one of several types of witnesses whom the government incentivizes to testify. *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 1 (2000) (internal quotation marks omitted) (citing Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 564, 580 n.58) (1999)).

[9] The practice was officially condoned by the United States Supreme Court in *The Whiskey Cases*, 99 U.S. 594 (1878). For a discussion of the history of inducements in the common law, see Hon. H. Lloyd King, Jr., *Why Prosecutors Are Permitted to Offer Witness Inducements: A Matter of Constitutional Authority*, 29 STETSON L. REV. 155, 159–65 (1999). For an explanation of the asymmetries inherent in the regulation of witness payments, see generally Saul Levmore & Ariel Porat, *Asymmetries and Incentives in Plea Bargaining and Evidence Production*, 122 YALE L.J. 690 (2012), admitting that most asymmetries in criminal law favor defendants while paradoxically arguing for increasing the availability of witness incentives.

[10] *See* Fessinger et al., *supra* note 7, at 152.

[11] This mistrust, unsurprisingly, disproportionately affects communities of color. In a 2020 NPR/PBS NewsHour/MaristPoll, 65% of Black Americans and 36% of Latino Americans said that they had "[j]ust some" or "[v]ery little/ . . . [n]o confidence at all" that

attached to "snitching;"[12] as well as (4) sufficient cost-benefit motivation to remain silent, at least in cases of organized crime, conspiracies, and corruption by government officials and "white-collar criminals."[13] Yet, each of these factors is a result of historical police practices rooted in prejudice, the origins of law enforcement as a mechanism to protect private property,[14] and inconsistent law enforcement protection of particular communities.[15] By offering incentives to testify for otherwise unwilling witnesses, the State skirts the underlying issues by employing a temporary "fix" that only serves to deepen community mistrust.

This deepening of mistrust occurs because history and practice, as well as empirical research in behavioral and social sciences, have proven that incentives have the propensity to induce even the most trustworthy citizens to fabricate testimony.[16] Moreover, the State is willing to accept such testimony almost without question to secure convictions.[17] Particularly strikingly, many prosecutors continue to insist on the reliability of specific testimony even after exonerations have proven it false.[18] Incentivized

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they had confidence that police officers in their community would "treat [B]lack people and white people equally"; 70% of white Americans said they had "[a] fair amount" or "[a] great deal" of confidence in the same proposition. MARISTPOLL, NPR/PBS NEWSHOUR/MARIST POLL OF 1,062 NATIONAL ADULTS 7 (2020), https://maristpoll.marist.edu/wp-content/uploads/2020/06/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_2006041039.pdf [https://perma.cc/C6N8-B5ZL].

[12] *See* U.S. DEP'T OF JUST., OFFICE OF CMTY. ORIENTED POLICING SERVS., THE STOP SNITCHING PHENOMENON: BREAKING THE CODE OF SILENCE 12 (2009), https://cops.usdoj.gov/RIC/Publications/cops-p158-pub.pdf [https://perma.cc/45CB-MCBC].

[13] *See, e.g.*, King, *supra* note 9, at 155–56; Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L. J. 1381, 1390–91 (1996). Trott, a former federal prosecutor, strongly cautions prosecutors against the use of informants where unnecessary and focuses his discussion of necessity on conspiracies and organized, government, and white-collar crime where criminal activity will otherwise proceed covertly. In so doing, he implicitly recognizes that in many circumstances, incentivizing testimony is altogether inappropriate.

[14] Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017, 9:45 AM), https://time.com/4779112/police-history-origins [https://perma.cc/T5RJ-L86M].

[15] *See, e.g.*, JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 6–7 (2015).

[16] *See generally* Christopher T. Robertson & D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20 U. PA. J. CONST. L. 33 (2018) (finding, based on multiple designed experiments with non-interested witnesses, that witness behavior is conditional on truth and incentives).

[17] *See* Trott, *supra* note 13, at 1383–90, 1394, 1404–07 (citing a host of cases in which prosecutors unscrupulously used informant testimony). The mere fact that a former prosecutor-turned-federal judge felt it necessary to write a law review article imploring prosecutors to exercise extreme caution when using incentivized informants speaks volumes.

[18] Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1385 (2014).

witnesses are "the leading cause of wrongful convictions in [United States] capital cases."[19] The age-old maxim uttered by Blackstone, upon which our criminal legal system allegedly rests, that "it is better that ten guilty persons escape than that one innocent suffer"[20] rings hollow in the face of such a finding.

While many have proposed various reforms or solutions to address the due process violations resulting from incentivized testimony, none offer sufficient solutions. Each stops short of proposing a complete ban on *all* incentivized testimony, regardless of the form of the incentive, be it money, relocation, leniency or favorable treatment for a "jailhouse snitch," or something else.[21] This Comment argues that we have reached the point at which asymmetries have rendered complete exclusion necessary. The Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution demand the prohibition of incentivized testimony in the name of fundamental fairness to the defendant. This concept should concern only fairness to the accused and should not consider the desires and purported needs of the State.

Part I of this Comment sets forth a brief and incomplete history of policing in the United States and its origins' consequences on citizens' faith in law enforcement in the over-policed communities most affected by centuries of police racism and community prejudice. It also notes that recent empirical studies reveal the willingness of individuals, given sufficient incentives, to corroborate the State's narrative even in the face of convincing evidence impugning that narrative. Part II discusses the history of the admissibility of incentivized testimony at trial, a tactic explicitly authorized for use by the State yet prohibited for the defense. The insufficiencies of currently proposed remedies are exposed in Part III. Part IV explains the

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[19] ROB WARDEN, CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM 4 (2004), https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf [https://perma.cc/JDP3-HNNQ]; *cf.* Robert Dunham, *The Most Common Causes of Wrongful Death Penalty Convictions: Official Misconduct and Perjury or False Accusation*, DEATH PENALTY INFO. CTR. (May 31, 2017), https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions [https://perma.cc/PKG8-B8SV] (supplementing claim with broader categories of cause without contradicting it).

[20] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (J.B. Lippincott Co., 1891).

[21] *See infra* Part III. "Jailhouse snitch" testimony is the colloquial term for testimony provided by prisoners against other prisoners. *See* Covey, *supra* note 18, at 1376. Rewards are commonplace in numerous forms including tangible material benefits both large and small, as well as reduced sentencing. *See Safeguarding Against Unreliable Jailhouse Informant Testimony*, INNOCENCE PROJECT (Dec. 1, 2022), https://innocenceproject.org/safeguarding-against-unreliable-jailhouse-informant-testimony [https://perma.cc/AX3W-QLWW].

history of procedural due process jurisprudence dealing with fundamental fairness concerns and argues that the Supreme Court's jurisprudence has departed not only from the original intent of the Constitution's drafters but also from any rational interpretation of what fundamental fairness could mean. The Comment concludes by demonstrating that a proper interpretation of fundamental fairness precludes the use of all incentivized testimony and proposing instead that the State be permitted to provide incentives only to individuals who can provide information leading to evidence that will corroborate the State's case at trial without testifying themselves.[22]

I. A PROBLEM OF THE STATE'S OWN MAKING

It is easy to take for granted the powerful role of the modern police force as the principal law enforcement mechanism in the United States. Yet the current policing paradigm is a relatively recent development in the common law tradition.[23] Modern policing structures arose primarily out of two distinct-yet-overlapping enforcement apparatuses from the antebellum era: the "watch" system in the North (community volunteers generally supervised by "constables" who performed a variety of bureaucratic functions), and the "Slave Patrol" in the South.[24] Neither modality's proliferation nor the organized forces that are their progeny grew out of a particularized response to increasing crime; both emerged as responses to "disorder" as perceived by "the mercantile interests" who supported later bureaucratic policing institutions through taxes and political influence.[25]

In the North, those "mercantile interests" were "commercial elites" who wanted to transfer the costs of protecting their private property onto the State through mechanisms of social control.[26] In the South, slave patrols functioned to (1) "chase down, apprehend, and return" enslaved humans to their enslavers; (2) terrorize enslaved individuals to deter revolts; and (3)

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[22] This is not to say that incentives should be per se permissible so long as an incentivized witness does not testify. There may be cases in which incentives lead to information that creates probable cause or creates exigency for warrantless entries, both of which are currently permissible but necessitate heightened scrutiny. This Comment argues only that an incentivized witness's act of testifying engenders a particularly disturbing unfairness that violates a defendant's right to constitutional due process.

[23] One scholar pinpoints the formation of the first American police force in 1838. Gary Potter, *The History of Policing in the United States, Part 1*, EKU ONLINE (June 25, 2013) [hereinafter Potter, *History of Policing, Part 1*], https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-1 [https://perma.cc/48F4-MT5A].

[24] *See id.*

[25] *See id.*

[26] *Id.*

maintain discipline on plantations.[27] In this sense, patrols in the South functioned similarly to "watches" in the North: Both prophylactically protected against the loss of their respective region's valuable "capital." This formulation contrasted with earlier systems of law enforcement which responded only reactionarily to individual criminal acts.[28] The emergence of public policing can be most easily recognized as a "capitalist invention[] to legitimate and tighten the hold of the ruling class over the working and 'redundant' classes."[29]

For their part, early northern police forces protected the institution of slavery in multiple ways.[30] It is no cruel irony that Wall Street served as the home to New York City's government-sanctioned slave market from 1711 to 1762 and continued to serve as the site for trading human capital until at least 1792.[31] Not only was the defense wall that gave the street its name built by enslaved people,[32] but the very commodities (primarily cotton) that drove the northern economy and its elites' wealth—protected by the "watches" mentioned above—were produced through chattel slavery and financed through banks in Manhattan or London, as were enslaved people themselves.[33] Additionally, northern police—both before and after the forces were institutionalized—acted as enforcers of the so-called Fugitive Slave Clause of the U.S. Constitution,[34] and the Fugitive Slave Acts of 1793[35] and 1850[36] meant to effectuate it.[37]

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[27] *Id.*

[28] ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE 27–50 (2014) (pinpointing the turn toward "preventive" (in other words, prophylactic) justice in the early nineteenth century). For a thorough discussion of the "depersonalization" (and one could argue, dehumanization) inherent in the shift to organized crime control through coercive State power, see generally Steven Spitzer, *The Rationalization of Crime Control in Capitalist Society*, 3 CONTEMP. CRISES 187, 188 (1979) (emphasis omitted).

[29] Spitzer, *supra* note 28, at 189 (quoting Steven Spitzer, *Toward a Marxian Theory of Deviance*, 22 SOC. PROBS. 638, 647 (1975)). Spitzer's use of "redundant" reflects the perspective of the ruling class toward those classes it deems socially undesirable.

[30] *See infra* n.37.

[31] Editors, *Wall Street Timeline*, HISTORY.COM (Jan. 3, 2019), https://www.history.com/topics/us-states/wall-street-timeline.

[32] *Id.*

[33] ANNE FARROW, JOEL LANG & JENIFER FRANK, COMPLICITY: HOW THE NORTH PROMOTED, PROLONGED, AND PROFITED FROM SLAVERY 13 (2005).

[34] U.S. CONST. art. IV, § 2.

[35] Act of Feb. 12, 1793, 1 Stat. 302, 1793 (repealed 1864).

[36] Act of Sep. 18, 1850, 9 Stat. 462, 1850 (repealed 1864).

[37] As Jonathan Daniel Wells puts it:

Unfortunately, "post-slavery"[38] policing continued to focus on race- and class-based enforcement, thus allowing the prior structure to evolve and survive under the façade of neutral state law legitimacy. Upon their post-Civil War transformation into organized bureaucratic institutions, Southern slave patrols transformed into means of enforcing Jim Crow segregation laws that possessed the primary purpose of denying formerly enslaved people equal human, economic, and political rights.[39] Meanwhile, police in general, including in the North, steadily grew into pervasive control mechanisms over an "underclass" comprised "primarily of the poor, foreign immigrants, and free [B]lacks."[40] Seeking to "insure a stable and orderly work force . . . and the maintenance of what they referred to as the 'collective good,'" the "commercial elites" used political and economic power to persuade police departments to effectuate "social control [rather] than crime control."[41] Police routinely employed extreme violence to break labor strikes and conducted arrests based on "public order" and vague vagrancy laws,[42] often

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[T]he [New York City] police department . . . seldom acted without consulting the business community. . . . While Wall Street, the New York City Police Department, the conservative press, and the Democratic Party aligned to defend slavery and the constitutional compact with slaveholders, the legal system often proved just as hostile to African Americans in New York. The federal courts made it very difficult to prosecute slave traders . . . . [and] [c]ity police officers collected reward money for returning runaways, essentially serving as a patrol force for southern masters.

JONATHAN DANIEL WELLS, THE KIDNAPPING CLUB: WALL STREET, SLAVERY, AND RESISTANCE ON THE EVE OF THE CIVIL WAR 7–8 (2020).

[38] It must be noted here that slavery has not, in fact, been completely outlawed in the United States due to the Thirteenth Amendment's allowance for "slavery []or involuntary servitude" as a punishment for individuals convicted of crimes. U.S. CONST. amend. XIII.

[39] Potter, *History of Policing Part 1*, *supra* note 23.

[40] Gary Potter, *The History of Policing in the United States, Part 2*, EKU ONLINE (June 25, 2013) [hereinafter Potter, *History of Policing Part 2*], https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-2 [https://perma.cc/8SZ3-R7XL] (citing RICHARD J. LUNDMAN, POLICE AND POLICING: AN INTRODUCTION 29 (1980)).

[41] *Id.* (quoting Steven Spitzer & Andrew T. Scull, *Privatization and Capitalist Development: The Case of the Private Police*, 25 SOC. PROBS. 18 (1977) for "collective good").

[42] Gary Potter, *The History of Policing in the United States, Part 3*, EKU ONLINE (June 25, 2013) [hereinafter Potter, *History of Policing Part 3*], https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-3 [https://perma.cc/P542-4CKW]; Risa Goluboff, *The Forgotten Law That Gave Police Nearly Unlimited Power*, TIME (Feb. 1, 2016), https://time.com/4199924vagrancy-law-history [https://perma.cc/RW47-LP6P]. These ambiguous vagrancy laws were not declared unconstitutional by the nation's highest Court until 1972 in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

through flagrant brutality.[43] This unrestricted power led, unsurprisingly, to vast corruption within police forces.[44]

Over time, police found new ways to regulate populations on racial and class-based lines. While banks and other financial institutions engaged in persistent redlining,[45] refusing to offer their services to individuals based on their zip codes, police ensured that municipal codes—and later, racially restrictive covenants—were enforced, guaranteeing that particular neighborhoods remained de facto segregated.[46] As the Civil Rights Era progressed, police forces brutalized Black protestors and their allies who peacefully fought to secure equal rights.[47] Increasingly, legislative "solutions" focused on particularized disparities that made little difference to crime prevention; even the notoriously conservative politician Newt Gingrich admitted that federal sentencing guidelines related to the possession and distribution of crack versus powder cocaine in the 1980s made little sense.[48] The disparate enforcement of these arcane laws through over-policing and brutality and media coverage of the acquittal of those police led to uprisings such as the Los Angeles Riots of 1992.[49] The ongoing

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[43] Potter, *History of Policing Part 2*, *supra* note 40.

[44] *Id.*

[45] RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW THE GOVERNMENT SEGREGATED AMERICA vii–viii, 64, 97, 108, 113 (2017).

[46] Matthew Fleischer, *Opinion: How White People Used Police to Make L.A. One of the Most Segregated Cities in America*, L.A. TIMES (Aug. 11, 2020) https://www.latimes.com/opinion/story/2020-08-11/white-people-used-police-brutality-los-angeles-most-segregated-city-in-america [https://perma.cc/J5MU-LFMM].

[47] Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG. (May 29, 2020), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098 [https://perma.cc/7ACN-5GYK] (describing the long history of police brutality toward Black people in the United States).

[48] *See generally*, *e.g.*, DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIV. LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW (2006), https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law (noting "the 100-to-1 crack versus powder cocaine sentencing disparity under which distribution of just 5 grams of crack carries a minimum 5-year federal prison sentence, while distribution of 500 grams of powder cocaine carries the same 5-year mandatory minimum sentence," and highlighting the racial consequences of this policy decision); 13TH (Kandoo Films 2016) (quoting former Speaker of the House of Representatives Newt Gingrich admitting, "We absolutely should have treated crack and cocaine as exactly the same thing. I think it was an enormous burden on the Black community, but it also fundamentally violated a sense of core fairness").

[49] *See* Jeff Wallenfeldt, *Los Angeles Riots of 1992*, BRITANNICA (Sep. 5, 2022), https://www.britannica.com/event/Los-Angeles-Riots-of-1992 [https://perma.cc/VY6K-PYUH] (describing the Los Angeles Riots of 1992).

congressionally authorized war on drugs and subsequent 1994 crime bill that reflected the increasing mass incarceration of people of color proved that racist crime prevention and enforcement was not a partisan issue; white "liberals" and "conservatives" alike feared the presence of non-whites.[50]

Still, today, "Massive racial disparities exist in rates of police traffic stops, stop and frisks, citations, and narcotic search warrants."[51] One only needs to turn on the news to hear the polarizing discourse related to racially biased policing. Police continue to kill Black, Native, and Latinx people at alarmingly higher rates than white people.[52] It is no wonder, then, that

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[50] Though the war on drugs began with a declaration from then-President Nixon in 1971, *A History of the Drug War*, DRUG POLICY ALLIANCE, https://drugpolicy.org/issues/brief-history-drug-war [https://perma.cc/XF6L-LAF9], current Democratic President Joe Biden co-authored and championed the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796. *See Examining Joe Biden's Record on Race: 1994 Crime Bill Sponsorship*, NPR (Oct. 13, 2020), https://www.npr.org/2020/10/13/923170325/examining-joe-bidens-record-on-race-1994-crime-bill-sponsorship [https://perma.cc/LLH5-22Q6] (discussing Biden's involvement in the 1994 crime bill); Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, AM. CIV. LIBERTIES UNION (June 4, 2019), https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis [https://perma.cc/S65S-NFK4] (describing the 1994 crime bill's interplay with already rapidly increasing incarceration rates). Leftist darling Senator Bernie Sanders voted to pass the bill, and former presidential candidate and United States Secretary of State Hillary Clinton notoriously called children committing crime in the 1990s "superpredators." Heidi Przybyla, *Bernie Sanders Has Dodged Criticism for Crime Bill Vote While Others Have Not*, NBC NEWS (June 23, 2019, 10:30 AM), https://www.nbcnews.com/politics/2020-election/bernie-sanders-has-dodged-criticism-crime-bill-vote-while-others-n1020726 [https://perma.cc/2KBP-ZUSV] (discussing Sanders' "yes" vote for the 1994 crime bill); Anne Gearan & Abby Phillip, *Clinton Regrets 1996 Remark on 'Super-Predators' After Encounter with Activist*, WASH. POST (Feb. 25, 2016, 3:50 PM), https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist [https://perma.cc/3QFQ-FUN5] (noting the outcry associated with Hillary Clinton using "superpredators" to describe Black children accused of committing crime).

[51] Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1115–16 (2020) (footnotes omitted) (citing to several studies to support the assertion).

[52] Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCI. 16793, 16793. The exact number of police killings is difficult to determine due to severe underreporting by law enforcement agencies. Mark Hansen, *Is Google More Accurate Than the FBI?*, MARSHALL PROJECT (July 2, 2015, 4:33 PM), https://www.themarshallproject.org/2015/07/02/is-google-more-accurate-than-the-fbi [https://perma.cc/4PQH-J4KR]. The FBI requests that law enforcement agencies submit counts of police-involved deaths annually, but participation by individual agencies is voluntary. *Id.* In 2013, only about 2,700 of 22,000 such agencies submitted reports. *Id.* A 2015 investigation by the Marshall Project suggests that crowdsourcing police-related killings may be more effective and accurate than the FBI's current strategy. *Id.*

communities of color, immigrant communities, and poor communities—despite being the communities most often victimized by crime of all types—are so apt to mistrust police and reticent to provide police with valuable information, especially when providing such information places them at risk.[53] Law enforcement bodies never existed to protect their interests.[54] In fact, while the percentage of white adults who express confidence in police has for decades hovered above 20% higher than the same rate for Black adults, that gap ballooned to 37% in 2020.[55] Similarly, while 24% of white adults express confidence in the American "criminal justice system"—a proxy for faith in prosecutors—just 11% of Black adults share that sentiment.[56] While one could point to growing public resentment due to the proliferation of public outrage via a hive mentality growing out of social media, the more likely conclusion based on the history of policing discussed above is that technology has only illuminated the existing disparities in treatment—not simply magnified outrage.

Indeed, 89% of Black Americans do not have confidence in the fairness of the legal system,[57] likely a result of racially disparate prosecution. The

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[53] *See* LEOVY, *supra* note 15, at 74–85. Though Leovy focuses more on the fear that particular communities bear due to the possibility of retaliation, she does note that one driver of mistrust continues to be law enforcement itself: "Snitching was sometimes seen as borderline racial betrayal, a concession to a law enforcement system that had not served [Black people] especially well." *Id.* at 81; *see* TALES OF THE GRIM SLEEPER (South Central Films 2014) (quoting one resident of South Central Los Angeles: "The relationship with the police in the community is such that no one wants to be the person who is giving the police information. You just don't.").

[54] *See supra* text accompanying notes 22–50.

[55] Jeffrey M. Jones, *Black, White Adults' Confidence Diverges Most on Police*, GALLUP NEWS (Aug. 12, 2020), https://news.gallup.com/poll/317114/black-white-adults-confidence-diverges-police.aspx [https://perma.cc/7BMG-BQUP].

[56] *Id.* The Gallup poll, of course, does not draw the conclusion that confidence in the American "criminal justice system" is a proxy for faith in prosecutors. However, because prosecutors enjoy such broad control of the criminal legal process through their close relationship to police, the farce of the grand jury system (federal prosecutors, for example, secure indictments 99.99% of the time), and their ability to coerce plea bargains, the inference is not strained. *See The Power of Prosecutors*, AM. CIV. LIBERTIES UNION (Jan. 12, 2023), https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors [https://perma.cc/2KGR-JWHU]; Zachary A. Goldfarb, *The Single Chart That Shows That Federal Grand Juries Indict 99.9 Percent of the Time*, WASH. POST (Nov. 24, 2014, 11:55 PM), https://www.washingtonpost.com/news/wonk/wp/2014/11/24/the-single-chart-that-shows-that-grand-juries-indict-99-99-percent-of-the-time; Alissa Marque Heydari & Ronald Wright, *The Ahmaud Arbery Case: Lessons to Prevent Prosecutor Conflicts*, BLOOMBERG L. (Sept. 22, 2021, 3:01 AM), https://news.bloomberglaw.com/us-law-week/the-ahmaud-arbery-case-lessons-to-prevent-prosecutor-conflicts [https://perma.cc/4RTY-4Q2K].

[57] *Id.*

differences in the prosecution of crack-versus-powder cocaine are well documented and have become lore in reform communities, even noted by this nation's highest Court.[58] A recent study examining disparities in capital-eligible cases in Georgia began with the near-consensus premise that Black "defendants are more likely to be charged with the death penalty than Caucasian defendants *and* [that] defendants of any race charged with killing Caucasian victims are significantly more likely to face a capital charge than defendants charged with killing non-Caucasian victims."[59] Such findings support the conclusion that the system was not intended to protect Black victims and actively works to disproportionately exert social control over Black actors.

The justification for using incentives for "white-collar crime" fails for the directly inverse proposition. As those whose interests police *were* instituted to protect slowly become the subject of the State's coercive power through an emergent field of regulation, confusion and unwillingness to cooperate continue to emerge, leading the State to believe that it must speak the language of capitalism to compel participation in the legal process.[60] The amorphous term "white-collar crime," which purportedly did not exist until 1939,[61] is largely absent from criminal statutes,[62] and for a good reason: The concept of "crime" in early American society did not incorporate the

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[58] *See* Terry v. United States, 141 S. Ct. 1858, 1865 (2021) (Sotomayor, J., concurring in part and concurring in judgment); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 164 (2017) (noting the 100:1 ratio of severity of mandatory punishment for crack versus powder cocaine and its racially disparate effect).

[59] Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, 45 AM. J. CRIM. L. 95, 98–99 (2018). The study—controlling for culpability factors to determine whether these disparities were "a function of differential criminal culpability (disparate effect) or discriminatory legal decision-making (disparate treatment)" found that responsibility rested overwhelmingly with disparate treatment by prosecutors based both on the victim's race (defendants were far more likely to be charged as death eligible if the victim was Caucasian) and the defendant's race (Black defendants were more likely to be charged with a death-eligible offense than similarly situated Caucasian defendants). *Id.* at 98–99 (footnote omitted), 144–146,

[60] The increasing unwillingness of federal prosecutors to charge white-collar criminals reflects this confusion. Recent data suggest that white-collar prosecutions are at a historic low. Stephen Gandel, *White-Collar Crime Prosecutions Hit Lowest Level in 33 Years*, CBS NEWS (Sept. 26, 2019, 5:25 PM), https://www.cbsnews.com/news/white-collar-crime-prosecutions-have-hit-lowest-level-in-33-years.

[61] *What Is White-Collar Crime and How Is the FBI Combatting It?*, FBI (Nov. 26, 2022), https://www.fbi.gov/about/faqs/what-is-white-collar-crime-and-how-is-the-fbi-combating-it [https://perma.cc/TL4X-YWDK].

[62] Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 1 (2004).

regulation of how the economic elite acquired wealth. Instead, it concerned almost exclusively the protection of their property and wealth-building strategies—strategies often agnostic to or, more often, antagonistic to the "underclass."[63] The very fact that those who coined the term "white-collar crime" felt obliged to do so undergirds the proposition that criminal regulation initially concerned only marginalized communities: because these new criminals were not like those who had come before, they needed a new name.

To combat the confusion resulting from both the prosecution of an entirely new kind of criminal and marginalized communities' mistrust of police and the legal system, police and prosecutors regularly turn to incentives to compel witnesses to testify.[64] While an extensive discussion of prosecutorial culture is beyond this Comment's scope, it is helpful to understand that incentive structures are critical to how district attorneys' offices operate. To secure convictions of any sort, prosecutors must necessarily retain close relationships with the police, whose explicit role is to investigate those crimes and whose implicit role is to proactively police particular communities to provide prosecutors with individuals to bring to trial.[65]

Prosecutors operate under a perpetual conflict of interest given that their primary duty to seek justice confronts head-on the practical reality that they must rely on convictions for personal career advancement, political clout in times of reelection, and to respond to general public pressure to address crime even where elections are not imminent.[66] Combined with community mistrust in both police and the legal system, the willful blindness that these pressures incentivize naturally causes prosecutors to rely on witness incentives. The precise prevalence of such incentives is difficult to obtain due

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[63] *See supra* text accompanying notes 22–50 (describing the origins of policing as motivated by a desire to control the "underclass"); Potter, *History of Policing Parts 1–3*, *supra* nn. 23, 40, 42.

[64] *See* Harris, *supra* note 8, at 1.

[65] *See generally* Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895 (2020) (arguing that the interdependence between police and prosecutors allows police misconduct to flourish since prosecutors are reluctant to initiate charges against police due to fear of retaliation).

[66] *See* Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 74–82 (2012); Heydari & Wright, *supra* note 56 (describing prosecutors' conflicts of interest as a result of various factors including political expediency).

to disclosure issues.[67] However, there is ample evidence that incentivized testimony is extremely pervasive.[68] One study found that one in eight federal prisoners received a reduced sentence through cooperation.[69]

Unfortunately, offering incentives to combat this reticence has devastating consequences on the reliability of testimony. A recent empirical study demonstrates that incentives "appear to elicit false testimony" from many individuals[70] and that juries are exceedingly poor at accounting for the effects of those incentives in assessing the credibility of witnesses.[71] The "process of wearing down a witness" by offering increasingly more substantial incentives nearly triples the rate of a witness' willingness to testify falsely.[72] Further, prosecutors, often operating within a culture that prioritizes securing convictions over seeking justice, routinely seek that testimony[73] despite the associated reliability problems, especially in weak

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[67] *See* Jessica Brand, *The Epidemic of* Brady *Violations: Explained*, APPEAL (Apr. 25, 2018), https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800 [https://perma.cc/46A9-FXD7] (noting that U.S. prosecutors often withhold evidence that could undermine their cases).

[68] *See, e.g.*, Parker Yesko, *What Exactly are Prosecutors Allowed to Do?*, APM REPS. (May 15, 2018), https://www.apmreports.org/story/2018/05/15/what-exactly-are-prosecutors-allowed-to-do [https://perma.cc/AN5B-96AS] (noting the pervasiveness in the U.S. criminal legal system of offering leniency from prosecution).

[69] Covey, *supra* note 18, at 1388 (citing Brad Heath, *Federal Prisoners Use Snitching for Personal Gain*, USA TODAY (Dec. 14, 2012, 6:11 AM), https://www.usatoday.com/story/news/nation/2012/12/14/jailhouse-informants-for-sale/1762013 [https://perma.cc/SE5B-GW69]). Due to the prevalence of *Brady* violations, one may assume this number is even higher. *See* Brand, *supra* note 67.

[70] Robertson & Winkelman, *supra* note 16, at 61. As at least some of the researchers acknowledge, there is likely a strong sampling error, optimism bias, and social desirability bias in these studies, indicating that the likelihood of incentives inducing false testimony is even stronger than these researchers found. *Id.* at 63–65. Additionally, the sampling bias they cite is underemphasized given the socioeconomic position of many incentivized witnesses, as well as the mistrust in police and prosecutors common among particular demographics. The respondents in the experiments were largely crowdsourced from online marketplaces, *see id.* at 60 n.141, indicating a higher level of education and increased access and familiarity with technology than is common among many informants.

[71] *Id.* at 61; *see also id.* at 55 (discussing the success of real world and experimental incentive structures in inducing lying); *id.* at 83 (suggesting that "blinded incentives" would not eliminate the motivation for false testimony).

[72] *Id.* at 60–61. Prosecutors are thereby given an advantage via negotiation over criminal defendants through both the chess game they may play with potential witnesses, and in the pretrial bargaining process with defendants discussed in more detail *infra* notes 174–76.

[73] Harris, *supra* note 8, at 1.

cases.[74] This is due in part to confirmation bias.[75] While impossible to identify the exact number of wrongful convictions in the United States resulting from incentivized testimony, over half of the 2,130 exonerations registered by the University of Michigan by 2017 involved perjury or false accusations.[76] Analyzing 250 wrongful convictions uncovered through DNA evidence, one researcher found that 21% involved incentivized witnesses of some sort.[77]

II. A HISTORY OF MISUNDERSTANDING

Courts have not always been so willing to accept incentivized testimony in the criminal context and remain unwilling to do so in the civil context for fact witnesses. In civil cases, if either party offers a fact (non-expert) witness any incentive beyond the monetary sum required to compensate them for travel and time missed from work, it is considered bribery.[78] Criminal *defendants* are strictly prohibited from offering inducements to witnesses to testify.[79] In fact, both a federal statute and the American Bar Association Model Rules of Professional Conduct explicitly forbid the inducement of testimony in *all* court proceedings where prohibited by law.[80] Prosecutors

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[74] Yesko, *supra* note 68.

[75] Covey, *supra* note 18, at 1384.

[76] Robertson & Winkelman, *supra* note 16, at 55 & n.107. Perversely, this impossibility results in part from the lack of physical evidence present in many cases in which prosecutors rely on witness testimony, rendering these convictions almost impregnable. *See id.* at 55 (highlighting the lack of physical evidence in such cases).

[77] *Id.* at 54–55 (citing BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 124 (2011)).

[78] *See* 18 U.S.C. § 201(b)(3) ("Whoever . . . directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of [a] person as a witness upon a trial . . . shall be fined . . ., imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust or profit under the United States."); *id.* § 201(d) (prohibiting all witness payments but carving out those "provided by law" and payment of "reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance"). This Comment does not take a position as to whether witnesses may be willing to condition testimony on the basis of missing work alone. It speaks only to incentives beyond what it costs one to appear in court.

[79] *See* Levmore & Porat, *supra* note 9, at 695 n.7, 707.

[80] 18 U.S.C. § 201(c)(2) ("Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . shall be fined under this title or imprisoned for not more than two years, or both."); MODEL RULES OF PRO. CONDUCT r. 3.4(b) (AM. BAR ASS'N 2019) ("A lawyer shall not . . . offer an inducement to a witness that is prohibited by law").

can circumvent these prohibitions, in part, due to an overly formalistic and disingenuous reading of those rules' language which relies on the idea that the United States as a sovereign cannot be subsumed by the term "whoever" since it is not a person.[81] In *United States v. Singleton*, the Tenth Circuit held that the term "whoever" does not apply to prosecutors who are "not simply . . . [lawyers] advocating the government's perspective of the case" but instead "the alter ego of the United States exercising its sovereign power of prosecution."[82] Based on this logic, the court found it "patently absurd" that a prosecutor would be forbidden to induce testimony.[83]

However, based on the incentive structures discussed above, the current structure is far more absurd. There is an inherent connection between the history of policing and how prosecutors think, function, and act as the instruments of "justice" in our criminal legal system. The Supreme Court's stubborn insistence on the presumption that prosecutors always act in good faith is far more ludicrous than the prospect of forbidding witness incentives. Prosecutors and police work in symbiosis, and the system inherently incentivizes police to twist the truth during criminal prosecutions; after all, the credibility and skill of law enforcement officers is on trial alongside the defendant in every criminal trial.[84] Such deception is commonplace: Participants in the criminal legal system, including police themselves, have adopted the term "[t]estilying" to characterize police testimony.[85] If prosecutors objectively looked at potential witnesses and determined why law enforcement "must" incentivize them to testify, prosecutors would often find that the police were in error, had scared the witnesses into testifying, or

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[81] *See* United States v. Singleton, 165 F.3d 1297, 1299–1300 (1999).

[82] *Id.*

[83] *Id.* at 1300.

[84] Police are routinely subpoenaed to testify as witnesses, and just like all other witness testimony, testimony from police officers is considered evidence which must have its credibility evaluated by the factfinder. The Federal Law Enforcement Training Centers, a federal governmental organization, posts easily accessible training material coaching officers on how to be credible witnesses. *See* MICHELLE M. HELDMYER, THE ART OF LAW ENFORCEMENT TESTIMONY: FINE TUNING YOUR SKILLS AS A WITNESS 3–4, https://www.fletc.gov/sites/default/files/the_art_of_testimony_4.20.18.pdf. Even where police do not testify at trial, a reasonable juror can correctly assume that nearly all the evidence presented by the State was gathered through police investigation. *See Preservation of Evidence in Criminal Cases*, NOLO, https://www.nolo.com/legal-encyclopedia/preservation-evidence-criminal-cases.html [https://perma.cc/VGN6-Q6LF].

[85] *See, e.g.*, United States v. Maclin, No. 18-CR-122, 2019 WL 5058905, at *12 (E.D. Wis., Mar. 22, 2019) (acknowledging, in a federal case, the practice of "[t]estilying" and citing Joseph Goldstein, '*Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html)).

that the witnesses had independent motivations for their willingness to perjure themselves in exchange for a reward.[86] However, this interrogation would compromise prosecutors' relationships with the police, endangering their ability to work together, and would further damage the likelihood of securing convictions. The prosecutor, therefore, is as much *Singleton*'s "whoever" as any other person whose fundamental duties conflict with the reality of the system within which they operate.

History further demonstrates that the argument that a prohibition against induced testimony would be "patently absurd" has little merit.[87] Approvement was a common law system in which an accomplice could enter into a contingent agreement with the court that if the accused was convicted, the accomplice would be banished instead of sentenced to death.[88] Courts initially presumed the testimony to be truthful because the "approver" was confessing to a capital crime (failing to recognize that a confession was more likely an attempt to save one's own life).[89] This justification fails in the modern era given that the development of DNA evidence has proven that false confessions occur with significant frequency.[90] In fact, most scholars

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[86] *See* H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, 32 COLO. LAW. 11, 11–12 (2003) (drawing on the percentage of wrongful convictions among Illinois death row inmates to estimate that, as of 2003, there were likely more than 200,000 wrongful convictions among those imprisoned for FBI "index crimes," and attributing these primarily to mistaken identification, police and prosecutorial misconduct, and perjured testimony).

[87] *See generally* King, *supra* note 9 (detailing the fraught history of incentivized testimony in England which culminated in most inducements being expressly forbidden). King, a former prosecutor-turned-immigration judge, believes that the American development of incentivized testimony has protected against perjury through procedural safeguards. *Id.* at 180. Based on the documented prevalence of perjured testimony by incentivized witnesses, there is little reason for such optimism. *See* Innocence Staff, *Barry Scheck Urges Washington Lawmakers to Pass Law to Curb False Testimony by Informants*, INNOCENCE PROJECT (May 3, 2017), https://innocenceproject.org/scheck-urges-passage-law-curb-false-informant-testimony [https://perma.cc/5FER-VQAQ] (describing the prevalence of incentivized testimony in cases of exonerees); Jeffrey S. Neuschatz, Deah S. Lawson, Jessica K. Swanner, Christian A. Meissner & Joseph S. Neuschatz, *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 L. & HUM. BEHAV. 137, 146 (2008) (noting that incentivized testimony in a controlled study did not affect juror conviction rates even though participants viewed the incentivized witnesses "as less interested in serving justice and more interested in serving self-interests").

[88] King, *supra* note 9, at 159.

[89] *Id.*

[90] *See Wrongful Convictions*, NAT'L INST. JUST., https://nij.ojp.gov/topics/justice-system-reform/wrongful-convictions [https://perma.cc/JS5Z-99FD] (noting that DNA evidence remains a primary way by which wrongful convictions are uncovered); Erin Blakemore, *Examining Why False Confessions Occur in the U.S. Criminal Justice System*, WASH. POST

agree that the practice of approvement fell out of favor by the close of the Medieval period due to "a societal recognition that the benefits of the practice were outweighed by the risks of perjury created by making" the pardon contingent on conviction.[91]

"[K]ing's evidence," a practice in which the Crown forewent prosecuting confessors based on their best efforts "to assist in the prosecution of [their] accomplices,"[92] similarly fell out of favor. By 1751, English courts recognized that incentives compromised the reliability of testimony and increased the likelihood of perjury, and required corroboration through independent evidence.[93] Judge H. Lloyd King, Jr. reasons that the differences between the English trial system upon which the American criminal system is based and the current criminal legal system in America render the corroboration requirement unnecessary, seemingly finding the presence of counsel and concomitant ability to cross-examine witnesses, the ability of a defendant to testify in their own defense, and appellate review sufficient to overcome the risk of perjury.[94] Yet, based on the apparent inability of juries to discount the awarding of incentives in evaluating credibility, even where informed of its existence,[95] none of these safeguards has proved sufficient. The Oregon Supreme Court, for example, recently stated in dicta that "'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence."[96] Additionally, given that the Constitution's drafters feared and loathed the authoritarian nature of the Crown, one would surmise that they intended criminal defendants in this country to enjoy at least the same procedural safeguards as defendants in the country from which they fought for independence.[97]

The United States Supreme Court did not officially condone the practice of inducing witnesses to testify—at least of the accomplice category—until

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(June 23, 2019, 7:00 AM), https://www.washingtonpost.com/health/examining-why-false-confessions-occur-in-the-us-criminal-justice-system/2019/06/20/10128bb4-9207-11e9-aadb-74e6b2b46f6a_story.html [https://perma.cc/M93X-H8D6].

[91] King, *supra* note 9, at 159–60.

[92] *Id.* at 160.

[93] *Id.*

[94] *Id.* at 161–64.

[95] *See* Neuschatz et al., *supra* note 87, at 146.

[96] State v. Lawson, 291 P.3d 673, 694–95 (Or. 2012) (en banc).

[97] *See, e.g.*, Lyon v. Aguilar, No. 08-1114 LFG/DJS, 2009 WL 10675506, at *1 (D.N.M. Oct. 21, 2009) ("[T]o ensure that the national government would not become as tyrannical as King George III, the Constitution and subsequent Bill of Rights imposed limitations on government").

The Whiskey Cases in 1878.[98] In large part, the frequency with which police and prosecutors have relied on incentivized testimony in the United States has followed political phenomena, becoming more prevalent following: (1) the capture of tens of thousands of political prisoners willing to switch sides and testify against one another after the Civil War; (2) the reallocation of resources by the federal government to prosecuting firearms-related crimes following Prohibition; and (3) the declaration of the War on Drugs.[99] That frequency expanded in these last two instances following federal government policy decisions that disproportionately affected poor people, immigrants, and people of color should come as no surprise given the discussion in Part I.[100]

In total, the criminal system's development through policing, legislative decisions to allocate resources toward particularized enforcement (e.g., the War on Drugs), the political forces underlying prosecutorial incentives, and the federal judiciary have essentially given carte blanche to prosecutors offering inducements for witness testimony. Compounding the tragedy, prosecutors often prey on especially vulnerable communities to accomplish the system's goals. Still, the practice has not gone altogether unquestioned.[101] Defendants have raised challenges to inducements in several cases on both statutory and constitutional grounds, and courts have routinely acknowledged the associated perjury risk,[102] even in cases upholding the use of incentivized informants: "We have previously recognized that criminals who are rewarded by the government for their testimony are inherently

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[98] 99 U.S. 594 (1878).

[99] Markus Surratt, Comment, *Incentivized Informants, Brady, Ruiz, and Wrongful Imprisonment: Requiring Pre-Plea Disclosure of Material Exculpatory Evidence*, 93 WASH. L. REV. 523, 547–48 (2018).

[100] *See* Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks"*, 6 J. GENDER, RACE & JUST. 381, 381–87 (2002); Alan Ashe, *It's National Moonshine Day. We Answer Your Questions*, CNN (June 7, 2018, 12:14 AM), https://www.cnn.com/2018/06/07/us/national-moonshine-day-facts-trnd/index.html [https://perma.cc/D3Q6-GEWA] (noting that recent immigrants disproportionately produced moonshine).

[101] Nor has the practice gone unquestioned in many other legal systems. Participants in the legal systems of Canada (including police officials) as well as European countries view the practice as "legally and morally problematic" and have enacted laws limiting its use. ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 68 (2d ed. 2022).

[102] *See, e.g.*, United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984); United States v. Dailey, 759 F.2d 192 (1st Cir. 1985); United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), *reh'g en banc granted, opinion vacated* (July 10, 1998), *on reh'g en banc*, 165 F.3d 1297 (10th Cir. 1999).

untrustworthy, and their use triggers an obligation to disclose material information to protect the defendant from being the victim of a perfidious bargain between the State and its witness."[103] In one particularly foreboding opinion, the Ninth Circuit stated:

> A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system . . . . Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy . . . . Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery.[104]

These courts usually conclude, however, that existing safeguards, especially an illusory mandatory disclosure requirement, should sufficiently protect defendants' due process rights.[105]

III. CAN POLICE AND PROSECUTORS POLICE AND PROSECUTE THEMSELVES?

Various commentators have proposed additional procedural safeguards as remedies to address the risk of perjury that incentivized testimony introduces, while some continue to insist that existing safeguards are adequate.[106] Chief among existing safeguards is a mandatory disclosure requirement[107] that already exists in theory under *Brady v. Maryland*'s requirement that prosecutors affirmatively disclose all material exculpatory

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[103] Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997).

[104] United States v. Bernal-Obeso, 989 F.2d 331, 333–34 (9th Cir. 1993).

[105] *See id*. at 335.

[106] King, *supra* note 9, at 180 (arguing that existing safeguards are adequate); JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 3–5 (2007), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf [https://perma.cc/5EV6-ENQR] (arguing for additional safeguards); Surratt, *supra* note 99, at 578; Robertson & Winkelman, *supra* note 16, at 80–83 (arguing for additional safeguards); Aaron M. Clemens, Note, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 QLR 151, 211–34 (2004) (arguing for additional safeguards)*; see generally* Covey, *supra* note 18(arguing for the prohibition of "jailhouse snitch" testimony).

[107] *See Safeguarding Against Unreliable Jailhouse Informant Testimony*, INNOCENCE PROJECT (Dec. 1, 2021), https://innocenceproject.org/safeguarding-against-unreliable-jailhouse-informant-testimony (advocating for mandatory disclosures of jailhouse informants' criminal histories, benefits implied or offered, and history of informant activities).

evidence, including facts that may impeach a State witness.[108] As discussed in Part II, some criminal legal system participants have justified the use of incentives by pointing to a defendant's ability to compel discovery, cross-examine witnesses, and the opportunity for postconviction review,[109] though none have accounted for why these have failed to prevent (and correct) wrongful convictions. More novel proposed safeguards and remedies[110] include:

- requiring corroboration of the testimony with other evidence;[111]
- stronger jury instructions;[112]
- requiring greater pretrial disclosure of impeachment evidence;[113]
- pretrial screening of incentivized witnesses akin to that required by *Daubert v. Merrell Dow Pharmaceuticals*[114] of expert witnesses;[115]
- the complete exclusion of "jailhouse snitch" testimony;[116]
- blinding (mandating that where police and prosecutors offer incentives, they do so prior to ascertaining whether the witness would testify favorably to the government);[117]
- police and prosecutorial reform;[118]
- polygraphs or other veracity tests.[119]

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[108] *See* Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150, 151–54 (1972) (applying the *Brady* requirement to impeachment evidence in a case addressing the failure to disclose an incentive to a key State witness).

[109] *See supra* notes 78–105 and accompanying text; *see also* King, *supra* note 9, at 180 (referencing cross-examination of witness about biases and interests).

[110] Most of these remedies are suggested exclusively for "jailhouse snitch" testimony.

[111] JUSTICE PROJECT, *supra* note 106, at 4.

[112] *Id*. at 5.

[113] *Id*. at 3; Surratt, *supra* note 99, at 578.

[114] 509 U.S. 579 (1993).

[115] JUSTICE PROJECT, *supra* note 106, at 3–4.

[116] *See generally* Covey, *supra* note 18 (arguing that such testimony is so inherently unreliable and simultaneously so persuasive that it must be completely excluded).

[117] Robertson, *supra* note 16, at 80–83.

[118] Clemens, *supra* note 106, at 211–34.

[119] *Id*. at 234–42.

This Section will address existing requirements and these proposed reforms, demonstrating that these also fail to adequately protect defendants from the risks of perjured testimony.[120]

A. EXISTING DISCLOSURE REQUIREMENTS

Existing disclosure requirements under *Brady* prove woefully ineffective for several reasons. First and fundamentally, disclosure requires prosecutors to police themselves and the police for violations. As illustrated in Part I, *supra*, due to the way police conceptualize their role in the criminal system, the likelihood is astronomically low that they will regulate their own conduct in this sphere by communicating to prosecutors information favorable to defendants. Similarly, despite the idealistic language often touted by this nation's highest Court related to prosecutors' duty to seek justice above all else, most district attorneys are elected officials subject to intense political pressures from powerful interests to carry out the regulation and prevention of "criminal" acts.[121] As Professors Mark Tushnet and Larry Yackle point out, "No politician in recent memory has lost an election for being too tough on crime."[122] Those pressures can create an incentive to secure convictions with as little interference from procedural safeguards as possible, which may lead to preying on the weakest targets as perceived by police and prosecutors. As Professor Angela J. Davis puts it, "Prosecutors have been left to regulate themselves, and, not surprisingly, such self-regulation has been either nonexistent or woefully inadequate."[123]

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[120] The sheer number of these proposed reforms indicates the unwillingness of the system to acknowledge that only a complete prohibition will adequately address the underlying problems.

[121] *See, e.g.*, LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 581–82 (Wolters Kluwer 4th ed. 2018). Lerman and Schrag recount a 2005 case in which assistant district attorney Daniel Bibb urged New York District Attorney Robert Morgenthau to join an effort to exonerate two men wrongfully convicted of murder. *Id.* at 581. Facing a contentious reelection, Morgenthau refused, forcing Bibb to throw the case. *Id.* at 581–82. Morgenthau was reelected. Robert D. McFadden, *Robert Morgenthau, Longtime Manhattan District Attorney, Dies at 99*, N.Y. TIMES (July 21, 2019), https://www.nytimes.com/2019/07/21/nyregion/robert-morgenthau-dead.html. The two men were eventually exonerated. LERMAN & SHRAG at 581.

[122] Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 1 (1997).

[123] Angela J. Davis, *The American Prosecutor – Power, Discretion, and Misconduct*, 23 CRIM. JUST. 25, 28 (2008).

Further compounding this failure, defendants are poorly positioned to uncover violations when they do occur.[124] Prior to trial, defendants cannot depose police officers to uncover their use of incentives.[125] Even if defendants were able to do so, it would merely incentivize prosecutors to not communicate to police which witnesses prosecutors had incentivized. After trial, the system guards heavily against witness harassment by the defense.[126] Therefore, when incentivized witnesses commit perjury by testifying that they received no incentives for their testimony, as informants often do,[127] that often concludes the matter since prosecutors have every reason to forego prosecuting them for perjury.[128]

Even where courts grant such discovery requests, existing materiality standards prove far too high to overturn most convictions under the harmless

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[124] *See* Covey, *supra* note 18, at 1403–09 (describing difficulties of challenging "jailhouse snitch" testimony on postconviction review).

[125] To depose witnesses in criminal cases in almost all states and in the federal system, the court must grant a defense attorney's motion based on good cause. Almost always, the required showing mandates that the witness be unavailable for trial. Stacey Barrett, *Criminal Depositions: Preserving Witness Testimony*, LAWYERS.COM (Dec 30, 2021), https://www.lawyers.com/legal-info/criminal/criminal-law-basics/criminal-depositions-preserving-witness-testimony.html.

[126] Federal witnesses and some state witnesses are protected by the U.S. Marshal Service's Witness Protection Program authorized by the Organized Crime Control Act of 1970. *Witness Security*, U.S. MARSHAL'S SERVICE, https://www.usmarshals.gov/what-we-do/witness-security [https://perma.cc/H3HX-JTGH]; 18 U.S.C. § 3521 (providing for witness protection and relocation at the federal level). Some states have enacted analogous statutes to accommodate gaps in the federal program. *See, e.g.*, 725 ILL. COMP. STAT. 120/2 (2015) (implementing procedures and "affording certain basic rights and considerations to the witnesses of crime who are essential to prosecution" in Illinois); VA. CODE ANN. § 19.2-11.1 (2021) (providing protections to participants in Virginia's "crime victim and witness assistance program"). Federal law also protects witnesses after trial at both the state and federal level. *See* 18 U.S.C. § 1512(h) (providing federal jurisdiction for the prosecution of offenses related to witness tampering).

[127] Fessinger, *supra* note 7, at 176. This study of twenty-two Innocence Record cases found that that all but seven of the thirty-nine criminal informants used in those cases explicitly denied receiving an incentive before the jury despite being questioned by nearly 75% of prosecutors and defense attorneys as to whether they had. *Id.* at 173, 176.

[128] Because of procedural defaults in both state post-conviction proceedings and federal habeas proceedings, what constitutes admissible evidence worthy of discovery depends on the vastly variable discovery schemes of each state. *See* Rachel G. Cohen & Krista A. Dolan, *Drowned Out Without Discovery: Post-Conviction Procedural Inadequacy in an Era of Habeas Deference*, 1 CRIM. L. PRAC. 5, 9–12 (2013). Some states are far more generous than others. *Id.* at 10. It follows, then, that once a defendant has not challenged a witness' testimony denying inducement, prosecutors would be undermining their own convictions by prosecuting a state witness.

error standard adopted in *Chapman v. California*.[129] While not related to incentivized testimony, a 2010 study by the Innocence Project identified forty-six DNA exonerations where defendants had claimed "improper argument"; courts found error in over half of them but deemed the errors harmless in all but five.[130] In one infamous federal habeas capital case in which the petitioner received recantation affidavits from seven of the State's nine witnesses, the court turned the credibility determination on its head, ruling that at least one witness's testimony had been so obviously false that the jury could not have meaningfully taken it into account in their verdict.[131] That man, Troy Davis, was executed in 2011, maintaining his innocence to the end.[132]

As several commentators have correctly noted, existing mandatory disclosure requirements also introduce timing problems.[133] Witnesses may testify honestly at trial that police and prosecutors did not promise them benefits in exchange for their testimony while they simultaneously suspect or expect that rewards will follow.[134] Context and preexisting knowledge of crime reward payments and reduced sentences allow testifying witnesses to rationally infer they will receive such benefits so long as they testify favorably for the State.[135] Thus, police and prosecutors never need to explicitly condition incentivized testimony on a witness testifying in a particular way. This systematized loophole exists thanks to the Supreme Court's decision in *United States v. Ruiz* categorically excluding impeachment evidence from the body of *Brady* evidence that prosecutors must disclose during pretrial plea negotiations.[136] This proves especially troubling since more than 97% of federal criminal defendants and around

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[129] 386 U.S. 18 (1967).

[130] DR. EMILY M. WEST, INNOCENCE PROJECT, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 5 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf [https://perma.cc/5Z9U-FCJR].

[131] *In re* Davis, No. CV409–130, 2010 WL 3385081, at *48–49 (S.D. Ga. Aug. 24, 2010).

[132] *Remembering Troy Davis*, INNOCENCE PROJECT (Sep. 24, 2012), https://innocenceproject.org/remembering-troy-davis [https://perma.cc/RYJ8-6KU4].

[133] *See generally, e.g.*, Surratt, *supra* note 99(arguing for an explicit "legal standard for when the government must provide material information about an informant [to a defendant] before a plea deal" due to *Brady*'s requirements taking effect only for trial).

[134] Covey, *supra* note 18, at 1415–16.

[135] *See* Levmore, *supra* note 9, at 713; Robertson & Winkelman, *supra* note 16, at 36.

[136] *See* United States v. Ruiz, 536 U.S. 622, 626 (2002).

94% of state criminal defendants never reach trial.[137] Prosecutors, therefore, can pressure would-be defendants into accepting unfavorable deals by truthfully disclosing the existence of witnesses willing to testify against them without qualifying the disclosure by informing the accused that their witnesses received incentives.

B. PRE-PLEA DISCLOSURE

Unfortunately, even a pre-plea disclosure requirement would fail for multiple reasons. First, regardless of timing, relying on disclosure at any point necessitates the self-regulation of police and prosecutors as discussed above. Furthermore, as noted in Part I, *supra*, disclosure itself does not significantly mitigate the risk that jurors will rely on perjured testimony from incentivized witnesses.[138] Finally, one can logically assume that police and prosecutors offer incentives to testify in proportion to the strength of the entire body of evidence against a defendant in a given case. If convictions are all they seek, convictions themselves become the commodities of a type of marketplace; the greater the evidence, the less likely law enforcement will find it necessary to employ valuable resources to strengthen a case and vice versa. Given this fact, voluntary disclosure is even less likely to occur in the cases in which it would have the most impact because it would often undermine the very heart of the prosecution's otherwise weak case.[139] All this further underscores the underlying incentives motivating both police and prosecutors to arrest and convict as many individuals as possible.

C. OTHER SAFEGUARD-LIKE PROPOSALS

Similar proposals fail for similar reasons. Stronger jury instructions, short of providing the jury with empirical evidence that incentivized witnesses routinely lead to wrongful convictions or that incentivized witnesses frequently perjure themselves[140]—instructions which, of course,

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[137] Clark Neily, *Prisons Are Packed Because Prosecutors Are Coercing Plea Deals. And, Yes, It's Totally Legal*, NBC NEWS (Aug. 8, 2019, 6:33 PM), https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201 [https://perma.cc/F3RF-FMXA] (first citing Ripley Rand & David M. Palko, *Year One of Trump's DOJ: The National Criminal Sentencing Statistics*, NAT'L. L. REV. (June 4, 2019), https://www.natlawreview.com/article/year-one-trump-s-doj-national-criminal-sentencing-statistics; then citing Emily Yoffe, *Innocence Is Irrelevant*, ATL. (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171).

[138] *See* Robertson & Winkelman, *supra* note 16, at 57; Neuschatz et al., *supra* note 87, at 146.

[139] *See* Covey, *supra* note 18, at 1416.

[140] *See* Robertson & Winkelman, *supra* note 16, at 55, 61.

would never be allowed by judges with any reverence for the judicial process—fall prey to the same impossibly difficult reliability determinations by factfinders that create problems in their absence. Polygraphs do not reliably work.[141] A pretrial *Daubert*-like screening would fail to protect defendants because judges are no more likely to be able to discern the truth of incentivized testimony than jurors. In fact, judges may be worse than jurors at assessing incentivized witnesses' credibility due to confirmation and persistent pro-prosecution biases, coupled with the incentive to preserve legitimacy in their courtrooms.[142]

While other proposals may be helpful, they do not eliminate risk and would be too slow to implement. Blinding, the practice of offering incentives to witnesses only before ascertaining how they would testify, may exclude some perjured testimony by a few lucky witnesses. However, if they are regular informants, as many are,[143] they will be just as likely to testify favorably to the prosecution for fear of losing their next payment. Even were blinding coupled with a modest cap on the number of times a witness could be incentivized to testify, the mere fact that the State is the incentive's source likely provides a strong psychological pull to testify in its favor. Requiring the corroboration of incentivized testimony by other evidence becomes an inestimable question of substance: How much and how strong must the other evidence be to justify such testimony? Need the prosecution produce only a modicum of evidence, or must it have "substantial" other evidence? What would "substantial" or "modicum" mean in practice? If the judge is the party making this determination, such a requirement is unlikely to provide much protection. Police and prosecutorial reform are admirable goals regardless of the admissibility of incentivized testimony. However, history has borne out the reality that structural racism and other biases are difficult to quickly weed out of the legal system,[144] especially in a federalist system where individual states primarily regulate their own criminal systems.

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[141] AM. PSYCH. ASS'N, *The Truth About Lie Detectors (aka Polygraph Tests*) (Aug. 5, 2004), https://www.apa.org/research/action/polygraph.

[142] *See* Covey, *supra* note 18, at 1412–14 (discussing confirmation bias and pro-prosecution bias).

[143] Emily Jane Dodds, Note, *I'll Make You a Deal: How Repeat Informants Are Corrupting the Criminal Justice System and What to Do About It*, 50 WM. & MARY L. REV. 1063, 1073–79 (2008).

[144] *See generally* Eric Foner, *The Supreme Court and the History of Reconstruction–and Vice-Versa*, 112 COLUM. L. REV. 1585 (2012) (arguing that post-reconstruction Supreme Court jurisprudence adopted a flawed historical narrative of Reconstruction that continues to haunt the cause of equality today); Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L. J. 1002 (2019) (reviewing ELIZABETH GILLESPIE MCRAE, MOTHERS OF MASSIVE RESISTANCE:

D. SELECTIVE ABOLITION

Finally, abolishing only "jailhouse" or "snitch" testimony fails to account for the degree to which incentives other than sentence reductions and favorable treatment in prison can be similarly powerful. A $20,000 check—such as the one discussed at the beginning of this Comment—represents 133% of yearly wages for a worker at the 2021 federal minimum wage of $7.25 per hour. Incentivized witnesses may feel other benefits less tangibly; a police officer's promise of friendship or protection (or, conversely, fear of a police officer's retribution) may prove incredibly powerful in motivating a witness to falsely testify. Such a narrow abolition also fails to acknowledge that, in some ways, incentivized testimony by "noncriminals" likely appears even more credible to a jury than that from witnesses whose character may be impeached through cross-examination. Incentives given to noncriminal witnesses, when disclosed, become a form of bizarre prosecutorial vouching where a prosecutor implicitly points to a witness and tells the jury, "I believe this person so much, and yet they were so afraid of testifying, that I was willing to pay them X to have them here today." Due to these realities, a more categorical prohibition on all forms of incentivized testimony is necessary.

IV. FUNDAMENTAL FAIRNESS: A HISTORY OF MISUNDERSTANDING REDUX

A. DUE PROCESS JURISPRUDENCE: FUNDAMENTAL FAIRNESS

The vehicle for such a prohibition should be obvious: the Due Process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution. The Court's approach to due process has evolved significantly over time in the realm of criminal procedure[145] and its conceptualization of what issues

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WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY (2018)); JEANNE THEOHARIS, A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY (2018) (noting the similarities between our racial past and present by highlighting the similarities between the discriminatory strategies and justifications employed during the Civil Rights Era and today).

[145] *See* Edward G. Mascolo, *Due Process, Fundamental Fairness, and Conduct that Shocks the Conscience: The Right Not to be Enticed or Induced to Crime by Government and Its Agents*, 7 W. NEW ENG. L. REV. 1, 1–2 (1984); *id.* at 11–12 ("Due process . . . embodies a concept that has evolved historically. It is neither fixed nor final. . . . [It] 'is not a technical conception with a fixed content' . . . [but] 'a summarized constitutional guarantee of respect for those personal immunities' which are 'fundamental' and 'implicit in the concept of ordered liberty'") (first citing Rochin v. California, 342 U.S. 165, 168–72 (1952); then quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring); and then quoting *Rochin*, 342 U.S. at 169)).

deserve "fundamental fairness" review has proven even more nebulous. Professor Tracey L. Meares summarizes the Court's evolution in this regard succinctly:

> Beginning in the late 1920s and continuing throughout the 1930s, the Court began to interpret the Due Process Clause of the Fourteenth Amendment to invalidate state criminal convictions . . . . In [so doing], the Court made clear that it regarded public perceptions of the fairness of proceedings as serving a critical function in establishing the constitutional standards for due process in criminal trials.[146]

The Court often used idealistic and inspirational language to describe the operation of fundamental fairness, with Justice Frankfurter writing in 1947 that due process required procedures that amounted to the "protection of ultimate decency in a civilized society."[147] In practice, however, the Court worked case-by-case to review for fairness, rarely developing prophylactic rules to protect defendants' rights as a whole.[148] This led to criticism that the use of the fundamental fairness doctrine merely revealed the personal beliefs and feelings of individual justices as to individual defendants.[149]

B. THE COURT SHIFTS TO SELECTIVE INCORPORATION

To effectuate the change compelled by the civil rights movement, the Warren Court felt it necessary to turn to a new vehicle by which to regulate criminal procedure and found it in selective incorporation of the Bill of Rights.[150] In making this transition, the Court mostly abandoned fundamental fairness as a doctrine. As Meares argues, such a switch made some sense during that era: "If one is suspicious of . . . open-ended fundamental fairness norms, then one might naturally look to lists of sharp-edged prophylactic prohibitions and requirements that can bring on reform of these actors' practices."[151] However, in shifting from judicial pronouncements of fairness to rule formalism, the Warren Court constrained the contours of where "fundamental fairness" decisions were likely to lead.[152]

Eventually, this constraint, coupled with the majority of the Court's turn to "originalism" and "textualism," has led to Supreme Court pronouncements like that in *Medina v. California*: "In the field of criminal law, we 'have

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[146] Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 111 (2005).

[147] *Id*. at 112; *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring).

[148] Meares, *supra* note 146, at 112–13.

[149] *Id.*

[150] *See id.* at 113.

[151] *Id.*

[152] *Id.*

defined the category of infractions that violate "fundamental fairness" very narrowly' based on the recognition that, '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'"[153] Thus, typically, the Court finds due process violations only related to those "immunities" that "have been found to be implicit in the concept of ordered liberty."[154] Fortunately, even with the originalists' demanding and aspirational standard for what constitutes such an immunity, it should not be difficult to locate immunity against coerced testimony as an immunity that is, in fact, implicit in ordered liberty.

C. IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY

Indeed, as Justice Holmes put it in *United States v. Oppenheimer*, "It cannot be that the safeguards of the person [in a criminal proceeding], so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt."[155] In *Apprendi v. New Jersey*, the Supreme Court had cause to pronounce that principles of due process extend "centuries into the common law" and are rooted in the necessity "'[t]o guard against a spirit of oppression and tyranny on the part of rulers' . . . ."[156] In the context of the right to a jury trial, that case acknowledged that trial practices may change over the "course of centuries and still remain true to the principles that emerged from the Framers' fears . . . ."[157] *Apprendi* also acknowledged the Court's willingness to recognize a distinction between rules related to fairness to the defendant that favor the defense at the expense of the prosecution (in that case, rules related to aggravating and mitigating factors for sentencing).[158] The Court also enforces the Federal Rules of Evidence and its state analogs, which largely prohibit parties from introducing evidence related to plea bargaining exclusively against the defendant, but not against the State.[159]

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[153] Medina v. California, 505 U.S. 437, 443 (1992) (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

[154] Palko v. Connecticut, 302 U.S. 319, 324–25 (1937).

[155] United States v. Oppenheimer, 242 U.S. 85, 87 (1916).

[156] Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540 (Thomas M. Cooley ed., 4th ed. 1873)).

[157] *Id*. at 483.

[158] *Id*. at 491–92 n.16.

[159] *See* DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 143 (West Academic Publishing) (4th ed. 2018) (describing Federal Rule of Evidence 410).

One of the most powerful voices ever to write for the Supreme Court appeared fundamentally uneasy with the fairness of the practice of incentivizing witnesses to testify. Dissenting in *Hoffa v. United States*, Chief Justice Earl Warren condemned as unfair the decision of federal prosecutors to "reach[] into the jailhouse to employ a man who was himself facing indictments far more serious (and later including one for perjury) than the one confronting the man against whom he offered to inform."[160] While *Hoffa* presented an extreme case and Justice Warren did state that, generally, the "[g]overnment must take the witnesses as it finds them,"[161] he stopped short of condoning the practice of incentivizing testimony, proclaiming that "[g]iven the incentives and background of [the witness], no conviction should be allowed to stand when based heavily on his testimony."[162] Justice Warren also quoted his proclamation in *Mesarosh v. United States*—a case directly dealing with the unreliability of an incentivized government informant's testimony—for the proposition that "[t]he government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them."[163]

D. A RETURN TO FAIRNESS DOCTRINE?

Indeed, despite the shift in vehicle to analyzing procedural rights of a criminal defendant in terms of the selective incorporation of the Bill of Rights, the Court has been unable to completely abandon the language of fairness. Twelve years before the Warren Court revolutionized due process, the Court stated in *Lisenba v. California* that the "aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."[164] Each of the Warren Court's landmark decisions involving criminal procedure, whether out of concern for stare decisis or for some other reason, strongly reflects this idea.

In arguably its first revolutionary criminal procedure opinion, *Napue v. Illinois*, the Warren Court held that the knowing use of false testimony by a prosecutor in a criminal case violates the Due Process Clause, regardless of

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[160] Hoffa v. United States, 385 U.S. 293, 321 (1966) (Warren, J., dissenting).

[161] *Id*. at 320.

[162] *Id*.

[163] *Id*. (internal quotation marks omitted); *Mesarosh v. United States*, 352 U.S. 1, 14 (1956).

[164] Lisenba v. California, 314 U.S. 219, 236 (1941).

whether the testimony goes only to credibility or to guilt.[165] Addressing a prosecution in which the State elicited incentivized testimony, failed to disclose the incentive, and failed to correct the incentivized witness' testimony denying the existence of that incentive, the Court noted that, even though the jury was apprised of other grounds for believing that the witness may have had a reason to testify falsely, the State's knowing use of false testimony did not transform "what was otherwise a tainted trial into a fair one."[166] Given the strength of the confirmation bias effect on prosecutors, it should not be difficult to extend this to most other circumstances by recognizing the presence of prosecutors' willful ignorance of the inherently suspect nature of incentivized testimony. *Gideon v. Wainright* determined that without counsel to represent them, criminal defendants "cannot be assured a fair trial."[167] Months later in *Brady*, the Court noted that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair . . . ."[168] Similarly, in *Miranda v. Arizona*, the Court invoked John Henry Wigmore in holding that the accused must be informed of their right to remain silent if their statements are to be used against them at trial in the interest of "maintain[ing] a 'fair state-individual balance' . . . ."[169]

Subsequent decisions have continued to consistently turn to the language of "fairness" to the defendant when limiting, defining, or expanding the rights of criminal defendants. In *United States v. Agurs*, another case dealing with incentivized testimony, the central question was whether the defendant had received a fair trial under *Brady*'s materiality standard.[170] Though the Court ruled that the defendant *had* received a fair trial despite the State's failure to turn over certain exculpatory evidence that had not been requested by the defense, the Court looked only to the fairness of the trial *to the defendant*. It did not engage in a balancing act of fairness to both the State

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[165] Napue v. Illinois, 360 U.S. 264, 265–72 (1959). Eleven years later, the Court added that the prosecutor's good faith cannot overcome this violation. Brady v. Maryland, 373 U.S. 83, 87 (1963).

[166] Napue v. Illinois, 360 U.S. 264, 270 (1959).

[167] Gideon v. Wainright, 372 U.S. 335, 344 (1963).

[168] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[169] 384 U.S. 436, 460 (1966) (quoting 8 WIGMORE, EVIDENCE 317 (McNaughton rev. 1961)).

[170] *See generally* United States. v. Agurs, 427 U.S. 97 (1976)*;* United States v. Bagley, 473 U.S. 667 (1985) (effectively supplanting the *Agurs* materiality standard holding elucidating *Brady*'s materiality standard as dependent on whether, in the absence of disclosure, the defendant was deprived of "a fair trial"); Kyles v. Whitley, 514 U.S. 419 (1995) (extending the *Brady* disclosure requirement to all evidence knowable to the prosecution whether or not actually known).

and the accused as so often advocated by those invoking justifications for incentivized testimony. Thus, while it would be easy to advocate for a simple return to "fairness" jurisprudence, the concern for fairness to the defendant has remained a central tenet of due process doctrine despite the Court's limitations on what can be achieved by the Due Process Clause alone.

E. A CONFUSED COURT

What the Court implicitly recognizes in each of these cases is that, once an accused has been indicted by a grand jury, in spite of the supposed presumption of innocence in favor of the defendant, the fairness scale has already shifted toward the State.[171] Prosecutors generally maintain superior access to witnesses and physical evidence through their relationship to police, enjoy superior funding, and typically receive better pay than public defenders.[172] Public defenders are notoriously overworked, handling caseloads that may appear morbidly comical if the stakes were not so high for their clients.[173] Further, juries (and judges) tend to be far more likely to believe the State's evidence than the defense.[174] Finally, the State enjoys the

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[171] *See* MERRITT & SIMMONS, *supra* note 159, at 141 (noting that, in the context of plea bargaining, which generally occurs directly after indictment, "The government is almost always more powerful than an individual defendant, particularly if the defendant is young, nonwhite, or poor").

[172] *See* JOSHUA DRESSLER, GEORGE C. THOMAS III & DANIEL S. MEDWED, CRIMINAL PROCEDURE: PROSECUTING CRIME 908 (West Academic Publishing) (7th ed. 2020) (noting prosecutors generally have more resources than defense attorneys); Filter Staff, *Public Defenders Are Hugely Overworked—But Also Underpaid Compared with Prosecutors*, FILTER MAG. (Feb. 4, 2019), https://filtermag.org/public-defenders-are-hugely-overworked-but-also-underpaid-compared-with-prosecutors [https://perma.cc/4B55-HQYF]; *New Findings on Salaries for Public Interest Attorneys*, NAT'L ASSN. FOR L. PLACEMENT (Sept. 2010), https://www.nalp.org/sept2010pubintsal [https://perma.cc/Z3JZ-63UY].

[173] *See* DRESSLER ET AL., *supra* note 172, at 1002 (describing public defender caseloads in certain jurisdictions as "astronomical").

[174] *See, e.g.*, Jonathan J. Koehler, *If the Shoe Fits They Might Acquit: The Value of Forensic Science Testimony*, 8 J. EMPIRICAL LEGAL STUD. 21, 33–40 (2011) (detailing an empirical study in which mock jurors gave great weight to shoeprint evidence presented by the prosecution and failed to account for cross-examination identifying multiple weaknesses in that evidence); *see also* Briscoe v. Lahue, 460 U.S. 325, 365–66 (1983) (Marshall, J., dissenting) (footnotes omitted) (noting this phenomenon for one type of State evidence and reiterating the interdependence of prosecutors and police: "A police officer comes to the witness stand clothed with the authority of the state. His official status gives him credibility and creates a far greater potential for harm than exists when the average citizen testifies. The situation is aggravated when the official draws on specific expertise. . . . At the same time, the threat of a criminal perjury prosecution . . . is virtually nonexistent in the police-witness context. Despite the apparent prevalence of police perjury, prosecutors exhibit extreme

power to affirmatively and proactively police and prosecute individuals with nearly limitless discretion, often employing the power of coercive violence to prevent what it merely suspects to be the commission of various crimes.[175] In so many ways, the proverbial deck is stacked firmly against defendants when they are accused and indicted by grand juries, and grand juries almost always indict.[176] The criminal process exists exclusively to protect defendants from losing their freedom in a society of "ordered liberty." Procedural safeguards are, therefore, called "safeguards" for a fundamental reason: their existence assumes that the State enjoys nearly limitless power in their absence.

Yet, despite these basic and intuitive presumptions underlying the foundation of the criminal legal system, the Court has often engaged in a balancing of fairness to the accused and to the State, almost uniformly citing concerns of efficiency.[177] The Court has repeatedly miscomprehended the inapplicability of balancing fairness between the State and the defendant.[178] In stark contrast, "balance" should only be an animating concern of the legal system in the context of granting the accused privileges.[179] Such an invocation necessarily assumes that if one appeals to "balance" in granting one adversarial party certain rights, the scale has already been tipped in favor of the other party. Thus, the idea that procedural rules in criminal trials should account for the process' efficiency does not comport with the implementation of procedural rules for the nearly exclusive purpose of safeguarding criminal

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reluctance in charging police officials with criminal conduct because of their need to maintain close working relationships with law enforcement agencies.").
Id.

[175] *See generally* Davis, *supra* note 123 (highlighting the room for abuse that such discretion affords).

[176] Federal grand juries indict people 99.99% of the time; there is reason to believe that state grand juries are not far behind except when the accused is a police officer. *See* Goldfarb, *supra* note 56.

[177] Any argument giving weight to the administrability of the criminal process is akin to arguing that administrative convenience outweighs a constitutional right, an argument that the Court has repeatedly rejected in other contexts. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 211 n.9 (1977); Craig v. Boren, 429 U.S. 190, 198 (1976); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (each holding that administrative convenience did not abdicate the state from its duty to uphold the fundamental constitutional right against discrimination based on gender classifications); *see also* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014).

[178] Even arguably the strongest advocate for criminal defendants in the Court's history, Justice Thurgood Marshall, appealed to the need for the criminal legal system to avoid "prejudice against [a defendant's] prosecution." Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (internal quotation marks and citation omitted).

[179] *See* Miranda v. Arizona, 384 U.S. 436, 460 (1960).

defendants. While critics of efficiency concerns could make another estoppel argument given the rapidly outsized growth of criminal prosecutions compared to the United States' population growth,[180] the idea that efficiency should play any significant role in the criminal adjudicative process also falls flat in the face of the Constitution's concern with protecting citizens against a tyrannical and coercive government.[181]

F. WHERE DOES ONE FIND BALANCE IN THE CONSTITUTION?

The amendments in the Bill of Rights establish privileges and immunities only for individual criminal defendants—not for the state. Statutory interpretation of the Fourteenth Amendment alone should clarify that due process fairness imposes limits solely on the state ("nor shall any State deprive any person . . . without due process").[182] No Amendment concerns itself with the rights of the state nor reserves to the state any defined prosecutorial power. In fact, the scope of police power rests squarely within just a few provisions within the Constitution: (1) Article I, § 8 (Congress granted the power to call "forth the Militia to execute the Laws of the Union [and] suppress Insurrections" and to "define and punish" certain specified offenses); (2) Article II, § 3 (the Executive mandated to "take Care that the Laws be faithfully executed"); and (3) Amendment X (all powers not delegated to the federal government reserved to the states).[183] These provisions do not use the word "police" or "prosecution" and do not define the power of the state to execute the laws. The first concerns only the deployment of the military and the establishment of laws themselves, while the second and third leave their boundaries completely ambiguous and undefined.

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[180] Between 1980 and 2008 when the rate of incarceration hit its peak in the United States, the number of incarcerated people grew by 360%. *See* John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995 [https://perma.cc/723H-UKDE]. During that same period, the country grew from about 227 million to about 304 million, an increase of only about 34%. *See* Erin Duffin, *Resident Population of the United States from 1980 to 2021*, STATISTA (Sep. 30, 2022), https://www.statista.com/statistics/183457/united-states--resident-population [https://perma.cc/RHH8-N64H].

[181] *See* Lyon v. Aguilar, Civil No. 08-1114 LFG/DJS, 2009 WL 10675506, at *1-2 (D.N.M. Oct. 21, 2009) (noting that the Constitution and Bill of Rights placed limitations on national and state governments to protect against government tyranny).

[182] U.S. CONST. amend. XIV. For support, see *Lyon*, Civil No. 08-1114 LFG/DJS, 2009 WL 10675506, at *1–2.

[183] U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 3; U.S. CONST. amend. X.

The Constitution's drafters may have been of two minds in granting such broad law enforcement powers while delimiting procedural boundaries in the exclusive favor of the accused, given the nefarious origins of policing discussed in Part I, *supra*.[184] Wishing, on the one hand, to strengthen the growth of a new economy through protecting the institution of chattel slavery, and, on the other, to avoid threats to their own liberty by safeguarding the rights of the individual, the drafters understood within two years of the Philadelphia Convention that the latter of these concerns required additional protections and led the charge to ratify the Bill of Rights.[185]

CONCLUSION: FUNDAMENTAL FAIRNESS MEANS BAN IT ALL

Thus, in the interest of due process fundamental fairness to criminal defendants, the State should be estopped from employing means forbidden to the defendant to solve a problem of its own making. The racist and classist origins and continued focus of criminal enforcement in this country have given birth to an environment where the majority of society harbors little trust in law enforcement, little faith in the legal process, and little incentive to cooperate with the police and prosecutors who seek to arrest and convict friends, family members, and a significant fraction of that society itself. To remedy this lack of trust, the State attempts to coerce witnesses to come forward with information that it can only hope to be true by offering incentives in some form or another. However, the inherent unreliability of incentivized testimony, so long comprehended by this country's legal tradition, renders its use fundamentally unfair even where the testimony is true. This Comment does not argue that the State should be categorically excluded from offering incentives to come forward with information that law enforcement can then corroborate through other means. Instead, it submits that the introduction of an incentivized witness's testimony at trial—testimony extracted only through the State's coercion—is so prejudicial that it must be excluded entirely.

Understanding that the criminal process was designed to protect the liberty of criminal defendants in the context of a distinct power imbalance between them and the State, does it stand to reason that "fundamental fairness" may ever allow the State to enjoy legally bolstered privileges that are strictly (and reasonably) prohibited to the criminal defendant? The State already enjoys the power to compel witnesses through subpoenas and it

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[184] *See supra* text accompanying notes 23–54, 60–65.

[185] *See Bill of Rights*, NAT'L ARCHIVES https://www.archives.gov/legislative/features/bor [https://perma.cc/829N-K4AB] (describing when the Bill of Rights was passed).

legally safeguards the truth of witness testimony with perjury laws. Instead of rewarding witnesses to testify in its favor and taking the first step on a path that leads to regularly suborning perjury, should the State not instead be compelled to do precisely the opposite by strictly enforcing those perjury laws[186] under its duty to "faithfully execute"[187] the law? After all, what is an incentive to testify if not a tool to condition testimony so that it reflects the State's will?

Further, if one believes in the strength of the criminal legal system as it currently operates to properly adjudicate the guilt of and proper sentence for the accused, what justification can be given for routinely providing leniency to those for whom adjudication is final as a reward for testifying against others? Two main justifications may be offered in response: (1) one's sentence should be mitigated by a willingness to work with the State; or (2) the State is not concerned with the finality, comity, or equity it has so routinely advanced as cause to eviscerate judicial review of criminal sentences. Both responses operate under the premise that the State's fundamental job in criminal cases is not to seek justice but to obtain more and more convictions, a perverse goal that incentivizes prosecutors to incentivize perjury.

As discussed *supra*, Part III, the ability to offer incentives not only affects trials, but also affects pleas by rewarding prosecutors with a valuable bargaining chip during pretrial negotiations. In a criminal legal system that disposes of the overwhelming majority of cases during these pretrial negotiations, the threat of the prosecution using witness testimony, which is not known to the accused to be incentivized under current disclosure rules, is surely enough to make even innocent persons and their generally risk-averse attorneys accept pleas. Inherent in this threat is the ability of the prosecutor to play a chess game—one in which the State can move pieces in ways unknown to the accused—in coercing the accused to accept increasingly unfavorable pleas. Knowing that the State must eventually disclose the impeachment evidence, the prosecutor can initially overcharge the accused, coercing them into accepting a lesser plea without ever disclosing that the State witnesses were incentivized.[188] Prosecutors can also overcharge

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[186] *See* Robertson & Winkelman, *supra* note 16, at 46 (noting that "prosecutions against [State] witnesses for perjury are rare").

[187] U.S. CONST. art. II, § 3.

[188] *See* DRESSLER ET AL., *supra* note 172, at 1105 (comparing the plea-bargaining process to "horse trading" in which "both sides start out asking for more than they expect to get") (internal quotation marks omitted).

accomplice witnesses, offering to reduce charges to what they would ordinarily charge in exchange for cooperation.[189]

Precedent does exist for this type of categorical ban on evidence, even where it imposes a greater burden on the State to investigate thoroughly and effectively. Coerced confessions represent the most obvious such parallel to incentivized testimony.[190] As Professor Russell D. Covey noted in arguing for the abolition of "jailhouse snitch" testimony, the common law rule forbidding the introduction of coerced confessions, to which the Supreme Court has attached constitutional significance in multiple opinions,[191] rests upon the premise that "confessions induced through promises or threats" lack any "indicia of reliability."[192] Though, ultimately, the most recent Supreme Court pronouncement on the admission of coerced confessions held that such an error could be "harmless," a four-Justice minority would have held that such admissions were so prejudicial that their introduction at any trial rendered that trial per se unfair.[193] Other categorical bans imposed or recognized by the Supreme Court include compelled self-incriminating evidence[194] and procedurally unreliable hearsay evidence.[195] Further, through statutes and administrative exclusions, many states have prohibited the use of polygraph evidence, and some states have deemed visual hair evidence, hypnotically refreshed testimony, and uncorroborated accomplice testimony inadmissible.[196] All of these exclusions concern the reliability of the evidence offered[197] and most are rooted in a concern with the fundamentally unfair nature of using such unreliable evidence against defendants.

To return to the hypothetical in the Introduction of this Comment, what remained of the State's case after throwing out the testimony of the incentivized witnesses could not possibly sustain the burden of proof required for conviction. A pretrial motion to exclude A's coerced confession

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189 *See id.*

190 *See* Covey, *supra* note 18, at 1422–24 (discussing the prohibition on using coerced confessions as evidence in criminal trials).

191 *E.g.*, Arizona v. Fulminante, 499 U.S. 279, 304 (1991); Hopt v. Utah, 110 U.S. 574, 583–87 (1884).

192 *See* Covey, *supra* note 18, at 1422.

193 *Id.* at 1424–25 & nn.345–363.

194 *See Miranda*, 384 U.S. at 467 (extending the Fifth Amendment protection against self-incrimination to out-of-court statements).

195 *E.g.*, Crawford v. Washington, 541 U.S. 36, 50–51 (2004) (holding that the Confrontation Clause extends to out-of-court statements made in the absence of the opportunity to cross-examine the declarant); Covey, *supra* note 18, at 1425–27.

196 Covey, *supra* note 18, at 1427–28.

197 *Id*. at 1422–28.

failed in part due to the corroboration of one of the State's incentivized witnesses at the pretrial hearing.[198] Absent that confession, the State had only the testimony of a police officer whose "police work" had previously resulted in several convictions being reversed. His testimony alleged that a man suffering from severe drug addiction told a different police officer[199] that he had seen A looking for something under the fender of a car near an alley in the neighborhood in which they both lived, and that A had cut short a question to the inebriated man after he looked under that fender. The drug-addicted man insisted at trial that he could not remember ever telling police that he had seen A that day—only that he had recovered the alleged murder weapon and sold it to a third man. The third man admitted that he had purchased a firearm from the drug-addicted man. The State alleged that the firearm sold by the drug-addicted man to the third man had matched bullet casings and a bullet found at the scene of the homicide, introducing incomplete ballistics evidence in its support.[200]

Assuming that the coerced confession would have been inadmissible in absence of corroborating incentivized testimony, the State's entire case relied on the words of a single corrupt police officer who demonstrably perjured himself multiple times throughout A's trial based on information since revealed to A's defense counsel. In an utter miscarriage of justice and fairness, A's liberty remains in "balance."

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[198] This corroboration was further complicated by the woeful ineffectiveness of A's trial counsel in describing the narrative of events that A has consistently maintained since his arrest.

[199] That police officer is now an infamous homicide detective convicted on dozens of criminal charges for his egregiously abusive conduct in his decades on the force.

[200] The information on which this paragraph is based is confidential.