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Panel Four: Cooperation and Plea Agreements—Professors & Practitioners

The Hnorable Steven Merryday

Caren Myers Morrison

Gerald Shargel

Barbara Sale

CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

PANEL FOUR: COOPERATION AND PLEA AGREEMENTS—PROFESSORS & PRACTITIONERS

MODERATOR

*Hon. Steven Merryday**

PANELISTS

Caren Myers Morrison[1]

Gerald Shargel[2]

Barbara Sale[3]

Christopher Brown[4]

Alan Vinegrad[5]

Jan Rostal[6]

Cris Arguedas[7]

JUDGE MERRYDAY: We will consider this afternoon the issue of plea agreements and cooperation agreements. It is a difficult subject. It is one that has, I think, the central attention of the subcommittee that is considering privacy issues, particularly in the area of criminal practice. From the vantage of our research, it is clear that many mechanisms are in place around the United States, based on similar but different operational principles. There is a variation in degree of satisfaction and confidence in those mechanisms, so we wanted to investigate an array of them.

We will do so in two panels, the first panel consisting of practitioners and academics, and the second panel of judges.

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* United States District Court Judge, Middle District of Florida.

1. Professor, Georgia State University College of Law.
2. Professor, Brooklyn Law School.
3. United States Attorney's Office, District of Maryland.
4. Correctional Programs Division, Bureau of Prisons.
5. Partner, Covington & Burling LLP.
6. Federal Defenders of New York.
7. Partner, Arguedas, Cassman & Headley, LLP.

We will begin with a presentation from Professor Caren Morrison, of Georgia State University.

PROF. MORRISON: Thank you very much.

Internet access to criminal case records in general, and to plea agreements and cooperation agreements in particular, poses several difficulties. The first and most obvious is that it raises the fear of retaliation against cooperators. The second is that it may deter some individuals from cooperating in the first place. Third, and probably most importantly, these two concerns may encourage prosecutors, who are apprehensive of their cooperators getting hurt or of losing important sources of evidence, to take steps to limit the damage before their fears are realized, even if their concerns are overblown.

So concerns triggered by Internet access may drive prosecutors to hide what they are doing, either by over-relying on sealing, masking the kinds of deals that they make with cooperators, either by using charge bargaining or hiding sentencing facts from probation departments and courts, or avoiding filing plea agreements in the first place.

An important backdrop to the whole issue is that use of cooperating defendants is far from transparent. It is a law enforcement mechanism that is difficult to regulate, susceptible to arbitrary application, and seems to result in wide disparities in the treatment of defendants. So increasing meaningful information about how the government chooses and rewards cooperators is an important goal.

For these reasons, I suggest that the Committee consider limiting Internet access to criminal court records on PACER to the parties and to the court, and not having these files be accessible to the general public except in paper form at the courthouse. But in addition, I propose that the Committee require the government to provide detailed data on plea and cooperation bargains and sentencing in the aggregate.

Before I get into specifics, I want to make clear several underlying premises on which I am basing my proposal.

The first is that the fundamental role of public access to court records is to enable the informed discussion of public affairs and, in particular, to allow the public to understand what the government is doing. These are the purposes that Judge Raggi spoke about in her remarks this morning. These, in turn, will enhance public confidence in the system and allow increased public oversight.

The second is that any solution ultimately reached must not result in a net loss of information to the public or in the alteration of the character of that information. At a minimum, my proposal assumes that the public will continue to have access to court records at the courthouse to the same extent that the public did in the past.

Further, any solution that treats cooperator files differently from non-cooperator files will raise a red flag, and in so doing, is going to identify the cooperators. So any solution that seals only cooperation agreements and not plea agreements, for example, will do little to protect cooperator security.

In addition, identification of cooperators is not limited to plea documents. Sentencing memoranda—in particular, substantial assistance motions filed by the government—are just as revealing. So are motions to adjourn sentencing until all related defendants' cases have been resolved. Even the docket sheet itself frequently reveals cooperation. If, for example, there are a lot of sealed entries or an unnaturally long delay between plea and sentencing, anybody who is familiar with the system will recognize that that is typically the file of the cooperator.

Prosecutors are well aware of these facts, and they will do whatever they feel is necessary to protect the safety of their cooperators. This can lead them to alter the way they conduct their business. So the practice of signing up and rewarding cooperators, which is already fairly opaque, can become even more so as prosecutors become concerned that their cooperators are in danger.

Finally, I think sealing documents is a poor solution, for a couple of reasons. First of all, sealing is not supposed to be a permanent or blanket solution. Sealing is supposed to be used in exigent circumstances and for limited periods of time only.[8] It is not meant to be used automatically in every case in which someone cooperates. Second, in an online context, there is a strong disincentive to unseal anything. Once something is unsealed, it immediately becomes available to an enormously wide public, and so prosecutors and defense lawyers representing cooperators will not be in any hurry to do so. Once again, this is contrary to the legal purposes of sealing, which is supposed to be a short term solution, ending once the exigency has passed.

As I said, the first part of what I am suggesting is to try to curb unwarranted exposure of cooperators by limiting access to the docket sheets and the case documents on PACER to the parties and to the court. This would leave all non-sealed documents still available at the courthouse.

Obviously, this kind of restriction on online access would need exceptions, particularly in high-profile cases or cases of heightened public interest, such as public corruption cases. That would help to answer the issues raised by the Salvatore Gravano or Bernie Madoff-type cases, where obviously there is going to be high newsworthiness content. In those cases it would make more sense, given the amount of publicity they generate, that the records be available online. In such cases, I think the district courts should have the flexibility, with input from the parties, to allow the public to access these cases on PACER, on a case-by-case basis.

But for the vast majority of run-of-the-mill cases which involve cooperators, such as narcotics cases, where the potential risks to the cooperators are high and the news value is low, I am not certain that there is that much public benefit from having those cases posted online.

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8. *See, e.g.*, United States v. Cojab, 996 F.2d 1404, 1405 (2d Cir. 1993) (noting that the power to seal documents "is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons").

This proposal might seem restrictive, but it actually would not result in a net loss of information to the public—at least not any more of a loss than there is already in a paper world. My concern with the solutions devised by the districts of North Dakota and New Hampshire, which have the virtue of treating cooperators and non-cooperators alike, is that they completely obscure the information about whether defendants are cooperating or not. In addition, they give the public no information whatsoever about what the terms of the cooperation agreements may be.

A system in which every plea agreement looks alike and everything is accompanied by a sealed plea supplement is misleading and fails to inform the public of what its government is doing. Worse, the public will be denied that information at the courthouse as well, as there is no access to sealed records. I think that solutions that provide protection to defendants by obscuring government action do run contrary to the purposes of public access.

So the second part of my proposal is that there really has to be a way of delivering information to the public so that it can understand how many defendants the government is cooperating with and the magnitude of the benefit given to those defendants compared to non-cooperating defendants. In my view, it is more important for the public to know exactly what kind of trades the government is making with individual cooperators than it is for them to know that the cooperator's name is, for example, "John Smith."

A way to increase public oversight without triggering fears of retaliation would be to organize the information differently, outside of the confines of a criminal case file with a specific defendant's name on it. Rather than sealing, redacting, or otherwise obscuring the terms of the cooperation bargain, it would be more helpful to disclose all cooperation agreements with the explicit terms of the bargain intact but the personal identifying information redacted. What I have in mind is a system of anonymous defendant profiles, which could be organized by the type of crime charged and then could include a statement of initial charges, all subsequent and superseding charges, plea documents, an indication of whether the defendant cooperated, and if so, the substance of his cooperation, and sentencing information. If the defendant did cooperate, the cooperation could be sorted into one of four general categories: providing background information, agreeing to testify, providing testimony, or taking an active part in the investigation.[9]

In this way, the computerization of the federal courts could give the government an opportunity to shed light on its practices without a massive loss of individual privacy.

JUDGE MERRYDAY: Thank you very much.

Criminal defense attorney and Professor at Brooklyn Law School, Gerald Shargel.

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9. This proposal is described in greater detail in Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 974–76 (2009).

PROF. SHARGEL: Thank you. Good afternoon.

In a system that celebrates transparency, I do not think that sealing is appropriate in the case of cooperators. Not only is it not appropriate, I do not think it accomplishes anything. The idea that people learn that a particular person is a cooperator online, whether it is on ECF or PACER or Whosarat.com, is nonsense. People learn that someone is a cooperator because they know about the case and they know generally what has happened to the defendant. A sealed proceeding is an advertisement that the person is cooperating. So is a delay. It is usually obvious within hours or days that someone is cooperating. As I have said, it is like Thanksgiving dinner. When one of the relatives is absent, you know something is wrong. The same is true in a multi-defendant criminal case: when one of the defendants is absent or someone that is part of the gang is not charged or sentence is delayed for two, three, four years or more, you know something is terribly wrong.

There is one other thing that flies in the face of sealing the information pertaining to a cooperator—and let me make this clear. If someone makes a deal with the government and goes in, sometimes under cover of night, and pleads guilty, I am not suggesting that the plea minutes not be sealed. I am not suggesting that any information pertaining to the cooperator not be sealed. But I am suggesting that it would be unconstitutional for the sentencing proceeding itself to be sealed. The Supreme Court has said recently, back in January of this year, in *Presley v. Georgia*,[10] that the public has a qualified First Amendment right to know exactly what occurs in a case.[11]

I use the example of Sammy Gravano, who received a sentence in the Eastern District of New York of five years, having admitted to nineteen murders and other related criminal activity.[12] The public has an absolute right to know why that happened. The source material for why that happened would be the sentencing minutes and the comments of the judge in imposing the sentence. If a lawyer stands before a sentencing judge and makes an argument that that client was an important, effective, and essential cooperator in rooting out a serious criminal organization, the public has the right to see that—my point being that it is constitutionally wrong to think about sealing these records.

There was a case in the Southern District of New York that went to the Second Circuit where a district court judge decided, only for her own convenience, to hold all sentencing proceedings and some guilty pleas in the robing room, simply, as I said, for convenience. No reason was put on the record. The Second Circuit reversed convictions in two companion

10. 130 S. Ct. 721 (2010).

11. *See id.* at 723–25.

12. Joseph P. Fried, *Ex-Mob Underboss Given Lenient Term For Help as Witness*, N.Y. TIMES, Sept. 27, 1994, at A1; *see* United States v. Gotti, 171 F.R.D. 19, 21–22 (E.D.N.Y. 1997).

cases that were reviewed by it.[13] Once again, the court found that it was unconstitutional.

I cannot imagine that there can be a blanket rule where courts were permitted to make generalized findings that all records are sealed in the cases of cooperating witnesses. It would never pass constitutional muster.

The danger of cooperation is not caused by posting the sentencing proceeding online. The danger of cooperation is not posed by having the sentencing proceeding as a public proceeding, which it is. Can we extend the closed filing online and say that the sentencing proceeding is closed, that the door should be closed and no one should be admitted, seal the courtroom? I do not think there is anyone in the room who would suggest that that is constitutional. I do not think there is anyone in the room that would suggest that is appropriate in any way.

My point, very simply, is this: if sentencing is an open proceeding, it should be available to the public, both in terms of entering the courtroom and seeing what occurred on PACER or ECF or any website that wants to pick it up. I think that cases like the Gravano case make absolutely clear that when something completely out of the ordinary happens, the public has a right to know why.

Moreover, I feel strongly that it is not the obligation of the judiciary, of the court system, to protect witnesses or protect cooperators. I think it is the obligation of the executive branch. I think it is the obligation of the Bureau of Prisons or the Marshals Service, with its Witness Protection Program, to engage in protecting its witnesses. There are mechanisms in place. There are separation orders. This is a vast country, with a vast network of prisons. Prisoners are routinely housed in places where a danger does not present itself. There are special prisons that accommodate cooperators. There are ways that the safety of a cooperator while in prison—and, of course, out of prison as well, in the Witness Protection Program—can and is effectively secured. The Marshals Service boasted of the fact, and I think continues to boast of the fact, that anyone who stayed in the program and followed its rules has never faced harm. There has never been a murder or an assault of any kind. I know that was true up until recent years, as long as that person stayed in the program.

This is the obligation of the executive branch. We have open court proceedings in this country, and it cannot be a policy to take a particular class of defendants and say, in those cases, we are going to seal.

Thank you.

JUDGE MERRYDAY: Thank you, Mr. Shargel.

Another vantage, no doubt, from the Criminal Chief, the United States Attorney's Office in the District of Maryland, Barbara Sale.

MS. SALE: Perhaps surprisingly, I agree with my colleague that sentencing proceedings should not be sealed. That is perhaps the extent of my agreement with him, however. And I thank the people who put this program together for allowing a diversity of views.

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13. *See* United States v. Alcantara, 396 F.3d 189, 201–03 (2d Cir. 2005).

I come from the District of Maryland, where the primary office is in Baltimore, which has one of the highest homicide rates in the country, I am not proud to say. It is the home of the infamous *Stop Snitching* videos, which were actually marketed DVDs, which exhorted people not to snitch on other people and threatened harm to those who cooperated with law enforcement. *Stop Snitching II* featured a little boy of about ten wielding a gun. Baltimore is also a place where we have had a constant stream of notorious, high-profile witness retaliation cases.

We had a hideous arson case some years back in which a family of seven was burnt to death in their home because the mother was suspected—suspected, merely—of having passed information to the police about neighborhood narcotics transactions. We had another firebombing where an older lady was burned out of her home for the same reason. These are just citizens trying to clean up their neighborhoods and make them safer for ordinary law-abiding people to live in.

We have more recently had cases involving deliberate first-degree murders of people who were believed to be cooperating in criminal cases. We had a case last year in which a person who was awaiting trial on a homicide learned from a witness list that a particular person, whose name was not theretofore known to him, was expected to be a witness. This happened to be a key witness, but he was a bystander, just somebody who just happened to be there and see something and report it to the police. The witness's mother urged him not to get involved because she had heard about the dangers faced by witnesses to inner-city crime. From his prison cell, using a smuggled cell phone, the defendant put together a network of gang members, who together gunned this man down in his front yard in front of his four-year-old child.

In this climate, we have to take every precaution we can to protect those who want to come forward and cooperate with the prosecution. It is not easy.

My colleague here says that the Marshals Service has a record of protecting people one hundred percent, but that speaks only to the formal WitSec program, in which witnesses are given new identities and relocated. In the real world, very few are admitted to that program, and even those who are often choose to go back to the neighborhoods that they come from. We had a case a year ago where a protected witness went home on Thanksgiving Day. He was supposed to be in witness protection, but he went home to see his mom for Thanksgiving, and was gunned down a block from her house because he was believed to be cooperating.

I do not need to tell horror stories for the rest of the afternoon, but they are real, and they happen, day in and day out.

There are two consequences to this in our federal court system. Maryland was among the last to go to electronic case filing in criminal cases because our Chief Judge and some of the key players were very wary about what would happen. We finally bit the bullet and, in August 2008, went to electronic case filing in criminal cases, but only after the public defender and I, and one of the judges, and a representative of the private

criminal defense bar sat down for months to try to figure out how best to protect cooperating witnesses. We adopted what has come to be known as the North Dakota plan. This means that whenever somebody pleads guilty, there are two documents that are filed on PACER. One of them is simply a plea agreement. It lays out all the things that you need for a plea agreement—the elements of the offense and the maximum penalty and the rights that the defendant is giving up and that sort of thing. Then there is filed in every case a "sealed supplement." If the person is not cooperating, the sealed supplement simply says, "This is not a cooperation agreement." If the person *is* cooperating, it lays out in three or four pages the whole litany of expectations and obligations that go with the cooperation agreement. So anybody looking at the docket from outside on PACER would see that all plea agreements look exactly the same, and only by gaining access to the sealed supplement—and people do move to unseal from time to time—could somebody determine that Person A was cooperating, whereas Person B was not.

This seems to have been effective. The defense bar is very happy with it because they feel that it protects their clients. But that seems to have resolved itself. As we stand now, we are confident that we are doing what we can to protect cooperating defendants from exposure as they move through the system.

There are several points throughout the system where this becomes important. Early on in the case you may need to protect the identity of the cooperators to protect an ongoing investigation. You might think that after they have testified at trial, it is all out in the open and there is no longer any need to protect them. But it turns out that there is a continuing need to avoid identifying cooperating witnesses on paper. Judges that I work with and people in my office have gotten letters from cooperators in prison begging them to send some kind of phony court document so that they can show it to their new colleagues in prison to prove that they are not snitches, that they are not cooperators. It is not simply that a person is endangered by cooperating in a particular case. It turns out that being a "snitch" is a status that sticks to people throughout their incarcerations, and—who knows?—maybe beyond, which puts them at risk. So we have had people ask to have phony judgment and commitment orders, or phony plea agreements that show that they are not cooperating.

Of course, the court cannot do that and we cannot do that. The public defender in our district has generated letters to former clients saying, "It is too bad you elected not to cooperate. I could have gotten you a better deal"—wink, wink. Presumably, they can show this around, and it may protect them.

It turns out that *paper*, something that is actually in black and white, is important to people in prisons and in the criminal community on the street who are trying to determine who is and who is not a cooperator. We are investigating a case right now where an FBI 302 report of investigation was circulated as proof that the victim was cooperating. That 302 report had been turned over in discovery, and copies were located in four penal

institutions in three states. The witness was, again, gunned down in his home neighborhood.

For now, I am not suggesting any global policy solution. Our solution of having a sealed supplement in every case seems to be working. Others have suggested the Southern District of New York solution of having the plea agreement remain in the prosecutor's file and never made a part of the court record. I think each district is going to have to work its way through these issues separately. I take Judge Raggi's point that everybody is looking for a carve-out here. We certainly are. We would like to have cooperators not exposed on the public record in perpetuity and endangered by having their status as witnesses on PACER.

Thank you.

JUDGE MERRYDAY: Thank you, Barbara.

From the Intelligence Operations Office of the Bureau of Prisons, Christopher Brown.

MR. BROWN: Good afternoon.

I just want to take a couple of minutes to talk about what happens to inmates once they are received inside a federal prison with the tag as a "snitch" or a "rat." I can tell you from experience that one of the things that happens right away is that other inmates seek to find out why they are there. What I mean by that is, once an inmate is received at a federal prison—I basically call them the welcoming committee. These are the inmates who attempt to be your friends, just to find out why you are there, what your case is all about. What they are actually trying to find out is if this person can be trusted or not. The way they do that is, they want to see your pre-sentence investigative report or your statement of reason—just something to say you did not cooperate with the government and you did not take a plea to basically rat out others.

The Bureau of Prisons does do a good job—as well as the Marshals—in keeping these individuals safe. However, one of the problems that we are faced with is, once an inmate has been outed as being a rat or a snitch, what to do with him. Once we find out that the inmate has been compromised—and I am not talking about inmates that are in the Witness Protection Program. I am just talking about the average inmate who, for whatever his reasons were, decided to take a plea and he named his codefendants and he received a reduced sentence.

The Bureau of Prisons tries to keep these inmates within 500 miles of their home. However, that is not always possible. First and foremost is the inmate's safety. Once this inmate steps foot inside the institution, if this inmate cannot produce some sort of documentation that says that he did not cooperate or take a plea, then he is basically ostracized for whatever time that he has to do. No other inmates want to befriend him. The only other inmates that receive this type of treatment are child molesters. We read about it, we talk about it, we see it on television, but it is real. These inmates basically do their time in isolation.

Let's talk a couple of minutes about assaults. They are assaulted. They are harassed pretty much on a daily basis. Basically, what can be done?

We can move them from prison to prison, but some of the intelligence of that inmate is passed on from institution to institution. Just like this inmate is transferred to another institution, so are others. It is almost like they have their own underground network.

The Bureau of Prisons does not allow these documents inside the prison, but the inmates are allowed to review them. However, they are not allowed to keep them in their possession. When I listen to the stories about the inmates asking for fake documentation, I have firsthand experience where inmates have basically asked me the same question: "How do I go about getting fake documentation? I am receiving pressure on the yard to produce some type of documentation that says that I am not a cooperator."

What happens from that point on is, we have to assess whether or not we can keep that inmate in the same institution or whether we are going to break our own rule of 500 miles, which is really an unwritten rule, and send that inmate somewhere where he will be safe.

Not only is the inmate in danger, sometimes his family members are in danger. I have had inmates tell me that individuals in their community want to see their pre-sentence investigation report. Somebody in their family will show it to someone in the community, who will verify the information and then get the word back into the prison that this person is okay or this person cannot be trusted.

The Bureau of Prisons recognizes that this is a problem. In 2002, what the Bureau of Prisons did was to basically let all inmates know that they can no longer have access to these materials. Simply telling an inmate, "You cannot have these materials, but do not talk about your case"—there are 1800 other inmates there. You have to talk to someone. You cannot spend ten, twelve years in a federal prison and not try to fit in with someone.

There also was the issue of moving them to other prisons where they will be less susceptible to harm. That is something that we try to do. We still try to keep them close enough so they can maintain family ties. However, that is not always possible. A lot of things depend on whether or not that inmate will stay close to home—basically, the security level of that inmate. We may not have a facility close by.

Sometimes the inmate will feel, "What did I get for cooperating? I get harassed daily. I have been assaulted. And to add insult to injury, I am being moved away from my family, where they can only come and visit me once a year."

We are addressing issues with inmates. However, one of the biggest problems that we face inside the prison is getting the inmates to actually come forward. More often than not, the inmate who has been assaulted will not tell you he has been assaulted. It is usually a situation where they say they were injured doing a sports activity. If there were no witnesses to what the event was, there is no way we can go forward and investigate, when an inmate swears under oath that he was not assaulted.

My last point, and one of the issues that we are also addressing, is that the inmates know that once they are assaulted and they admit to being assaulted, they are going to be moved. They want to know how much time

they are going to spend in the special housing unit under twenty-three-hour lockdown. They cooperated. They were assaulted, harassed. Now they are locked down for twenty-three hours a day, and they are going to be moved somewhere away from home.

Those issues are currently being addressed. We are doing the best we can. My personal opinion is that access to records—it is an issue where inmates know, once they step inside the prison, that they have done something wrong and their safety is basically going to be up to them. We do provide the best security we can for them. However, we cannot be everywhere at once. We do ask them to cooperate with us. Sometimes they do, sometimes they do not. But I do not think limiting access to records will really help us at all, the issue being that the information that the other inmates receive is information that can be found just about anywhere.

Thank you.

JUDGE MERRYDAY: Thank you, Christopher.

A former United States Attorney and now an attorney with Covington & Burling, Alan Vinegrad.

MR. VINEGRAD: Thank you.

I start from the presumption, which is a safe one, because I think it has been endorsed by the Supreme Court of the United States,[14] that there should presumptively be a qualified First Amendment right of access—to be specific, to criminal proceedings, including plea agreements.[15] My general view on this issue is that the Federal Rules of Criminal Procedure and the case law that has developed surrounding the issue of sealing criminal proceedings or documents relating to them provide sufficient legal authority for case-by-case fact-specific determinations of when that presumptive right of access should be overridden.

The safety of witnesses is obviously an important consideration. Not having ongoing government investigations compromised is obviously a valid interest and consideration. In fact, it may be such that in a particular case it justifies denying public access to cooperation agreements, not just electronically, but even in hard copy from a courthouse.

But I caution against a categorical approach because even with cooperators—I am putting aside people who simply plead guilty (I think there is less of a concern about confidentiality for them)—I think a hard and fast rule that shields their agreements or sentencing proceedings from public view is hard to justify, the prime example being cases in which the cooperation of those defendants becomes publicly known, either at the time of their plea or the time that they testify in open court at a trial, or even earlier. To pick one recent notorious case, the longtime chief financial officer who worked for Bernard Madoff pled guilty several months ago,

14. *See* Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984).
15. *See id.* at 510–12.

pursuant to a cooperation agreement.[16] I think the fact that he was cooperating became publicly and widely known even before he entered his plea.

So I am hard-pressed to envision a rule that would deny the public access, electronically or otherwise, to the terms and conditions of his cooperation agreement. It is hard to see what higher value, from the law-enforcement perspective, is being served there. And so I do question this all-or-nothing approach, where either we grant access electronically or otherwise categorically to plea and cooperation agreements or we do not.

Obviously, there are competing considerations here. That is why we are all sitting in this room right now talking about it. But having said that, I would make just a couple of brief points.

One is, I do question the efficacy of what will be achieved ultimately by having varying levels of access to these types of agreements, either going to the courthouse to get them in hard-copy form or electronically, again as a categorical matter that says you can get it one way, but not the other. I think it is a challenge to see the meaningful, principled, constitutional difference that would support different rules for one versus the other. It seems to me that, in this day and age, with lots of enterprising people and organizations out there who amass data and information and documents, especially in our electronic age, equal access basically just avoids the necessity of having a so-called cottage industry of those who would gather this information anyway and make it public or sell it to persons and make it electronically available.

I could take a more cynical approach and say that basically, while I completely understand and agree with many of the concerns that Barbara Sale articulated earlier from the law enforcement perspective, it seems to me that in a great majority of cases, those who are bound and determined to make mischief with a cooperating defendant are going to be able to do that, whether the cooperation agreement is electronically available on PACER or not, whether they take the time to go to the courthouse and get it or get somebody to go get it. Or, I think as is more typically the case, as Gerry Shargel mentioned before, the people who have the greatest interest in finding out who the cooperators are and who may want to make mischief are going to figure it out anyway, through the normal course of events in a criminal case.

So, while I think the concerns are valid, I do not know what is really accomplished by denying electronic access. I would say the same about Mr. Brown's comments with regard to what happens in the Bureau of Prisons. I will not repeat it, but he basically said it at the end of his remarks. I do not know what sealing or denying electronic access accomplishes or does to solve the many problems that confront cooperators in prison. In fact, if I can plagiarize my former colleague Caren Myers

16. *See* Transcript of Plea at 8, 40-41, United States v. DiPascali, No. 09 CR 764 (RJS) (S.D.N.Y. Aug. 11, 2009); Jack Healy & Diana B. Henriques, *A Madoff Aide, Guilty, Reveals Scheme Details*, N.Y. TIMES, Aug. 12, 2009, at A1.

Morrison's article, which is excellent on this topic, I think I question the severity of the risk, not posed by cooperation generally, but by electronic access to the sorts of documents we are talking about here, where there are organizations that have had a field day making these documents available, and virtually no documented instances of retaliation have resulted.[17]

There are districts that have come up with creative solutions, I think, to these problems. I think the creativity comes with concerns of its own. I will just mention two, and then I will be done.

One is the notion of filing generic plea agreements that all contain these generic cooperation provisions even for non-cooperators, which seems to me troubling from a public "right to know" perspective because what the public is getting is misleading information. So, too, I think one has to look hard at a practice well known to me—I hope the Chief Judge from my old district does not take my head off for saying this—of having plea or cooperation agreements not actually filed with the court, and therefore avoiding, frankly, the types of requirements that are embedded within our Rules of Criminal Procedure and our case law. I think there is a tension between that practice, on the one hand, and the notion that criminal matters and dispositions should be subject to public scrutiny.

Thank you.

JUDGE MERRYDAY: Thank you, Alan. From the Federal Defenders of New York, Jan Rostal.

MS. ROSTAL: Thank you, and thanks to the subcommittee for bringing out all these views.

I speak on behalf of the constituency my office represents, which is the indigent defendants in the Southern and Eastern District court system (we represent some 2500 indigent defendants a year). No one pays a lot of attention to my clients, including the press, which does not have a lot of interest in them. They are not the Bernie Madoffs, they are not the cases that the press really cares about or deems newsworthy.

I have to say, thinking about their cases, and thinking about the advice I have to give a client when he or she is deciding whether to cooperate, one of the questions I get is obviously how much time they are going to get. But the other is: what is it going to mean? Who is going to hear the details of my case and my life? What is it going to mean in the Bureau of Prisons? What is it going to mean when I get deported, as many of my clients will, to the Dominican Republic, Colombia, or Mexico? What is electronically available in other countries? What is my family going to be able to see? What are the enemies of my family going to be able to see?

Those are obvious and fair questions. Clients are being asked to cooperate by law enforcement, by U.S. Attorney's Offices, and being told that everything is being done to try to protect them. They are told maybe they will not have to testify, maybe their cooperation will never be made known to the public. Yet, under the current system of free electronic

17. *See* Morrison, *supra* note 9, at 956–58 (discussing www.whosarat.com).

access, somebody out there Googling can get it, regardless of whether there is any true public interest in disclosure of the information.

This seems backwards to me. On behalf of my clients, I have to say, I fall with what I hope is going to be dubbed the "Professor Morrison rule," which is that the problem is not so much in the sealing or unsealing, it is in the unfettered electronic access. It seems to me that if there is going to be a presumption, why wouldn't the presumption be in favor of limiting the electronic access to parties and to the court, probation officers, pretrial officers, other people with an institutional need to know? If there is a case of public interest, a Bernie Madoff kind of situation for example, or any other case of a newsworthy level, let the press or parties come in and ask for the access and then weigh all these competing interests. Why mess with it from the get-go and put my (no offense to them) less newsworthy when there is no one interested in their proverbial tree falling in the woods?

There should be a concern for the folks whom I represent, who, for the most part, have given up their freedom. Part of the bargain was not necessarily giving up their privacy, and not just whether they cooperated, but in sentencing submissions, what diseases they have, what learning disabilities their children have, what medications they are on, whether they did or did not give post-arrest statements when they were arrested. Maybe that does not rise to the level of cooperation, but who knows how that is going to play back home?

There are already too many personal details of clients' lives getting revealed in electronic systems, details that are not newsworthy, and that nobody really seems to care about, except for more sinister reasons. If there is an interest in those details, that interest it seems to me, can be protected by making the press or those who have the interest take the steps to get access to the information and show why they care, even if that is just going to check out the courthouse file the old-fashioned way. I object to the Facebook-ization of ECF and PACER.

Thank you.

JUDGE MERRYDAY: Thank you, Jan. Our final but not least panelist is Cris Arguedas, a criminal defense attorney. Cris?

MS. ARGUEDAS: Thank you. I am a criminal defense attorney. I started as a federal public defender, and I still do a lot of indigent work. I think this is a pretty complicated subject, actually.

My position is that the First Amendment requires that shutting out the public should be viewed as a drastic step, and it should be taken in as narrow a way as possible. I think that is probably kind of unassailable. The question is, how do you do that?

I think one needs to look at where the danger is from. It is, I think we all agree, from the people in the system. It is from your codefendants, your potential codefendants, or your prison mates. It is not from the public, basically. We now have a situation where all of these various versions of sealing very effectively do shut the public out of knowing what is going on, and they do not at all effectively stop your codefendants, potential codefendants, and housemates in the prison from knowing what is going on.

So we have done a very dramatic thing that is aimed at the wrong section and that implicates the First Amendment.

I also think that there are some real dangers over the fact that we have such radically different procedures going on in each district of our federal courts. I want to just identify how different they are. One could argue that these are examples from a menu, so everyone could choose which one sounds good to them. And it does show flexibility in the federal system—always a good thing, I think. But the other thing is, it is quite chaotic, and it gives a lot of mixed messages that could be exactly misinterpreted by the people whom we are supposed to be protecting these cooperators from.

For example, in many districts, it is the way it always was. Plea agreements are filed and they are put on PACER, and that is where they are, unless I, when I am representing the cooperator, move to seal them. If I move to seal them, it is always granted and it is sealed. Then everyone in the system knows: sealed means cooperation. Right? So the public gets to know kind of nothing, but the flag is up for all the people who are dangerous to my client.

We have the Northern District of California, San Francisco. They have no plea agreements available on PACER at all. PACER shows a plea was entered. But if you go to the courthouse, you can see it all on paper, unless it is sealed, in which case, again, the public does not get to know what happened, but the people who are dangerous do.

You have the District of New Hampshire, in which every plea agreement has boilerplate language in it that says if the defendant gives valuable assistance and cooperates, the government will make a 5K1 motion.[18] You put that in every plea agreement, whether you are cooperating or not. This is supposed to be protecting someone from danger? I would not want to be the person at Lompoc [Federal Correctional Complex], who is saying, "Oh, no. They put it in everybody's. It is a way of camouflage." Does this make sense to anybody?

The District of North Dakota: they file a basic plea agreement. It never says you are cooperating. Then every case files something separate, which is under seal and says "Plea Agreement Supplement." My plea agreement supplement, which is under seal, might say I am cooperating. The other one says, not in these words, "This is just a camouflage document. I am not cooperating at all, and we do not even need this thing here, except it is here so that it hides the guys that are cooperating."

Again, I think that is pretty much a big deception. It should not be what our courts are doing. But also, if you are a San Francisco hoodlum and you see a sealed document from North Dakota, that means snitch in San Francisco and in a lot of places. So I do not even think it is very good camouflage.

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18. A 5K1 motion is a "motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009). When the government makes a 5K1 motion, the court may depart from the sentencing guidelines. *See id.*

The Eastern District of Pennsylvania: they are like the Northern District [of California], but they refuse to put on paper everything that has to do with a criminal case. Nothing from the criminal case is there—not the plea, not the motions, not the sentencing documents, not anything.

Then we have the Northern District of Illinois, which I think has been described, which says that the criminal case, all of it, is accessible to the lawyers, basically, to the people involved in the case. So the public is entirely shut out of that. In my opinion, most of the time, in most of the cases, the people who are dangerous know who is snitching and who is not. So what has happened in the Northern District of Illinois is that nobody in Chicago gets to know what is happening in their federal criminal cases. That seems to me to be a serious abrogation of the First Amendment.

But my main message here is that we should be aware that there may be ninety different ways of doing this. It is because the various courts have decided this is the best way to protect their people. I appreciate, from Maryland, what your point is. But we cannot be so parochial, I do not think. What you may think is protection, I might think is a red flag based on the way my district does it. So it seems to me that at least there should be some guidelines and then exceptions, as always.

JUDGE MERRYDAY: Thank you, Cris.

Christopher, you were talking about the incidents in the Bureau of Prisons. Does the Bureau of Prisons compile data to determine the number of those and make any effort to categorize them by severity and cause?

MR. BROWN: We do collect data. But basically right now the only thing that we do is treat it as an assault. We do not categorize and say, this was an assault based on cooperation. That was one of the things that was brought up during the telephone conference. I did bring that up to my superiors. It would make it easier for us to track if we did have a system, not just saying it was a simple assault or a serious assault, if we broke it down to say it was because of cooperation.

JUDGE MERRYDAY: And you might have a problem with the credibility of your source for that information, as far as making a judgment about what it actually was. Some people would tell you that, I suppose, to divert your attention away from the real cause.

MR. BROWN: Yes, they do.

JUDGE MERRYDAY: Does the Department of Justice do that, Barbara? Do you know?

MS. SALE: Compile information about the reason for the assault? No.

JUDGE MERRYDAY: If a threat is made on a judge, the United States Marshals do a threat analysis, and they give it a rating and decide whether you will receive protection. I was wondering if the Department of Justice does that with respect to its witnesses or cooperators.

MS. SALE: It may be done with respect to witnesses who have been admitted to the Witness Protection Program because that is such a high level of protection. As Gerry mentioned, there are, I believe, four prisons where everybody in the prison is a cooperator. Presumably the risk level is

a little bit lower there. But for the vast number of people—and I think probably thirty percent of our cases in the District of Maryland involve making 5K1 recommendations,[19] and that is a lot of defendants—there is no threat assessment that follows them.

We do, as you mentioned earlier, separation memoranda to the Bureau of Prisons and say that Gerry should not be with Cris, and so forth. There is only so much they can do. When you have a case that has thirty-seven individual cases—and some of these gang cases are just, as you all know, unwieldy and huge—there is only so much you can do to keep people separated. I think some people just live on buses, getting moved around to BOP [Bureau of Prisons] facilities.

MR. BROWN: One of the things I want to clarify is, when you talk about threat assessments, we do complete threat assessments on inmates who have been threatened. Generally, we have thirty days to complete a threat assessment. At the end, we have to verify it or un-verify it. That stays as a part of that inmate's permanent record, no matter where they go, that a threat assessment was completed on that inmate.

JUDGE MERRYDAY: It seems that, at least in one sense, what we are doing here is deciding what risk to encounter and on whose behalf. Evaluating that is made particularly difficult if you do not have reliable data on how frequently this happens, how severe it is, what the source was, and whether there is, actually, anything you can do about it one way or the other.

JUDGE RAGGI: I have two questions, one for those of you who have supported removing criminal cases from the electronic filing and then one for those of you who think that is problematic.

To the former, as a rules committee, we can only implement congressional legislation. I am not sure that your proposal can be reconciled with the E-Government Act.[20] Is that right? Is this an argument for Congress rather than for a judiciary committee? Or are you urging something by the judiciary itself?

PROF. MORRISON: I am urging action by the judiciary itself, through its supervisory power over its own records. It is true that some of the tactics used in certain districts, such as the Eastern District of Pennsylvania, which provides no Internet access to criminal court records at all, seem as if they might fall afoul of the E-Government Act. But to my knowledge, no court has yet interpreted the E-Government Act as limiting the discretion of the judiciary to manage its own records. Congress has directed each federal court to maintain a website containing public information on its files, including docket sheets, but it could be argued that it gave substantial deference to the courts as to what information to provide. It is possible that a system that took docket sheets and court records offline but then provided detailed information in the aggregate would satisfy the requirements of the Act.

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19. *See id.*
20. 44 U.S.C. § 101 (2006).

JUDGE RAGGI: For those of you who are more inclined to see this done ad hoc as individual cases may need attention, we are about to hear from a panel of judges who use some of the diverse means that you have talked about. There has been some question about whether the Privacy Committee should take a stand on any of these particular practices or view it as beneficial for individual districts to work out what suits their particular culture best. Does anyone want to speak to the issue of whether we ought to recognize certain best practices or encourage diversification?

PROF. SHARGEL: I think it is problematic if you have an ad hoc approach. I think that is just too difficult. I think there has to be some symmetry. It is either going to be one way or another.

Another problem that you face is that all these plans have been implemented, and yet seemingly there has not been any challenge to the plans. Several panel members have been talking about the constitutional requirements of the First Amendment, yet none of these plans or programs have faced a First Amendment challenge. It would be interesting to see what happens if they do.

It would seem to me that it should be symmetrical. I think it should be uniform. I do not think it should be a catch-as-catch-can approach, with local rules in each district. But I think that the serious issue will be determined when someone, sooner or later—probably an institutional litigant like Federal Defenders—brings a First Amendment challenge.

MS. ARGUEDAS: To me, the salient point is that the most dangerous population, in terms of who is going to do the beating-up and killing of people, is in the federal prisons. They come from all the different districts, and so they are misinterpreting, or perhaps correctly interpreting, these different signals from the different places. So I think it has to be pretty uniform—not without some flexibility on a case-by-case basis. But I think we have to act like a federal system, since we are sending them to federal prisons.

MR. VINEGRAD: I think the rules currently provide both a general rule of application that people can follow and also an ability of courts, based on, not so much custom and practices, but particular problems in a particular district or case, to make a case-by-case determination of what falls within that standard. Rule 49.1[21] has a good-cause standard now for limiting electronic remote access to documents, and good cause may vary between New York and North Dakota as to what meets that standard. It is not all that different than what courts do all the time, which is apply a standard to the particular facts of a case and come up with their body of law for what is going to fly in terms of a request for confidentiality and what is not.

PROF. SHARGEL: Also, if I may, I do not think we should walk away from this meeting with the notion that there is an inexorable path from electronic filing to trouble in prison or trouble on the street. Trouble in prison happens in all sorts of ways. I have heard several times of people working in the prison offices actually selling information contained in

21. FED. R. CRIM. P. 49.1.

private probation reports that are in the offices and alerting other prisoners that an inmate is cooperating. Stopping electronic filing is not going to solve that problem. On the street there are similar ways that lead to trouble and danger to cooperators or potential cooperators.

Keep in mind, the troublemakers, the killers, the vicious people do not have a proof-beyond-a-reasonable-doubt standard. They do not even need probable cause. Mere suspicion has resulted in the deaths of many cooperators and people who actually were not cooperating.

We are here talking about a small segment of a potential problem, a problem with constitutional implications. That is why, once again, I look back to the executive branch to resolve this.

JUDGE MERRYDAY: On behalf of Judge Raggi and the Standing Committee, thank you all for participating in this panel.