AN "UNFORTUNATE BIT OF LEGAL JARGON": PROSECUTORIAL VOUCHING APPLIED TO COOPERATING WITNESSES

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Vouching, which developed out of the Supreme Court's desire to protect the jury's right to evaluate credibility, traditionally forbids prosecutorial statements designed to enhance or attest to the credibility of a government witness. This Note examines a flavor of vouching unique to cases involving cooperating witnesses. Prior to testifying, cooperating witnesses sign an agreement setting out the terms of their deal with the government, including a requirement of truthful testimony. Three circuits, the Second, Ninth, and Eleventh, utilize vouching doctrine to restrict references during trial to such truthful-testimony provisions. The Second and Eleventh Circuits only permit references when the cooperator's credibility has been attacked by the defense, which is known as the "invited response" doctrine. The Ninth Circuit has displayed a willingness to completely foreclose references to such a provision. On the other side of the split, a majority of circuits allow a cooperator's plea agreement to be put before the jury in its entirety when the prosecution wishes. This Note concludes that this split should be resolved in favor of the majority approach, which will provide much needed clarity to lawyers on both sides of the criminal bar and return vouching doctrine to its principles.

INTRODUCTION

"Do you solemnly swear or affirm that you will tell the truth, the whole truth, and nothing but the truth, so help you God?"

Witnesses in courtrooms throughout the country declare a form of this oath every day. It is not recited to honor American tradition or out of a reluctance to break with custom; rather, it is used in adherence to a codified federal rule requiring every witness to "give an oath or affirmation to testify truthfully."[1] When criminals testifying as cooperating witnesses raise their right hands to take this oath, it is not the first time they have made such a promise. In exchange for leniency yet to be determined, the government requires that cooperating witnesses sign a plea bargain agreement to "tell the complete truth" before they are even called to testify.[2] Surprisingly, prosecutors who elicit testimony regarding this agreement during the government's case-in-chief may risk a mistrial

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1. Fed. R. Evid. 603.

2. E.g., United States v. Dorsey, 677 F.3d 944, 953 (9th Cir. 2012).

or lose a secured conviction on appeal.[3] Invoking the doctrine of vouching, three circuits have suggested that such a potentially innocuous reference to the truthfulness provision in a cooperator's plea agreement may constitute reversible error. The danger, as expressed by the Ninth Circuit, is that a "plea agreement requir[ing] a witness to tell the truth might be argued to suggest that a witness, 'who might otherwise seem unreliable, has been compelled by the prosecutor's threats and the government's promises to reveal the bare truth.'"[4]

Vouching restrictions, which developed out of the Supreme Court's desire to protect the jury's right to evaluate credibility,[5] continue to grow in scope. Initially, vouching doctrine sought to limit prosecutors' ability to inject personal opinion or other extrinsic evidence concerning a witness's credibility into a trial.[6] Courts would intervene or require a retrial when tactless prosecutors argued they could verify that a witness had told the truth.[7] Today's vouching doctrine reaches beyond such blatant events, evidenced by the fact that in certain circumstances, cooperating witnesses are forbidden from testifying that they have promised to tell the truth. These constraints significantly impact a large number of criminal cases: In 2012, approximately twelve percent of all defendants sentenced in the federal system cooperated with the government, and some likely assisted in multiple matters.[8] Such cooperation is often the only reason that federal law enforcement is able to carry out successful large-scale criminal investigations and prosecutions.[9]

Standards governing prosecutorial vouching vary by circuit and continue to diverge, specifically in the context of references to the truthful-testimony provisions of cooperating witnesses' plea agreements.[10] A majority of the circuits find such provisions harmless and admit them as

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3. See infra Part II.B (discussing cases prohibiting testimony concerning promise to testify truthfully).

4. *Dorsey*, 677 F.3d at 953 (quoting United States v. Wallace, 848 F.2d 1464, 1474 (9th Cir. 1988)).

5. See infra notes 22–25 and accompanying text (noting vouching's basis in jury's exclusive right to make credibility determinations).

6. See United States v. Francis, 170 F.3d 546, 550 (6th Cir. 1999) (describing general forms of vouching); James D. Carlson, Note, Admissibility of Plea Agreements on Direct Examination—Are There Any Limits?, 55 U. Miami L. Rev. 707, 717 (2001) (same).

7. See infra notes 18–20 and accompanying text (recounting case in which prosecutor directly asserted witness's truthfulness).

8. See U.S. Sentencing Comm'n, Sourcebook of Federal Sentencing Statistics tbl.N (2012), available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/TableN.pdf (on file with the *Columbia Law Review*) (recording number of defendants who received substantial assistance departure).

9. See Stephen S. Trott, Words of Warning for Prosecutors Using Criminals as Witnesses, 47 Hastings L.J. 1381, 1390 (1996) (noting "many important prosecutions—especially in the area of organized and conspiratorial crimes—could never make it to court" without cooperating witnesses).

10. See infra Part II (analyzing circuit split).

evidence.[11] A minority, the Second, Ninth, and Eleventh Circuits, endorse tighter restrictions that, at minimum, bar any discussion of the truthfulness requirement prior to an attack on the cooperator's credibility.[12] As recently as 2012, the Ninth Circuit issued a decision that portends a willingness to completely foreclose any reference to these provisions.[13]

This Note argues that this split should be resolved in favor of the majority approach, which allows references to a cooperator's agreement to testify truthfully to be made at any point in the proceeding.[14] Such a solution is consistent with Supreme Court precedent, which suggests that vouching restrictions should be targeted at prosecutorial comments explicitly corroborating a witness's testimony, not vouching alleged to be implicit in a plea agreement. Furthermore, the majority avoids other significant pitfalls in the minority's reasoning, such as a misinterpretation of Federal Rule of Evidence 608.[15] Adoption of this approach would provide much needed clarity to lawyers on both sides of the criminal bar and return the doctrine to its principles.

Part I discusses the background of vouching and its relevance in the context of cooperating witnesses. Part II analyzes the split among the circuits and discusses the varying bases for these opinions. Part III proposes a resolution consistent with a majority of circuits, which would allow references to the truthfulness provision of a cooperator's plea agreement.

I. VOUCHING AND ITS ANTECEDENTS: AN INTRODUCTION

There are many flavors of vouching.[16] Because it is targeted at prosecutorial expressions of opinion, vouching often arises in the con-

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11. See infra Part II.A (discussing majority approach).

12. See infra Part II.B (examining restrictions utilized by minority circuits).

13. See infra notes 196–201 and accompanying text (discussing *United States v. Dorsey*).

14. See infra Part III (outlining advantages of majority approach).

15. See infra Part III.B (discussing Rule 608's inapplicability).

16. In addition to its substantive flavors, there is some diversity in the terminology used to describe this conduct. Some circuits exclusively use the term "bolstering" to refer to what is termed "vouching" throughout this Note. Most circuits appear to use both terms interchangeably or suggest that bolstering is encompassed within vouching. See United States v. Edwards, 581 F.3d 604, 609–10 (7th Cir. 2009) ("Improper *vouching* is trying to *bolster* a witness's believability with 'evidence' that was not presented and may well not exist." (emphasis added)); United States v. Delgado, 56 F.3d 1357, 1368 (11th Cir. 1995) ("[T]he defense argues the government improperly attempted to bolster or vouch for the credibility of its witnesses."); United States v. Necoechea, 986 F.2d 1273, 1279 (9th Cir. 1993) ("This statement is *vouching*. The prosecutor's argument *bolsters* Gibson's credibility . . . ." (emphasis added)); United States v. Bowie, 892 F.2d 1494, 1499 n.1 (10th Cir. 1990) ("A number of courts appear to regard credibility-bolstering as no different from credibility-vouching, and merge the two concepts."). Only the Tenth Circuit has attempted to distinguish the two, id., but this is because it has decided to use the term "bolstering" exclusively in the context of Federal Rule of Evidence 608. United States v.

text of closing argument.[17] *Byrd v. Collins* provides a quintessential example of a vouching statement.[18] In that case, the prosecution heavily relied on the testimony of a jailhouse snitch, Ronald Armstead, who testified that the defendant, John Byrd, had bragged about murdering a convenience store clerk during an armed robbery.[19] During his closing argument, the prosecutor made the following improper appeal:

> Armstead said that he was told by Byrd that Byrd stabbed Monte Tewksbury. I haven't heard any evidence to contradict that. I have seen a lot of circumstantial evidence to support that. I have heard no evidence direct or circumstantial to contradict what Armstead said. *I believe him, and I submit that you should believe him.*[20]

Prosecutorial guarantees of trustworthiness are just one form of vouching. In other cases, prosecutors have vouched by claiming they verified a witness's testimony with a polygraph or by some other means.[21] This Note focuses on a somewhat more subtle variety of vouching, the introduction of evidence concerning a cooperating witness's plea agreement promise to testify truthfully.

This Part introduces the concept of vouching and its legal bases. Part I.A considers the doctrinal foundations of vouching, loosely drawn from the jury-trial right, and Part I.B zeroes in on the Supreme Court's limited attempts to directly address the vouching issue. Part I.C discusses how the special circumstances surrounding cooperating witnesses led to an expansion of vouching doctrine.

A. *Doctrinal Underpinnings*

It is considered a "fundamental premise of our criminal trial system . . . that 'the jury is the lie detector.'"[22] Thus, as an offshoot of the

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Lord, 907 F.2d 1028, 1030 (10th Cir. 1990); see also Fed. R. Evid. 608(a) (permitting "evidence of truthful character . . . only after the witness's character for truthfulness has been attacked"). For the purposes of this Note, the term vouching encompasses bolstering.

17. See, e.g., United States v. Dispoz-O-Plastics, Inc., 172 F.3d 275, 282 (3d Cir. 1999) (analyzing two instances of vouching in prosecutor's closing); United States v. Smith, 962 F.2d 923, 933 (9th Cir. 1992) (finding vouching during closing).

18. 209 F.3d 486 (6th Cir. 2000).

19. Id. at 496.

20. Id. at 537 (emphasis added). Although the court found these statements to be improper vouching, it refused to hold that they rose to meet the high burden required for reversal under habeas corpus review. Id.

21. E.g., United States v. Brown, 720 F.2d 1059, 1074 (9th Cir. 1983).

22. United States v. Scheffer, 523 U.S. 303, 313 (1998) (emphasis omitted) (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)). Although "fundamental," the extent of the jury's lie-detecting role has not been fixed over time. Studying the development of this role extensively, Professor George Fisher traced the "gradual erosion of those evidence rules that had spared juries the task of deciding which of two competing witnesses lied under oath," such as the bar on sworn testimony by criminal defendants. George Fisher, The Jury's Rise as Lie Detector, 107 Yale L.J. 575, 582 (1997). Fisher

jury-trial right, the Supreme Court has long held that credibility determinations are solely within the province of the jury.[23] Jurors are considered well equipped for this task due to "their natural intelligence and their practical knowledge of men and the ways of men."[24] Courts have acknowledged that safeguarding the jury's time-honored role feeds directly into the prohibition on vouching.[25] As Donna Lee Elm noted, "The Constitution gave to the people the power to decide legal disputes. If the government tries to usurp that, then it interferes with one of the most basic precepts that formed our country."[26]

Vouching doctrine protects against such usurpation by limiting prosecutors' ability to inject personal opinion or other extrinsic evidence concerning a witness's credibility into a trial.[27] Because of the elevated status of prosecutors,[28] there is a general concern that they will lend a witness's testimony undeserved heft and credibility.[29] In other words,

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concludes, "[T]he lie-detecting power of the jury has grown consistently and has never, for any sustained period, diminished." Id. at 584.

23. Lessee of Ewing v. Burnet, 36 U.S. (11 Pet.) 41, 50–51 (1837); see also Kansas v. Ventris, 129 S. Ct. 1841, 1847 n.* (2009) ("Our legal system . . . is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses . . . ."); Glasser v. United States, 315 U.S. 60, 77 (1942) ("[T]he credibility of a witness is a question for the jury."); Ric Simmons, Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding, 74 U. Cin. L. Rev. 1013, 1021 (2006) ("In short, witness credibility is uncontrovertibly within the sole province of the jury in the context of the separation of powers between the judge and the jury."). Interestingly, no case cites to a constitutional provision to support the proposition that this is the jury's hallowed ground.

24. Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891); see also Barry Tarlow, Some Prosecutors Just Don't Get It: Improper Cross and Vouching, Champion, Dec. 2004, at 55, 58 ("[T]he jury is in the best position to determine a witness's credibility and, indeed, it has the right to do so.").

25. See United States v. Weatherspoon, 410 F.3d 1142, 1147 (9th Cir. 2005) ("It is up to the jury—and not the prosecutor—to determine the credibility of a witness' testimony."); United States v. Andreas, 216 F.3d 645, 672 (7th Cir. 2000) (examining whether alleged vouching "invade[d] the province of the jury to assess credibility or determine facts").

26. Donna Lee Elm, Vouching: A Defense Attorney's Guide to Witness Credibility, Law and Strategy 3 (2008).

27. See United States v. Francis, 170 F.3d 546, 550 (6th Cir. 1999) (explaining "[i]mproper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility," whether by "blunt comments" or reference to "facts not in front of the jury"); Carlson, supra note 6, at 717 (detailing express and implicit vouching).

28. See Kenneth Rosenthal, Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence, 71 Temp. L. Rev. 887, 897 (1998) (suggesting "prosecutor commands special respect (unavailable to any other lawyer) by virtue of the office he holds and the 'client' he represents").

29. See United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985) (expressing concern jury "may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled"). Although vouching prohibitions could apply to defense attorneys as well, "almost all the cases making vouching law feature prosecutorial misconduct." Elm, supra note 26, at 8.

there is a presumption that jurors will be persuaded by a prosecutorial expression of faith in a witness. Thus, courts seek to foreclose the prosecutor from "hinting to the jury that [she] has reasons unknown to [the jury] for believing that a government witness is telling the truth."[30]

Although predating the coining of the term "prosecutorial vouching," *Berger v. United States*[31] is the foundational case on prosecutorial misconduct.[32] Underscoring the special role of the prosecutor and the importance of his actions, *Berger* spawned modern-day vouching doctrine.[33] The case involved a counterfeiting conspiracy with eight alleged participants, but the evidence against the defendant Berger was particularly scant.[34] Berger appealed the trial court's refusal to dismiss the indictment for insufficient evidence and complained of several prosecutorial wrongs,[35] one of which closely mirrors the vouching claims of today. During trial, a government witness "had difficulty" in properly identifying the defendant.[36] Seeking to compensate for the witness's deficiencies, the prosecutor implied to the jury during his closing argument that he had been barred by the "rules of law" from eliciting testimony that the witness would have freely given concerning the defendant's identity.[37] The Court noted that this statement by the prosecutor "invited [the jury] to conclude that the witness . . . knew [the defendant] well but pretended otherwise; and that this was within the personal knowledge of the prosecuting attorney."[38] According to the Court, the prosecutor's behavior was well beyond "the bounds of that propriety and fairness which should characterize the conduct of such an officer."[39] The impropriety of such references to evidence not before the jury, real or imagined, is a repeated theme of vouching law.[40]

Berger also emphasized the special position of United States Attorneys and their attendant duties to prosecute vigorously while always

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30. United States v. Edwards, 581 F.3d 604, 609 (7th Cir. 2009).

31. 295 U.S. 78 (1935).

32. Peter J. Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 Wash. U. L.Q. 713, 720 (1999) ("*Berger* furnishes the basis for courts to assert that when the government crosses the line between proper and improper methods, what has taken place is 'prosecutorial misconduct.'"); see also Anne Bowen Poulin, Convictions Based on Lies: Defining Due Process Protection, 116 Penn St. L. Rev. 331, 347 n.77 (2011) ("The most quoted statement of the prosecutor's special duty is found in *Berger v. United States* . . . .").

33. Elm, supra note 26, at 2.

34. *Berger*, 295 U.S. at 79–80.

35. Id. at 80. The Second Circuit agreed that the prosecutor's conduct should be "condemned," but did not find that it warranted reversal. Id.

36. Id. at 86.

37. Id. at 87.

38. Id. at 88.

39. Id. at 84.

40. See supra notes 27–30 and accompanying text (discussing safeguards vouching doctrine provides against extrinsic evidence).

seeking to ensure that "justice shall be done."[41] Using language that has been cited in a number of vouching cases,[42] *Berger* suggested that the jury's belief that prosecutors will dutifully fulfill their obligations raises the risk that "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."[43] This weight is not to be underestimated; commentators have noted that the "special respect" afforded prosecutors allows them to "exert[] great influence on the jurors (and trial judges) and hence on the ultimate outcome."[44] Such influence fuels fears that a prosecutor may infringe on the jury's exclusive assessment of witness credibility.[45]

B. *The Supreme Court's Limited Explicit Input on the Issue*

Although *Berger* provided its doctrinal basis, the Court did not address vouching. In fact, the Supreme Court has explicitly tackled the concept of vouching in just two cases, both limited in scope.[46] Part I.B.1 will consider the first case to explicitly address vouching, *Lawn v. United States*,[47] which failed to provide much, if any, guidance to lower courts. *United States v. Young*,[48] discussed in Part I.B.2, is the Court's most detailed statement regarding the issue and provides insight into what would merit the Court's attention in this area. These cases are guideposts—not fully formed rules—that should orient the lower courts' handling of vouching.

1. Lawn *and the Introduction of "Invited Response" Doctrine.* —

The first explicit mention of vouching can be traced to a footnote in *Lawn*. The petitioner and several codefendants were charged with "evading, and conspiring to evade . . . federal income taxes."[49] The petitioner claimed that it was improper for a prosecutor to suggest during closing argument that particular government witnesses had told the truth.[50] The use of the term vouching resulted from the prosecutor's specific proclamation that he was willing to "vouch for" the witnesses in question.[51] Despite the

41. *Berger*, 295 U.S. at 88.

42. See, e.g., United States v. Brown, 508 F.3d 1066, 1075 (D.C. Cir. 2007) (quoting *Berger*); United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980) (identifying this as "well-established principle").

43. *Berger*, 295 U.S. at 88.

44. Rosenthal, supra note 28, at 897.

45. See supra notes 28–29 and accompanying text (noting risks resulting from "elevated status of prosecutors").

46. Importantly, neither case considers whether a cooperator's plea agreement poses a vouching danger.

47. 355 U.S. 339 (1958).

48. 470 U.S. 1 (1985).

49. *Lawn*, 355 U.S. at 341.

50. Id. at 359 n.15.

51. Id. (internal quotation marks omitted).

prosecutor's willingness to vouch, the Court relied on two factors in dismissing any notion of impropriety: First of all, there was no suggestion by the prosecutor that his claim "was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury."[52] This demonstrated the Court's preference for an "objective test," aimed at a prosecutor's express statements "indicating a personal belief in the witness's credibility," instead of a "subjective test," which would try to determine whether a juror could have reasonably inferred such a belief.[53] Second, the Court pointed out that the defense's own attacks, including characterizing the cooperators as "admitted perjurers," had "invited the reply."[54] As will be seen in Part II, both of these concepts have been adopted into circuit case law regarding prosecutorial vouching, although in varying forms.

Lawn's treatment of the prosecution's reference to credibility evidence outside the record picks up a thread from *Berger* and stands as one of the two major elements underlying vouching law today.[55] This decision is generally invoked when the prosecutor makes express vouching references during argument, but not in response to subtler acts such as a reference to the truthful-testimony requirement of a cooperator's agreement.[56]

2. Young *and the Dangers of Vouching*. — The Court waited more than a quarter of a century before addressing vouching again in *United States v. Young*.[57] The defendant had been charged with fraudulently representing a shipment of oil to a refinery as pure crude oil when most of the shipment was actually a cheaper crude derivative.[58] As in *Lawn*, the prosecutorial conduct in question took place during closing arguments.[59] Defense counsel claimed that "the prosecution deliberately withheld exculpatory evidence, . . . attempt[ed] to cast a false light on respon-

52. Id. at 360 n.15.

53. Note, Accomplice Testimony and Credibility: "Vouching" and Prosecutorial Abuse of Agreements to Testify Truthfully, 65 Minn. L. Rev. 1169, 1173–74 (1981).

54. *Lawn*, 355 U.S. at 360 n.15; see also United States v. Ollivierre, 378 F.3d 412, 423 (4th Cir. 2004) (mentioning Lawn's defense counsel "suggested that the government's key witness was a liar"), vacated on other grounds, 543 U.S. 1112 (2005). The Court subsequently made it clear that *Lawn* "should not be read as suggesting judicial approval . . . of response-in-kind that inevitably exacerbates the tensions inherent in the adversary process." United States v. Young, 470 U.S. 1, 12 (1985).

55. See United States v. Walker, 155 F.3d 180, 184 (3d Cir. 1998) (citing *Lawn*, 355 U.S. at 359 n.15) (mentioning concerns with bolstering witness credibility by using "information outside of the testimony before the jury"); Note, supra note 53, at 1174 n.23 (noting *Lawn* applied same test as *Berger*).

56. See, e.g., *Walker*, 155 F.3d at 187 ("[I]t is not enough for a defendant on appeal to assert that the prosecutor assured the jury that a witness' testimony was credible. The defendant must be able to identify as the basis for that comment an explicit or implicit reference . . . .").

57. 470 U.S. 1.

58. Id. at 3.

59. Id. at 4–5.

dent's activities," and did not even believe that Young intended the crime.[60] In response, the prosecutor took the opportunity to clearly state his "personal impression[]" that it was intentional fraud.[61] At one point he exhorted, "I don't know what you call that, I call it fraud."[62] Although the Court did consider it "an improper expression of personal opinion," the Court once again found solace in the fact that it was responsive to a prior assertion by the defense.[63]

For the purposes of this Note, *Young*'s primary significance is that the Court added a second element to the doctrine, neatly encapsulating the justifications for a vouching prohibition[64]:

> The prosecutor's vouching for the credibility of witnesses . . . pose[s] two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.[65]

The first of these two dangers, the risk of out-of-record evidence swaying the jury, is familiar because of its prior introduction in *Lawn*.[66] The second danger, that of juries giving undue weight to the prosecutor's opinion, is new in its application to a vouching statement. But it closely parallels the language in *Berger*, cited by the Court,[67] speaking to the heightened status and commensurate responsibility of the prosecutor.[68] Although many may classify this statement as dictum in the broader context of the Court's opinion, these two concerns provide the loose framework lower courts must consider when separating the permissible from the impermissible.[69] As a Ninth Circuit case noted, it would be

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60. Id.

61. Id. at 5.

62. Id.

63. Id. at 17–18.

64. See Randy V. Cargill, "Hard Blows" Versus "Foul Ones": Restrictions on Trial Counsel's Closing Argument, Army Law., Jan. 1991, at 20, 23 (noting rationale for "prohibition was summarized succinctly by the Supreme Court in *United States v. Young*").

65. *Young*, 470 U.S. at 18–19.

66. See supra notes 52–53 and accompanying text (discussing *Lawn*'*s* emphasis on prohibiting references to outside evidence).

67. *Young*, 470 U.S. at 18–19 (citing Berger v. United States, 295 U.S. 78, 88–89 (1935)).

68. See supra notes 41–43 and accompanying text (summarizing *Berger*'s discussion of prosecutor's specialized role).

69. See William B. Johnson, Annotation, Propriety and Prejudicial Effect of Comments by Counsel Vouching for Credibility of Witness—Federal Cases, 78 A.L.R. Fed. 23, § 2[a] (1986) (noting varied results reached by lower courts "[t]aking these considerations into account").

erroneous to evaluate a vouching claim utilizing one of these criteria but not the other.[70]

In the process of filling out vouching law, however, the *Young* court also added substance to guide the determination of what constitutes an "invited response."[71] The Court expressed concern that the *Lawn* decision had been misconstrued as a catchall endorsement of improper prosecutorial responses whenever it was arguable that the defense had opened the door.[72] Putting forth a contextual balancing approach, the Court pronounced, "[T]he reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo."[73] It is not clear that, in practice, courts ensure that a prosecutor's response is so circumscribed; instead they often grant "a blanket license for improper argument."[74] The reach of the "invited response" doctrine has extended beyond those situations where the prosecutor's conduct has already been deemed improper into the determination of propriety itself, limiting the *introduction* of nonprejudicial evidence simply because the defense has yet to deliver an invitation.[75]

C. *The Risks of Cooperating Witnesses and the Use of Truthful-Testimony Provisions*

Cooperating witnesses play a central role in the modern criminal justice system, and their involvement raises attendant concerns. This section focuses on the importance of these witnesses, the credibility conundrum posed by their participation in trials, and how these factors fueled an extension of vouching doctrine well beyond its initially limited sphere.

The Sentencing Guidelines increased the power of prosecutors to control sentencing outcomes across the board through charging determinations,[76] but prosecutors have a particularly powerful lever in the cooperation context: The section 5K1.1 substantial-assistance motion allows them to grant sentencing leniency in exchange for testimony.[77]

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70. See United States v. Weatherspoon, 410 F.3d 1142, 1147 (9th Cir. 2005) (citing *Young* for proposition vouching is no longer limited to preventing single vice described in *Lawn*).

71. *Young*, 470 U.S. at 11–13.

72. See id. at 12 ("*Lawn* . . . should not be read as suggesting judicial approval or—encouragement—of response-in-kind that inevitably exacerbates the tensions inherent in the adversary process.").

73. Id.

74. Rosemary Nidiry, Note, Restraining Adversarial Excess in Closing Argument, 96 Colum. L. Rev. 1299, 1320–21 (1996).

75. See infra notes 240–243 and accompanying text (discussing misapplication of "invited response" in some jurisdictions).

76. See Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 Calif. L. Rev. 1471, 1516 (1993) (discussing central role of prosecutors in sentencing determinations).

77. See United States v. Ming He, 94 F.3d 782, 788 (2d Cir. 1996) ("Before the promulgation of § 5K1.1, district judges, not prosecutors, had discretion to decide

Even after *United States v. Booker* dispatched with mandatory sentencing guidelines,[78] "the prosecutor's power to award or deny a substantial-assistance sentence reduction is virtually unlimited."[79] Cooperation is also the primary means by which defendants facing mandatory minimums can lower their sentences.[80] This allows prosecutors to provide an enticing offer to defendants willing to turn on their criminal brethren.

Cooperating witnesses are typically serious criminals facing significant prison time.[81] With increased incentives to cooperate, "[e]very defendant or target of an investigation must contemplate cooperation with federal authorities."[82] These pressures have provided prosecutors with a "seemingly inexhaustible supply of such 'cooperators.'"[83] There is also a compelling reason that prosecutors are willing to strike these deals: Cooperating witnesses are effective.[84] The growing supply of willing pleaders and the number of prosecutors eager to gain the benefit of a bargain have spawned a system in which "[m]ost federal criminal cases are resolved based, at least in part, on the anticipated or actual testimony of cooperating defendants."[85]

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whether to reduce a sentence based on a defendant's assistance. Under the Guidelines this sentencing power—of such great moment to a cooperating witness—was transferred from the sentencing court to the prosecutor." (citation omitted)).

78. 543 U.S. 220, 245 (2005).

79. Melanie D. Wilson, Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation, 45 Am. Crim. L. Rev. 67, 92 (2008). Although a judge could theoretically exercise a downward departure without a government motion, prosecutors ultimately control the gateway to cooperation, and no mechanisms are in place to check their rejection of a potential cooperator. Id. at 91–92.

80. See Ian Weinstein, Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing, 40 Am. Crim. L. Rev. 87, 94–95 (2003) (identifying cooperation as one of two possible ways to escape mandatory minimum sentences). The only other way to avoid a mandatory minimum is the "safety valve," codified at 18 U.S.C. § 3553(f) (2012), which only permits downward departures for "low-level, first-time drug offenders." Philip Oliss, Comment, Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines, 63 U. Cin. L. Rev. 1851, 1884 (1995).

81. See Daniel C. Richman, Cooperating Clients, 56 Ohio St. L.J. 69, 83 (1995) ("[R]are is the criminal associate who cooperates *before* he faces serious charges; the snitch typically forces the government to 'buy' information that the 'concerned citizen' would have freely given.").

82. Ellen Yaroshefsky, Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 Fordham L. Rev. 917, 919 (1999).

83. John Gleeson, Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges, 5 J.L. & Pol'y 423, 424 (1997).

84. See Yaroshefsky, supra note 82, at 921 ("Accomplice testimony is often the most damaging evidence against a defendant . . . .").

85. Id. This Note focuses exclusively on federal law in part because of the relative importance of cooperators in those cases. Also, state courts draw extensively on federal circuit court decisions in considering vouching claims. See, e.g., Commonwealth v. Williams, 896 A.2d 523, 541 (Pa. 2006) (citing Third Circuit case law); State v. Ish, 241 P.3d 389, 392–93 (Wash. 2010) (citing Ninth Circuit case law).

Vouching claims often center on cooperators not only in light of their expanding role, but also because such witnesses' motivations and credibility are frequently questioned.[86] The Supreme Court's skepticism regarding such witnesses is longstanding. In a 1909 decision, the Court advised that "the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses."[87] Justice Jackson echoed these concerns almost fifty years later, warning that "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility."[88]

The structure of cooperation agreements amplifies reliability concerns. In most cases, cooperating witnesses hope to procure some favorable treatment from the government in return for their testimony, which may include immunity from prosecution or more lenient sentencing.[89] The government is forbidden from making any explicit guarantees regarding this special consideration prior to the cooperator's testimony.[90] Agreements often specify that leniency will only be granted if there is "substantial performance . . . to the government's satisfaction."[91] Any rational individual entering one of these agreements is aware that the government would not have made such concessions if it expected unfavorable or middling testimony.[92] This may create a very real temptation for a cooperator "to give a false account that he believes—correctly or not—the government would prefer to hear."[93] Commentators have

86. See R. Michael Cassidy, "Soft Words of Hope:" *Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements, 98 Nw. U. L. Rev. 1129, 1140 (2004) ("Not only do accomplice witnesses have a *motive* to fabricate, they have an *ability* to fabricate and to fabricate convincingly."); Bennett L. Gershman, Witness Coaching by Prosecutors, 23 Cardozo L. Rev. 829, 850 (2002) ("[S]ome cooperators may not even appreciate the difference between truth and untruth.").

87. Crawford v. United States, 212 U.S. 183, 204 (1909).

88. On Lee v. United States, 343 U.S. 747, 757 (1952).

89. See Richman, supra note 81, at 85 (identifying "substantial reward" of cooperation as "far lighter sentence").

90. See Shabazz v. Artuz, 336 F.3d 154, 165 (2d Cir. 2003) ("The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases . . . *provided* that it does not promise anything to the witnesses prior to their testimony.").

91. Cassidy, supra note 86, at 1147; see also Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 Vand. L. Rev. 1, 3 (1992) (discussing how government's need to ensure leniency is tied to "cooperator's substantial performance").

92. Cf. Note, supra note 53, at 1185 ("[J]urors probably realize that the government believes that the witnesses it puts on the stand will aid the prosecution.").

93. Richman, supra note 81, at 97 n.98; see also Cassidy, supra note 86, at 1147 ("The cooperating witness's obligation is to tell the truth, but from his perspective 'truthful cooperation' of course means cooperation that satisfies the prosecutor and is thereby consistent with the prosecutor's theory of the case."); George C. Harris, Testimony for Sale: The Law and Ethics of Snitches and Experts, 28 Pepp. L. Rev. 1, 51 (2000) ("'Truthful' will necessarily be defined as consistent with the proffer that inculpated

also pointed out that accomplices will skew the story to minimize their involvement and "shift blame even without the promise of lenient treatment from the government."[94] Witnesses who plan to give dishonest testimony in their self-interest may be emboldened by the fact that their location within the criminal enterprise allows them to tinker with facts without the risk of detection by outsiders.[95]

Courts have designed a number of prophylactic measures to constrain these threats to truthful testimony, including "instructing juries to consider [cooperators'] credibility cautiously."[96] For their part, prosecutors include boilerplate language in plea agreements binding a cooperating witness to testify truthfully in order to secure favorable treatment.[97] A standard agreement reads: "The Defendant agrees that if the United States determines, in its sole discretion, that he has not provided full and truthful cooperation . . . the plea agreement may be voided by the United States."[98] It is entirely permissible for a prosecutor to include a truthfulness provision in a cooperator's plea agreement, although there is disagreement as to whether it meaningfully deters incomplete or misleading testimony.[99] Regardless of its effect, this

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another defendant and led to the cooperation agreement."); Spencer Martinez, Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency, 47 Clev. St. L. Rev. 141, 145 (1999) ("[O]nce the prosecutor enters into a cooperation agreement with a witness, that witness has a strong incentive to ensure that, at least in the eyes of the prosecutor, he has performed his end of the bargain.").

94. Harris, supra note 93, at 51; see also Richard L. Lippke, The Ethics of Plea Bargaining 161 (2011) ("[D]efendants who cooperate may seek to conceal or downplay their own crimes, and thus shift responsibility for criminal acts onto others . . . .").

95. See Christine J. Saverda, Note, Accomplices in Federal Court: A Case for Increased Evidentiary Standards, 100 Yale L.J. 785, 786–87 (1990) ("Th[e] claim to 'inside knowledge' . . . allows the accomplice to deviate from the truth without arousing the jury's suspicion.").

96. Michael S. Ross, Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals, 23 Cardozo L. Rev. 875, 880 (2002).

97. See United States v. Reid, 625 F.3d 977, 982 (6th Cir. 2010) (noting "chance for a reduction in sentence" for cooperating witnesses was contingent on "truthful testimony"); United States v. Hall, 434 F.3d 42, 56 (1st Cir. 2006) (discussing normal inclusion of such language); Cassidy, supra note 86, at 1146 (mentioning typical inclusion of such clauses); Note, supra note 53, at 1169 ("As a part of such agreements, the prosecutor will usually require the witnesses to promise to testify truthfully at trial."); James W. Haldin, Note, Toward a Level Playing Field: Challenges to Accomplice Testimony in the Wake of *United States v. Singleton*, 57 Wash. & Lee L. Rev. 515, 525 (2000) ("Traditional accomplice plea agreements typically require the witness to promise to testify 'fully and fairly' or 'truthfully.'"); Sam Roberts, Note, Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?, 74 Fordham L. Rev. 257, 263 (2005) (discussing standard agreement terms).

98. United States v. Harlow, 444 F.3d 1255, 1262 (10th Cir. 2006).

99. Compare Tarlow, supra note 24, at 59 ("[T]hese provisions do not effectively produce truthful testimony."), with Haldin, supra note 97, at 525–26 (remarking benefit of bargain may be extinguished if testimony is not truthful).

language is at the center of the disputed piece of vouching doctrine[100] that is the focus of this Note.

There is concern that a truthful-testimony requirement implicitly suggests that the witness's testimony has been stamped with a government seal of approval.[101] The admission of the truthful-testimony requirement does not appear directly analogous to the improper expressions of prosecutorial opinion present in the prototypical vouching case—namely, it does not involve a direct expression by the prosecutor at all.[102] However, courts have been willing to bridge the gap. As the Sixth Circuit explained, the jury might assume "that the prosecutor is in a special position to ascertain whether the witness was, in fact, testifying truthfully."[103] In seeking to cure this potential ill effect, courts have crafted a number of restrictions rooted in prosecutorial vouching doctrine aimed at references to the truthfulness provisions of plea agreements. Part II of this Note analyzes each of these approaches in detail.

II. CONTRASTING APPROACHES IN THE CIRCUITS

This Part examines the divergent approaches that have emerged for the treatment of truthfulness provisions in cooperating witness agreements. The circuits disagree as to the type and number of references to such clauses that are permissible.[104] The majority approach, discussed in Part II.A, is largely permissive. The Second and Eleventh Circuits, analyzed in Part II.B.1, pioneered a more distrusting method that draws heavily on the "invited response" doctrine. As seen in Part II.B.2, the Ninth Circuit is worthy of particular attention because of its unique approach and apparent willingness to push the boundaries of the doctrine to cover an increasing range of conduct.

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100. See Stephen A. Saltzburg, Plea Agreements: Confrontation Versus Vouching, Crim. Just., Fall 2005, at 65, 65 ("When defendants who plead become witnesses, questions arise as to the proper use of their plea agreements in the trial of others.").

101. United States v. Necoechea, 986 F.2d 1273, 1278 (9th Cir. 1993) ("[I]t does mildly imply, as do all statements regarding truthfulness provisions, that the government can guarantee . . . truthfulness."); United States v. Shaw, 829 F.2d 714, 717 (9th Cir. 1987) ("[E]very plea agreement that contains a requirement of truthful testimony contains an implication, however muted, that the government has some means of determining whether the witness has carried out his side of the bargain.").

102. See United States v. Wallace, 848 F.2d 1464, 1474 (9th Cir. 1988) (noting plea agreement references not "as direct[] as statements by the prosecutor himself").

103. United States v. Francis, 170 F.3d 546, 550 (6th Cir. 1999).

104. Robert E. Larsen, Navigating the Federal Trial § 9:25 (2013 ed.) ("There is a split in the circuits as to when the truth-telling provisions of a witness's plea agreement are admissible.").

A. *The Majority Approach: References to Truthful-Testimony Provisions Generally Permitted*

A large majority of circuits take a tolerant stance toward cooperators' testimony regarding truthfulness requirements.[105] There are subtle differences in approach, but these circuits agree that they do not find the introduction of the truthful-testimony requirement prior to an "invited response" to be fatal. Part II.A.1 focuses on the circuits' general approbation of the use of truthful-testimony requirements. Part II.A.2 investigates the limited restrictions that these courts have advanced to police extreme cases of vouching.

1. *Admit the Complete Agreement.* — Most circuits find nothing wrong with admitting the entirety of a cooperating witness's plea agreement, including the truthfulness requirement. As a recent study noted, both state and federal "[j]urisdictions overwhelmingly find that the 'testify truthfully' plea bargain clause does not 'vouch.'"[106] Specifically, the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits have ruled that references to a requirement for truthful testimony are permissible whether or not the witness's credibility has already been attacked.[107] For example, the First Circuit has held that a "prosecutor properly may admit a witness's plea agreement into evidence, discuss the details of the plea during closing arguments, and comment upon a witness's incentive to testify truthfully."[108]

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105. See *Necoechea*, 986 F.2d at 1280 n.4 ("[M]ost other circuits are not as concerned with whether truthfulness provisions are referred to.").

106. Elm, supra note 26, at 69.

107. See United States v. Lewis, 110 F.3d 417, 421 (7th Cir. 1997) (noting "well-settled rule in this circuit" allowing admission of agreement on direct examination); United States v. Spriggs, 996 F.2d 320, 324 (D.C. Cir. 1993) ("[T]he jury is not likely to place special credence in the witness merely because of the terms of the agreement."); United States v. Lord, 907 F.2d 1028, 1031 (10th Cir. 1990) (refusing to require "invited response" before introduction); United States v. Drews, 877 F.2d 10, 12 (8th Cir. 1989) (affirming admission of plea agreements containing truthful-testimony requirements); United States v. Townsend, 796 F.2d 158, 162–63 (6th Cir. 1986) (noting plea agreement with truthfulness provision does not constitute impermissible bolstering); United States v. Oxman, 740 F.2d 1298, 1303 (3d Cir. 1984) (holding government may anticipate impeachment of cooperator on cross-examination "by disclosing the truthful-testimony condition" during direct examination), vacated on other grounds sub nom. United States v. Pflaumer, 473 U.S. 922 (1985); United States v. McNeill, 728 F.2d 5, 14 (1st Cir. 1984) (approving testimony on direct regardless of likelihood of attack); United States v. Henderson, 717 F.2d 135, 137–38 (4th Cir. 1983) (finding introduction of truthfulness requirement appropriate regardless of defense's plans to attack credibility). It should be noted that the Fifth Circuit's position on whether or not an "invited response" is a prerequisite is unclear. See United States v. Edelman, 873 F.2d 791, 795 (5th Cir. 1989) (finding admission permissible but noting defense made "agreement an issue"); United States v. Martino, 648 F.2d 367, 389 (5th Cir. June 1981) (discounting vouching claim targeted at promise to testify truthfully in plea agreement), rev'd en banc on other grounds, 681 F.2d 952 (Former 5th Cir. 1982), aff'd sub nom. Russello v. United States, 464 U.S. 16 (1983).

108. United States v. Bey, 188 F.3d 1, 7 (1st Cir. 1999).

The extent of this general approval becomes clearer when applied to specific facts. The First Circuit case *United States v. Hansen* provides an illustration.[109] *Hansen* involved a prosecution for the theft of a minivan that was to be used later during the robbery of an armored vehicle.[110] The government built its case around the testimony of the defendant Hansen's accomplice, Brendan Brennan.[111] During his opening argument, the prosecutor referenced the fact that Brennan's agreement "required him to tell the truth."[112] The court summarily dismissed any suggestion of wrongdoing in connection with this statement because of the circuit's law allowing admission of the complete agreement and discussion of truthfulness requirements.[113] The court also considered references made during rebuttal where the prosecutor pushed the envelope further:

> "[Brennan] said . . . over and over again[,] 'My deal with the government is to tell the truth.' And any benefit [Brennan] gets is based on whether he tells the truth. It's in the agreement, ladies and gentlemen. Go ahead and read it. His deal here is to tell the truth, and I submit to you, that is precisely what he did during this trial."[114]

First, the court noted this statement was made in response to a claim in the defense's closing argument that the government "bought and paid for" Brennan's testimony.[115] However, the court found it wholly unnecessary to rely on "invited response" doctrine to dismiss the vouching claim.[116] Rather, the court simply held that since the truthfulness requirement was a fact in evidence, it was available for the prosecutor's use during argument.[117]

The circuits following a *Hansen*-like approach call into question the prejudicial value of the cooperator's truthfulness promise. As the Fourth Circuit explained, there is "no evidence that the government derive[s] any improper advantage" from such evidence.[118] The likeminded D.C. Circuit noted, "Simply put, we are not persuaded that evidence of the contents of a cooperation agreement unduly bolsters the credibility of a Government witness."[119] The Seventh Circuit has flipped the argument

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109. 434 F.3d 92 (1st Cir. 2006).

110. Id. at 96.

111. Id. at 97.

112. Id. at 101.

113. See id. (finding statement was "not improper").

114. Id. at 101–02 (third alteration in original) (quoting prosecutor's remarks in rebuttal to Hansen's closing statement).

115. Id. at 102 (internal quotation marks omitted).

116. See id. (noting prosecutors are allowed to respond to defense attacks of that ilk).

117. Id.

118. United States v. Henderson, 717 F.2d 135, 138 (4th Cir. 1983).

119. United States v. Spriggs, 996 F.2d 320, 324 (D.C. Cir. 1993).

on its head and suggested that references to the plea agreement work to undermine the cooperator's credibility: "[A]sking a witness whether he is testifying by agreement is not likely to bolster his credibility. If anything it is likely to have the opposite effect, by imputing a motive for the witness's testifying as the prosecution wants him to testify, regardless of the truth . . . ."[120]

By permitting the introduction of the entire cooperation agreement into evidence, these cases limit the relevance of *Young*'s first element, targeted at allusions to facts not available to the jury.[121] The *Hansen* decision emphasizes that "a prosecutor is not prohibited from pointing to specific record evidence (e.g., a plea agreement), and suggesting to the jury how these particular facts may have provided the witness with an incentive to testify truthfully."[122] If the entire agreement is within the jury's purview, the prosecutor need not enter the realm of out-of-record evidence to assert the witness is under an obligation to testify truthfully.[123] Instead, the vouching inquiry focuses on the second element and its *Berger*-esque examination into whether or not the prosecutor has invaded the jury's province in the evaluation of witness credibility.[124] Thus, allowing admission of the agreement in its entirety significantly narrows the vouching analysis.

2. *Limited Restrictions.* — There may be a nebulous outer bound on the use of truthfulness provisions even in these otherwise permissive circuits. These restrictions are bars against quantitatively and qualitatively egregious uses of truthful-testimony provisions.

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120. United States v. LeFevour, 798 F.2d 977, 983 (7th Cir. 1986). In fact, one defendant argued that a district court's exclusion of a plea agreement was an abuse of discretion because it "limited his ability to demonstrate to the jury that the testimony of [two cooperators] should not be believed because of 'the inherent coercive effect' of the cooperation provisions in their agreements." United States v. Morris, 327 F.3d 760, 762 (8th Cir. 2003).

121. See supra notes 64–70 and accompanying text (discussing two prongs laid out in *Young*).

122. United States v. Page, 521 F.3d 101, 107 (1st Cir.) (citing *Hansen*, 434 F.3d at 101), modified, 542 F.3d 257 (1st Cir. 2008).

123. See United States v. Segal, 649 F.2d 599, 604 (8th Cir. 1981) (holding prosecutor's reference to cooperator's agreement was not vouching since it did not suggest basis outside record); United States v. Isaacs, 493 F.2d 1124, 1165 (7th Cir. 1974) (finding no reference to "anything de hors the record"). However, it may be problematic if the agreement text, or the prosecutor, suggests that the witness will be or has been independently verified, such as through a polygraph. See infra notes 132–136 and accompanying text (discussing limitations on prosecutor's ability to assert independent verification).

124. Cf. United States v. Perez-Ruiz, 353 F.3d 1, 9 (1st Cir. 2003) (defining vouching as limited to "when [a prosecutor] places the prestige of her office behind the government's case by, say, imparting her personal belief in a witness's veracity or implying that the jury should credit the prosecution's evidence simply because the government can be trusted").

On the quantitative side, the Seventh Circuit has warned that "repetitive references" to the truthfulness requirement could be improper if the agreement has been admitted into evidence.[125] In *United States v. Thornton*, the government utilized nine cooperating witnesses in the prosecution of a cocaine distribution conspiracy stretching across Indianapolis and Chicago.[126] The government admitted all of the witnesses' plea agreements into evidence, each containing five references to the truthfulness obligation.[127] The court determined that the references did not bolster the witnesses' credibility.[128] However, in dictum, it offered "some words of wisdom to the wise," warning that "five references in the plea agreements comes perilously close to being unnecessarily repetitive."[129] Apart from suggesting that prosecutors "ease up on multiple references to the necessity of complete and truthful testimony,"[130] the court failed to provide clear guidance as to when references to the provision would be considered excessive.[131] There is no published decision from any circuit in which this test resulted in a finding of misconduct.

On the qualitative side, even circuits that generally treat truthfulness provisions as admissible will draw the line if the agreement's text, or a prosecutor, suggests a means of independent verification.[132] For exam-

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125. United States v. Thornton, 197 F.3d 241, 252 (7th Cir. 1999); United States v. Mealy, 851 F.2d 890, 899 (7th Cir. 1988) ("In drafting plea agreements, the government should avoid unnecessarily repetitive references to truthfulness if it wishes to introduce the agreements into evidence."). The Sixth Circuit has echoed this concern in a recent unpublished opinion. See United States v. Balark, 412 F. App'x 810, 817 (6th Cir. 2011) ("Repeating, as with a drumbeat of increasing intensity, the truthfulness provision witness by witness by witness, and also introducing plea agreements, proffers, and Rule 35 motions, might drown out other evidence.").

126. *Thornton*, 197 F.3d at 246, 251.

127. The five references were as follows:

> (1) [T]he codefendant agreed to provide "complete, total and truthful debriefings" regarding criminal activity to the government; (2) the codefendant agreed to provide "complete, total and truthful" testimony before grand juries and at trials; (3) the government agreed not to bring criminal charges against the codefendant for the "full, complete and truthful information and testimony" the codefendant provided; (4) the government reserved the right to prosecute for perjury or false statements if the codefendant testified "falsely"; (5) breach of the agreement, such as the failure to provide "full, complete and truthful information and testimony," could result in the agreement being withdrawn.

Id. at 251 n.3.

128. Id. at 252 (citing United States v. Lewis, 110 F.3d 417, 422 (7th Cir. 1997)).

129. Id.

130. Id.

131. The Seventh Circuit was similarly unclear in another "repetitive references" case as to "how little (or how much) emphasis was given" to the truthfulness requirements, which makes it hard to evaluate where a line would be drawn. See Carlson, supra note 6, at 734 n.171 (citing United States v. Mealy, 851 F.2d 890, 899–900 (7th Cir. 1988)).

132. See United States v. Bowie, 892 F.2d 1494, 1498 (10th Cir. 1990) ("Use of the 'truthfulness' portions of these agreements becomes impermissible vouching only when the prosecutors explicitly or implicitly indicate that they can monitor and accurately verify

ple, if a polygraph was conducted on a cooperator during trial preparation,[133] it may be necessary to redact a provision that indicates the government's agreement was contingent on consent to such an examination.[134] Unlike a mere promise to testify truthfully, such provisions "indicate that [the government] can monitor and accurately verify the truthfulness of the witness' testimony."[135] Even without admission of the polygraph results, there is a risk that the jury will "infer[] . . . that the witness had passed it."[136]

B. *The Second, Ninth, and Eleventh Circuits: More Restrictive of Vouching*

The Second, Ninth, and Eleventh Circuits' approaches, discussed in this section, are considerably more restrictive than the eight circuits just discussed. Rather than generally blessing such references, all of these circuits only permit statements regarding a requirement for truthful testimony in a cooperator's plea agreement if his or her credibility has previously been put at issue in the proceeding.[137] The Second and Eleventh Circuits, discussed in Part II.B.1, ground their restrictions in Rule 608. As discussed in Part II.B.2, the Ninth Circuit's approach is worthy of its own analysis because of its novel Rule 403 basis and its imprecise progression over the last two decades, which appear to have resulted in the most strenuous vouching test among the circuits.[138]

1. *The Second and Eleventh Circuits: Approval of Defensive Use.* — Between these two circuits, the Second Circuit has led the way in developing restrictions on the admissibility of truthfulness provisions, while the Eleventh Circuit has been content to mirror the Second

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the truthfulness of the witness' testimony."); United States v. Binker, 795 F.2d 1218, 1226 (5th Cir. 1986) (expressing unease with assertion of independent verification).

133. The government may use polygraphs early in investigations to filter out cooperators suspected of lying. Ann C. Rowland, Effective Use of Informants and Accomplice Witnesses, 50 S.C. L. Rev. 679, 683–84 (1999).

134. United States v. Hilton, 772 F.2d 783, 786 (11th Cir. 1985) ("Evidence of plea agreements containing provisions that the government's witnesses have agreed to take polygraph tests to verify trial testimony constitutes improper bolstering of the witnesses' credibility."). Interestingly, because many courts are generally skeptical of their accuracy, defendants may be denied the opportunity to cross-examine a cooperating witness concerning a failed polygraph. See United States v. Sanchez, 118 F.3d 192, 197 (4th Cir. 1997) ("The rule of this circuit is that polygraph evidence is never admissible to impeach the credibility of a witness." (citing United States v. Chambers, 985 F.2d 1263, 1270 (4th Cir. 1993); United States v. A & S Council Oil Co., 947 F.2d 1128, 1133 (4th Cir. 1991))).

135. *Bowie*, 892 F.2d at 1498.

136. Elm, supra note 26, at 73.

137. Carlson, supra note 6, at 731; see also Rowland, supra note 133, at 691–92 ("In the Second Circuit, . . . the Government . . . may not introduce portions of the plea agreement that could bolster the credibility of the witness unless the defense has attacked it.").

138. In a piece written prior to recent Ninth Circuit developments, the Second Circuit's approach was singled out as "[t]he most stringent." Carlson, supra note 6, at 748.

Circuit's approach.[139] The Second Circuit's treatment of vouching arises from its evaluation of the differing impacts that various provisions of a cooperator's agreement can have on a jury. In *United States v. Arroyo-Angulo*, the court considered an appeal by four defendants convicted largely thanks to the testimony of coconspirator Emilio Rivas.[140] The government "introduced [Rivas's cooperation] agreement on direct examination," anticipating an attack on his credibility.[141] The court acknowledged that a number of cases had expressly sanctioned the introduction of a plea agreement's terms, but found it distinguishable that the prosecutors in those cases were merely trying to salvage a witness whose credibility had already been "ravaged on cross-examination by defense counsel."[142] Relying on "well established rules of evidence that absent an attack on the veracity of a witness, no evidence to bolster his credibility is admissible," the court found it inappropriate for the prosecution to use its direct examination to preempt an anticipated attack.[143] As evidenced by its citation to commentaries on the Federal Rules of Evidence, the "well established rule" that the Second Circuit was referring to was Rule 608.[144] Specifically, Rule 608(a) provides that "evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked."[145]

Following the *Arroyo-Angulo* decision, there was a lack of clarity in the Second Circuit as to what terms of a cooperation agreement, if any, could properly be admitted prior to an attack by the defense. The court again took up the issue of wholly admitting cooperation agreements in *United States v. Edwards*.[146] Consistent with other circuits,[147] *Edwards* acknowledged that a cooperation agreement should be considered a "double-edged sword."[148] The court discussed how the cooperating witness's motive in testifying—seeking leniency for crimes committed—had an impeaching quality, but the fact that "the agreement was revocable if

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139. See United States v. Cruz, 805 F.2d 1464, 1480 (11th Cir. 1986) (citing United States v. Smith, 778 F.2d 925, 928 (2d Cir. 1985)) (adopting Second Circuit's approach); Carlson, supra note 6, at 731 (noting Eleventh Circuit adopted Second Circuit rule).

140. 580 F.2d 1137, 1139 (2d Cir. 1978).

141. Id. at 1146.

142. Id.

143. Id. (citing Edward W. Cleary et al., McCormick on Evidence § 49, at 102 (2d ed. 1972); 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 607[08] (1st ed. 1975)).

144. Id.; see also United States v. Jones, 763 F.2d 518, 522 (2d Cir. 1985) (citing Fed. R. Evid. 608(a)(2)).

145. Fed. R. Evid. 608. As discussed later, treating the terms of the plea agreement as "evidence of truthful character" is suspect. See infra Part III.B (critiquing use of Rule 608).

146. 631 F.2d 1049 (2d Cir. 1980).

147. See infra notes 251–255 and accompanying text (discussing multifaceted nature of cooperation agreements).

148. *Edwards*, 631 F.2d at 1051 (citing *Arroyo-Angulo*, 580 F.2d at 1146).

the witness perjured himself" could bolster the witness's credibility.[149] On balance, the *Edwards* court held that the bolstering effect outweighed the impeaching effect, so it would be improper to introduce the entire agreement if the defense had yet to impugn the witness's credibility.[150]

The Second Circuit put these doctrinal pieces together in *United States v. Jones*.[151] Jones and two codefendants had been convicted of using drugstores to sell drugs without the requisite prescriptions.[152] The government relied on the testimony of six cooperating witnesses at trial, mostly employees at the pharmacies involved in the conspiracy.[153] During direct examination, the government elicited testimony from these witnesses about their truthful-testimony obligations.[154] Once again highlighting the text of Rule 608(a)(2), the court laid down a bright-line rule that evidence of an agreement to testify truthfully "is admissible on direct only if the witness' credibility was attacked in the opening argument."[155]

A critical question that arises under the Second Circuit's formulation is what exactly can be characterized as a sufficient "attack" to warrant the government's response. In some cases, this is not a particularly subtle issue because the defense makes credibility a central issue at trial.[156] However, it is not always so cut and dried.[157] In *Jones*, for example, the court considered three statements made during the defense's opening: The defense (1) mentioned the witnesses' immunity status, which "meant they have committed 'many crimes, and they are not going to be prosecuted'"; (2) highlighted that one of the six cooperators was a convicted perjurer; and (3) asked the jury to consider "whether the government witnesses they heard had 'made a deal to save

149. Id. at 1052.

150. Id.

151. 763 F.2d 518 (2d Cir. 1985).

152. Id. at 520.

153. See id. at 521 (recounting testimony given and role of each witness in conspiracy).

154. Id.

155. Id. at 522 (citing United States v. Maniego, 710 F.2d 24, 27 (2d Cir. 1983) (per curiam)).

156. See, e.g., United States v. Quinones, 511 F.3d 289, 313 (2d Cir. 2007) ("[F]rom opening statements through summation, defense counsel argued not only that government witnesses were lying when they implicated defendants in narcotics trafficking and in the murder of Eddie Santiago, but that their relationships with the prosecutors provided them with a particular motive to do so.").

157. The Second Circuit's opinion in *United States v. Fernandez* tacitly recognized the uncertain nature of these determinations. See 829 F.2d 363, 365–66 (2d Cir. 1987) (discussing when undermining witness's direct testimony during cross-examination constitutes attack on credibility). After wrestling with whether or not the defense's cross-examination justified the prosecution's introduction of the cooperation agreement on redirect, the most definitive statement the court could muster on the issue was that it was "*unlikely* that Mrs. Cedeno's credibility was challenged on cross examination." Id. at 365 (emphasis added). Eventually, the court simply avoided the question altogether by finding any possible error harmless. Id. at 366.

their own hide.'"[158] None of these statements appear particularly vicious in isolation, but the court ruled that they were attacks that opened the door to the prosecution's introduction of the truthfulness requirement on direct examination.[159] This precedent suggests that a reference to a cooperating witness's leniency might open the door to a prosecutorial rebuttal.

The Second Circuit applies harmless-error analysis to successful vouching claims, which may work to prevent reversal even in an acknowledged instance of vouching.[160] The case law illustrates a few ways that a court may reach the point of classifying an error as harmless. In *Arroyo-Angulo*, the court relied on the "inevitability of defense counsels' attack" to excuse the prosecution's "error in the timing of the introduction of the cooperation agreement."[161] In another instance, the court simply pointed to the prosecutor's "good faith belief" that credibility had been questioned in concluding "that the admission of testimony regarding the truth-telling requirements of the cooperation agreements on direct examination was harmless error."[162] Professor Bennett Gershman has noted the "feverish intensity with which courts throughout the country have invoked harmless error to ignore serious evidentiary and procedural violations."[163] Thus, harmless-error review may significantly limit the scope of the circuit's bright-line rule.

2. *The Ninth Circuit: A Stricter (or More Opaque) Standard?* — The Ninth Circuit's approach to vouching has been less than crystal clear. Starting with its decision in *United States v. Roberts*[164] and continuing through its recent decision in *United States v. Dorsey*,[165] the circuit has displayed a willingness to experiment with new vouching constraints. However, the circuit has moved in a zigzag pattern, sometimes expressing an affinity for an approach similar to that of the majority of circuits. Prosecutors confronted with vouching claims in the Ninth Circuit must parse an assortment of decisions and attempt to place their conduct under the imprimatur of a friendly opinion, while defendants hope for a

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158. *Jones*, 763 F.2d at 522.

159. See id. ("Since these opening statements by defense counsel attacked the credibility of the government witnesses, appellants may not be heard to complain at their rehabilitation on direct examination.").

160. See, e.g., *Fernandez*, 829 F.2d at 366 (finding possible error in admitting cooperation agreement harmless). The court is unlikely to find the error harmless if the defense raised a timely objection to the improper introduction of the evidence at trial and admission of the evidence was clearly contrary to precedent. See id. (citing United States v. Borello, 766 F.2d 46, 57–58 (2d Cir. 1985)).

161. United States v. Arroyo-Angulo, 580 F.2d 1137, 1147 (2d Cir. 1978).

162. United States v. Musacchia, 900 F.2d 493, 498 (2d Cir. 1990), vacated, 955 F.2d 3 (2d Cir. 1991).

163. Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 426 (1992); see also Note, supra note 53, at 1180 (complaining "mere warnings are futile").

164. 618 F.2d 530 (9th Cir. 1980).

165. 677 F.3d 944 (9th Cir. 2012).

favorable ruling on the basis of cases decrying seemingly identical conduct.[166] A discussion of these opinions and their mixed signals follows.

Roberts involved a high-stakes prosecution for the attempted bombing of a federal building.[167] As is usually the case,[168] the cooperator, Adamson, was the government's chief witness, and his agreement specified he would lose any benefits if he were to testify untruthfully.[169] What was rather unusual was the extent to which the prosecutor relied on the truthful-testimony provision during closing argument, suggesting that Adamson would be recharged with first-degree murder and likely sent "to the gas chamber" if he lied.[170] Evidently unsatisfied that this would alleviate the jury's credibility concerns, the prosecutor went on to state that a police detective had remained in the courtroom during Adamson's testimony to "make sure that . . . [i]f Adamson lied, ladies and gentlemen, the plea agreement is called off."[171] The court decried the prosecutor's "devastating use" of the truthfulness provisions and reversed.[172]

Roberts laid the cornerstone of Ninth Circuit doctrine regarding the admissibility of truthfulness provisions.[173] Rather than following the Second and Eleventh Circuits' lead in relying on Rule 608, the court invoked Rule 403,[174] which provides that a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[175] With this test in mind, the court stated:

> A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.[176]

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166. See infra notes 202–203 and accompanying text (referring to recent district court application of Ninth Circuit vouching law).

167. *Roberts*, 618 F.2d at 532.

168. See supra notes 84–85, 97 and accompanying text (discussing important role of cooperating witnesses and inclusion of truthful-testimony requirements).

169. *Roberts*, 618 F.2d at 532.

170. Id. at 533.

171. Id.

172. Id. at 532, 537.

173. Id. at 535 (providing "some guidance concerning . . . prosecutorial use of the promise to testify truthfully").

174. Id. at 536.

175. Fed. R. Evid. 403.

176. *Roberts*, 618 F.2d at 536.

Despite this "strong case," the court refused to install a complete ban on the admission of such provisions. Consistent with the balancing directive of Rule 403, the Ninth Circuit recommended that a trial court "consider the phrasing and content of the promise to ascertain its implications and decide whether an instruction to the jury would dispel any improper suggestions."[177] Following this decision, however, some commentators still believed that the Ninth Circuit was "ready to adopt a rule forbidding the introduction and use of agreements to testify truthfully."[178]

The majority of Ninth Circuit cases have involved alleged vouching that occurred after the cooperating witness's credibility had already been questioned by the defense. In accordance with its sister circuits, the Ninth Circuit has found this defensive exploration of the truthfulness provision permissible if it does not rise to *Roberts*'s level of overzealous guarantees of testimonial accuracy.[179] Such reasoning would seem to flow naturally from the Supreme Court's approval of "invited responses" in *Lawn* and *Young*.[180] However, the Ninth Circuit has set off on its own path in cases where the alleged vouching took place before the defense questioned the cooperating witness's credibility.

The court had the opportunity to consider the prosecution's discussion of a truthfulness requirement prior to attack in *United States v. Shaw*, a bank robbery case involving an accomplice-turned-government-witness.[181] The vouching claim arose from the prosecutor's opening statement, where he asserted: "You will learn that . . . the prosecutor and the government have agreed that as long as he is truthful we will present his truthful cooperation to the local prosecutor so they can decide what value it has for the purposes of deciding what to do with his case."[182]

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177. Id. In applying Rule 403 balancing, a court can weigh the prejudicial effect of a truthful-testimony provision against the prosecution's legitimate interest in questioning a witness about his or her plea agreement. E.g., State v. Ish, 241 P.3d 389, 396 (Wash. 2010) (en banc) (Stephens, J., concurring).

178. Note, supra note 53, at 1180 n.61.

179. See United States v. Shaw, 829 F.2d 714, 716 (9th Cir. 1987) ("We have made it clear that references to requirements of truthfulness in plea bargains do not constitute vouching when the references are responses to attacks on the witness' credibility because of his plea bargain."); United States v. Rohrer, 708 F.2d 429, 433 (9th Cir. 1983) (holding agreement properly admitted in response to "extensive impeachment" of witness's motives and "discussion of part of the agreement"); United States v. Brooklier, 685 F.2d 1208, 1218–19 (9th Cir. 1982) (determining plea agreement properly admitted to rebut defense references to witness as "perjurer, paid informant, and murderer who escaped the death penalty by cooperating with the FBI").

180. See supra Part I.B.1–2 (discussing Supreme Court's treatment of "invited responses").

181. 829 F.2d at 716.

182. Id.

The court's rather equivocal language in evaluating this vouching claim portends the circuit's later decisions on the issue.[183] Initially, the *Shaw* court acknowledged that there was "some logic" to the government's argument that it should be permitted to anticipate a "defense attack on the credibility of its witness" and agreed "with the government that what was said is more important than when it was said."[184] This sympathy for the prosecution was short-lived, however. In the end, the court determined that the prosecutor's statement was improper vouching because it came before any defense attack and "necessarily impl[ied] that the prosecution has some method of determining whether the witness' testimony is truthful."[185] Thus, *Shaw* appeared to signal that the Ninth Circuit would be satisfied with a rule coextensive with the Second and Eleventh Circuits'—requiring a defense attack before a government reference to the cooperator's agreement.[186]

On the heels of *Shaw*, the Ninth Circuit abruptly turned toward the majority approach. In *United States v. Necoechea*,[187] the court ruled that a prosecutor's query into whether a cooperator's agreement required truthful testimony[188] was "not vouching" because it did "not imply a guaranty of . . . truthfulness, refer to extra-record facts, or reflect a personal opinion."[189] This language harkens back to *Young*'s admonitions regarding prosecutorial expressions of opinion,[190] and the court's rationale would appear to complement that of the majority of circuits that permit admission of the complete agreement for the jury's consideration.[191]

The Ninth Circuit subsequently evinced a desire to move away from *Necoechea* and tighten restrictions on vouching once again. In *United States v. Brooks*, the court analyzed a claim of vouching arising from the testimony of three cooperating witnesses; all three testified during direct examination to the consequences, both good and bad, that could result from a failure to give completely truthful testimony.[192] The court's recitation of the facts does not say whether the witnesses' credibility had been

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183. See infra note 195 and accompanying text (discussing possible interpretations of *United States v. Brooks*).

184. *Shaw*, 829 F.2d at 717.

185. Id.

186. See supra Part II.B.1 (discussing Second and Eleventh Circuit rule).

187. 986 F.2d 1273, 1278 (9th Cir. 1993).

188. Specifically, the prosecutor asked the witness if the agreement required "that she 'testif[y] truthfully and cooperat[e],' to which she responded yes." Id.

189. Id. at 1278–79.

190. See supra notes 64–68 and accompanying text (discussing *Young*'s directives concerning improper expressions of opinion).

191. See supra Part II.A.1 (discussing majority approach).

192. 508 F.3d 1205, 1209 (9th Cir. 2007). The court also addressed two other vouching claims irrelevant to this Note. See id. at 1210 (analyzing second and third vouching claims).

called into question prior to the direct examinations in question.[193] Despite this ambiguity, the court characterized the testimony concerning the truthfulness requirements as "mild forms of vouching" due to the implication that the "prosecutor can verify the witness's testimony."[194] If the defense had raised the issue of the witnesses' credibility first, this would present a new, albeit rather tepidly stated, frontier for vouching doctrine: It would suggest that any reference to a truthfulness provision, regardless of timing or defense attacks on credibility, could constitute vouching.[195]

The Ninth Circuit's most recent contribution seems to be an open acknowledgement of the circuit's past obfuscation. In *United States v. Dorsey*, the government enlisted William Fomby, a co-conspirator in a stolen-vehicle-trafficking ring, to testify against the defendant concerning a witness-tampering charge.[196] Defense counsel launched an attack on Fomby during his opening statement, characterizing him as "a convicted perjurer."[197] During direct examination, the prosecutor inquired as to Fomby's understanding of the cooperation agreement. In an awkwardly disjointed series of questions and answers, Fomby thrice reiterated his obligation to tell the truth, acknowledged that deception would not be tolerated, and suggested that he hoped to gain some leniency in exchange for his truthful testimony.[198] Dropping the "mild" language

193. Compare id. at 1209–10 (discussing facts of first vouching claim with no mention of defense attack), with id. at 1210 (discussing facts of second vouching claim and noting "credibility had been attacked on cross").

194. Id. (quoting United States v. Wallace, 848 F.2d 1464, 1474 (9th Cir. 1988)).

195. A subsequent opinion, written by Judge Posner in the Seventh Circuit, lends some weight to this reading. United States v. Edwards, 581 F.3d 604, 610 (7th Cir. 2009) (identifying *Brooks* as case that "breaks from . . . pattern" of permitting "government to present evidence that plea deals are conditioned on truthful testimony").

196. 677 F.3d 944, 950 (9th Cir. 2012). Fomby had seen Dorsey with a gun prior to a shooting that took place at the witness's residence. Id.

197. Id. at 953.

198. Id. at 953–54. The exchange proceeded as follows:

Q: What is your understanding of the cooperating agreement?

A: To tell the complete truth.

Q: Does it require you to cooperate with the United States?

A: Yes.

Q: And what must your cooperation be?

A: To tell the complete truth.

Q: Are you required to testify as part of your cooperation?

A: Correct.

Q: And what must your testimony be?

A: The complete truth.

Q: Isn't it true, sir, that the United States will not tolerate any deception from you?

A: Correct.

Q: What do you hope to gain from the United States and from this court for your complete and truthful testimony?

found in *Brooks*, the court held, "Eliciting testimony on direct examination that a witness entered into a plea agreement that requires truthful testimony may constitute vouching."[199]

Since it no longer retains the "mild" qualifier, *Dorsey* "may" be construed as a more stringent restriction, especially if *Brooks* is read to proscribe references to the agreement responsive to a defense credibility attack.[200] Alternatively, *Dorsey* "may" be viewed as a continuation of the *Roberts* hesitancy to install a bright-line rule.[201] In a recent opinion, a magistrate judge seeking to dutifully apply the circuit's "varied caselaw on the issue of vouching" cited to *Shaw*, *Necoechea*, *Brooks*, and *Dorsey*.[202] Highlighting the contrasting opinions of *Dorsey* and *Necoechea*, the court could only say that eliciting testimony regarding a truthful-testimony requirement "is not, *per se*, improper vouching."[203]

The Ninth Circuit is uniquely ambiguous not only in its evaluation of whether evidence of a truthfulness requirement constitutes vouching, but also in its framework for determining whether such error requires reversal. In *Necoechea*, the court laid out an eight-factor balancing test that accounts for:

> the form of vouching; how much the vouching implies that the prosecutor has extra-record knowledge of or the capacity to monitor the witness's truthfulness; any inference that the court is monitoring the witness's veracity; the degree of personal opinion asserted; the timing of the vouching; the extent to which the witness's credibility was attacked; the specificity and timing of a curative instruction; the importance of the witness's testimony and the vouching to the case overall.[204]

The *Necoechea* court emphasized that the substance of the statements made regarding a truthfulness provision is more important than the time at which they are made.[205] In contrast to the Second Circuit's use of a prosecutor-friendly harmless-error standard,[206] the Ninth Circuit's balancing test is hard to predict. Courts may add up the total number of factors on each side, or alternatively they may consider the greater weight

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A: Some leniency on my sentence.

Id.

199. Id. at 953.

200. See supra note 195 and accompanying text (analyzing *Brooks*).

201. See supra notes 176–177 and accompanying text (describing holding in *Roberts*).

202. Melendez v. McEwen, No. 2:11-CV-2895 MCE EFB, 2013 WL 2150664, at *17–*18 (E.D. Cal. May 16, 2013) (citing *Dorsey*, 677 F.3d at 953; United States v. Brooks, 508 F.3d 1205, 1210 (9th Cir. 2007); United States v. Necoechea, 986 F.2d 1273, 1278 (9th Cir. 1993); United States v. Shaw, 829 F.2d 714, 717–18 (9th Cir. 1987)), adopted by No. 2:11-CV-2895 MCE EFB, 2013 WL 5773104 (E.D. Cal. Aug. 5, 2013).

203. Id. at *17 (emphasis added).

204. *Necoechea*, 986 F.2d at 1278.

205. Id. at 1278 n.2.

206. See supra notes 160–163 and accompanying text (discussing Second Circuit's harmless error approach).

of individual factors.[207] As with any balancing test, there is no bright-line rule that mandates reversal in any case.[208]

As it stands today, the Ninth Circuit is a wildcard in its approach to vouching. However, it finds common ground with the Second and Eleventh Circuits in the belief that truthful-testimony requirements pose a vouching danger. These three circuits diverge significantly from the majority circuits in this regard. Thus, the criminal defendant that hopes to raise this sort of vouching claim and the prosecutor that hopes to avoid reversal face significantly different odds of success depending on the jurisdiction.

III. COURTS SHOULD ADOPT THE MAJORITY APPROACH

The divergent approaches of the circuits and the circuits' inconsistencies in the application of their respective rules have created great uncertainty in this area.[209] Because prosecutorial improprieties can erode the "public's faith not just in prosecutors, but in the justice system,"[210] the importance of adequate safeguards cannot be understated. However, such safeguards must be understood by all involved. Since "[t]he principal objective of any criminal justice system is to render justice[,] . . . clear rules and procedures must govern the conduct of the trial and safeguard the rights of the accused."[211] To that end, it is critical that the Supreme Court act to clear up the cloud of uncertainty surrounding this area of vouching law.

The lack of clarity in current doctrine may be particularly detrimental in the area of habeas corpus claims. Following the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), the Supreme Court needs to have "broken sufficient legal ground to establish an asked-for constitutional principle" before a court grants habeas corpus

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207. Compare Bell v. United States, No. SA CV 10-0415 DOC, 2012 WL 404973, at *6 (C.D. Cal. Feb. 6, 2012) ("Balancing all of these factors, the Court finds only two that weigh in favor of [the petitioner], while the others—especially [the fifth *Necoechea* factor]—weigh in favor of finding no improper vouching."), with *Dorsey*, 677 F.3d at 954 (focusing on two factors—absence of extrarecord facts and claims of independent verification—in dismissing vouching claim).

208. *Necoechea*, 986 F.2d at 1278; see also Stephen J. Meyer & Norman D. Singleton, Rehabilitation of Witnesses: Looking out My Back Door, 23 Am. J. Trial Advoc. 525, 558 (2000) (recognizing absence of bright-line rule).

209. See Elm, supra note 26, at 75 ("[T]here is a split over whether the 'testify truthfully' clause can be introduced in evidence on direct examination or only on cross-examination to rehabilitate a witness . . . .").

210. Randall Grometstein & Jennifer M. Balboni, Backing Out of a Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct post *Thompson*, 75 Alb. L. Rev. 1243, 1280 (2012).

211. John H. King, Jr., Note, Prosecutorial Misconduct: The Limitations upon the Prosecutor's Role as an Advocate, 14 Suffolk U. L. Rev. 1095, 1096 (1980).

relief.[212] Considering the Court's limited input in *Berger*, *Lawn*, and *Young*,[213] it appears the Court has failed to meet this sufficiency bar with regard to vouching.[214] This is evidenced by the open disagreement in the circuits as to whether or not vouching even implicates constitutional principles at all.[215] By reining in vouching law gone amok, the Supreme Court can strengthen the doctrine in a meaningful way and solidify its principles. Thus, regardless of whether the Supreme Court selects the majority or minority approach, the decision could serve as the basis for future habeas corpus relief.

Specifically, this Note suggests that the Supreme Court should settle the disagreement among the circuits in favor of the majority approach, in which references to the truthful-testimony requirement of a plea agreement are generally permitted with or without a defense attack on credibility. This would allow the prosecution to outline the contours of a cooperator's agreement during opening statements or to ask questions concerning the truthful-testimony obligation on direct examination. As demonstrated by the majority circuits, trial judges should still curb egregious uses, such as prosecutorial guarantees of truthfulness or unnecessary harping on the truthfulness provision.[216] Part III.A and Part III.B argue that this is the correct interpretation of both the underlying Supreme Court and evidentiary law, respectively. Part III.C argues that policy considerations also weigh in favor of this approach.

A. *The Minority Approaches Are Inconsistent with Supreme Court Precedent*

The discrepancies in circuit vouching law may be a consequence of the limited Supreme Court precedent available to guide lower courts.[217] However, the approaches of the Second, Ninth, and Eleventh Circuits diverge from the Supreme Court's precedents in *Lawn* and *Young* in important ways. Given *Young*, there are two possible scenarios vouching should guard against: prosecutorial comments suggesting evidence out-

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212. Williams v. Taylor, 529 U.S. 362, 381 (2000). Although separating one from the other presents its own difficulties, the Court specified that this bar could only be met through holdings, not dicta. Id. at 412.

213. See supra Part I.A–B (recounting Supreme Court jurisprudence relevant to vouching).

214. Cf. Carey v. Musladin, 549 U.S. 70, 77 (2006) (ruling lack of Supreme Court holdings prevents finding of clearly established federal law). See generally The Supreme Court, 2006 Term—Leading Cases, 121 Harv. L. Rev. 185, 337 (2007) (discussing *Musladin*'s requirements for finding federal law clearly established).

215. Compare Byrd v. Collins, 209 F.3d 486, 546 (6th Cir. 2000) (Jones, J., dissenting) (decrying vouching as "flagrant constitutional error"), with United States v. Dispoz-O-Plastics, Inc., 172 F.3d 275, 286 (3d Cir. 1999) (deeming it nonconstitutional error). Although this Note does not focus on the constitutional-error split, Supreme Court input on the use of truthfulness provisions could—and likely would—kill this bird with the same stone.

216. See supra Part II.A.2 (discussing restrictions imposed by majority of circuits).

217. There has not been any Supreme Court input on the issue since *Young* in 1985.

side the record and instances where the prosecutor's special status may infringe on the jury's province to weigh the evidence.[218] Significantly, neither of these ends is met by the minority circuits' approaches that refuse to admit evidence of a truthful-testimony requirement.

The clear bent of the *Young* opinion suggests that the chief concern is "comments" or "opinion[s]" expressed by the prosecutor.[219] The plea agreement cannot be classified as either.[220] Furthermore, any limitations on the discussion of the agreement during direct examination are unnecessary to limit prosecutorial comment or opinion, because it is well settled that attorneys are not allowed to testify during their questioning.[221] The minority circuits, however, have shifted away from the Supreme Court's emphasis on principally regulating comments from the prosecutor's own mouth.[222] It is possible that admitting the agreement would allow the attorney to opine on it later in argument, but those uses can be appropriately controlled without completely removing the evidence from the jury's purview.

It may be contended that the prosecution makes an implied comment simply by choosing to call a cooperator.[223] Facially at least, this has some merit. As former federal prosecutor Robert Mintz put it, "'[W]hen you present a cooperating witness to a jury you essentially vouch for their credibility.'"[224] However, no court considers the calling of a witness prejudicial enough in isolation to bar the prosecution from enlisting cooperators altogether.[225] Thus, this puts the minority circuits back in the difficult position of fitting the square peg of a promise to testify truthfully in the round hole of an improper prosecutorial comment.

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218. See supra notes 65–68 and accompanying text (discussing two prongs of *Young*).

219. United States v. Young, 470 U.S. 1, 18–19 (1985).

220. Cf. Richman, supra note 81, at 97 ("The uncertainty that the government prefers in its cooperation agreements also reflects the fact that the document is designed to be seen not just by its parties but by the jury considering the cooperator's testimony.").

221. See Fed. R. Evid. 611(c) ("Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.").

222. See Meyer & Singleton, supra note 208, at 545 (noting some courts have diverged from historical view on vouching); see also United States v. Lewis, 10 F.3d 1086, 1089 (4th Cir. 1993) (stating "improper vouching must generally come from the prosecutor's own mouth" or result from prosecutor's solicitation of testimony asserting trustworthiness of government witnesses).

223. At the very least, jurors likely presume that prosecutors refrain from calling witnesses they know to be disingenuous.

224. Kurt Eichenwald, How the Trial of Andersen Could Hurt a Fraud Case, N.Y. Times (May 24, 2002), http://www.nytimes.com/2002/05/24/business/24ARTH.html (on file with the *Columbia Law Review*).

225. Even commentators critical of certain aspects of cooperation conclude that "no one would reasonably suggest the wholesale abandonment of this tool." Miriam Hechler Baer, Cooperation's Cost, 88 Wash. U. L. Rev. 903, 967 (2011).

Young also warns against a prosecutor's status infringing on the jury's ability to weigh the evidence.[226] However, it is hard to see how the minority circuits' complete removal of relevant evidence from the purview of the jury protects against this possibility.[227] In this way, the minority circuits disregard the fact that vouching doctrine is born out of a deep respect for the jury's right and ability to assess credibility.[228] The majority circuits, in contrast, allow the evidence to be evaluated by the jury while retaining a lever of control over prosecutorial excesses in argument.[229]

B. *The Minority Approaches Misinterpret Evidentiary Law*

There are two possible bases for the minority circuits' insistence on a prior attack by the defense before vouching is permitted: the "invited response" doctrine and Rule 608. The latter has been clearly invoked by both the Second and Eleventh Circuits.[230] This, however, is a gross misinterpretation of the evidentiary rule, which provides that "evidence of *truthful character* is admissible only after the witness's *character* for truthfulness has been attacked."[231] Cross-examination regarding a cooperator's motives under a plea agreement is not a character attack. Rather, merely questioning the witness's potential bias in this way is wholly outside of Rule 608's scope.[232] For example, defense counsel would not trigger a response under 608(a) by questioning whether a cooperating witness was just trying to "save his own hide."[233] However, the Second Circuit has invoked Rule 608 in such circumstances to justify the use of a truthfulness provision that would otherwise be considered vouching.[234]

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226. See supra notes 65–68 and accompanying text (noting *Young*'s warnings regarding prosecutors' influence).

227. See infra notes 251–255 and accompanying text (discussing relevance of truthful-testimony requirement).

228. See supra notes 23–26 and accompanying text (discussing jury's longstanding right to determine credibility).

229. See supra Part II.A.2 (highlighting restrictions under majority approach).

230. United States v. Hilton, 772 F.2d 783, 787 (11th Cir. 1985); United States v. Jones, 763 F.2d 518, 522 (2d Cir. 1985).

231. Fed. R. Evid. 608(a) (emphases added).

232. See United States v. Abel, 469 U.S. 45, 52 (1984) ("Bias . . . describe[s] the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness's like, dislike, or fear of a party, or by the witness's self-interest."); see also United States v. Dring, 930 F.2d 687, 691 (9th Cir. 1991) (noting evidence of bias "does not trigger rehabilitation under Rule 608(a)").

233. See Carlson, supra note 6, at 731–32 (explaining types of attack that trigger rehabilitation).

234. See supra notes 157–159 and accompanying text (documenting what Second Circuit has deemed attacks).

Some might argue that this is a hypertechnical reading of Rule 608, which fails to sufficiently account for its common law basis.[235] Under the common law incarnation, witnesses were presumed trustworthy until their veracity was questioned.[236] However, the attack on the cooperator's incentives is not the only piece that fails to satisfy Rule 608. The introduction of evidence regarding a truthful-testimony provision is not the "evidence of truthful *character*" that the rule sanctions as a response[237]: A guilty plea is neither opinion nor reputation evidence[238] and "[e]ntering into a plea agreement is no indication of whether the witness is generally a liar."[239] Thus, the Second and Eleventh Circuits, which allow references to the agreement once a cooperator's credibility has come under attack, permit a response beyond the limited scope actually permitted by the rule.

If Rule 608 is inapplicable, the courts could try to fall back on the "invited response" doctrine.[240] This doctrine, however, is only applicable once a court determines that there have been "[i]nappropriate prosecutorial comments."[241] The mere introduction of a cooperator's agreement to testify truthfully does not require prosecutorial comment.[242] Furthermore, proper application of the "invited response" doctrine as developed in *Young* would then require a court to engage in contextual balancing to determine whether or not the prosecutorial comment was prejudicial.[243] The bright-line rules in effect in the Second and Eleventh Circuits do not permit such balancing.

The final approach would be to exclude truthful-testimony provisions by applying a bare Rule 403 analysis, as is seen in the Ninth Circuit's decisions.[244] This is misguided for a few reasons. First, this approach unduly discounts the probative value of truthful-testimony

235. See United States v. Universal Rehab. Servs. (PA), Inc., 205 F.3d 657, 680 (3d Cir. 2000) (en banc) (Roth, J., dissenting) (noting common law rule preceding Rule 608).

236. E.g., Homan v. United States, 279 F.2d 767, 772 (8th Cir. 1960).

237. Fed. R. Evid. 608(a) (emphasis added).

238. *Universal Rehab. Servs.*, 205 F.3d at 668 n.13.

239. Daniel J. Capra, Admissibility of Plea Agreements on Direct Examination: The Limits Vanish, 55 U. Miami L. Rev. 751, 768 (2001).

240. See supra text accompanying notes 71–74 (discussing formation and application of "invited response" doctrine).

241. See United States v. Young, 470 U.S. 1, 11 (1985) (noting "invited response" doctrine requires courts to view prosecutor's comments in context of trial).

242. See supra notes 219–222 and accompanying text (citing historical emphasis on vouching comments coming directly from prosecutor); see also United States v. Hansen, 434 F.3d 92, 102 (1st Cir. 2006) (finding it unnecessary to extensively analyze whether response was invited because comments were not improper); Note, supra note 53, at 1174 n.26 (discussing how *Lawn* Court found invitation unnecessary since comments were proper).

243. *Young*, 470 U.S. at 12 ("[T]he remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error.").

244. See supra notes 173–177 and accompanying text (describing Ninth Circuit's attempt to utilize Rule 403 balancing).

provisions, which provide the jury with a fuller picture of the witness's motives in testifying.[245] Second, Rule 403 leans heavily toward admissibility in the absence of extreme prejudice.[246] The trial court would surely be within its discretion to exclude evidence if it found its prejudicial value substantially outweighed its probative value,[247] but it is highly doubtful that such prejudice is present when a prosecutor seeks to preemptively raise the truthful-testimony provisions of a cooperator's agreement.[248] Finally, while the Ninth Circuit has barred preemptive references without further explanation,[249] such a seemingly per se approach is at odds with the fact-specific contextual balancing necessitated by Rule 403.[250]

C. *Policy Considerations Weigh in Favor of the Majority Approach*

There are a number of justifications for allowing the agreement to be set before the jury in its entirety, truthfulness requirement and all. First, "[t]he existence of a plea agreement can cut both ways."[251] It must be conceded, as it has been by the majority circuits, that there are bolstering aspects to a cooperator's agreement to testify truthfully. The witnesses "could not have incriminated themselves with the truth, but could have been prosecuted for perjury if they lied."[252] However, entering the full agreement into evidence allows the jury to consider the full background against which the cooperating witness is testifying.[253] "A

245. See United States v. Martin, 815 F.2d 818, 821 (1st Cir. 1987) ("Only by viewing the entire agreement can the jury get the whole picture, from which to assess, as best it can, the probable motives or interests the witnesses could have in testifying truthfully or falsely."); see also infra notes 251–254 and accompanying text (discussing importance of full agreement to jury's evaluation of evidence).

246. See United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980) ("In weighing the probative value of evidence against the dangers and considerations enumerated in Rule 403, the general rule is that the balance should be struck in favor of admission."); Amina Quargnali-Linsley, Evidence Law—Boundaries, Balancing, and Prior Felony Convictions: Federal Rule of Evidence Rule 403 After *United States v. Old Chief*, 28 N.M. L. Rev. 583, 590 (1998) ("The words 'substantially outweighed' indicate that Rule 403 favors admissibility.").

247. Fed. R. Evid. 403.

248. See infra notes 256–259 and accompanying text (suggesting truthfulness requirements are no more prejudicial than witness taking oath).

249. Although the Ninth Circuit initially considered a categorical pre-attack ban under Rule 403 in *Roberts*, see supra notes 173–177 and accompanying text, later decisions embracing a ban, including *Brooks* and *Dorsey*, have neglected to engage in a Rule 403 analysis.

250. The Supreme Court did invoke Rule 403 to establish such a per se bar in Old Chief v. United States, 519 U.S. 172, 191–92 (1997). However, the Court acknowledged that decision was prompted by certain "peculiarities" in the facts before it. Id. at 191.

251. United States v. Reid, 625 F.3d 977, 983 (6th Cir. 2010).

252. United States v. McNeill, 728 F.2d 5, 14 (1st Cir. 1984).

253. See United States v. Townsend, 796 F.2d 158, 163 (6th Cir. 1986) ("Introduction of the entire plea agreement permits the jury to consider fully the possible conflicting motivations underlying the witness' testimony and, thus, enables the jury to more accurately assess the witness' credibility."); see also Randolph N. Jonakait, The American

party ought to be able to extract the complete testimony of his witness, including the essential circumstances bearing on its believability, rather than forced to leave gaping holes to be poked at by his opponent."[254] This is also consistent with the underlying principle of vouching doctrine: Weighing evidence is the province of the jury.[255]

The existence of an agreement itself does not suggest that the government has verified the witness's testimony.[256] As Judge Posner explained in dispatching a vouching claim, simply referring to an agreement to testify truthfully is not the same as a prosecutor "implying that he had secret information."[257] In fact, the truthfulness language in a cooperator's plea agreement standing on its own does not significantly bolster the credibility of a witness already testifying under penalty of perjury.[258] As the D.C. Circuit stressed, there is "considerable difficulty with the proposition that such supposed 'vouching' would have substantially swayed an impartial jury where the witness in question had already been introduced by the prosecutor and had sworn in the presence of the jury to tell the truth."[259]

It is also important to consider the chilling effect that uncertainty in vouching law has on prosecutorial work. Given the ever-increasing role that cooperators play, this issue is regularly encountered.[260] In the minor-

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Jury System 56–57 (2003) (explaining "completeness" is critical to juries' credibility determinations).

254. United States v. LeFevour, 798 F.2d 977, 983 (7th Cir. 1986).

255. See supra notes 22–26 and accompanying text (highlighting vouching law's basis in preserving jury role); see also United States v. Isaacs, 493 F.2d 1124, 1165 (7th Cir. 1974) ("The agreement was before the jury for such consideration as anyone might wish to give it.").

256. See Rowland, supra note 133, at 692 ("These cases reason that cooperation agreements provide no special incentive to testify truthfully and do nothing to enhance the Government's ability to determine if the witness is lying; thus, nothing in the plea agreement implies the Government has any special knowledge of the witness's veracity.").

257. United States v. Edwards, 581 F.3d 604, 610 (7th Cir. 2009).

258. Capra, supra note 239, at 753 n.5; see also United States v. Castro, 89 F.3d 1443, 1457 (11th Cir. 1996) (dismissing vouching claim where "prosecutor merely pointed out that [witness] risked prosecution if he perjured himself"); United States v. Ricco, 549 F.2d 264, 274 (2d Cir. 1977) (finding no improper vouching where prosecutor indicated witnesses "would be subject to indictment for perjury"). Some have argued that perjury is not an effective sanction because it is so rarely enforced. Saverda, supra note 95, at 788. However, it is hard to believe that the average juror is likely to believe that the government would have any more difficulty enforcing the testimonial oath than a cooperating witness's agreement.

259. Ford v. United States, 616 A.2d 1245, 1254 n.21 (D.C. Cir. 1992); see also United States v. Leslie, 759 F.2d 366, 378 (5th Cir. 1985) ("A witness's promise in a plea agreement letter to testify truthfully . . . is the same promise he or she makes when called as a witness at trial. As such, a mere promise to testify truthfully does not amount to improper vouching."), aff'd en banc, 783 F.2d 541 (5th Cir. 1986), vacated on other grounds, 479 U.S. 1074 (1987).

260. See supra notes 82–85 and accompanying text (emphasizing central role of cooperating witnesses).

ity circuits, prosecutors and defense attorneys are left to conjecture when the invisible threshold has been crossed in questioning a cooperator's credibility.[261] Prosecutors operate under this cloud of uncertainty with the not-insignificant risk of reversal awaiting a misplaced guess.[262] Even the Second Circuit, which adopted a bright-line rule, later expressed regret at the burdens it had imposed on practitioners: "Were we writing on a blank slate, we might have followed the other circuits that avoid the distinctions we have required judges and lawyers to make during the heat of trial."[263] Prosecutors' fears concerning successful vouching claims could influence whether or not they decide to even call cooperating witnesses in some matters.[264]

The vouching restrictions discussed in this Note are an ineffective means of protecting against the dangers of cooperating witnesses with dubious motives. Prosecutors are obliged with unique responsibilities in this regard. As representatives of the "state as an impartial sovereign," prosecutors are charged with both "discover[ing] innocence and . . . punish[ing] guilt."[265] It is essential that they be satisfied "to a moral certainty that the informant's testimony is truthful. . . . It is inappropriate to 'play the game,' question the witness, and 'let the chips fall where they may.'"[266] To this end, as one commentator noted, the Department of Justice must do more to ensure that its attorneys are adequately equipped and rewarded for making proper determinations regarding cooperators' credibility.[267] Since prosecutors have significantly more time to evaluate cooperating witnesses than the jury does,[268] this type of internal regulation is the most effective check on the dangers of cooperating witnesses.[269]

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261. See supra notes 156–159 (discussing various possibilities of what constitutes credibility attack).

262. See 75A Am. Jur. 2d Trial § 584 (1991) ("A number of cases have turned on the question of whether counsel's particular remark constituted improper vouching for the credibility of a witness.").

263. United States v. Cosentino, 844 F.2d 30, 33 n.1 (2d Cir. 1988).

264. Cf. Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 Fordham L. Rev. 851, 900 ("Whether or not reversal of a conviction should be "counted" as a sanction for misconduct, reversal affects the prosecutor's behavior.").

265. King, supra note 211, at 1102.

266. Alan J. Spilker, The Ethical Charge to Counsel, 22 A.F. L. Rev. 101, 105 (1981).

267. Wilson, supra note 79, at 98.

268. See Daniel S. Medwed, Prosecution Complex: America's Race to Convict and Its Impact on the Innocent 80 (2012) (discussing prosecutor's opportunity to meet with witnesses early on in process).

269. Cf. Bruce A. Green et al., Panel Discussion: The Regulation and Ethical Responsibilities of Federal Prosecutors, 26 Fordham Urb. L.J. 737, 744 (1999) (quoting Michael Bromwich, Department of Justice Inspector General, as saying, "[I]nternal regulations in individual U.S. Attorney's Offices . . . [are] absolutely critical to, not only setting, but maintaining, the appropriate ethical tone that you want to be followed by prosecutors").

CONCLUSION

Judge Posner has dismissively described vouching as an "unfortunate bit of legal jargon."[270] Although this Note does not seek to minimize the doctrine's general usefulness, the Second, Ninth, and Eleventh Circuits' use of vouching to target truthful-testimony provisions is "unfortunate." It fails to appreciate vouching's foundational principles and deprives the jury of a tool that could be used to evaluate the credibility of what is often the government's star witness. Adopting the majority approach would equalize this jurisdictional discrepancy and provide clear guidance to both sides of the criminal bar.

270. United States v. Edwards, 581 F.3d 604, 609 (7th Cir. 2009).