Snitching: The Institutional and Communal Consequences

Professor Alexandra Natapoff

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I. INTRODUCTION

The use of criminal informants[1] in the U.S. justice system has become a flourishing socio-legal institution unto itself. Characterized by secrecy, unfettered law enforcement discretion,[2] and informal negotiations with criminal suspects, the informant institution both embodies and exacerbates some of the most problematic features of the criminal justice process.[3] Every year tens of thousands of criminal suspects—many of them drug offenders concentrated in high-crime inner-city neighborhoods—informally negotiate away liability in exchange for promised cooperation.[4] Law enforcement meanwhile recruits and relies on ever greater numbers of criminal actors in making basic decisions about

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1. The classic "criminal informant" with whom this Article is concerned is a person who trades information about others in order to obtain lenience for his or her own crimes. This Article does not address informants who work solely for money, or citizen informants who provide information to the police without recompense. *See infra* notes 24-30 and accompanying text for discussion of the distinction.

2. The term "law enforcement" broadly includes state and local police and federal agents, as well as prosecutors.

3. Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992) (arguing that informant use creates "procedural deformations" with respect to appellate review and double jeopardy); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999) (arguing that informants undermine sentencing uniformity and the adversarial process); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000) (using compensated informant witnesses undermine legal ethics and reliability); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995) (cooperation compromises role of defense attorney); Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81 (1994) (documenting the corrupting impact of untruthful informants).

4. Use of informants is most prevalent in drug offense cases, which represent a growing proportion of federal and state criminal caseloads. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Table 5.26 (2001) [hereinafter BJS] (40% of federal convictions drug-related); *id.* at Table 5.34 (nearly 30% of drug offenders received a cooperation departure); *see also* Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement* , 56 VAND. L. REV. 1, 7-14 (2003) (describing how combination of sentencing guidelines and mandatory minimums for drug sentences radically increased co-operation). Part II.B *infra* attempts to estimate the actual number of informants at large at any given time.

investigations and prosecutions. While this marriage of convenience is fraught with peril, it is nearly devoid of judicial or public scrutiny as to the propriety, fairness, or utility of the deals being struck.[5] Moreover, it both exemplifies and exacerbates existing problems with transparency, accountability, regularity, and fairness within the criminal process.[6]

The caustic effects of the informant institution are not limited to the legal system; they can have a disastrous impact in low-income, high-crime, urban communities where a high percentage of residents—predominantly young African American men—are in contact with the criminal justice system and therefore potentially under pressure to snitch.[7] The law enforcement practice of relying heavily on snitching creates large numbers of criminal informants who are communal liabilities. Snitches increase crime and threaten social organization, interpersonal relationships, and socio-legal norms in their home communities, even as they are tolerated or under-punished by law enforcement because they are useful.[8]

The global contours of the informant institution are reflected both in the ways that the informant is created and managed by the government

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5. *See* Daniel Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT. REP. 292, 294 (1996) (noting that "the exchange of cooperation for sentencing leniency is under-regulated and never the subject of systematic empirical investigation").

6. *See* Steven Greer, *Towards a Sociological Model of the Police Informant*, 46 BRIT. J. SOCIOL. 509, 509 (1995) (noting generally that informant use "open[s] up a range of opportunities and dilemmas, particularly for law enforcement professing commitment to due process and the rule of law."). This approach mirrors that of other recent scholarship that looks beyond substantive criminal rules to focus on enforcement practices as a central aspect of the law's nature. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001) (criticizing the academic tendency to focus on normative rules instead of practice); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) (analyzing the corrosive effect of hidden police enforcement discretion on democratic principles); *see also* Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (arguing that the administrative process of prosecutorial decision-making violates adversarial ideals but functions fairly in practice).

7. In low-income urban communities in cities such as Baltimore and Washington D.C., a staggering 50% or more of the African American male population between the ages of 18-35 is under criminal justice supervision at any given time. Eric Lotke, *Hobbling a Generation: Young African American Men in D.C.'s Criminal Justice System Five Years Later* (Nat'l Ctr. on Insts. and Alternatives, Alexandria, VA), Aug. 1997, *at* http://66.165.94.98/stories/hobblgen0897.html; Jerome G. Miller, *Hobbling a Generation: Young African-American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland* (Nat'l Ctr. on Insts. and Alternatives, Alexandria, VA), Sept. 1992, *at* http://66.165.94.98/stories/hobblgen0992.html. Nationally, 30% of that demographic group was under criminal justice supervision as of 1995. MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (1995). Nearly 40% of African American offenders are incarcerated for drug-related offenses. *Incarcerated America*, HUM. RTS. WATCH BACKGROUNDER (Human Rights Watch, New York, NY), Apr. 2003, at 3, *available at* http://www.hrw.org/backgrounder/usa/incarceration/.

8. This approach builds on a growing literature that identifies the collateral social consequences of criminal justice policies in high-crime communities. For two very different approaches compare INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds. 2002) [hereinafter INVISIBLE PUNISHMENT] with Tracey Meares & Dan Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'TY REV. 805 (1998).

and how the informant in turn interacts with his community.[9] The following example represents a classic drug informant scenario drawn from actual cases:

> Drew, a low-level drug dealer who is also an addict, is confronted by [federal Drug Enforcement Agency (DEA)] agents and local police on his way to make a deal. They offer to refrain from pressing charges at that moment in exchange for information and the active pursuit of new suspects. Drew agrees, immediately provides the name of one of his suppliers to whom he owes money, and is released.[10] As an informant, Drew's investigative activities require him to meet with his police officer handler every two weeks to provide information and make a controlled buy every month or so. In the meantime, with his handler's knowledge, Drew continues to consume drugs and carries a gun illegally. Unbeknownst to (but suspected by) his handler, he skims drugs from his controlled buys and continues to deal drugs on the side.[11] In the course of his cooperation he also provides the police with truthful incriminating information about a competing drug dealer, his landlord to whom he owes rent, and his girlfriend's ex-boyfriend whom he dislikes. The police arrest all three. When Drew is arrested in another jurisdiction for simple drug possession, his handler calls the prosecutor and those charges are dropped.[12]

As the example demonstrates, not only do informants' past crimes go unpunished, but authorities routinely tolerate the commission of new crimes—both authorized and unauthorized—as part of the cost of maintaining an active informant.[13] The phenomenon is particularly

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9. Because the majority of criminal defendants are male, the rest of this Article refers to informants by the male pronoun. The growing problem of the female informant is specifically addressed below. *See infra* Part IV.C.2.

10. In another common practice, the suspect is arrested, brought to court, and then released with the understanding that he will cooperate during the pendency of his case in order to "work off" his sentence. The defendant's sentencing may be postponed indefinitely in order to give him the opportunity to cooperate as extensively as possible. The federal criminal procedure rules expressly promote such arrangements. *See* FED. R. CRIM. P. 35.

11. *See* JEROME SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 123-29 (2d ed. 1975) (documenting instances where police did not pursue suspicions that their informants were simultaneously dealing drugs); Bruce A. Jacobs, *Contingent Ties: Undercover Drug Officers' Use of Informants*, 48 BRIT. J. SOCIOL. 35, 43-44 (1997) ("[I]t is not uncommon for informants to take advantage of their protected status by pursuing more criminal opportunities." (quoting M.R. Pogreba & E.D. Poolle, *Vice Isn't Nice: A Look at the Effects of Working Undercover* , 21 J. CRIM. JUST. 383, 387 (1993))).

12. This example is a composite of facts drawn from published cases, *see, e.g.*, United States v. Willis, 300 F.3d 803 (7th Cir. 2002) (documenting use of crack addict informant); Pyles v. Johnson, 136 F.3d 986 (5th Cir. 1998) (documenting use of heroin addict on probation as informant receiving lenience for burglary charge), sociological studies, *see* SKOLNICK, *supra* note 11; Greer, *supra* note 6, and my own experiences as a former Assistant Federal Public Defender.

13. *See, e.g.*, Greer, *supra* note 6, at 514-15; Hughes, *supra* note 3, at 21, 22 n.72 (cooperation agreements "carry a special danger of licensing continuing criminal acts"). This phenomenon increases with

troubling because it represents under-enforcement and tolerance of criminality in high-crime communities.[14] Authorities may also indirectly ratify the interests of informants when those informants provide information selectively and in self-serving ways. This scenario is repeated over and over, both within the criminal system and in the community, creating dynamics of scale. Within the system, the effect is a shift in the adjudicatory process whereby police and prosecutors informally adjudicate the criminal liability of informants based primarily on expediency and investigative usefulness. Within the community, large numbers of criminals remain active who, due to their role as government informer, obtain some degree of immunity (and, arguably, arrogance) even as they continue their antisocial behavior.

Many aspects of this type of informant practice are in obvious tension with principles of public accountability, consistency, predictability, and other "rule of law"-type precepts.[15] In its most extreme form, bare-knuckled negotiations between suspect and agent take place unsupervised and unrecorded, without judicial or public review or even the presence of counsel.[16] Informants consistently are treated differently from other equally culpable defendants, and informants themselves are routinely treated inconsistently. Similarly situated informants often receive widely disparate rewards for comparable cooperation.[17] Although written cooperation agreements resemble contracts and formal plea bargains, they are generally vague and open-ended. The earlier and more informal the negotiation, the less is written down.[18] Informant

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informality and therefore is of most concern in drug enforcement, which is characterized by informal and active snitch-agent relationships.

14. *See infra* notes 196-97 and accompanying notes discussing Randall Kennedy's theory of underenforcement in minority communities.

15. These informant "adjudications" mirror the more general shift in adjudicatory power away from courts toward law enforcement decision-makers. *See* Stuntz, *supra* note 6, at 519 (noting that the breadth and depth of criminal codes "shift lawmaking from courts to law enforcers . . . . [and] give prosecutors the power to adjudicate"); Lynch, *supra* note 6, at 2120 ("[F]or most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode."); *see also* text *infra* (analyzing informant use as a problematic subspecies of prosecutorial discretion).

16. *See* Mark Curriden, *The Informant Trap: Secret Threat to Justice*, NAT. L.J., Feb. 20, 1995, at A1 (noting the "explosion" in the numbers of confidential informants who never testify or go to court).

17. *See* Weinstein, *supra* note 3, at 602-11 (documenting sentencing discrepancies among cooperators among judicial districts); Frank O. Bowman, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 61 (1999) (worrying that Weinstein's findings of disparity might indicate that prosecutors are "seizing control of the entire sentencing process by sub rose manipulations"); Laurie P. Cohen, *Split Decisions: In Federal Cases, Big Gap in Rewards for Cooperation*, WALL ST. J., Nov. 29, 2004, at A1 (documenting racial disparities in cooperation credit).

18. *See* Hughes, *supra* note 3, at 3 (describing cooperation agreements as the "privatization" of criminal adjudication); Richman, *supra* note 3, at 73 (describing cooperation as relational contract rather

deals thus have become an all too common way of circumventing more formal adjudications of guilt and penalty, or even the counsel-dominated process of plea bargaining. Indeed, the use of informants can be seen as a relaxation of public, rule-bound decision-making in the most practical sense: secret negotiations lead to the application of secret rules in which crimes are forgiven, or resurrected, by state actors without defense counsel, judicial review, or public scrutiny.

The legal literature on snitching has not addressed its potential impact on high-crime, low-income communities in which the practice is common.[19] The omission is glaring if only because of the potential scale of the phenomenon. Given rates of criminal involvement for some young black male populations at fifty percent or more,[20] the predominance of drug-related arrests, and the pervasiveness of informant use in drug enforcement, the logical conclusion is that these communities are being infused with snitches and that informing has become part of the fabric of life. Active informants impose their criminality on their community, while at the same time compromising the privacy and peace of mind of families, friends, and neighbors. Informants also are a vivid reminder that the justice system does not treat suspects even-handedly and may even reward antisocial or illegal behavior. In this scheme, the individual willing to sacrifice friends, family, and associates fares better than the loyalist;[21] the criminal snitch is permitted to con-

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than executory agreement).

Hughes criticizes extensively the vague open-endedness and other irregularities in what he terms "informal" cooperation agreements, by which he means written plea agreements or letter immunity. *See* Hughes, *supra* note 3, at 2-3. The irregularities associated with unwritten terms and agreements are infinitely greater as there is almost no possibility of identifying, much less enforcing the terms of an informal, unwritten agreement between a suspect and a police officer or prosecutor. Depending on the authority of the agent, an agreement between a suspect and an agent may simply be unenforceable on its face. *Id.* at 10 n.32.

19. It is with some trepidation that I use the term "community." *See* Robert Weisberg, *Norms and the Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY. 467, 514 (2003) (criticizing law-and-social-norms scholarly assertions about normative behavior in poor black neighborhoods, noting that "the very fluidity of the population in these neighborhoods only underscores the difficulty of conducting any useful discourse about norms when one relies on an unexamined word like 'community'"). I mean to focus on that relatively well-recognized socio-economic phenomenon of the economically disadvantaged, urban community of color in which poverty, unemployment, crime, and incarceration rates are disproportionately high. *See* Marc Mauer & Meda Chesney-Lind, *Introduction* to INVISIBLE PUNISHMENT, *supra* note 8, at 1, 2-4 (describing some of the socio-economic characteristics of poor black communities). I do not mean to suggest that every individual in these "communities" is necessarily black, poor, or, most importantly, shares the same opinions or is impacted in the same way by criminal justice policies. On the other hand, I do argue that informant policies should be expected to have a greater impact on the people who live in such communities than those in low-crime neighborhoods with low arrest rates where residents are economically better off.

20. *See supra* note 7.

21. *See* Jacobs, *supra* note 11, at 44 ("As one of that study's [police] officers explained, 'You can't turn your back on [informants] for a second or they will bite you. They lie to you all the time. They are untrustworthy. They have the morals of an alley cat.'" (quoting Pogreba & Poolle, *supra* note 11)).

tinue violating the law even as those on whom he snitches are punished.[22]

Sociological studies have documented the harmful impact that pervasive informant presence can have on communities and individuals.[23] In the context of poor, urban, American communities already suffering from high crime, reduced personal security, and distrust of law enforcement, the informant institution may function as a destructive social policy in ways that are not commonly recognized.

This Article is organized into five parts. Part II describes key features of the informant institution: it outlines the classic informant practice, surveys the limited public data on the scope and nature of the practice, describes the pervasive secrecy that surrounds the institution, and raises some theoretical difficulties with classic utilitarian justifications for the practice. This Part is not intended as an exhaustive description of informant practices; rather, it aims to identify the key features of the institution that render it systemically problematic in light of the analyses below.

A major task of this Article is to recognize the informant institution not as an aberrant or extreme practice but as a paradigmatic feature of the modern criminal system, both in its operation and its expressive value. To this end, Part III theorizes the informant institution in terms of three related doctrinal analyses: plea bargaining, prosecutorial discretion, and the administrative, non-adversarial nature of the American criminal justice system. This reframing de-emphasizes the traditional doctrinal criticism of informants based on their unreliability and reconceptualizes informant use as a quintessential yet under-appreciated practice that implicates some of the most contentious characteristics of the modern criminal system—a system dominated by law enforcement discretion, secrecy, and informal adjudications. Part of this reconceptualization draws on scholarship regarding legal norms and the expressive values of the law in an effort to identify what might be the broader normative impact of the informant institution. The conclusion of this Part is twofold: first, the informant institution is best understood as part and parcel of some global concerns about the criminal justice system, and second, the system's current woes cannot be fully understood without taking into account the pervasive influence of the informant institution.

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22. *See* Luna, *supra* note 6, at 1144-48 (arguing that secret police behavior exacerbates community distrust of and resistance to law enforcement).

23. *See infra* Part IV.C.1. The sociological research is a review of case studies of Eastern Europeans during the Cold War.

Part IV describes the concrete harms created by the informant institution to socially disadvantaged, high-crime communities, harms that include increased crime and the erosion of trust in interpersonal, familial, and community relationships. This Part also hypothesizes some ways that the informant institution may erode the relationship between high-crime communities and law enforcement, both in terms of communal loss of faith in the state and the undermining of law-abiding norms. This Part also argues that heavy informant use represents a devaluation of the dignitary interests in target communities and is part of a larger problem of the official, negative construction of poor black communities.

Part V proposes reforms, mainly of the "sunshine" variety. Although there are numerous ways of tinkering with the informant institution, the proposed reforms reflect the conclusion in Part III that what ails the informant institution is centrally a function of the increasingly secretive, undocumented, discretionary exercise of law enforcement authority that constitutes the bulk of the criminal justice system. Accordingly, the proposed reforms aim to reduce the secretiveness surrounding the informal adjudication of informant liability and the concomitant lack of official accountability that flows from the lack of public information, and to increase legislative and public awareness of this quintessentially secretive executive practice.

II. THE INFORMANT INSTITUTION

A. What are Criminal Informants?

"Snitching," "ratting," "flipping," "informing," "cooperating," "whistleblowing," "turning state's evidence": this range of terms illustrates the conflicted and sometimes dramatic nature of the informant's practice. From Judas Iscariot to "Sammy the Bull," the snitch often represents betrayal and unreliability, even as "Deep Throat" and corporate whistleblowers may be celebrated for their roles in bringing wrongdoing to light. The focus here, however, is not on the complex moral posture of the informant and his disloyalties, or even his questionable value as a witness. Rather, it is the meaning and consequences of the very specific law enforcement practice of rewarding informants by forgiving them their crimes. This information-liability exchange between informants and the government thus distinguishes criminal snitching in part from other forms of whistleblowing in which betrayal is not rewarded by official forgiveness for other crimes.[24] While the use

24. I am indebted to Dan Kahan for pressing me on this distinction.

of criminal informants still raises the disloyalty concerns raised by the more general use of informants,[25] the government-sponsored market in betrayal and liability adds a unique dimension.[26]

In practice, an informant provides information about someone else's criminal conduct in exchange for some government-conferred benefit, usually lenience for his own crimes, but also for a flat fee, a percentage of the take in a drug deal, government services, preferential treatment, or lenience for someone else.[27] The term "flipping" refers to the government practice of persuading a suspect to cooperate and, so to speak, change sides. The arrangement can be retrospective or prospective, in the sense that an informant can provide information about past events or promise to continue providing information about future events.[28] This Article focuses on the common, staple arrangement in which an informant trades information about other people's activities—both past and future—in exchange for leniency.[29] Such cooperation can range from simple reporting, to wearing a wire, to making controlled drug sales and buys, to actively recruiting new participants. Rewards range from the considerable—outright forgiveness, in which the suspect escapes all charges—to the conditional—a non-binding recommendation by the prosecutor to impose a lower sentence, to nothing at all if the government decides the informant has been insufficiently useful. Arrangements generally remain fluid. Agents and prosecutors often wait to evaluate the usefulness of an informant's cooperation before making final charging decisions, and an informant's obligation to the police can last for years.[30]

Criminal informants interact with numerous actors in the legal system, but it is the police "handler" or agent who is primarily responsible for creating, maintaining, and controlling the informant. While a defendant may agree to cooperate as a result of direct discussions with

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25. *See* Richman, *supra* note 3, at 77-84 (surveying historical distaste for snitching as an anti-loyalty norm).

26. Weinstein, *supra* note 3, at 564 (describing "overheated cooperation market").

27. *See* 21 U.S.C. § 886(a) (2000) (authorizing DEA payments to informers as the Attorney General "may deem appropriate"); 18 U.S.C. § 3059B (2000) (authorizing discretionary informant payments up to $100,000 and providing that award determinations are not subject to judicial review); United States v. Boyd, 833 F. Supp. 1277 (N.D. Ill. 1993) (while in prison, gang member informants were permitted contact visits, sex, illegal drugs, gifts, clothing and telephone privileges).

28. *See* Greer, *supra* note 6, at 510-13 (categorizing informant arrangements by four criteria: Outsiders and Insiders, and Single Event informants and Multiple Event informants, and describing the "Inside Multiple Event Informants, [as] the classic police informers").

29. This Article does not address the additional cash incentives provided to some criminal informers, although the practice is extensive. *See* Curriden, *supra* note 16, at A1 (federal payments to informants totaled nearly $100 million in 1993).

30. *See* Hughes, *supra* note 3, at 2-3, 22 (documenting fluidity and length of informant obligations).

a prosecutor, usually it is the police officer or agent—not the prosecutor—who maintains the closest contact with him.[31] If that informant is eventually charged or used as a witness, the prosecutor then becomes responsible for providing information regarding the informant's activities to the court and thereby to the public.[32]

Most importantly, using informants entails the official toleration of crime, both past and present. By their nature, informant deals require that law enforcement ignore or reduce liability for an informant's past misdeeds. Although drug defendants famously cooperate, no class of offenders is off-limits: snitching can reduce or eliminate liability for crimes as diverse as kidnapping, arson, gambling, and murder.[33]

As part of the process of gathering information, active informants necessarily continue to engage in criminal activity. Drug informants, for example, are routinely authorized to buy, sell, and even use drugs in pursuit of targets. More broadly, U.S. Department of Justice guidelines expressly contemplate ongoing informant criminality, with two tiers of "Otherwise Illegal Activity" that can be authorized by the handler. Tier 1 Otherwise Illegal Activity includes violent crimes committed by someone other than the informant, official corruption, theft, and the manufacture or distribution of drugs, including the provision of drugs with no expectation of recovering them. Tier 2 activity includes all other criminal offenses.[34]

Above and beyond even this criminal activity is the well recognized fact that active informants continue to commit unauthorized crimes even while cooperating with the government.[35] While there is some

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31. *See* Jacobs, *supra* note 11, at 36 (sociological study of how police handlers interact with their informants); Zimmerman, *supra* note 3, at 99-100 (discussing common abuses of handler-informant arrangements).

32. The gap between what the police or agent handler knows and what the prosecutor learns creates additional opportunities for details to be lost in the translation, requiring prosecutors to rely heavily on agent judgments about informants. As one prosecutor described it, "the black hole of corroboration is the time that cooperators and agents spend alone." Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 936 (1999) (quoting an interviewed Assistant U.S. Attorney).

33. BJS, *supra* note 4, at Table 5.34 (showing federal cooperation rates in excess of 20 percent for kidnapping, arson, bribery, money laundering, racketeering, gambling, antitrust (47 percent), and national defense offenses).

34. *See* Department of Justice Guidelines Regarding the Use of Confidential Informants (Jan. 8, 2001) [hereinafter DOJ Guidelines], *at* http://www.usdoj.gov/ag/readingroom/ciguidelines.htm. Tier 1 criminal activity must be authorized in writing in advance by a Special Agent or prosecutor; Tier 2 criminal activity must be authorized in writing in advance by a Senior Field Manager. *See also* Gregory D. Lee, *Drug Informants: Motives, Methods, and Management*, FBI LAW ENFORCEMENT BULLETIN, Sept. 1993, at 10, *available at* http://www.fbi.gov/publications/leb/1989-1995/leb89-95.htm.

35. Hughes, *supra* note 3, at 21 (cooperation agreements "carry a special danger of licensing continuing criminal acts"); *id.* at 47 ("Practices like these . . . can place the State in the suspect role of licensing and managing some crime and some criminals in order to hit the target of the day."); Jacobs, *supra*

sociological debate about the extent to which law enforcement expressly tolerates it, the fact of the tolerance is undisputed.[36] Police, for example, routinely accept the reality that informants will continue to consume illegal drugs during their cooperation period, either because they have a substance abuse problem or because they must use drugs in order to maintain their credibility within the drug-trade community.[37] Continued unauthorized drug dealing and theft of government drugs are also commonly tolerated.[38] Other unauthorized but accepted activities that have made their way to the public record include carrying weapons, prostitution, fraud, and tax evasion.[39] It is this compromise of the goal of crime-prevention, law enforcement's putative raison d'etre, that generates the central irony of the informant institution: in high-crime communities, law enforcement's central crime-fighting strategy may itself exacerbate crime. Likewise, it is this aspect of criminal snitching that distinguishes it from other types of informing in which the informant's own criminality is not at stake.

B. Data on the Informant Institution

The informant institution is one of the most secretive aspects of the criminal justice system. Data on its key aspects simply do not exist. How many informants are there? What percentage of suspects become informants? How many are "flipped" without ever being arrested or formally charged? How many arrests or solved cases are due to informant tips? What types of crimes are tolerated when committed by active informants? We can only answer such questions partially and indirectly, based on general principles and the small percentage of informants who actually surface either because they eventually come to court or because some aspect of their cooperation becomes public.

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note 11, at 43; SKOLNICK, *supra* note 11, at 124-30.

36. Jacobs, *supra* note 11, at 43-44.

37. SKOLNICK, *supra* note 11, at 128-29.

38. Jacobs, *supra* note 11, at 43-44.

39. United States v. Boyd, 833 F. Supp. 1277 (N.D. Ill. 1993) (while in prison, gang member informants were permitted contact visits, sex, illegal drugs, gifts, clothing and telephone privileges); United States v. Flemmi, 225 F.3d 78, 81-82 (1st Cir. 2000) (FBI handlers permitted and even facilitated their informants' extortion and murder); Michael D. Sorkin, *Top U.S. Drug Snitch is a Legend and a Liar*, ST. LOUIS POST DISPATCH, Jan. 16, 2000, at A1; David Rovella, *Some Superinformant: Lies, Rap Sheet of DEA's Million Dollar Man Starts a Legal Fire*, NAT'L L.J., Nov. 22, 1999, at A1 (DEA agents covered up their informant's tax fraud, prostitution, perjury); *see also* Bennett v. DEA, 55 F. Supp.2d 36 (D.D.C. 1999) (Freedom of Information Act lawsuit seeking to compel DEA disclosure of Chambers's activities and payments).

It is undisputed that informant use is on the rise.[40] Our justice system has become increasingly dependent on criminal informants over the past twenty years, primarily as a result of the confluence of several related trends: the United States Sentencing Guidelines (USSG), mandatory minimum sentences, and the explosion of drug crime enforcement efforts.[41] With regard to sentencing, the USSG make cooperation the central basis for lenience: indeed, only a defendant's cooperation permits a court to depart from the high statutory mandatory minimum drug sentences.[42] On the enforcement end, nearly every drug case involves an informant, and drug cases in turn represent a growing proportion of state and federal dockets.[43]

Informant use, however, is not limited to drug cases; the culture of cooperation permeates the entire system, from burglary to white collar crimes.[44] Police and prosecutors rely on cooperation as a way of managing new suspects, conducting investigations, and resolving cases in court. Courts in turn see an increasing number of cases that involve informants, either as witnesses or—because trials are so rare—more often as defendants seeking a reduced sentence based on their cooperation.

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40. Simons, *supra* note 4, at 3 ("Cooperation has never been more prevalent than it is today."); Weinstein, *supra* note 3, at 563-64 (describing "significant increase in cooperation").

41. *See* Simons, *supra* note 4, at 7-14 (describing how combination of sentencing guidelines and mandatory minimums for drug sentences radically increased cooperation); Weinstein, *supra* note 3, at 563 (describing these as "boom times for the sellers and buyers of cooperation").

42. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002); 18 U.S.C. § 3553(e) (2000). While this Article was going to press, the Supreme Court decided *United States v. Booker*, 125 S. Ct. 738 (Jan. 12, 2005), holding that the U.S. Sentencing Guidelines are advisory in nature. To what extent this decision will impact the use of the § 5K cooperation provision is unclear at this stage. Assuming that *Booker* gives sentencing courts more flexibility in evaluating cooperation, this should neither alter the core law enforcement practice of using informants, nor eliminate judicial deference to the government's description of an informant's usefulness.

43. *See* Greer, *supra* note 6, at 515 ("[I]nformers are almost invariably used in crimes of vice . . . ."); Curriden, *supra* note 16; Weinstein, *supra* note 3, at 579-81 (describing the prevalent role of cooperation in drug cases). In federal court, 64% of on-the-record sentencing reductions for cooperation involve drug cases. BJS, *supra* note 4, at Table 5.34.

The number of drug-related offenses, however, actually understates the role that drug informants play in the criminal justice system. Sixty-five percent of adult male arrestees test positive for drugs upon arrest. *Id.* at Table 4.30. Seventy-five percent of prisoners have a history of substance abuse. Mauer & Chesney-Lind, *supra* note 8, at 2. This means that most defendants are in contact with the world of drug trafficking even if their offense was not itself directly drug related, while drugs often motivate the offense in the first place. Such defendants may have drug-related information, and therefore be treated by law enforcement as valuable drug informants, even where their offenses are not ostensibly drug-related. *See, e.g.*, SKOLNICK, *supra* note 11, at 126 (documenting pervasive use of addict informants in burglary investigations).

44. BJS, *supra* note 4, at Table 5.34 (statistics on cooperation for each type of offense, showing rates in excess of 20% for kidnapping, arson, bribery, money laundering, racketeering, gambling, antitrust (47%), and national defense offenses); Bowman, *supra* note 17, at 15 (as a general matter, the focus on cooperation has "changed the way federal prosecutors bargain and, perhaps, the way criminal defendants think about cooperating").

Federal and state legislatures promote the practice both directly and indirectly. In the federal system, cooperation is the favored and sometimes the only basis for lenience,[45] while mandatory minimum sentences generally strengthen the prosecutorial arsenal with respect to charge and sentence bargaining thereby making cooperation more likely.[46] Defendants and their attorneys have likewise grown accustomed to the practice.[47] As one court lamented:

> [n]ever has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.[48]

So prevalent is the practice that critics complain that the justice system has devolved into a "culture" of snitching.[49] In this way, snitching—and the creation and maintenance of snitches—has come to permeate the criminal process in ways the United States Supreme Court likely did not contemplate when it comprehensively authorized the use of informants nearly forty years ago.[50]

The first clue to the empirical magnitude of informant use lies in the massive drug docket. There were approximately two million drug-related arrests in 2000, representing approximately thirty percent of federal arrests and ten percent of state arrests.[51] Another type of case that commonly relies on informants is burglary, which accounts for another two million state arrests each year.[52]

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45. *See* U.S. SENTENCING GUIDELINE MANUAL § 5K1.1 (authorizing courts to reduce sentences where the defendant has provided "substantial assistance" to the government); 18 U.S.C. § 3553(e) (2000) (cooperation only basis for departure below mandatory minimum sentence). *But see supra* note 42, regarding the impact of *Booker*. See *infra* text for expanded discussion of 5K practice.

46. *See* SKOLNICK, *supra* note 11, at 138 ("Penalties thus are the capital assets of the informer system. High penalties for such relatively minor violations as possession of [drugs or drug paraphernalia] increase the capital assets of the policeman and create conditions under which the information system will work most efficiently."); Stuntz, *supra* note 6, at 508 (describing prosecutorial leverage derived from mandatory minimum sentences).

47. Richman, *supra* note 3, at 75-76 (arguing that informant use deforms role of defense attorney); Weinstein, *supra* note 3, at 617-21 (noting corrosive effect of pervasive informant use on defense counsel).

48. Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001).

49. Bowman, *supra* note 17, at 46 (chronicling complaints of "snitch culture").

50. Hoffa v. United States, 385 U.S. 293, 311 (1966) (governmental use of compensated, secret informer "not per se unconstitutional"); *see* Bowman, *supra* note 17, at 45 (noting sea change in way informants are used since *Hoffa*).

51. BJS, *supra* note 4, at Table 4.1 (1,579,566 state drug-abuse arrests); *id.* at Table 4.33 (32,630 federal drug arrests); *id.* at Table 4.40 (40,000 DEA arrests). Drug convictions make up a higher percentage of the total docket—40% of federal convictions and 30% of state convictions. *Id.* at Tables 5.32, 5.42.

52. For the year 2000. *Id.* at Table 3.109 (2002); *see* SKOLNICK, *supra* note 11, at 126-30 (documenting heavy use of informants in burglary cases).

More explicitly, approximately twenty percent of federal offenders received on-the-record cooperation credit under USSG § 5K1.1,[53] as did thirty percent of drug defendants.[54] Those recorded percentages in turn represent less than half of defendants who actually cooperate: some co-operators receive no credit,[55] while others escape the process altogether by having charges dismissed or never being charged at all.

Other indicia of informant use can be gleaned from warrant statistics. The San Diego Search Warrant Project found that the majority of the approximately 1,000 search warrants issued in 1998 were targeted to inner-city zip codes and that eighty percent of those warrants relied on a confidential informant.[56] Studies in Atlanta, Boston, San Diego, and Cleveland produced comparable results, finding that 92 percent of the 1,200 federal warrants issued in those cities relied on an informant.[57] It thus is reasonable to conclude that informants are involved in a high percentage of the hundreds of thousands of search warrants issued in inner-city communities every year.

Finally, additional factors suggest that standard data collection efforts are insufficient to determine the actual number of informants. Police jealously guard the identities of their informants, often failing to reveal that an informant has contributed to a case.[58] Police and prosecutors will sometimes go so far as to drop cases or agree to reduced charges in efforts to maintain the confidentiality of informants who contributed to the investigation. In sum, the data suggest that there are hundreds of thousands of informants at any given moment, that informant use is concentrated around, although by no means limited to, drug enforcement in inner-city communities, and that public records severely understate the extent to which informants are used throughout the criminal process.

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53. *See infra* note 61 and accompanying text.

54. BJS, *supra* note 4, at Table 5.34.

55. *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1503, 1504 (2001) (citing sentencing commission report that "fewer than half" of cooperating defendants receive a departure).

56. Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER, RACE & JUST. 183, 200 & n.60 (2002); s*ee also* Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. WEST. L. REV. 221 (2000) (same data). This study noted, however, that estimating actual informant use from search warrants is not completely reliable in light of the police's concomitant practice of using "boilerplate" warrants and fabricating informants.

57. Curriden, *supra* note 16 ("[P]ractically all warrants now rely on information from [confidential informants] in some manner."). Federal magistrate judges issued 31,571 search warrants in 2001. BJS, *supra* note 4, at Table 1.62.

58. Jacobs, *supra* note 11, at 43, 51 n.1 ("Officers were extremely protective of their 'snitches' because they depended so heavily on them to initiate and develop investigations.").

C. Secret Adjudications: The Inscrutable Nature of Informant Arrangements

The core challenge presented by the informant institution is the informal, ad hoc way it eliminates or reduces criminal liability off the public record. The informant institution "adjudicates"[59] criminal liability without the benefit of rules or regularity, while its secretiveness immunizes its irregularities from the checks and balances traditionally provided by other government branches and public scrutiny. It is this combination, discussed further below, that makes informant use institutionally problematic and demonstrates the need for the types of sunshine reforms proposed in Part V of this Article.[60]

Not all aspects of informant deals are secret; rather, the spectrum of informant practices range from the partially public and transparent to the completely opaque and confidential. At the most transparent end are the so-called "5K" agreements, named after the provision in the federal sentencing guidelines that permits judges to reduce sentences for cooperation.[61] If a defendant cooperates or promises to cooperate with the government, that defendant's plea agreement may contain a 5K provision in which the prosecution promises to inform the Court whether the defendant has provided "substantial assistance" and, if he has, to recommend a downward sentencing departure. If the government makes such a motion, the defendant may seek a greater reduction. If the government declines to make a motion, the court is precluded from awarding the defendant any benefit for his cooperation.[62] In this way, the fact of the defendant's cooperation and the extent of the reward become public record.[63]

Even in 5K agreements, very little information about informant activities becomes public. Salient details of the cooperation may or may not be provided to the court; if they are, such proceedings are routinely

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59. *See* Stuntz, *supra* note 6, at 519 (applying the term "adjudicate" to law enforcement determinations about liability, noting that it is not true adjudication in the traditional, judicial sense); Lynch, *supra* note 6, at 2120 (same).

60. *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1566 (1981) (arguing that with respect to prosecutorial discretion generally, "[w]e presently tolerate a degree of secrecy in one of our most crucial decisionmaking agencies that is not only inconsistent with an open and decent system of justice, but that may not even be efficient in avoiding the additional effort necessary to make the system accountable").

61. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002) provides that a defendant may receive a downward departure for providing "substantial assistance" to the government. *See also supra* note 42.

62. *See, e.g.*, *In re* Sealed Case, 181 F.3d 128, 130 (D.C. Cir. 1999) (en banc) (court cannot award cooperation benefits absent a government motion). This aspect of 5K practice is likely now improper under *Booker*. *See supra* note 42.

63. *See* Hughes, *supra* note 3, at 19 (delineating the limited extent of judicial review of informant activities).

sealed.[64] The full extent of an informant's activities is almost never shared: the respective parties provide the court merely with enough information to support their respective sentencing recommendations. The limits on information-sharing flow from the circumscribed purpose of the proceeding: the 5K provision is not designed to permit the court to evaluate the use of the informant per se, but only to determine the extent to which that informant should benefit from his cooperation.[65]

At the other end of the spectrum, the least transparent and therefore most problematic informant arrangement occurs where the informant is "flipped" by a law enforcement agent at the moment of initial confrontation and potential arrest. The mutual promises of the agent and suspect at that moment are shrouded in secrecy and if that particular informant never makes it to court, so they will remain.[66] The scope and methodology of those negotiations, moreover, depend on the idiosyncrasies of the particular officer, making the process remarkable for its lack of rules or uniformity. As one prosecutor described it, "the black hole of corroboration is the time that cooperators and agents spend alone."[67] Actual practices vary widely: an informant may be flipped initially by an agent in secret but eventually end up with counsel, or talking to a prosecutor, or in court, at each stage subjected to additional scrutiny and a new set of increasingly formal rules. Similarly, a charged defendant may morph into an informant during the progress of his case and recede from public view. Parts of a cooperation agreement may be memorialized in writing in a plea agreement or proffer letter, while other aspects will remain unrecorded.

An informant's activities may become public in another, less common way:[68] when that informant is used as a witness against another defendant. This is the paradigmatic process described by the Supreme Court in *Hoffa v. United States*,[69] which approved the propriety of using informants as witnesses. This approval was based in part on the requirements of disclosure of aspects of the informant relationship through discovery, cross-examination, and jury instructions.[70] A defendant is

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64. *See, e.g.*, *In re* Sealed Case, 349 F.3d 685, 690 (D.C. Cir. 2003) (noting that trial court sealed sentencing record for two years based on "circumstances of the [defendant's] cooperation").

65. *See* Yaroshefsky, *supra* note 32, at 926-29 (describing guidelines practices).

66. Such transactions may be later revealed in proffer sessions if the informant ends up being charged. Those proffer sessions are likewise confidential. *See* Yaroshefsky, *supra* note 32, at 952-62 (describing the processes and perils of the proffer session); Bowman, *supra* note 17, at 12 & n.62 (describing formal proffer sessions).

67. Yaroshefsky, *supra* note 32, at 936 (quoting an interviewed Assistant U.S. Attorney).

68. Informant witnesses are necessarily few as compared to non-witnesses because 90 to 95 percent of cases are resolved by plea, requiring no witnesses at all. BJS, *supra* note 4, at Tables 5.32, 5.55.

69. 385 U.S. 293, 311 (1966).

70. *Id.* at 311.

entitled to exculpatory evidence and, eventually, prior statements and impeachment material if an informant testifies.[71]

From a systemic perspective, the scope of the inquiry produced during litigation by these methods is limited in several ways. First, it addresses only the role played by that particular informant in that particular case. In addition, even where a defendant actively seeks information about the informant's activities, much of that information may be protected by law enforcement privilege.[72] Finally, because over ninety percent of cases never go to trial, most cases in which informants are active are never vetted through the discovery and trial process.

In sum, it is hard to determine what portions of the universe of informant activities are revealed through public processes, but the data suggest that it is meager. Although 5K and comparable state agreements constitute a growing proportion of cases, they necessarily represent a fraction of the informant pool, because many defendants cooperate without receiving any on-the-record recognition and others avoid going to court at all by cooperating off the record. Likewise, while revelations of informant malfeasance are most likely to be revealed when individual defendants litigate the use of informant witnesses against them, most cases remain unlitigated. In sum, only the tip of the informant iceberg ever reaches the public record where a judge, legislator, or other independent observer might scrutinize it.[73]

D. The Utilitarian Problem

The informant institution raises numerous social utility problems.[74] The classic justification for informant use is that it is a necessary evil. As one court put it:

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71. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150 (1972); Roviaro v. United States, 353 U.S. 53, 59-60 (1957); FED. R. CRIM. P. 26; Jencks Act, 18 U.S.C. § 3500 (2000). The Supreme Court recently decided that the government need not provide impeachment evidence to defendants who plead guilty. United States v. Ruiz, 536 U.S. 622 (2002) (upholding guilty plea requiring waiver of right to impeachment evidence). As mentioned above, 90 to 95% of all cases are resolved by plea, *see* BJS, *supra* note 4, at Tables 5.32, 5.55, and a great deal of discovery about informants comes in the form of impeachment evidence, the Court's decision drives informant activities even further from public view. *But cf.* Lynch, *supra* note 6, at 2148 & n.22 (advocating greater pre-charge discovery for defendants as a way of balancing prosecutorial charging authority).

72. *See* Roviaro, 353 U.S. at 59 (balancing government's investigatory need for confidentiality against defendant's right to exculpatory information); 18 U.S.C. § 3500 (2000) (limiting defense access to cooperating witness statements).

73. I do not include "scrutiny" of the process by informants' defense counsel, although it may be extensive, since the information obtained is privileged and therefore cannot directly contribute to the public understanding of the institution.

74. *Compare* Bowman, *supra* note 17, at 43 ("The true justification for exchanging leniency for cooperation is a utilitarian argument from necessity.") *with* Simons, *supra* note 4, at 25 (arguing that the investigative utility of informants is suspect and, alone, insufficient to justify their use).

> our criminal justice system could not adequately function without information provided by informants . . . . Without informants, law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes.[75]

The use of informants makes possible certain sorts of investigations and convictions. It is also valuable as a labor-saving device for prosecutors. Behind this traditional story, however, is the unstated assumption that as a result of their invaluable assistance in certain types of cases, active informants abate more crime than they generate. The main acknowledged countervailing arguments against informant use are moral and procedural: the propriety of the government's reliance on criminals and the fairness of using paid criminal witnesses to convict defendants.

There is, however, a third possibility: that the use of informants on balance may not always be an effective crime fighting tool. The fact that some types of cases cannot be pursued without informants does not address the problem that the informant institution tolerates and generates a certain amount of crime. In addition, there is no reason to assume that a given informant, even if he is useful to law enforcement in a particular case, is producing a net benefit to his community. Indeed, he may be a neighborhood scourge, a source of violence and fear, and a bad influence on local youth, fueled by his personal knowledge that as long as he remains useful to the authorities his collateral bad behavior will remain essentially unchecked. In this sense, like the "broken window," the impact of informant criminality must be measured not merely in terms of his individual conduct, but also by his impact on others' experiences, behaviors, and the perception of the community that he creates.[76]

This question of whether the net benefits conferred by the informant institution outweigh the harm imposed by individual informants cannot be answered satisfactorily because of the lack of data on snitch use and because of the way flipping decisions are made by the government. No

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75. United States v. Bernal-Obeso, 989 F.2d 311, 335 (9th Cir. 1993); *see also* John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1722-27 (2003) (arguing that bargaining over the death penalty with cooperating murder defendants, and using cooperation in murder cases more generally, is an "effective" crime control strategy, albeit one "fraught with difficult issues").

76. *See* Bernard Harcourt, *Reflecting on The Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style* , 97 MICH. L. REV. 291 (1998) (discussing "broken windows" theory of policing that visible disorder promotes crime).

mechanism exists to permit public scrutiny of the institution.[77] It has been suggested that prosecutors engage in a sort of general "balancing" test in which the investigative utility of the informant is weighed against some combination of factors including the seriousness of the instant offense and potential danger to the community.[78] But such an inquiry is at best implicit and incomplete;[79] at worst this "balancing test" represents merely a post hoc description of the fact that some decision must be made. Rather, like all highly discretionary decisions, the decision to convert a traditional defendant into an informant is made on an ad hoc basis, subject to everyday bureaucratic and individual pressures. In this vein, Ian Weinstein argues that "[t]he current rate of cooperation is particularly troubling because a significant portion of snitching brings relatively few concomitant law enforcement benefits."[80] Based on inter-district studies, he concludes that prosecutors manipulate cooperation to reach a variety of goals: "in the current overactive market in cooperation, prosecutors use cooperation to achieve docket control and influence case outcomes to achieve particular results in individual cases, as well as to further law enforcement goals," and that some cooperation is simply "not motivated by the scope of its law enforcement impact."[81]

In sum, informants serve many law enforcement needs that may be unrelated to their value in solving crimes. Because of its inherent

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77. One counterexample might be the Bail Reform Act, which provides for limited judicial review of the question of a defendant's dangerousness to the community in the context of deciding whether to release that person pre-trial. *See* 18 U.S.C.A. § 3142(e) (West 2000 & Supp. 2004) (court to evaluate whether conditions of release will ensure "safety . . . [to] the community"). Where a defendant is cooperating and the government supports his release, however, the Court will usually lack any factual basis to countermand the government's priorities.

78. It is hard to identify precisely how prosecutors actually make informant decisions. According to Yaroshefsky, "[w]ithin the Justice Department there are few, if any, internal standards for substantial assistance to guide the discretion of prosecutors." Yaroshefsky, *supra* note 32, at 927. The Principles of Federal Prosecution generally instruct prosecutors to consider "the importance of the case, the value of the person's cooperation to the investigation or prosecution, and the person's relative culpability and criminal history." *Id.* at 927 n.44. Noting these general contours, Hughes argues that for prosecutorial decision-making "the utilitarian approach is surely the correct one." On the other hand, he also assumes "prosecutors always should perceive immunization as a last resort," and that prosecutors should be able to evaluate an informant's "future danger to the public." *See* Hughes, *supra* note 3, at 14-15 & n.48 (noting the 1980 DOJ guidelines recognize "in very general terms the propriety of permitting the prosecutor to make a utilitarian calculation."); *see also* Amanda Schreiber, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301 (2001) (pointing out that no enforceable guidelines exist to control informant use or behavior). By contrast, Bowman presumes the general utility of informants, focusing only on the question of whether the informant will lie on the stand. Bowman, *supra* note 17, at 45 ("Only untruthful accomplice testimony is bad.").

79. Simons, *supra* note 4, at 25 (utilitarian balancing is incomplete).

80. Weinstein, *supra* note 3, at 565.

81. *Id.* at 614; *see also* Cohen, *supra* note 17, at A1 (documenting the same tendency).

secrecy, however, the process evades public inquiry into whether those values served and the discretionary decisions to flip and reward particular suspects enhance the public good. The reforms proposed below are designed in large part to remedy this systemic blindness and to create both data and mechanisms for review that would permit genuine inquiry.

III. DOCTRINAL PROBLEMS WITH INFORMANT USE

The core doctrinal issues concerning informant use are in some sense variations on a familiar theme: they are problems inherent in the exercise of broad police and prosecutorial discretion in connection with the practice of plea bargaining.[82] The growth of informant use is also part of larger systemic trends: the expansion of prosecutorial control; the overwhelming dominance of the plea bargain; the centrality of drug cases in criminal dockets; and the increasingly administrative, nonadversarial nature of the criminal system. At the same time, informant use is an under-appreciated engine of these very trends. Heavy reliance on informants exacerbates the culture of secrecy and untrammeled discretion that permeates law enforcement. The sheer scale of informant practices and the gravitational force they exert on other aspects of law enforcement make the informant institution a unique window into some of the most contentious aspects of the American criminal justice system.[83]

A. Beyond Unreliable

Judicial as well as much scholarly discomfort with informants traditionally has flowed from their infamous unreliability as witnesses. Courts have held that without procedural protections against unreliability, using criminals who testify in exchange for benefits may raise due process and other fairness issues for defendants against whom

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82. *See* Hughes, *supra* note 3, at 4 (identifying the plea bargaining process and prosecutorial discretion as keys to understanding informant deals); Weinstein, *supra* note 3, at 565 ("The problem of externalized costs in the criminal justice system is not unique to cooperation. It is part of the story of the ascendancy of the plea bargain and its centrality in the American criminal justice system.").

83. These secretive adjudicatory practices in turn distort traditional aspects of criminal practice in additional ways described by other authors. *See* Richman, *supra* note 3, at 111-26 (prevalence of cooperation undermines ability of defense attorney to give good advice to client); Harris, *supra* note 3, at 7-9, 49-58 (compensating criminal informants for testimony compromises legal ethics and evidentiary integrity); Hughes, *supra* note 3, at 10, 13, 21, 57, 60 (informant agreements distort the processes and protections of plea bargaining, appeals, and double jeopardy).

informant testimony is levied.[84] Commentators have documented numerous horror stories of fabrication and perjury by informants.[85]

The conventional focus on unreliability reflects the realities of snitch litigation. The Supreme Court's decision in *Hoffa* apparently foreclosed the argument that the use of informants itself violates due process, while at the same time directing attention to the formal procedures guaranteeing reliability: discovery, cross-examination, and the jury's evaluation.[86] Attention thus has focused on unreliability and the procedures surrounding it as the dominant ground for realistic legal challenges to the use of informants.[87]

This analytic shift away from informant use as a species of public policy to the narrower question of the snitch's unreliability obscures the nature of the mechanisms by which that unreliable testimony is created —secretly negotiated deals between criminals and law enforcement in which information is exchanged for reduced liability and penalties. Insofar as those mechanisms distort the criminal justice process and affect communities, they may cause more widespread damage than any false information that might be generated. In other words, while informants may well be inherently unreliable, that is not their worst feature. Rather, their use is problematic because it undermines the uniform application of criminal liability rules, the accountability of law enforcement, and, for some neighborhoods, the well-being of a community.

B. Mechanics of the Deal: Informing as a Problematic Type of Plea Bargain

Some of the systemic challenges posed by snitching can be understood by conceptualizing cooperation as an extreme form of plea bargain.[88] The government (provisionally) agrees to reduce or eliminate a suspect's

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84. *See* Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001); United States v. Bernal-Obeso, 989 F.2d 331, 335 (9th Cir. 1993).

85. *See, e.g.*, Harris, *supra* note 3, at 2 (noting study result that fabricated snitch testimony has been a factor in 21% of wrongful capital convictions) (citing JIM DWYER, PETER NEUFIELD & BARRY SCHECK, ACTUAL INNOCENCE (2000)); ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 63-105 (2002) (documenting numerous instances of informant lying); Zimmerman, *supra* note 3, at 90-99 (same); Schreiber, *supra* note 78 (describing FBI difficulty in preventing informant fabrication).

86. Hoffa v. United States, 385 U.S. 293, 311 (1966) (use of compensated informant did not violate due process). *But see* United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998) (holding that use of compensated informant violated federal bribery statute), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999).

87. *Bowie*, 243 F.3d at 1110 ("[T]he Constitution required a prompt pretrial investigation of the integrity of the government's [informant] evidence before the witnesses were called to the stand" and prosecution's failure to investigate informant testimony warranted new trial.); *Bernal-Obeso*, 989 F.2d at 337 (dismissal of indictment would be appropriate remedy if trial court were to find that prosecution propounded perjured informant testimony); s *ee also supra* note 85 (listing scholarship focused on reliability).

88. *See* Richman, *supra* note 3, at 73 (analyzing cooperation agreements as a problematic type of plea); Hughes, *supra* note 3, at 2 (same).

liability, while the suspect (temporarily) forswears his right to contest liability and promises to provide information incriminating others. Unlike a typical plea bargain, the informant deal is secretive and changeable. Many of its aspects are unenforceable because details often remain unspoken and unwritten. It involves the constant exercise of law enforcement judgment as to the utility of the informant's cooperation, and in the end, it may be jettisoned if the government decides the informant is unhelpful or lying, or the informant decides belatedly to go to trial.[89] Formal written agreements, when they exist, address only the broadest parameters of cooperation without revealing details of informant activities or obligations,[90] and even these agreements are "exotic plants that can survive only in an environment from which some of the familiar features of the criminal procedure landscape have been expunged."[91]

As such, the informant deal lacks the safeguards of the typical plea: specificity, completeness, finality, enforceability, judicial review and publicity, and, in the case of the most informal negotiations, counsel. It is precisely these safeguards, however, on which courts and scholars have relied in justifying the system's heavy reliance on plea bargaining.[92] Absent these protections, the informant deal pushes plea bargaining to the limits of its legitimacy.

For example, unlike a classic plea bargain, informant deals lack finality because an informant's obligations are ongoing. Written cooperation agreements often extend a defendant's obligations into perpetuity,[93] while informal, unwritten agreements last as long as the police

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89. Hughes analyzes in detail the uncertainty associated with written, formal cooperation agreements. Hughes, *supra* note 3, at 2-3. The analysis here attempts to extend that inquiry into the more elusive and problematic practice of informal, unwritten snitch arrangements.

90. Typical federal cooperation agreements are often generic: they require defendants to engage in all possible activities—surveillance, controlled buys, testifying—in the event that the prosecutor decides she wants them. They also frame the government's obligations broadly, stating that in the event that substantial assistance is provided the government will inform the court. Such agreements reveal little or nothing about actual defendant activities or obligations. Richman, *supra* note 3, at 96-100 & nn.98-108 (describing government practice of keeping cooperation agreements vague).

91. Hughes, *supra* note 3, at 3. What Hughes calls "informal" agreements are written agreements for cooperation and lenience, either in the form of a written plea or letter immunity. This Article treats such agreements as formal: the informality discussed here refers to the unwritten, implicit terms of informant deals.

92. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30-38 (1991) (describing the classic judicial justifications for plea bargaining); Brady v. United States, 397 U.S. 742 (1970) (upholding constitutionality of plea bargain based in part on active participation of defense counsel, defendant's opportunity to fully assess scope of agreement, and taking of the plea in open court before a judge).

93. Hughes, *supra* note 3, at 3, 19-22, 41-49 (noting special contractual problems with cooperation agreements, including lack of requirement that agreement be reduced to writing at any particular time, lack of consensus on what constitutes unconscionability or material breach, and unfettered discretion of

or prosecutor wishes to use that informant.[94] In general, snitch relationships with the government tend toward the open-ended and indefinite; they may outlast a particular charge and go on for years.[95] The promise of cooperation does not bring closure to a case. Rather, it creates an ongoing relationship between a criminal actor and the government. Particularly with high recidivism rates, an informant may carry old relationships with the police from case to case, leveraging old and new cooperation in an effort to escape liability for new crimes in new jurisdictions, while police in turn may manipulate arrest and charging decisions to preserve and encourage their information sources.[96]

While written cooperation agreements are enforceable, many aspects of a cooperation remain unwritten, discretionary, and impossible to litigate. More broadly, informant deals are contingent upon police or prosecutor satisfaction with an informant's usefulness, and therefore the benefits to be conferred remain indeterminate and discretionary. Ironically, one of the most powerful protections available to informants may not be the court but the market: police who "burn" their snitches or prosecutors whose rewards are meager may have difficulty recruiting future informants.[97]

Informant deals evade judicial review and publicity to an even greater extent than do traditional plea bargains because the only aspect of the arrangement over which the court has jurisdiction at sentencing is the question of how much benefit, if any, the defendant should receive for his cooperation.[98] When a defendant pleads guilty, the court must independently question him as to whether he understands the rights he is giving up and whether he is entering into the plea knowingly and volun-

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prosecutor in setting the terms).

94. SKOLNICK, *supra* note 11, at 121-24 (describing police dependence on regular contact with and supply of addicts informants).

95. Hughes, *supra* note 3, at 46-49.

96. *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 298 (1966) (pending state and federal charges were dropped against informer). I personally witnessed or negotiated numerous such interjurisdictional deals on behalf of cooperating clients.

97. Jacobs, *supra* note 11, at 43 (quoting J. R. Williams & L. L. Guess, *The Informant: A Narcotics Enforcement Dilemma*, 13 J. PSYCHOACTIVE DRUGS, 235-45 (1981) ("The narcotics unit's success in protecting informants establishes a reputation on the basis of which the unit can recruit new informants. A unit which 'burns' their informants usually has difficulty in recruiting new [ones]." (alteration in original)); Richman, *supra* note 3, at 109-10 (The snitch's protection "lies in the discipline of the marketplace. The prosecutor who mistreats snitches risks not being able to attract such assets in the future."). Richman also notes the importance of the experienced repeat player defense attorney who can advise clients as to the reliability of prosecutorial promises. *Id.* Such protections are obviously unavailable to the informant who deals only informally with police agents.

98. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002); *In re* Sealed Case, 181 F.3d 128, 130 (D.C. Cir. 1999) (en banc) (court has limited jurisdiction to review cooperation).

tarily.[99] This inquiry usually includes questions about the performance of defense counsel and whether the defendant has been threatened or coerced in any way.[100] By contrast, there is no such colloquy administered to a prospective informant, inquiring as to whether his decision to snitch is "knowing and voluntary" and warning him of the rights he is about to waive, the risks he is about to incur, the government's complete latitude in deciding his fate, and the impossibility of predicting what benefits might accrue.[101] Judicial oversight is also narrow in the sense that courts do not review the propriety of the cooperation per se. The sentencing inquiry does not account for charges never brought, for cooperation unrevealed, potential fruits of the informant's work, other misdeeds of the informant, or for that matter, any other information not brought forward by the parties.[102]

Insofar as judicial review guarantees a measure of publicity for plea agreements, even this element may be lacking for informants. Informant plea agreements and sentencings are routinely sealed in order to protect the informant, preventing the public from knowing of the particular arrangements.[103]

Finally, the suspect approached by police and invited to snitch has no right to counsel, even though the decision to inform may have a greater and more lasting impact on his life than the decision whether or not to plead guilty.[104] By contrast, the defendant who decides to exercise his constitutional right to proceed to enter a guilty plea without counsel will receive a lecture from the judge on the heavy risks of doing so and a probing inquiry as to whether he understands those risks.[105]

Lack of counsel characterizes even formal informant agreements. A typical cooperation agreement requires the defendant to waive the presence of counsel for conversations with the handling agent. An infor-

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99. FED. R. CRIM. P. 11 (requiring courts to establish knowing and voluntary entry of plea); Boykin v. Alabama, 395 U.S. 238, 242 (1969) (that plea is "intelligent and voluntary" is sine qua non of its constitutional validity).

100. *See* FED. R. CRIM. P. 11.

101. Even when the informant is represented by counsel, Richman worries about the complex pressures on defense counsel that undermine their ability to fully advise defendants about the costs and benefits of cooperating. Richman, *supra* note 3, at 75-76, 99 & n.105, 111-13. Yaroshefsky also points out that the "race" to cooperate—early cooperators usually get the best deals—means that defense counsel simply may have insufficient information at the early stages of the case to give good advice. Yaroshefsky, *supra* note 32, at 929-30.

102. *See* Yaroshefsky, *supra* note 32, at 937-39 (describing chaotic, unreliable process by which narcotics and violent gang cooperations are conducted).

103. *See supra* note 64-65 and accompanying text (on sealing).

104. *See* Richman, *supra* note 3, at 74 (noting value of experienced counsel in explaining risks of cooperation to potential cooperator).

105. Godinez v. Moran, 509 U.S. 389, 400 (1993) (describing constitutional requirements of knowing and voluntary self-representation).

mant, even one who has been formally charged and has an attorney, will routinely work and communicate independently with law enforcement in the course of cooperation.[106] Insofar as defenders of the plea bargaining system rely on defense counsel to mitigate the authority of prosecutorial discretion, this balance is largely absent in informant deals.[107]

Informant deals differ so deeply from plea bargains, of course, because their purposes are different: they aim not merely to resolve the criminal liability of the informant but to obtain incriminating information about others. In this sense, the informant deal is more akin to an investigative tool like a wiretap or search warrant, implicating the privacy rights of others. The law, however, does not treat this alternative purpose as giving rise to any cognizable rights or protections, either for the informant or the targeted defendant.[108]

Despite its dominance, the plea bargain still stirs considerable academic discomfort. Scholars complain that plea bargaining exacerbates the problems of excessive prosecutorial discretion, shortchanges defendants' rights to due process, and generally evades the mechanisms of public openness and accountability.[109] In this sense, informant deals represent a problematic extension of what is most suspect in the plea bargaining process. With the reduced safeguards and increased secrecy involved in snitching, doctrinal concerns about thin due process, arbitrary official decision-making, and weakened rule of law are at their highest.

C. Informants as a Problem of Broad Law Enforcement Discretion

In a related vein, the heavy use of informants can be conceptualized as a troubling result of the breadth of law enforcement discretion and authority. Much ink has been devoted to criticizing the immense power vested in American prosecutors,[110] and many of those complaints apply

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106. *See, e.g.*, Yaroshefsky, *supra* note 32, at 959-60 (describing lack of counsel during cooperation process).

107. *See* Lynch, *supra* note 6, at 2125-26, 2131, 2148.

108. The Supreme Court held in *Hoffa* that the Fourth Amendment does not govern informant use. An individual has no reasonable expectation of privacy when he reveals information to another person and therefore assumes the risk that that person will reveal that information. Hoffa v. United States, 385 U.S. 293, 301-03 (1966); *cf. id.* at 319 (Warren, C.J., dissenting) (calling the informer a "bugging device which moved with Hoffa wherever he went"); *see also* Zimmerman, *supra* note 3, at 128 (summarizing scholarship in support of enhancing Fourth Amendment protection against informants).

109. *See* Wright & Miller, *supra* note 92, at 30-38 (describing scholarly debate over plea bargaining); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1038-40 (2000) (describing the powerful institutional incentives of administrative ease and assurance of victory that encourage prosecutors and courts to promote the practice of plea bargaining).

110. *See generally* Vorenberg, *supra* note 60, at 1521; Stuntz, *supra* note 6; Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny* , 86 IOWA L. REV. 393 (2001); Wright & Miller, *supra* note 92. *But see generally* Lynch, *supra* note 6 (defending prosecutorial discretion).

equally if not more strongly to informant use. James Vorenberg's classic treatment identifies "prosecutors' virtually unlimited control over charging as inconsistent with a system of criminal procedure fair to defendants and to the public."[111] His concerns about the prosecutorial institution—that the lack of standards, publicity, and judicial review of prosecutorial decisions, combined with the executive institution's immense power, is inconsistent with political accountability and subject to excessive abuse—are precisely those raised by the use of informants. Indeed, Vorenberg recognized in 1981, long before the war on drugs made snitches a law enforcement fixture, that the prosecutor's "power to bargain for information is so broad that it has probably led to some abuses."[112]

William Stuntz identifies the trend toward prosecutorial dominance as flowing from the over-inclusiveness of the criminal law itself. "As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long."[113] Snitching is prototypical of this phenomenon. By using snitching rather than formal adjudication or even conventional plea bargaining to resolve liability, law enforcement accretes power to itself. Police and prosecutors decide what laws are to be suspended or enforced against the informant, balance his liability against his usefulness before a jury ever has a chance to decide his guilt or innocence, negotiate the informant's ultimate punishment by manipulating charges, and may even defend the informant against judicial or other public scrutiny. Stuntz goes further still, arguing that the delegation of adjudicatory authority to the unbounded discretion of police and prosecutors represents "the antithesis of the rule of law."[114] This observation correlates with the analysis above that informant practices are inherently unregulated, ad hoc, secretive, and generally in tension with rule-of-law ideals.

In a slightly different vein, Angela Davis identifies unfettered, secretive prosecutorial discretion as an invitation to official abuses such as coercion, misrepresentation, and racially biased policymaking.[115] Infor

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111. Vorenberg, *supra* note 60, at 1525; *see also id.* at 1527 ("One major exception [to the prosecutorial habit of charging serious crimes to the maximum] arises when the prosecution needs information or testimony to convict a more important target . . . ."); *id.* at 1536 ("The leverage of plea bargaining is important in eliciting information and cooperation.").

112. *Id.* at 1553.

113. Stuntz, *supra* note 6, at 509. Stuntz does not specifically address informants.

114. *Id.* at 578.

115. Davis, *supra* note 110, at 397 (arguing that conventional prosecutors share the same flaws as the much-criticized Independent Counsel Kenneth Starr, who was accused of being unaccountable, politically motivated, unscrupulous, and prone to abusing his power); *see also* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (documenting the operation and effect of

mants likewise represent a strong example of this problem. The creation of a snitch represents a rule-poor application of discretionary, non-public standards by public officials who lack accountability and who may be driven by inappropriate motives such as personal gain, race, politics, or even laziness.[116]

Even those scholars more comfortable with broad exercises of prosecutorial discretion might flinch at the way that discretion expresses itself in the context of informant use. Gerald Lynch, for example, openly acknowledges that that the current system driven by prosecutorial discretion "is not . . . an adversarial or judicial system. It is an inquisitorial and administrative one, characterized by informality and ad hoc flexibility of procedure."[117] He defends the system as a rational compromise among the ideals of due process embodied in the adversarial model, the realities of overbroad criminal codes, and the need for flexibility in the selection of enforcement targets.[118] Lynch relies heavily on the phenomenon, prevalent in white collar cases, that vigorous defense counsel can engage prosecutors pre-indictment, giving rise to a quasi-administrative, informal adjudication before charges are filed. He points to this process as a rational, flexible one that incorporates many of the same inputs as do trials.

Lynch acknowledges, however, that the opacity of the process and its lack of uniform rules tend toward unfairness. He thus proposes enhanced discovery and a more rigorous defense counsel role in the charging process in order to make the process more formal, transparent, and uniform.[119]

The informant institution, however, is inherently hostile to such reforms. Lynch relies on prosecutorial evaluation of fairness, but informant deals are swayed by immediate investigative utility. Lynch proposes increased transparency, but cooperation drives suspects into the most informal, privileged recesses of the system. Insofar as scholars such as Lynch rely on informal counsel negotiations to ease the apparent arbitrariness of the charging process, informants often proceed without counsel. Most troubling for Lynch's model, an informant's guilt is adjudicated by agents and prosecutors who may be driven by immediate investigatory needs that conflict with the need to ensure fairness and balance.

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unconscious racial bias in the exercise of prosecutorial discretion).

116. Davis does not specifically discuss informants.

117. Lynch, *supra* note 6, at 2129.

118. *Id.* at 2141-45.

119. *Id.* at 2147 ("[G]reater formality of procedure could enhance the fairness of the process."); *see also* Wright & Miller, *supra* note 92, at 34-35, 57 (proposing internal prosecutorial screening mechanisms to enhance the transparency and uniformity of charging decisions).

In these senses, the creation of a snitch is a quintessential exercise of law enforcement discretion, subject to the same and even heightened types of abuses and concerns. The growth of the informant institution should thus be seen as an important development for the prosecutorial function. Above and beyond this descriptive claim, however, informant deals raise additional unique issues connected to law enforcement discretion, in part because of the influence that using informants can have on law enforcement decision-making and in part because of the central role played by the police.

1. The Impact of Informant-Dependence on Law Enforcement

The informant institution affects the integrity of the law enforcement process because it influences how police and prosecutors do their jobs. These influences can be divided into three related categories: identification, focus, and ratification. By using informants, law enforcement identifies its mandate with the creation and maintenance of criminal informants. By relying on informants, law enforcement focuses its resources based on informant information. And by wielding the state's power based on informant information, law enforcement ratifies informant interests. In essence, the highly discretionary nature of police and prosecutorial power renders it vulnerable to influence from the very informants on which it depends. The three categories, identification, focus, and ratification, are discussed below.

a. Identification

"You're only as good as your informant," explained the police officers to the sociology professor.[120] "Informers are running today's drug investigations, not the agents," complained a twelve-year veteran of the DEA.[121] "[A]gents have become so dependent on informers that the agents are at their mercy."[122] "I can't tell you the last time I heard a drug case of any substance in which the government did not have at least one informant," related District Judge Marvin Shoob.[123] "Most of the time, there are two or three informants, and sometimes they are worse criminals than the defendant on trial."[124] Even prosecutors com-

120. Jacobs, *supra* note 11, at 51 n.1 (study of U.S. city police, describing "sentiment echoed by every officer").

121. Curriden, *supra* note 16 (quoting Celerino Castillo, 12-year veteran DEA Agent).

122. *Id.*

123. *Id.*

124. *Id.*

plain: "These [drug] cases are not very well investigated. . . .[O]ur cases are developed through cooperators and their recitation of the facts. . . . Often, in DEA, you have little or no follow up so when a cooperator comes and begins to give you information outside of the particular incident, you have no clue if what he says is true. . . ." Another prosecutor revealed that "the biggest surprise is the amount of time you spend with criminals. You spend most of your time with cooperators. It's bizarre."[125]

This dependence can become so great that it creates a sort of perverse romance known as "falling in love with your rat."[126] Another prosecutor explains the phenomenon:

> You are not supposed to, of course. . . . But you spend time with this guy, you get to know him and his family. You like him. . . . [T]he reality is that the cooperator's information often becomes your mind set. . . . It's a phenomenon and the danger is that because you feel all warm and fuzzy about your cooperator, you come to believe that you do not have to spend much time or energy investigating the case and you don't. Once you become chummy with your cooperator, there is a real danger that you lose your objectivity.[127]

In all these ways, the prosecution of drug cases has become synonymous with official cultivation of and reliance on informants. As a result, protecting and rewarding informants has become an important part of law enforcement, identifying informants with the law enforcement function not only in the eyes of agents, lawyers, and judges, but insofar as the favorable treatment becomes known, in the eyes of the public as well. Because the system relies so heavily on the purported neutrality and independence of prosecutorial decision-making, the identification of that authority with informant protection and reward threatens the core of the institution.[128] In particular, the identification of law enforcement with criminal interests should be expected to strain police-civilian relations in high-crime communities of color in which many residents already distrust law enforcement.[129]

b. Focus

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125. Yaroshefsky, *supra* note 32, at 937-38.

126. *Id*. at 944.

127. *Id*.

128. *See* Morrison v. Olson, 487 U.S. 654, 727-28 (1988) (Scalia, J., dissenting) (describing paramount importance of prosecutorial neutrality); *see also generally* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (arguing that public perception of law enforcement fair treatment of individuals is central to its legitimacy).

129. *See infra* Part IV.D.

In relying on snitches, police and prosecutors receive information about the community of that informant, thereby ensuring a concentration of resources directed not by independent law enforcement decision, but by the identity and choices of the informant. To put it another way, snitches can only snitch on people they know. They are unlikely to know people outside their community or socio-economic group. The use of snitches thus becomes a kind of focusing mechanism guaranteeing that law enforcement will expend its resources in the snitch's community whether or not the situation there independently warrants it. The use of informants as a racial focusing mechanism in the use of search warrants has already been recognized.[130] In addition, heavy reliance on informants displaces more independent decisional processes. According to one former DEA and Customs agent, "reliance on informants has replaced good, solid police work like undercover operations and surveillance."[131] Prosecutors in Yaroshefsky's study described violent gang cases as "all based on cooperators . . . [and evidence] for which there is only one rat after another."[132] This is a particularly troubling development in the context of the war on drugs, which has led to disproportionate levels of drug-related arrests and law enforcement presence in black communities.[133] The possibility arises that the concentration of law enforcement resources in black communities flows in part from law enforcement overdependence on informants.

c. Ratification

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130. Donna Coker, *Foreward: Addressing the Real World of Racial Injustice in the Criminal Justice System* , 93 J. CRIM. L. & CRIMINOLOGY 827, 837 (2003):

> With the search warrants that were issued for neighborhoods that were predominantly African American and Latino, eighty percent relied on confidential informants. This was not the case for warrants issued in majority-white neighborhoods. . . . If, as some studies have found, drug users are more likely to purchase drugs from dealers of the same race, one expects that the racial pattern of traffic stops and searches would increase exponentially the racial disparity in search warrants. Even if there are low rates of success, significant racial disparities in warrant issuance will likely result in race disparities in drug arrests and incarceration.

See also Benner, *Racial Disparity in Search Warrants*, *supra* note 56 at 200-01 (attributing concentration of drug arrests in urban zip codes in part to heavy reliance on confidential informants).

131. Curriden, *supra* note 16 (quoting Michael Levine, 25-year veteran of the DEA and Customs).

132. Yaroshefsky, *supra* note 32, at 938.

133. *See* VINCENT SCHIRALDI ET AL., JUSTICE POLICY INSTITUTE, POOR PRESCRIPTION: THE COST OF IMPRISONING DRUG OFFENDERS IN THE UNITED STATES 3-5 (2000), *available at* http://www.justicepolicy.org/article.php?list=type&type=49 (blacks make up 13% of drug users but 63% of imprisoned drug offenders; black males are imprisoned for drug offenses at a rate 13 times higher than whites although there are 5 times more white drug users); MARC MAUER, RACE TO INCARCERATE 145-47, 149-50 (1999) (documenting disproportionate increases in drug arrests of African Americans although whites constitute "vast majority of drug users" and drug sales in white neighborhoods were comparable to those in black neighborhoods).

By relying on informant tips in making their own investigative and prosecutorial decisions, police and prosecutors often inadvertently validate the interests of the informants who provide the information.[134] When informants snitch on competitors or other enemies, the state effectively places its power at the disposal of criminals. The question is not whether those competitors and enemies are guilty: they often are. But the integrity of law enforcement discretion turns heavily on how the system selects among a vast pool of potentially culpable targets.[135] Indeed, it is the quintessential role of the prosecutor to choose what crimes are to be prosecuted and how, in a way that validates broad public values of fairness and efficiency.[136] The more reliant police and prosecutors become on snitches in the selection process, the more this aspect of the system's integrity is compromised.

2. Increasing Police Authority

The informant institution further shapes the law enforcement process by shifting ultimate decisions about liability away from prosecutors to police.[137] Most informants are created and managed by police officers whose highly discretionary activities evade judicial and public scrutiny.

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134. There are of course instances where police purposefully validate the interests of informants, in the form of favors, warnings, and other misuses of official power. *See, e.g.*, United States v. Flemmi, 225 F.3d 78, 81-82 (1st Cir. 2000); United States v. Boyd, 833 F. Supp. 1277 (N.D. Ill. 1993). Such behavior constitutes corruption and is not the focus here. The point here is that reliance on informants necessarily leads to ratification of some informant interests even absent corrupt intentions on the part of law enforcement.

135. Morrison v. Olson, 487 U.S. 654, 727-28 (1988) (Scalia, J., dissenting) (quoting Justice Robert Jackson's view that the most dangerous and important power of the prosecutor is her ability to pick defendants); *see also* Vorenberg, *supra* note 60, at 1524-25 ("The core of prosecutors' power is charging, plea bargaining, and, when it is under the prosecutor's control, initiating investigations.").

136. Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

137. Daniel Richman offers a global description of federal prosecutor-agent relationships, revealing a highly interdependent and complex working relationship. *See* Daniel Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COLUM. L. REV. 749, 778-79, 789-91, 817 (2003) (describing agent control over informant creation and deployment). Otherwise, little legal scholarship exists on how police impact prosecutorial decisions. According to Stuntz, "it is difficult, maybe impossible, to determine how much influence police have over prosecutors' case selection. . . . No good work has been done on police officers' effect on local prosecutors' case selection. The scholarship on the parallel phenomenon at the federal level is thin." Stuntz, *supra* note 6, at 539 & n.135. What little scholarship there is reflects the primacy of the police officer. *See* Lynch, *supra* note 6, at 2124 ("Most commonly, in all likelihood, the prosecutor simply accepts the results of the police investigation, and any process of independent adjudication occurs at the instigation of defense counsel."); Yaroshefsky, *supra* note 32, at 945 (anecdotal evidence that agents influence prosecutorial decisions of less experienced U.S. Attorneys); Davis, *supra* note 115, at 25-31 (prosecutors usually do not become involved in a case until after an arrest has been made). The few sociological studies of informants describe the primary role of the police officer in creating and maintaining informants. *See, e.g.*, SKOLNICK, *supra* note 11, at 112.

Even in more formal settings, the agent's narrow investigatory goals can dominate the informant management process. One of Yaroshefsky's defense counsel interviewees described a "typical scenario" at a confidential proffer session: the agent believes that "Jones" was at a particular illegal meeting. The cooperator does not mention Jones. The agent asks the cooperator:

> Was anyone else there? The cooperator says no. Are you telling me that Jones was not there? At that juncture, the cooperator knows what the agent wants to hear. Moreover, the agent might then say, look, I know that Jones was there. Let's take a break. The agent then walks off with your client. After the break, when the client is asked again, he knows that Jones was there.[138]

Prosecutors in turn rely heavily on police agents to handle informants, sort through and relay their information, and evaluate their usefulness.[139] Indeed, the law expressly deems investigatory decisions to be police work, depriving prosecutors of their traditional absolute immunity when they participate in investigative stages of a case.[140] In effect, the first order decisions about informant culpability are being made by the least accountable players, with the most expedient world view, farthest from the judicial process. Whatever justifications support broad prosecutorial discretion in determining the relative liability and utility of

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138. Yaroshefsky, *supra* note 32, at 959.

139. *Id.* at 945 (describing how less experienced AUSA's are particularly dependent on their agents).

140. Kalina v. Fletcher, 522 U.S. 118, 126 (1997) (quoting Buckley v. FitzSimons, 509 U.S. 259 (1993)) (distinguishing functions of police and prosecutors and concomitant degrees of immunity); Burns v. Reed, 500 U.S. 478, 494-95 (1991) (prosecutor loses absolute immunity when participating in "investigatory phase" of police work).

This treatment of prosecutorial involvement in investigations raises the question of whether a civil rights action might be available against informants as agent of the state. In practice, the Supreme Court's suggestion that informants might be treated as state agents for constitutional purposes, *see* Hoffa v. United States, 385 U.S. 293, 311 (1966) (referring to "secret government informer" as "government agent" and noting that as such the informant would be subject to "all relevant constitutional restrictions"), appears to have gone unheeded. More often, courts find that informant activities take place at arms length from government handlers and therefore do not qualify as state action. *See* Ghandi v. Police Dep't of Detroit, 823 F.2d 959 (6th Cir. 1987) (activities of paid informant are not per se government actions for purposes of civil rights statute). Informants are deemed to be acting under color of law when they are directed to perform specific actions such as recording a conversation. *See* 18 U.S.C. § 2511(2)(c) (2000) (wiretap statute authorizing interception of communications by person acting under color of law who is also party to the communication). A search of Westlaw reported cases and the scholarly literature reveals few cases in which informants were deemed state agents for liability purposes. Matje v. Leis, 571 F. Supp. 918, 927 (S.D. Ohio 1983) (undercover agents acting under state law); United States v. Cella, 568 F.2d 1266, 1282 (9th Cir. 1978); United States v. Bennett, 729 F.2d 923, 924-25 (2nd Cir. 1984); *see also* Zimmerman, *supra* note 3, at 166-71 (noting that courts rarely hold informants accountable and arguing that courts should apply a rebuttable presumption that informants act under color of law in order to bring them within the purview of 42 U.S.C. § 1983).

informants, those same justifications apply only weakly to the investigative decisions being made by police officers and agents.[141]

One response might be to require greater prosecutorial oversight of police "flipping" decisions. Such an approach has several potential benefits.[142] First, it would reduce the invisibility of the most ad hoc and secretive informant practices, if only by injecting another institutional decision-maker into the process. It also would shift decision-making about informant liability back to the public sector actor generally assumed to be making such decisions in the first place—a government attorney who has a broader obligation to justice than investigative expediency, whose job also includes making judgments about the propriety and legality of police conduct, and who is an officer of court.

The problem with this partial solution is that it is both impractical and fails to address the inability of prosecutors to cure what ails the informant institution. First, prosecutors, who already have more cases than they can prosecute, must rely on their agents to handle so-called investigative matters. Even when prosecutors make the initial decision to permit a defendant to cooperate, the more active the cooperation the more it is dominated by agents, not by the prosecutor.[143] The delegation of authority to the police thus is inherent in the definition of the informant as an investigative tool and the reality of an overcrowded docket.

Second, prosecutors are susceptible to the same workplace pressures that afflict police: the desire to avoid trial, manage their dockets, and clear cases.[144] It is far easier to flip a suspect than to go to trial or even to negotiate a conventional plea.[145] In informant deals the prosecutor is in the paramount position of authority. Even before a plea deal is negotiated the informant is at a severe disadvantage, having already admitted guilt and provided evidence against himself and others. Although this information may technically be inadmissible at trial, the

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141. *See* Stuntz, *supra* note 6, at 537 (contrasting prosecutorial concerns with convictions with police concerns with arrests).

142. *See* Wright & Miller, *supra* note 92, at 55-58 (arguing that reformers of the criminal system should focus more on better internal prosecutorial policies than trying to impose external regulations on prosecutors).

143. *See* Stephen S. Trott, *Word of Warning for Prosecutors Using Criminals as Witnesses* , 47 HAST. L.J. 1381, 1397 (1996) (cautioning prosecutors about the difficulties in controlling their agents).

144. Various scholars have noted that the pressure on prosecutors to keep conviction rates high and trial rates low leads to heavy reliance on plea bargaining. Stuntz, *supra* note 6, at 536; Wright & Miller, *supra* note 92, at 38-39; Fisher, *supra* note 109, at 1038.

145. *See* Bowman, *supra* note 17, at 59 (criticizing heavy prosecutorial use of 5K as indicating that cooperation has "degenerated into a convenient caseload reduction tool"); Cohen, *supra* note 17, at A1 (quoting Attorney General Ashcroft memo stating, "It is not appropriate to use substantial assistance motions as a case management tool" as evidence of the growing tendency among prosecutors to do so).

dynamic of having confessed and informed puts heavy pressure on suspects to continue being cooperative. Prosecutors thus are susceptible to the ease and lures of the informant institution as much as their police counterparts.[146]

Finally, as noted above, traditional concerns about the unfettered exercise of prosecutorial discretion apply equally, if not more strongly, in the context of informant creation. The secret, ad hoc nature of the informant mirrors the worst aspects of prosecutorial authority: even if prosecutors were to make all flipping decisions, the process would still be non-public, unregulated, unaccountable, and lacking in rules.

For all these reasons, although the role of the police in the informant institution is troubling, the solution cannot lie solely in shifting more authority to the already overextended prosecutor. Driven by law enforcement exigencies and case-specific concerns, individual police and prosecutors are ill-equipped to make holistic decisions about the overall public utility of informants. Such evaluations are better made through greater judicial, legislative, and public scrutiny. The proposed sunshine reforms discussed in Part V of this Article would enable such evaluations.

D. Transparency and Expressive Problems

The institution of informant use sits squarely at the intersection of a number of generalized concerns about the criminal justice system. On the one hand, scholars have zeroed in on the fact that the criminal system is increasingly administrative, informal, and secretive in practice despite long accepted ideals about its adversarial, formal, public, truth-seeking function. At the same time, scholars are paying increasing attention to the expressive role that criminal law plays as a "teacher": by conveying or reinforcing specific behavioral norms, or more generally by playing a role in society's ongoing dialogue about what behavior is right and wrong.

Although they represent distinct concerns and areas of scholarship, the transparency and expressive inquiries can converge with regard to the legitimacy of the criminal law. The expressive model presupposes transparency of the law and its workings. As an expressive matter, secrecy in the law and its application undermines the dialogue between the law as teacher and its citizen-students.[147] Similarly, the concern that

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146. *See generally* Trott, *supra* note 143 (surveying concerns about prosecutorial overdependence on informants).

147. The term "citizen" is used in its broadest sense to refer to participants in the socio-political process.

the criminal law has become an administrative bastion of secretive, informal decision-making by law enforcement officials threatens its democratic legitimacy, at least in part because it represents a retreat from the law's public, expressive character.[148]

Taken together, these two trends of analysis—one concerned about the criminal law's lack of transparency and one concerned with its expressive function—illustrate important facets of the informant institution and its damaging effects on the efficacy and legitimacy of the criminal system. In turn, the informant institution poses interesting conundrums for these two schools of thought. They are discussed in turn.

1. Administrative Transparency

There is growing recognition that the criminal system has changed: the public adversarial ideal has given way to a more informal administrative reality.[149] Cases are negotiated, not litigated. The prosecutor, not the judge, makes central decisions about liability and punishment. Most decisions, negotiations, and exchanges of information take place off the record, in offices and hallways and not in court. Some argue that the prosecutor has become a quasi-administrative law judge, resolving charge and liability questions based on a pre-trial record with the input of defense counsel.[150] Others point out the highly secretive, discretionary nature of police work and how it leads to police abuses and community distrust of police.[151] Reform proposals focus on making overt this transformation by officially acknowledging the demise of the adversarial model and increasing the transparency of the system.[152]

The informant is the quintessential creature of this opaque administrative reality. Born of informality and discretion, the informant survives at the whim of police and prosecutors, surfacing only if and when he is needed in a formal court proceeding or when he comes forward to be sentenced. The use of an informant inevitably involves the bending or breaking of rules, blurring formal lines between lawful and unlawful conduct. The heavy reliance on informants represents the logical conclusion of a process in which the adjudication of criminal liability has moved out of the public sphere into the hands of law

148. *See* Luna, *supra* note 6, at 1154-63 (surveying democratic concerns raised by lack of transparency).

149. *See* Lynch, *supra* note 6, at 2118-20.

150. *Id. at* 2118; Wright & Miller, *supra* note 92, at 38-39.

151. Luna, *supra* note 6, at 1157-60.

152. Lynch, *supra* note 6, at 2147; Luna, *supra* note 6, at 1166-71; Wright & Miller, *supra* note 92, at 48-56.

enforcement actors, and in which the public has lost the ability and the right to observe how the laws are enforced.

Although he does not specifically mention informants, Erik Luna's proposals for increased transparency in policing resound in this context. Luna argues that secretive police practices promote official abuses and reduce the public's trust in law enforcement.[153] These concerns apply with equal if not greater force to informants. Luna proposes greater public access to data on police practices, crime mapping, and other mechanisms to promote public knowledge and reduce police secrecy. Such proposals would shed light on informant practices as well, increasing the public accountability of the informant institution generally and making it available for public evaluation.[154]

Likewise, the informant institution could benefit from Ronald Wright and Marc Miller's proposal for a more formalized, publicly accessible prosecutorial screening process.[155] Wright and Miller argue that current plea bargaining practices in which prosecutors have complete discretion to reduce charges at any point in the process promotes dishonesty and distrust of official judgments about criminal liability. They recommend a more formal screening process in which prosecutors make stronger, more informed judgments about liability and charges early in cases, after which charge reductions would become strongly disfavored.[156]

Although Wright and Miller do not address informant use, their proposal would have significant implications in this realm. An official commitment to formally charging defendants early in the process would reduce the ease with which informants could obtain charge reductions and curtail the free-wheeling trade in liability for information. It also would shed public light on the process when cooperators do receive charge reductions, thereby injecting more public accountability into the process.[157]

Although the transparency debate represents just one facet of the informant institution problem, it addresses some of the central issues of secrecy and lack of accountability that plague informant use. Con-

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153. Luna, *supra* note 6, at 1155-58.

154. *See also* Davis, *supra* note 110, at 461-64 (recommending increased data on and public scrutiny of prosecutorial practices through the creation of Public Information Departments and Prosecution Review Boards); Davis, *supra* note 115, at 54-56 (proposing that racial impact studies be conducted documenting the race of defendants and victims in order to shed light on prosecutorial decisions).

155. Wright & Miller, *supra* note 92, at 48. Vorenberg also advocates for a more rigorous, formal screening process. Vorenberg, *supra* note 60, at 1565.

156. Wright & Miller, *supra* note 92, at 51-55.

157. On the other hand, formal screening might drive informant use even further underground so as to avoid premature decisions about liability and to maximize bargaining power. Wright and Miller generally acknowledge the possibility of law enforcement avoidance of screening but do not specifically address the problem of open-ended informant deals. At the very least, under a screening system prosecutors' offices would have to confront openly the problem of ongoing charge negotiations with informants.

versely, informant use represents one of the worst symptoms of the lack of systemic transparency. Insofar as transparency continues to gain recognition as an important and threatened value in the criminal system, informant use should be part of that dialogue.

2. The Expressive Value of the Informant

A burgeoning legal literature attempts to understand the relationship between social norms and the law. The literature is diverse in its focus and analytic tools. Some proponents use social norms as a way of expanding and refining the economic model of the citizen as rational actor, while others focus more broadly on the law's expressive function. Despite the controversy surrounding specific analyses and proposals, the impulse behind the inquiry rests on some relatively uncontested notions, namely, that people react to laws in the context of broader notions of right and wrong, and that the law both influences and is influenced by these informal social constructs.[158]

The brief discussion here does not attempt to summarize the norms debate or to follow any particular school of norms analysis. Rather, it aims to show that informants pose interesting and difficult problems for norms scholarship and that the expressive quality of the law makes informants particularly problematic as a law enforcement mechanism.[159] It also provides a theoretical background for some of the discussion in Part IV, which explores the concrete manifestations of these normative problems in high-crime communities of color.

The criminal informant embodies conflicting and contradictory values. Part of the conflict flows from the two-faced nature of the informant as simultaneous law enforcer and law breaker, and part from the widespread practice of letting incidental informant criminality slide. On the one hand, criminal informants help law enforcement.[160] Becoming an informant can constitute a kind of punishment or even repentance.[161]

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158. *See* Weisberg, *supra* note 19, at 472. Weisberg criticizes the law-and-norms school as overly general, conclusory, insufficiently original, and generally lacking scholarly rigor with respect to criminal law and policy analysis. Weisberg does not, however, appear to discount the general usefulness of normative descriptions, noting that "[v]arious phenomena that can be called 'social norms' surely influence crime and the criminal law, and criminal law scholarship surely benefits from attending to these phenomena in their various concrete forms – indeed, that is what much of criminology is all about." *Id.* at 473.

159. Like the transparency scholarship discussed in Part III.D.1, norms literature is practically silent on the issue of informant use. The informant scholarship likewise tends to address snitching's social implications in passing; only Michael Simons focuses exclusively on the societal, normative aspects of informant use. *See generally* Simons, *supra* note 4.

160. *See* Gleeson, *supra* note 75, at 1724.

161. *See* Simons, *supra* note 4, at 33-38. Another potentially positive message sent by informant deployment is that the government is working hard to prevent crime. *See, e.g.*, Jay Whearley & Mark Melady,

One potential normative message sent by the informant institution is that bad actors can repent and give back to society by informing on others. The robustness of this picture depends, of course, on the public perception that informants help law enforcement, reduce crime, and repent.[162] The problems with such empirical assumptions are discussed above.[163]

The informant-as-helpful-repentant, however, is not the only normative message sent. The criminal informant also teaches that culpability for legal transgressions can be mitigated by participating in illegal conduct at the behest of the police in order to catch other transgressors, who in turn may mitigate their own liability in the same fashion. At the same time, the fact of ongoing informant criminality sends an even more troubling signal: for those who cooperate with the police, other illegal acts such as taking or dealing drugs or carrying a weapon may be excused.[164]

Thus there are two negative expressive lessons to be drawn from the criminal informant. The first is that criminal culpability is relative and fungible. The market exchange of liability through the informant institution reduces the strength of absolute claims about the inherent wrong of a particular illegal act, because liability for that act can so easily be traded away.[165] Second, the informant institution elevates the official decision-maker over the law itself. With the help of a supportive handler, an informant can slip beneath the radar of the criminal justice system, evading legal liability for a host of offenses. Because informant rewards depend on the discretionary preferences and habits of the particular police officer or prosecutor in charge, snitching sends a message not about the value of law abiding behavior, but about the value of

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The Drug Toll: Examining a War Fought on the Streets of Worcester , TELEGRAM & GAZETTE (Worcester, Mass.), Mar. 2, 2003, at A1 (major police campaign to stop drug trafficking involved careful cultivation of informants). Insofar as informants are permitted to continue criminal activities, however, this positive message is undermined.

162. There may be further divergence between what informants actually accomplish and what the public perceives to be their accomplishments. Such reality-perception variances may themselves differ between communities. One purpose of the sunshine reforms proposed in Part V is to provide actual evidence of the value of informant use and make possible an educated public debate.

163. *See supra* Part II.B.

164. Simons acknowledges, for example, that the crime-fighting potential of the cooperator may be "outweighed by the counterdeterrent message of cooperation discounts: You can escape punishment for your crime so long as you have someone to rat on." Simons, *supra* note 4, at 25.

165. *See, e.g.*, Weinstein, *supra* note 3, at 624-25; Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law ?*, 10 N.Y.L. SCH.J. HUM. RTS. 835 (1993) (questioning whether pressure to inform created by the USSG promotes respect for the law among defendants).

opportunistically currying favor with powerful government actors. In other words, it suggests that we live in a government of men, not laws.[166]

Norms literature offers a range of ways to express these general conclusions. Richard Pildes and Elizabeth Anderson describe the expressive function of the law broadly as that aspect of the law that conveys normative, moral rules for how people should behave and why.[167] They define a norm as "a rule that tells us what to count (and reject) as reasons for adopting particular ends,"[168] and expressive norms as those norms that "regulate actions by regulating the acceptable justifications for doing them." The expressive analysis focuses on the principled reasons and justifications conveyed by the law, as opposed to the material results promoted or prohibited. State action harms people and society expressively, therefore, "when it expresses impermissible valuations" about individuals, communities, or their relationships to each other or to the state.[169]

In these terms, the informant institution is comprised of a set of assumptions, rules, and state actions that reflect potentially harmful expressive norms. The institution validates relativistic evaluations of criminal wrongdoing, in the sense that it puts a "price" on informant wrongdoing. It promotes secretive, opportunistic, rule-less relationships between the state and criminal actors. It devalues the pain experienced by victims of informant criminality. And finally, it disrespects the privacy of the people around informants. Anderson and Pildes point out that "public discourse over certain policy issues is often carried out in consequentialist language despite the fact that people's views appear actually rooted in expressive considerations."[170] It could be said that the public discourse regarding informants, revolving primarily around consequentialist issues of unreliability and the impact on defendants, has suffered from a lack of attention to the expressive harms inflicted by informant use.

In a slightly different vein, Tracey Meares and Dan Kahan apply norms analysis directly to issues of criminal policy that affect high-crime communities of color.[171] They argue that social norms play a central role in promoting or discouraging crime, and that the vehicles of social

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166. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

167. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

168. *Id*. at 1510-11.

169. *Id*. at 1531.

170. *Id*. at 1532.

171. *See, e.g.*, Meares & Kahan, *supra* note 8, at 805; *see also* Dan M. Kahan & Tracey L. Meares, *Foreward: The Coming Crisis of Criminal Procedure* , 86 GEO. L.J. 1153 (1998).

organization, social influence, and social meaning together create a framework for the conveyance and enforcement of normative rules about acceptable behavior. In particular, they argue that law enforcement policies that promote collective action and build trust between a community and law enforcement will have greater success in stemming crime than deterrent and punitive strategies.[172]

Assuming the validity of the Meares/Kahan norms strategy, the deployment and rewarding of criminal informants appears at best conflicted and at worst counter-productive. On the one hand, informant use might be associated with positive norms such as cooperating with police, repudiating old criminal companions, and abandoning criminal behavior. On the other hand, insofar as informants are perceived as "getting away with murder," continuing to commit crime, and exploiting personal relationships in order to obtain favors from law enforcement, the institution promotes norms of criminal duplicity, disloyalty, opportunism, and moral relativism.

This brief discussion of norms literature illustrates the potential ironies of the informant institution as a law enforcement strategy. If one goal of the law is to instill law-abiding norms, the informant institution may be counterproductive. Put more strongly, the informant institution conveys destructive and contradictory normative messages that may undermine the moral and expressive validity of the law itself.[173]

IV. COMMUNITY HARMS

Increasing attention is being paid to the collateral consequences of criminal justice policies—particularly high incarceration rates and long sentences—to high-crime, low-income, urban communities of color.[174] Although this literature has not addressed the informant phenomenon,

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172. Meares & Kahan, *supra* note 8, at 809-20. Meares and Kahan explicitly advocate one form of snitching, namely, rewarding youth who report their peers for gun possession, arguing that such programs undermine the social status associated with gun possession and promote law abiding behavior. *Id.* at 824. As noted above, however, *supra* note 1, the normative concern here is not with innocent snitches or those who inform for money, but specifically with criminal snitches whose own liability is reduced in exchange for information about others. Thus, while such gun rewards programs may indeed reinforce law abiding norms, when the snitch is a criminal the normative message sent by the snitch's own reduction in liability, compounded by the tolerance of his ongoing criminality, undermines or even contradicts such positive messages.

173. Further extrapolation of these insights to informants in high-crime disadvantaged communities is explored in Part IV.

174. *See generally* INVISIBLE PUNISHMENT, *supra* note 8 (surveying wide range of communal consequences of mass incarceration including disenfranchisement, loss of social and governmental resources, psychological damage, damage to families and economic opportunity); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997) (arguing that social dislocation and disadvantage undermine collective efficacy of communities which in turn disables those communities from internally regulating violence and crime).

the logical conclusion is that like mass incarceration, heavy informant use in such communities imposes collateral harms: tolerance of informant criminality, erosion of personal relationships and trust, and the normative message conveyed when the state secretly permits criminals to evade punishment by snitching on friends and family.[175]

This portion of the Article hypothesizes several types of consequences that can be expected to flow from law enforcement's heavy reliance on snitching in high-crime, socially disadvantaged communities.[176]

A. African American Community Vulnerability

Poor black urban communities suffer from a wide range of problems that make them likely loci of informant activity. First and foremost is the high rate of criminal exposure of African American men. Nationally, one in three black men between the ages of 20 and 29 are under some form of court supervision at any given time, while in poor urban neighborhoods the percentage can reach fifty percent or more.[177] The nature of criminal involvement is also heavily weighted toward drug

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175. Consequentialist concerns about rampant informant use and community harm are strongest with respect to drug enforcement in which informant use is both most informal and prevalent. Those same concerns may be weaker or even absent in areas such as white collar fraud where informants are deployed more sporadically, where defense counsel plays a greater role, and the "communities" in which informants operate are of a different nature. As Yaroshefsky explains:

> The entry of a cooperator into the criminal justice process differs by type of case. In "white collar" . . . it is not uncommon for the target of an investigation to secure the services of a lawyer, and begin the cooperation process to ward off an indictment. In the "street crime" . . . context, defendants are typically indicted by grand jury, obtain the services of a lawyer, and begin the cooperation dance with the government. . . . In some instances, cooperation begins by the agents' discussions with a defendant or target of prosecution prior to the time that the prosecutor meets the cooperator.

Yaroshefsky, *supra* note 32, at 929 n.52; *see also* OMRI YADLIN, THE CONSPIRATOR DILEMMA: INTRODUCING THE "TROJAN HORSE" ENFORCEMENT STRATEGY (U.C. Berkley School of Law John M. Olin Found. Program in Law, Econ. & Insts., Working Paper 2001-2, Spring 2001), *available at* http://www.bepress.com/blewp/default/vol2001/iss1/art2 (arguing that informants are a good way to internally regulate corporate fraud while acknowledging that they may exacerbate violence in other contexts). *But see generally* Hughes, *supra* note 3 (arguing that even formal white collar cooperation agreements present rule-of-law and fairness problems).

176. Although this Article primarily hypothesizes the impact of snitching on poor African American communities, this is not a race-based argument per se. Rather, it derives from the confluence of other social factors, such as high rates of criminal system involvement and social disadvantage which themselves have racial components. The arguments with respect to snitching apply equally to any high-crime community with high arrest rates and a comparable lack of social resources. Of note, some Hispanic communities may be suffering from similarly heavy drug enforcement attention. *See* BJS, *supra* note 4, at Table 5.26 (24.1% of federal drug defendants were white, 29.8% were black, and 44.3% were Hispanic).

177. *See supra* note 7; MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 4 (1995).

offenses,[178] the type of offense most often associated with informant use. In particular, the trend toward high mandatory sentences for common drug offenses makes informing one of the only ways a drug suspect can avoid certain long-term incarceration. In addition, even where the individual's offense is not ostensibly drug-related, as many as seventy-five percent of offenders have a history of substance abuse; they routinely intersect with the drug trade in some way and are therefore potentially valuable drug-crime informants.[179]

In this context, the routine law enforcement practice of pressuring drug offenders and users to cooperate has special significance for poor black communities. With half the male population under supervision at any given time, and with more than half of this group connected with the illegal drug trade, it is fair to estimate that more than one quarter of the black men in the community are under some pressure to snitch. Assuming that thirty percent of those succumb, approximately one in twelve men in the community are active informants at any given time.[180] By way of comparison, at the height of its power the East German secret police—one of history's most infamous deployers of informants—had 174,000 informants on its payroll, approximately one percent of the entire 16 million East German population.[181]

The communal impact of these informants flows not only from their sheer numbers but from the social disarray and lack of resources in low-income urban communities, and the connectivity between criminal offenders and the communities in which they live.[182] The combination of high rates of poverty, unemployment, single parent households,

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178. It is estimated that approximately 40% of African American convictions are drug related. *See Incarcerated America*, *supra* note 7; *see also* MAUER, RACE TO INCARCERATE, *supra* note 133, at 145 (documenting disproportionately increased drug arrest statistics); s *ee also* BJS, *supra* note 4, at Table 5.26.

179. *See supra* note 7.

180. The 30% figure is drawn from the DOJ statistic that 30% of federal drug defendants receive actual sentencing credit for cooperation. *See supra* note 54. We also know that twice that percentage of defendants cooperate, although half do so without recognition. On the other hand, in states where drug sentences are less draconian than the USSG, the percentage of cooperating drug offenders may be lower. In light of these competing trends, 30% seems like a reasonable and conservative hypothesis. *See, e.g.*, Bowman, *supra* note 17, at 47 (estimating in 1999 that 30 to 40% of federal defendants cooperated).

181. BARBARA MILLER, NARRATIVES OF GUILT AND COMPLIANCE IN UNIFIED GERMANY: STASI INFORMERS AND THEIR IMPACT ON SOCIETY 4 (1999); Roger Boyes, *Swift Solution to Stasi's Jigsaw Puzzle of Secrets*, LONDON TIMES, June 17, 2003, at A15.

182. As Randall Kennedy puts it, we cannot "neglect[ ] the webs of commonality that connect criminals to law abiding members of communities. Crime war 'hawks' sometimes forget, as Glenn Loury observes, 'that the young black men wreaking havoc in the ghetto are still "our youngsters" in the eyes of many of the decent poor and working class black people who are often their victims.'" RANDALL KENNEDY, RACE, CRIME AND THE LAW 19 (1997); *see also* INVISIBLE PUNISHMENT, *supra* note 8; Todd R. Clear, *Backfire: When Incarceration Increases Crime*, *in* THE UNINTENDED CONSEQUENCES OF INCARCERATION 1, 2-3 (1996) [hereinafter THE UNINTENDED CONSEQUENCES] (criticizing the dominant "atomistic" model of criminal behavior and its impact), *available at* http://www.vera.org/section3/section3_4.asp.

substance abuse, and involvement in the criminal justice system makes these communities uniquely insecure. Individuals not only lack material and educational resources but also are often related to someone who is incarcerated, a drug abuser, a parentless child, or otherwise needs special support. In addition, residents of high-crime, disadvantaged neighborhoods suffer psychological impacts such as high rates of depression and substance abuse.[183]

It is within this context of personal and social insecurity that the large numbers of informants operate. Related scholarship suggests that they probably do so with relative ease. Community networks in socially disadvantaged neighborhoods are more fluid and informal, often lacking ties with external economic institutions. As one researcher puts it:

> High unemployment means that people remain at home, living with their families, and on the streets much of their time. The gradual informalization of the labor market places more emphasis on friendship and kinship networks. Increased neediness means that these networks are more active than ever.[184]

The informal, personal nature of these community networks makes them particularly susceptible to law enforcement disruption. The open dynamics in low-income urban neighborhoods contribute to the ease with which informants and even police officers can penetrate otherwise private zones. As Michael Tonry explains:

> For a variety of reasons it is easier to make arrests in socially disorganized neighborhoods . . . . [Specifically] it is easier for undercover narcotics officers to penetrate networks of friends and acquaintances in poor urban minority neighborhoods than in more stable and closely knit working-class and middle-class neighborhoods.[185]

Heavy pressure on large numbers of people to inform is taking place in communities that already are characterized by high levels of personal insecurity, fluid social relationships, and lack of private space. From this scenario several things can be inferred: informants can obtain information easily about a wide range of people; most residents are connected to someone who is vulnerable to law enforcement pressure; and it is

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183. Carol Aneshensel & Clea Sucoff, *The Neighborhood Context of Adolescent Mental Health*, 37 J. HEALTH & SOC. BEH. 293 (1996) (documenting mental health effects associated with living in high-crime, economically depressed conditions).

184. Joan Moore, *Bearing the Burden: How Incarceration Weakens Inner-City Communities*, *in* THE UNINTENDED CONSEQUENCES, *supra* note 182 at 69, 78.

185. TONRY, *supra* note 177, at 105-06; *see also* MAUER, *supra* note 133, at 148 ("[I]t is far easier to make arrests in [inner city neighborhoods], since drug dealing is more likely to take place in open-air drug markets. In contrast, dealing in suburban neighborhoods almost invariably takes place behind closed doors.").

common knowledge in the community that people are snitching. Social insecurities are thus being exacerbated by an undocumented but growing informant culture.

B. Increased Crime and Violence

1. Informants Generate Criminal Activity

As described above,[186] a central harmful aspect of informant use is the official toleration of crime. Ongoing crimes committed by active informants directly harm the communities in which they live. The crimes may involve violence, drug dealing, substance abuse, and other destructive activities that exact an immediate toll on their surroundings. The informant "revolving door," in which low-level drug dealers and addicts are arrested and released with orders to provide more information, arguably perpetuates the street-crime culture and law enforcement tolerance of it.[187] At the very least, it violates the spirit of "zero tolerance" and "quality of life" community policing policies aimed at improving the communal experience in high-crime communities.[188] Drug trafficking, for example, correlates highly with violence and petty theft, crimes that render the streets more dangerous, depress property values, and may compel those who can afford it to leave.[189]

Scholars also have attempted to assess the psychological and social impacts of visible street crime on residents' sense of well-being[190] as well as the destructive "education" it provides to the neighborhood's youth.[191] For communities already suffering from high crime rates, criminally active informants exacerbate a culture in which crime is commonplace and tolerated.

As noted above, the classic utilitarian justification for informants is that they enable the prosecution of certain types of crime that otherwise would be impenetrable to law enforcement, and therefore, that they produce a net crime-fighting benefit.[192] Assuming for the sake of argu

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186. *See supra* notes 8-12, 33-39 and accompanying text.

187. *See* Orena v. United States, 956 F. Supp. 1071, 1102 (E.D.N.Y. 1997).

188. *See* Meares & Kahan, *supra* note 8, at 822-23 (describing virtues of order-maintenance community policing).

189. *See* Clear, *supra* note 182, at 13; Moore, *supra* note 184, at 79.

190. *See* Sampson et al., *supra* note 174, at 921-22.

191. John Hagan, *The Next Generation: Children of Prisoners*, *in* THE UNINTENDED CONSEQUENCES, *supra* note 182, at 21, 25-27; *see also* MAUER, *supra* note 133, at 185-86 (documenting negative impact of incarceration on children, families, and communities); Aneshensel & Sucoff, *supra* note 183 (documenting mental health effects associated with living in high-crime, economically depressed conditions).

192. *Compare* Simons, *supra* note 4, at 22-24 (summarizing and criticizing utilitarian argument) *with*

ment that this is true on average across the entire criminal justice system,[193] it cannot be assumed in the context of high-crime urban communities. There, informants may well produce more criminal activity on any given day than they prevent. Informants participate in and facilitate ongoing crimes, generate crime, contribute to the tolerance of crime, and are forgiven for their crimes, all in their home communities. While providing information about an investigation, they are simultaneously participating in, even generating, a wide range of activities destructive to their surrounding community. A given informant, even a useful one, may be a neighborhood problem in his own right, a "broken window" that is tolerated by the authorities while his activities degrade his community.

The expansive nature of the drug trade further suggests that despite their usefulness in particular prosecutions informants may exacerbate crime in their home communities. Arresting specific individuals often does not dent the drug trade because when one drug trade participant is removed another one springs up to take his place.[194] Researchers theorize a constant supply of young, jobless, undereducated males willing to power the drug trade.[195] If so, snitch information leading to the arrest of a particular individual may have less of an impact on overall criminality in the community than does the informant's ongoing criminal behavior, which is tolerated by law enforcement.

Police tolerance of informant criminality further reflects the devaluation of law and order within disadvantaged communities of color. Randall Kennedy argues that the central criminal justice problem for African American communities is not overenforcement, i.e., the singling out of blacks for prosecution and punishment, but rather underenforcement, namely, the failure to prevent crime in black communities, the tolerance of more crime than is tolerated in white communities, and the imposition of lesser punishments when the victims are black.[196] Pointing out that African Americans experience higher victimization rates than

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Bowman, *supra* note 17, at 45 (vigorously defending utility of cooperators for law enforcement).

193. *But see supra* notes 74-81 and accompanying text (discussing problems with the utilitarian assumption). *See also* Weinstein, *supra* note 3, at 565, 614 (questioning law enforcement value of using informants); Bowman, *supra* note 17, at 43 (acknowledging lack of empirical proof of value of informants); SKOLNICK, *supra* note 11, at 526 (acknowledging lack of empirical proof). The problem of informant criminality is likely stronger for informal practices associated with drug enforcement than for more formal white collar investigations in which targets often have counsel, but the lack of data on informant criminality in either realm makes them hard to compare.

194. Richard Winton, *41 Arrested in Police Sweep through Nickerson Gardens*, L.A. TIMES, Jan. 22, 2004, at B1 (quoting public housing resident as saying that arresting one drug dealer simply makes room for another).

195. *See* Meares & Kahan, *supra* note 8, at 817 & n.13 (documenting economic role of drug trade in inner city and noting that drug arrest policy "doesn't do much to stifle the drug trade").

196. KENNEDY, *supra* note 182, at 69-75.

whites and that black neighborhoods are more crime-ridden, Kennedy asserts that the nation's history of racial segregation and discrimination plays out most disastrously in the form of official tolerance of black-on-black crime.[197]

The heavy use of informants in black communities arguably constitutes a species of Kennedy's underenforcement phenomenon. Police tolerate, even foster, informant criminality in exchange for information. Some of this criminality constitutes a direct threat to the safety and well being of the residents who live in the communities in which informants operate. Not only does this dynamic potentially increase crime, but it degrades those communities' experience of the criminal justice system. If the immediate costs of snitch use outweigh its benefits, or even if community members perceive the official use of snitches as devaluing the security of the community, the informant institution may be eroding law enforcement effectiveness and legitimacy. This potential state of affairs is another reason why more and better information on the informant institution is needed both to assess the efficacy of the public policy in high crime communities and to evaluate public perceptions of the policy.

2. Increased Gang Violence as a Response to Increased Snitching

Informant use also may cause increased violence within drug gangs and other illegal networks as a mechanism for ensuring loyalty. The use of violence against snitches is neither new nor surprising. Criminal gangs and organizations routinely use violence to prevent snitching and punish informants.[198] More generally, widespread violence against informants has infected communities as diverse as the Palestinian territories and Northern Ireland.[199]

Even proponents of snitching admit the possibility that it increases violence. Omri Yadlin, for example, has proposed a "Trojan Horse"

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197. *Id.* at 11, 19.

198. *See, e.g.*, Henry E. Cauvin, *Witness Says Slain Girl Was Warned*, WASH. POST, Feb. 11, 2004, at B01 (14-year-old who threatened to tell authorities about murder she witnessed unless she was paid was told day before she was killed: "For real, little sis, you better not be snitching."); Paul Gustafson, *Three Gang Members Found Guilty of Killing 4-year-old*, MINNEAPOLIS STAR TRIB., June 13, 2002, at A1 (noting that "[d]espite offering a large reward, authorities said they were unable to crack the case because of the Rolling 60s' [gang] reputation for violence against informants and its own code of silence"); Simons, *supra* note 4, at 29 & n.134 (noting pervasive violence against informants).

199. Lee Hockstader, *Palestinians Battle the Enemy Within: Menace of Israeli Collaborators Spawns Executions, Vigilantism, Revenge Killings*, WASH. POST, Feb. 2, 2001, at A1; Editorial, *Haunted By an Informer*, BOSTON GLOBE, May 20, 2003 ("For generations, informers' whispers have sowed distrust, fear, and violence in Northern Ireland.").

enforcement mechanism in which criminal participants would be encouraged to exit the criminal scheme early, inform on their colleagues, and as a result receive a portion of the fines and penalties assessed against their colleagues.[200] Yadlin candidly admits, however, that an expected response to the Trojan Horse model is violence, and that the creation of snitches "might actually increase the level of violence among criminals."[201] This analysis and the fact that drug-related violence is increasing raises the possibility that heavy informant use could be exacerbating violence in high crime areas. If so, this would be an extremely costly aspect of the informant institution.

C. Harm to Interpersonal, Family, and Community Trust

Another type of harm inflicted by heavy informant deployment is the damage done to the fabric of interpersonal trust and psychological security in already beleaguered communities. While we lack empirical studies of individual responses to criminal snitching in the United States, recent scholarship has examined the impact of widespread informant use in other contexts, in particular Cold War Eastern Europe. The comparison is admittedly inexact: pre-1990 East Berlin differs in large and obvious ways from today's inner city Baltimore. Nevertheless, the example illustrates the ways in which the presence of large numbers of informants in a community can exact a heavy psychological price from residents.[202]

1. The East German Informant Experience

The pre-unification East German government was well known for conducting pervasive surveillance of its own citizens through the state secret police or "Stasi." The Stasi recruited informants—as many as 174,000 at its peak—throughout East German society to spy on each other, gather information, infiltrate dissident organizations, and turn on their own friends and family.[203] In the early 1990s, after reunification

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200. YADLIN, *supra* note 175; *see also* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1390-92 (2003) (arguing that publicizing the extent to which co-conspirators flip will deter entry into conspiracies).

201. *Id.* at 16.

202. Anecdotal evidence suggests that a similar culture of suspicion may be a by-product of the Israeli reliance on informants in the occupied Palestinian territories. *See* Catherine Taylor, *How Israel Builds its Fifth Column: Palestinian Collaborators Face Mob Justice and Fuel a Culture of Suspicion* , CHRISTIAN SCI. MONITOR, May 22, 2002, at P1. This reporter described a "culture of suspicion such that anyone who runs a successful business or has access to hard to get permits is often suspected." *Id.*

203. MILLER, *supra* note 181, at 4; James O. Jackson, *Fear and Betrayal in the Stasi State*, TIME, Feb. 3, 1992, at 32.

with West Germany, Stasi files were made available and the full extent of the surveillance of millions of citizens became known. Husbands had informed on wives, neighbors on neighbors, writers and intellectuals on each other, and many well-known anti-communist dissidents had co-operated in one way or another with the Stasi.

Recent studies examine how the East German informant culture destroyed the social fabric in vital areas of politics, culture, and community. It did so in part by undermining interpersonal relationships and in part by literally damaging the individual psychologies of citizens who had to cope with constant, pervasive, officially sponsored duplicity.[204] Barbara Miller's in-depth study of former informants reveals the deep psychological and political scars left by the informant culture on intellectuals and activists. What Miller calls the "indirect harm" of informants consisted of the widespread undermining of personal and social relations, a kind of personal and social "malaise, described by some as a form of schizophrenia, which developed in response to the permanent suspicion that one might be under surveillance."[205]

In interviews, East German citizens described the change in their own personalities: "These informers determined my life, changed my life over those ten years. In one way or another—because they poisoned us with mistrust. They caused damage simply because I suspected that there could be informers in my vicinity."[206]

After finding out the extent to which her friends and family had given the Stasi information, one activist confessed, "I'm also shocked about the fact that there was so much mistrust within me and that also one of the informers' tasks, to plant mistrust, and I didn't trust a lot of people."[207] One intellectual summed it up this way:

> In the defeated system we lived in deformed interpersonal relationships and conditions. We did not act freely in casual encounters with others—like with the neighbours. We automatically blocked our reactions, we turned away as soon as a look seemed too curious to us, a question too probing, an interest in us not sufficiently justified. We lived in many respects like oysters.[208]

The uncoordinated, widespread use of informants in the United States by thousands of different police departments and various federal agencies does not, of course, amount to the focused, purposeful political mission of the Stasi. But if anywhere near eight percent of the male

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204. Jackson, *supra* note 203, at 32-38.
205. MILLER, *supra* note 181, at 133.
206. *Id.* at 101 (quoting Katrin Eigenfeld of the Neues Forum).
207. *Id.* at 127 (quoting Irena Kukutz of Women for Peace).
208. *Id.* (quoting Gunter Kunert).

population in inner city communities is snitching,[209] that figure meets or surpasses Stasi levels of between one and ten percent of the total population as informers. Other parallels are illuminating as well. In the Stasi's "War on Dissent," dissenters were the most valuable informants, and the Stasi recruited heavily within the very world it was trying to destroy, employing the very people it was trying to eliminate. As a result, East German dissident-informants often paradoxically "helped the [anti-government] movement, partly simply by swelling its ranks, but also by actively working on opposition activities."[210] Many informants had what Miller calls a "reciprocal relationship"—helping the Stasi while helping the movement at the same time.[211]

In the same vein, the "War on Drugs" likewise recruits and relies on the very criminals it is designed to catch. Drug informants often continue their drug operations while providing the government with partial information, even manipulating their cooperation to eliminate competition and otherwise serve their own ends. Finally, like the U.S. police, the Stasi experienced great difficulty assessing the reliability of their informants, causing them to accept vast amounts of inaccurate or fabricated information.[212]

U.S. criminal informants obviously differ from Stasi collaborators in their motivations, their rewards, and the context in which they operate. At the same time, their friends, families, and neighbors are not immune from the social and personal "malaise," "schizophrenia," "mistrust," and "deform[ity]" suffered by East German citizens overexposed to informants. The erosion of the social fabric that accompanied the East German experience thus raises the possibility that overuse of informants in high-crime communities could be fueling comparable damage.

2. Women Snitches

Although criminal system participants (and therefore informants) are predominantly male, the dramatic rise in the numbers of women in the criminal justice system bears attention because of the special potential for the disruption of family and personal relationships.[213] The "girlfriend" snitch is a well-known character in fiction and the media: it mirrors the actual practice of targeting women in order to reach male

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209. *See supra* note 180 and accompanying text.

210. MILLER, *supra* note 181, at 101.

211. *Id*. at 102.

212. *Id*. at 15.

213. Women constitute a growing proportion of offenders, doubling from about 4% of the prison population to nearly 7% by 1999. Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, *in* INVISIBLE PUNISHMENT, *supra* note 8, at 79, 80-81.

suspects with whom they have a relationship.[214] Moreover, the increase in female arrest and incarceration rates is heavily tilted toward drug crimes: One-third of female inmates are serving time for drug offenses.[215] Given the prevalence of informant practices in the drug context, it is fair to surmise that, like their male brethren, women in the criminal system experience significant pressure to provide the government with information.

The pivotal role of women in poor urban communities of color could make the policy of widespread "flipping" particularly caustic for the community at large. In communities where employable, non-incarcerated men are in short supply, women are the central societal and economic glue. Women earn the bulk of the community's income; they head up families in which several generations of children and seniors may rely on them. They also often provide for the men who are on average less educated and who routinely have trouble obtaining employment and public benefits.[216] As more women are exposed to criminal liability and more of them are pressured to exploit the networks of people who rely on them for information, it seems inevitable that the already delicate fabric of informal reliance will be further strained.

The point is not that female suspects should be insulated from liability or given special treatment, but rather that widespread use of female informants, particularly to pursue their male partners, creates a remarkably destructive dynamic. Given the staggering vulnerability of black males and the high incidence of female-headed households, exploiting those intimate relationships for law enforcement purposes through snitching can only exacerbate the difficulty in maintaining long-term, stable familial relationships.[217]

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214. Chesney-Lind discusses the Kemba Smith case in which a drug kingpin's girlfriend received a 24-year sentence although she never actually handled any drugs, primarily because she refused to cooperate. *Id.* at 90. Chesney-Lind actually complains that women are disadvantaged in the informant institution because

> one of the few ways that mandatory sentences can be altered is if the defendant can provide authorities with information that might be useful in the prosecution of other drug offenders. Because women tend to be working at the lowest levels of the drug hierarchy, they are often unable to negotiate plea reductions successfully. Added to this is the ironic fact that it is not uncommon for women arrested for drug [offenses] to be reluctant to testify against their boyfriends or husbands.

Id. at 89.

215. *Id.* at 88.

216. Beth Richie, *The Social Impact of Mass Incarceration on Women*, *in* INVISIBLE PUNISHMENT, *supra* note 8, at 136, 145-48. In a subsection entitled "Women as Family Members and Community Caregivers," Richie documents the central role of women as economic and social caregivers in high-crime communities. She argues that mass incarceration has a particularly destabilizing effect on the community by undermining women's ability to perform these roles.

217. *Id.* at 148.

D. Harm to Communal Faith in Law Enforcement and the Law

The discussion of norms literature in Part III.D above describes various scholarly treatments of the interaction between public perception of the law and the law's efficacy. Nowhere is this expressive, normative inquiry more troubling than in low-income African American communities that are simultaneously overexposed to the justice system and have a historic distrust of law enforcement.[218]

For high-crime communities, informant use sends problematic messages about the exercise of state power. First, it involves the official tolerance of crime, which can be seen as an abdication of the state's guardianship role in the very communities most in need of protection.[219] Second, it sends the message that criminal liability is negotiable and rife with loopholes for those willing to betray others. In communities suffering from the collateral consequences of mass incarceration, the state-sponsored suggestion that this devastation is based on morally flexible standards adds insult to injury. Third, it institutionalizes secretive official decision-making and an arbitrary rewards system in which similarly situated individuals are treated differently depending on their personal relationships with and usefulness to law enforcement actors. For a population well acquainted with the dangers of unconstrained police authority and discretion, this might well be a fearsome state of affairs.[220]

While the predictive value of norms analysis is controversial,[221] it is fair to say that any of these hypothetical developments would be deeply undesirable. Any public policy that contributes to further alienation in communities already in tension with the justice system needs to be reconsidered.

E. Harm to Dignitary Interests: The Negative Construction of the Black Community

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218. *See* KENNEDY, *supra* note 182, at 24-27 (describing history of distrust). Thirty percent of black respondents rated their confidence in the police as "very little" or "none." This is a stark contrast to white respondents, 63% of whom expressed a "great of deal" of confidence and another 30% reported "some" confidence. BJS, *supra* note 4, at Table 2.16. Similarly, 56% of blacks reported that they felt police in their community treated different groups unfairly. *Id*. at Table 2.29.

219. *See* KENNEDY, *supra* note 182, at 110-35 (surveying modern history of underenforcement).

220. *See* James Forman, Jr., *Children, Cops and Citizenship: Why Conservatives Should Oppose Racial Profiling* , *in* INVISIBLE PUNISHMENT, *supra* note 8, at 150, 151-55 (arguing that racial profiling and other racially-biased police conduct damages the norms and values of inner city youth).

221. *See* Weisberg, *supra* note 19, at 472.

Public policies that regulate a community reflect official attitudes towards the people who live there. In turn, those policies contribute to the public understanding of that community.[222] In that sense, the public policy of unlimited and widespread informant deployment represents part of the social construction of the black community. Whether it is a conscious construction intended by policymakers, or, as is most likely, the unintended collateral consequences of a series of other policy decisions, the effect of the construction is the same: the community becomes defined by the policies that are visited upon it.

In this case, the vast informant deployment taking place in poor urban communities contributes to a negative identity for those communities. The policy presupposes a community filled with criminals that needs to be infiltrated in order to be saved. It is a community with reduced privacy interests in which it is permissible for the state to use informants to penetrate the most private zones in pursuit of prosecutorial goals.[223] It is, in essence, a community with lessened dignitary interests in the eyes of the state that due to its high crime rates, is treated as having relinquished some of the basic rights to privacy and to be let alone. In this sense, the widespread use of informants can be seen as an informal control mechanism created by the police to attempt to regulate behavior in high-crime communities.[224]

In this context it is useful to recall the outcry against informant bounties that followed the Linda Tripp episode in which Independent Counsel Kenneth Starr used Tripp—an informant—to extract information about President Clinton from her close friend Monica Lewinsky. Distaste for the exploitation of those private relationships led to a public assault on Starr's use of Tripp, as well as an attack on the IRS informant bounty program.[225] Senator Harry Reid decried the program as "[r]ewards for [r]ats."[226] It is precisely this distaste that has been sus-

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222. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 964-70 (2002) (describing the negative construction of black identity through Fourth Amendment jurisprudence); Meares & Kahan, *supra* note 8, at 818 (noting that the disproportionate burdens imposed by drug law enforcement tactics on inner city black residents "construct the social meaning of drug-law policy").

223. *See* Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1 AM. B. FOUND. RES. J. 1193, 1195 (1976) (arguing the use of informants "could all too easily jeopardize the very foundation of personal privacy and security upon which a free society must ultimately rest").

224. *See* Jonathan Simon, *Crime, Community, and Criminal Justice*, 90 CAL. L. REV. 1415, 1416-17 (2002) (arguing that the war on drugs and mass incarceration in poor communities of color constitute a policy of "governing through crime").

225. Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141, 1142, 1160 (1999) (documenting opposition to use of Tripp and IRS bounty programs, while defending use of such programs).

226. *Id.* at 1142, 1160.

pended when it comes to the infiltration of poor, high-crime communities.

More hypothetically, one can inquire whether the polity would tolerate similar scales of informant infiltration into other communities. Imagine, for example, if the IRS was to institute a policy of informant recruitment such that tax evaders could relieve their own tax liability by snitching on their neighbors.[227] The neighborhood holiday party would be transformed into an opportunity for snitches to report to the IRS on neighbors' acquisitions of art, automobiles, and other high-income indicators. Tax time would become an occasion of civil strife. Many would consider such a policy to be an inappropriate governmental intrusion,[228] and yet it is effectively the policy in place in high-crime communities where so many people are vulnerable to law enforcement.

For all these reasons, informant use should be understood in the context of other destructive conditions that hobble inner city communities, such as poverty, unemployment, crime and incarceration rates, single-parent households, and the like. The informant institution has taken on a systemic character and should therefore be reconceived, not merely as an ethically questionable law enforcement tactic, but as a social problem in its own right.

V. PROPOSALS FOR REFORM

The war on drugs and concomitant legislative enactments of the 1980s raised the profile of informants in the criminal justice system without increasing protections against their overuse. Two decades later, a systemic reconsideration is due. The above discussion points to three areas in which reforms are needed: openness, accountability, and community protection.

These reforms share a common thread: they are largely "sunshine," or public accountability, measures rather than substantive limits on informant use. Insofar as the reforms below suggest substantive limits, they constrain informant rewards rather than informant activities. The reasons for this focus are both pragmatic and analytic. First, it would be very difficult to impose meaningful substantive constraints on the day-to-day operations of law enforcement's investigative and prosecutorial discretion.[229] Indeed, without more information about the institution of

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227. It could be argued that the IRS cash bounty program already does precisely that by rewarding informants in cash. The program does not, however, expressly relieve the legal liability of informants.

228. *See id.* at 1142, 1160 (documenting Senator Harry Reid's attack on the moral propriety of the IRS bounty program which provides cash rewards, calling it "rewards for rats").

229. *See* Stuntz, *supra* note 6, at 580 (rejecting reforms that eliminate or reduce prosecutorial discretion

informant use, it is hard to say at this stage what such rules should look like.[230]

Second and more fundamentally, the harms of the informant institution flow largely, albeit not exclusively, from its tendency to operate in secret and to make official decisions without accountability. As Vorenberg wrote:

> [o]ne consequence of giving an official broad discretionary power is to relieve pressure on the public and the legislature to make important and painful decisions. . . . The results [of unfettered prosecutorial discretion] are disheartening for one who believes that the legislature and the public should have sufficient information to improve the way government works. Prosecutorial discretion precludes access to such information.[231]

Discretion and secrecy are thus inextricably linked, and while direct cabining of law enforcement discretion with respect to informants may be unrealistic, increasing information about informant use is not.

Access to information about the informant institution would temper law enforcement discretion and permit public consideration of a variety of "important and painful decisions" about what substantive limits, if any, should be placed on informant use. With the exception of a few case-specific measures, the reforms proposed here thus aim not to constrain but to reveal the contours of the informant institution—levels of informant-dependence, the frequency with which informants are created and used, and the usefulness of informants in generating arrests and convictions. This design acknowledges the current realities of broad police and prosecutorial discretion, and it respects core values of confidentiality that protect specific informants while increasing public understanding of and access to the informant institution more generally. It also tracks the types of reforms proposed by scholars concerned more generally with the secrecy and discretion surrounding prosecutorial discretion and plea bargaining.[232]

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because "discretion is not so easily abolished, or even cabined"); Wright & Miller, *supra* note 92, at 52-55 (outlining difficulty in imposing guidelines or other external restrictions on prosecutorial discretion).

230. While no scholar has, to my knowledge, advocated an absolute ban on using informants, some have proposed significant limits or changes to the practice, or both. *See* Weinstein, *supra* note 3, at 630-31 (proposing a 15% quota on prosecutorial use of cooperation credit to restrict use of informants); Harris, *supra* note 3, at 60-66 (proposing drastic increases in defense counsel's access to informant witnesses, including the recording of all government preparations with the witness, as well as judicial review of informant compensation, and government compensation of informants who testify favorably to the defense).

231. Vorenberg, *supra* note 60, at 1559.

232. *See supra* notes 115-19, 153-57 and accompanying text (describing sunshine reform proposals of Luna, Davis, Wright & Miller, and Lynch).

By reducing the veil of secrecy surrounding informant practices, several effects can be expected. First, informant use will lose some of its appeal to police and prosecutors because of the attendant burdens and exposure that it will incur. While specific names of informants would not be revealed, the fact of their use and the numbers of cases influenced by informants would become public knowledge. What are now discretionary, unrestricted transactions would have to account for the possibility of public disapproval of the extent of the practice. Reporting requirements and openness thus might reduce the ease with which liability is currently traded as well as the centrality of snitch deals in resolving cases.[233]

Second, increased information would enable the other branches of government to evaluate informant practices and regulate them as appropriate. Data on the extent of snitching might, for example, influence courts to take a harder look at informant testimony and informant-based warrants, while prompting legislatures to demand more accountability from prosecutors, or even rethink the extent to which liability for certain crimes should be exchangeable. Finally, the true public costs of informant use will come into view more clearly, permitting a debate over the impact of snitching, particularly for those communities most impacted by the practice. The following proposals offer initial reforms.

A. Increase Openness in Individual Cases

Various commentators have called for increased disclosure of informant information in the context of litigation. Those proposals generally aim at increased fairness for individual defendants. They are appropriate here for a different reason: it is in individual litigation that informant excesses are most likely to be revealed by zealous defense counsel. That mechanism should be strengthened to serve both as an accountability check on the use of informants and a way of making public the extent and manner of informant use. To that end, specific reforms should include increased discovery, reliability hearings, and depositions.

1. Discovery

Defense counsel should have more and earlier access to information about informants, including their complete criminal records, any co-

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233. Increased information would also have the benefit of reducing the opportunities for corruption and malfeasance. *See* BLOOM, *supra* note 85, at 159 ("Each scenario [of perjury and corruption] in this book shows in some way how public scrutiny can lead to reform.").

operation provided in or promised in any other cases, copies of any statements made regarding the case, and a description of all promises—implicit and explicit—made by the government.[234] While such discovery is already provided to a limited extent,[235] the government's ability to limit and postpone production of information should be curtailed. This might require, for example, legislatively superceding the Supreme Court's decision in *United States v. Ruiz* that impeachment material need not be produced to defendants who plead guilty.[236]

2. Reliability hearings

In *Daubert v. Merrell Dow*, the Supreme Court held that expert testimony is at once so potentially powerful and so potentially unreliable that courts must act as "gatekeepers" of its admissibility.[237] As George Harris has described, informant witnesses share many of the attributes of expert witnesses: they are one-sided, potentially unreliable, compensated witnesses with personal motivations who may have great sway over a jury.[238] For these reasons, courts should evaluate the reliability of informant witnesses in the same way that they evaluate experts. "Reliability hearings," comparable to *Daubert* hearings, should be used to help courts evaluate the likelihood that an informant is fabricating evidence or is otherwise so unreliable that his testimony should be excluded.[239]

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234. *See* Harris, *supra* note 3, at 61-64 (spelling out discovery proposals). The Oklahoma Court of Appeals has institutionalized these requirements for all jail house snitches as follows:

> At least ten days before trial, the state is required to disclose in discovery: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make *in the future* to the informant (emphasis added); (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.

Dodd v. State, 993 P.2d 778 (Okla. Crim. App. 2000).

235. *See supra* note 78 (listing discovery rules).

236. *See* United States v. Ruiz, 536 U.S. 622 (2002). Since 90-95% of defendants plead guilty, this ruling effectively shields from discovery vast amounts of data related to informant credibility.

237. Daubert v. Merrell Dow, Inc. 509 U.S. 579, 593-94 (1993) (requiring courts to evaluate reliability of expert scientific evidence before permitting its admission into evidence or letting the jury hear it).

238. Harris, *supra* note 3, at 55-57.

239. *See* Harris, *supra* note 3, at 63-64 (advocating reliability hearing). At least one court has imposed such a requirement. *See* Dodd, 993 P.2d at 785 (Strubhar, J., specially concurring).

3. Depositions

Informant testimony is particularly hard to challenge on cross-examination,[240] yet courts rely explicitly, sometimes exclusively, on cross-examination as the primary protection against fabrication and irregularity. Defendants should therefore have the opportunity to depose informants before trial. The more informal nature of depositions and the absence of the jury will permit defendants to expose inconsistencies and fabrications prior to trial in a way that in-court cross-examination does not allow. If depositions are not made available, courts should order them subsequent to or in lieu of reliability hearings where necessary.

B. Increase Democratic Accountability

Informants should no longer be treated as an exclusively law enforcement concern. Legislatures should expressly evaluate the practice and its impact on the judiciary and the community to determine appropriate regulations of the practice.[241] In order to do this, legislatures need information. The following reforms are aimed first at increasing the information available to the legislative branch, and second, at suggesting ways in which legislatures might usefully impose limits on current executive informant practices.

1. Create Public Data

In order to permit legislatures and the public to evaluate the true costs and benefits of informant policies, the extent of informant use must be made public.[242] Like tax information, law enforcement agencies could be required to provide annual compilations of redacted informant profiles, or perhaps aggregate statistics, so that public policies can be made on an informed basis.[243] The types of information to be culled are: the

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240. *See* Harris, *supra* note 3, at 52-53.

241. *See* Vorenberg, *supra* note 60, at 1562-67 (arguing generally that prosecutors should be made more accountable for their decisions and that legislatures should take a stronger oversight role). *But see* Stuntz, *supra* note 6, at 534-37 (noting natural confluence of legislators and prosecutors goals leads to legislative expansion of prosecutorial authority).

242. Hughes proposes that prosecutors be required to file details of formal immunity and plea agreements in order to track the extent of cooperation. Hughes, *supra* note 3, at 20-21. Hughes's focus on formal agreements, rather than the informal scope of the informant practice, makes this proposal a useful starting point. Luna and Davis likewise argue for more public data on law enforcement practices as a way of increasing accountability, transparency, and strengthening the democratic process. Luna, *supra* note 6, at 1166-70; Davis, *supra* note 110, at 461-64; Davis, *supra* note 115, at 54-56.

243. *See* 26 U.S.C.A. § 6103 (West 2002 & Supp. 2004) (permitting release of tax information that

actual number of informants created and maintained by police and prosecutors; the extent to which informants are not being formally charged (and therefore do not show up in public arrest records); the uses to which informants are being put; the number of arrests and convictions that arise, in part or in whole, from informant information; the race, gender, age, and location of informants; and the offenses that are being traded for information.[244]

Although the production of such information would clearly impose an administrative burden on police and prosecutors, it would not jeopardize a single investigation, nor would it prevent the flipping of a single suspect. What it would do is provide a clear picture of the informant institution, its role in the criminal process, the concentration of informants in certain communities, and the types of liability decisions being made.

2. Restrict Informant Rewards

Legislatures should consider restricting informant compensation and lenience. These should take the form, not of mandatory informant guidelines,[245] but rather restrictions on the types of criminal offenses that can be mitigated through cooperation.[246] For example, legislatures could decide that liability for murder, rape, and other particularly heinous crimes could never under any circumstances be reduced as a result of a defendant's cooperation. That would insert a braking mechanism into law enforcement's consideration of using a particular informant if there was a possibility that he might be subject to such charges. It also would send an important expressive message to the

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cannot be associated with a particular taxpayer).

244. Sometimes it will not be obvious what charges could eventually be brought against a suspect in the absence of his cooperation. Police charging statements, however, routinely contain numerous potential or suggested charges based on as little as the initial arrest. Prosecutors then decide whether to go forward on these or other charges. While thus not perfect, such initial police estimations would at least provide an indication of what kind of charges are being traded for information.

245. Weinstein argues persuasively that guidelines are too rigid an approach to the realities of prosecutorial discretion in the cooperation area and would be ineffective. Weinstein, *supra* note 3, at 626-27. *But see* Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 245 (advocating national prosecutorial guidelines governing the award of cooperation credit).

246. Weinstein proposes imposing quotas on informant use to limit the ability of prosecutors to award cooperation credit. *See* Weinstein, *supra* note 3, at 630 (proposing quotas on USSG § 5K1.1 motions to reduce informant use). The difficulty with quotas is that they would generate competition among informants to provide better information and among defense counsel to obtain valuable concessions, a dynamic that could produce more unreliability and place more pressure on defendants rather than on prosecutors or law enforcement. The problem lies less with the rewards that informants receive on the record than with the ones that take place more informally. In order to reduce the centrality of informants, cooperation should be made less, not more, valuable.

public, namely, that certain crimes will not be tolerated even where the defendant is otherwise useful to the government.

Legislatures should also restore judicial oversight of sentencing for informants. The government motion requirement in USSG § 5K1.1 should be eliminated[247] and judicial discretion restored in order to break the prosecutorial monopoly over cooperation-based rewards. Additional bases for departures below statutory minimums should also be created to reduce the pressure on defendants to inform.

Even with such reforms, the problem remains of the informant who, by virtue of his cooperation, completely evades criminal charges and thereby any external evaluation of the propriety of his use. Because there is no possibility of judicial review for these potential defendants, police and prosecutors should implement institutional mechanisms for heightened review when a particular informant receives rewards greater than a certain criminal liability limit. For example, a board composed of police supervisors and prosecutors could periodically review informant files in which informant-suspects (1) have been active without being charged for more than one year, and (2) the potential charges for that suspect would give rise to a sentence in excess of ten years.[248]

C. Community Protection and Public Debate

If the purpose of criminal laws is to protect individuals and communities, the mere fact that informants are useful law enforcement tools does not alone justify their use. No longer should the benefits of the informant institution be evaluated solely by the law enforcement community; rather, legislatures should explicitly attempt to evaluate and balance law enforcement benefits with the community costs of informants. The additional public information about law enforcement practices proposed above will permit the debate to begin. In addition, confidential research should be performed specifically on the impact of informants on high-crime communities.[249] Based on such information, policy-makers can begin to evaluate whether high informant use produces sufficient benefits or whether it should be constrained in other

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247. *See* Lee, *supra* note 245, at 240 ("By far the most common—and in my opinion the best—proposal for reform is elimination of the government motion requirement."); Bowman, *supra* note 17, at 8-9 (hypothesizing judicial discomfort with the government motion requirement). *Booker* may have effectively eliminated this requirement already. *See supra* note 42.

248. DOJ Guidelines begin this process by creating uniform review mechanisms for the use of CI's by agents. *See* DOJ Guidelines , *supra* note 34. The process should be extended to prosecutors. *See* Wright & Miller, *supra* note 92, at 55-57 (arguing for the efficacy of internal prosecutorial mechanisms).

249. Such research would presumably be difficult to conduct without strict confidentiality guarantees, given the potential shame and danger associated with snitching or being associated with informants.

ways. Perhaps most importantly, information will permit an authentic public debate and invite the communities most affected by informant use to share their perspectives on the practice.

VI. CONCLUSION

Recent developments in the law have placed excessive weight on the use of informants, damaging communities as well as the legal system. The heavy use of informants undermines fundamental principles of accountability, publicity, and regularity within the criminal system, and may well cause severe social and psychological damage in high-crime, low-income communities of color. It therefore is time to reevaluate the justice system's overreliance on the double-edged sword of the snitch. With better public disclosure, judicial and legislative oversight, limitations on rewards, and careful attention to community needs, the informant institution can be better regulated in order to mitigate the collateral damage that it now inflicts.