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ARTICLE

BRASS RINGS AND RED-HEADED STEPCHILDREN: PROTECTING ACTIVE CRIMINAL INFORMANTS

MICHAEL L. RICH*

Informants are valued law enforcement tools, and active criminal informants—criminals who maintain their illicit connections and feed evidence to the police in exchange for leniency—are the most prized of all. Yet society does little to protect active criminal informants from the substantial risks inherent in their recruitment and cooperation. As I have explored elsewhere, society's apathy toward these informants is a result of distaste with their disloyalty and a concern that protecting them will undermine law enforcement effectiveness. This Article takes a different tack, however, building on existing scholarship on vulnerability and paternalism to argue that society has a duty to protect some vulnerable informant interests. In particular, I assess informant vulnerabilities against accepted societal norms to determine which informants deserve greatest protection and balance informant autonomy interests against informant interests in avoiding harm.

Against this backdrop, I propose safeguards to protect the vulnerable safety and autonomy interests of active criminal informants that most deserve society's protection while minimally interfering with law enforcement effectiveness. The proposals include: requiring court approval for the use of particularly vulnerable active informants and prosecutorial consent for the use of all others; providing training for informants and law enforcement agents in minimizing the risks of harm from cooperation; and folding informants into existing workers' compensation schemes.

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INTRODUCTION

Informants are critical law enforcement tools,[1] and the active informant, i.e., one who will continue to acquire information for the police while maintaining her criminal connections, is the "brass ring" for an agent.[2] Her continuing connections to the criminal underworld allow for a number of benefits to law enforcement, including the efficient and effective infiltration of criminal organizations and the collection of damning evidence against them, all at a diminished cost to law enforcement.[3] But despite their importance, society treats informants generally, and criminal informants specifically,[4] like red-headed stepchildren.[5] Active criminal informants are vulnerable to substantial physical, social, and moral harm,[6] yet society does little to ensure their safety.[7] Moreover, informant recruitment is inherently coercive, and there are no safeguards to ensure that informants agree voluntarily to cooperate.[8] Finally, many active criminal informants possess individual characteristics, such as youth, mental illness, and drug addiction, that make them particularly vulnerable to coercion and other harm,[9] but few jurisdictions impose any restrictions on who the police may recruit to cooperate.[10]

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1. *See* JOHN MADINGER, CONFIDENTIAL INFORMANT: LAW ENFORCEMENT'S MOST VALUABLE TOOL 27 (2000) (noting "the tremendous usefulness of informants in resolving crimes"); STEPHEN L. MALLORY, INFORMANTS: DEVELOPMENT AND MANAGEMENT, at ix (2000) ("After 24 years in the profession of drug enforcement, extensive training, and continuous education, I have reached the same conclusion as many criminal investigators regarding informants—successful investigations are dependent on informant development."); CARMINE J. MOTTO & DALE L. JUNE, UNDERCOVER 13 (2d ed. 2000) ("Informants are a very necessary part of police work and most agencies would be at a loss to operate without them."); *see also* DELORES JONES-BROWN & JON M. SHANE, AM. CIVIL LIBERTIES UNION, AN EXPLORATORY STUDY OF THE USE OF CONFIDENTIAL INFORMANTS IN NEW JERSEY 3 (2011) [hereinafter ACLU STUDY] ("In some law enforcement agencies, the research revealed a substantial use of information from CIs, rather than independent police work, as part of the routine investigation of drug activity.").

2. MADINGER, *supra* note 1, at 29.

3. *See infra* Part I.A (describing how law enforcement uses criminal informants).

4. Criminal informants are those informants that cooperate with police in exchange for leniency, often motivated by the fear of incarceration. MADINGER, *supra* note 1, at 51.

5. In common parlance, a red-headed stepchild is one "who is neglected, mistreated or unwanted." Michael Quinion, *Red-Headed Stepchild*, WORLD WIDE WORDS (Aug. 6, 2011), http://www.worldwidewords.org/qa/qa-red2.htm.

6. *See infra* Part III.A.1 (illustrating the unique societal and situational vulnerabilities of criminal informants).

7. *See infra* Part V (explaining the current protections criminal informants receive and the limitations of such protections).

8. *See infra* Part III.A.3 (noting how coercion, usually stemming from fear of criminal sanctions, can be used to recruit criminal informants).

9. *See infra* Part III.B.

10. *See infra* Part V.B (detailing the inadequate protections provided to criminal

Why would society fail to protect such valuable law enforcement assets? First, informants are treated poorly because, to put it bluntly, society dislikes them.[11] By assisting the police in apprehending their associates and friends, informants commit the egregious sin of betrayal.[12] The resulting disdain is heightened with respect to criminal informants because they are criminals who betray others for the purely selfish purpose of obtaining leniency.[13] Second, though active criminal informants are valuable to police, they are often fungible.[14] Though the criminal connections of the low-level criminals who frequently become informants are useful, many others typically share these criminal connections.[15] Moreover, the benefits of cooperating with the police are substantial enough to entice a continuous stream of criminals to cooperate, notwithstanding the risks.[16]

Though society's disdain for informants is understandable, the failure to protect them is unjustified. Society has a widely-accepted obligation to protect its most vulnerable members,[17] and informants

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informants in their dealings with agents).

11. *See, e.g.*, MOTTO & JUNE, *supra* note 1, at 13 ("'Rat,' 'squeal,' 'stool,' 'canary,' 'fink,' 'snitch,' 'narc,' and variations of these words are only a few of the less-than[-]respectful terms that have been used to designate one who gives information to enforcement or investigative agencies.").

12. *See* Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257, 1269 (2011) (explaining that for an informant to have knowledge of criminal activity, the informant must have earned the trust of the criminal, a trust the informant violates); Michael L. Rich, *Lessons of Disloyalty in the World of Criminal Informants*, 49 AM. CRIM. L. REV. (forthcoming 2012) (manuscript at 16–17), *available at* http://ssrn.com/abstract=1722597 (discussing how members of society, especially in high crime neighborhoods, possess an unfavorable view of informants' breaches of loyalty).

13. *See* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 39 (2009) (establishing that the criminal system is relatively unsympathetic toward criminal offenders); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 28–29 (2003) (asserting that criminal informants are like Judas, but are paid in leniency rather than money).

14. On the other hand, high-level criminal informants, such as those glamorized in popular culture, are difficult, if not impossible, to replace. *See, e.g.*, GOODFELLAS (Warner Bros. Pictures 1990) (telling the fictionalized story of Henry Hill, a former mobster who became a government informant); THE INFORMANT! (Warner Bros. Pictures 2009) (recounting the experience of Mark Whitacre, an executive at Archer Daniels Midland, who provided the FBI with information about his employer's criminal price-fixing scheme). For this reason, witness protection programs are tailored to protect them. *See infra* Part V.A (detailing the components of witness protection programs).

15. *See* MALLORY, *supra* note 1, at 8–10 (describing the utility of informant connections).

16. Estimates have placed the number of informants who are active at any given time in the hundreds of thousands. *See, e.g.*, Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 657 (2004).

17. *See infra* Part II.A (describing the political, legal, and philosophical schools of thought that support society's duty to protect the vulnerable). The assertion that

are often quite vulnerable.[18] This duty is enhanced when an individual's vulnerabilities are the result of her engagement in socially-beneficial activities; the active criminal informant's cooperation falls into that category.[19] It is easy to muster the political will to protect those who are vulnerable and sympathetic, but society also must protect those who, like criminal informants, are repugnant to the majority.[20]

But to identify active criminal informants as vulnerable and to recognize a normative obligation to protect them raises more questions: Does society have a duty to protect all vulnerable informant interests? Is there a hierarchy among interests such that society has a greater duty to protect some more than others? What should happen when protecting one informant interest endangers another? In particular, to what extent should society impinge on the autonomy interests of an informant in order to protect her safety interests? Finally, if there is a duty to protect some informant interests, how should society satisfy that duty?

In answering these questions, this Article proceeds as follows. Part I briefly describes the role of the active criminal informant in the criminal justice system. Part II explores society's duty to protect the vulnerable and examines societal norms suggesting that the

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society has a duty to protect the vulnerable must be distinguished from the position that *government* has such a duty. The concept of a governmental duty, a special application of societal duties, was rejected by the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

18. Interestingly, the informants who receive the greatest amount of media attention are often those who are the least vulnerable. A recent example of this focused media attention is the publicity surrounding the capture of Whitey Bulger, a Boston gangster and FBI informant who cannot be fairly described as vulnerable. *See* Adam Nagourney & Abby Goodnough, *Long Elusive, Irish Mob Legend Ended Up a California Recluse*, N.Y. TIMES, June 24, 2011, at A1. Bulger used his status as an FBI informant as a cover for his commission of a wide range of crimes over more than a decade, including drug trafficking, extortion, and murder. *See generally* United States v. Salemme, 91 F. Supp. 2d 141, 175–315 (D. Mass. 1999) (recounting at length findings of fact regarding Bulger's time as an FBI informant), *rev'd in part sub nom.* United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000). Bulger's relationship with his FBI handler, John J. Connolly, Jr., led to Connolly's conviction on corruption charges. *See* Fox Butterfield, *Ex-F.B.I. Agent Sentenced for Helping Mob Leaders*, N.Y. TIMES, Sept. 17, 2002, at A22. The media attention paid to the few informants, like Bulger, who effectively game the informant system to their benefit, likely makes protection of the vast majority of informants even less popular.

19. *See infra* Part III.B (illustrating the personal characteristics of criminal informants that may make them even more vulnerable).

20. For this reason, one of the goals of the Bill of Rights was to fulfill society's obligation to protect unpopular and minority interests from oppression by the majority. *See* Feldman v. United States, 322 U.S. 487, 501 (1944) (Black, J., dissenting) ("The founders of our federal government were too close to oppressions and persecutions of the unorthodox, the unpopular, and the less influential, to trust even elected representatives with unlimited powers of control over the individual.").

vulnerabilities that result from an individual's immutable characteristics or socially-beneficial activities are entitled to the greatest protection. Part III applies the observations of Part II to the specific case of the active criminal informant and identifies those vulnerabilities that are most deserving of protection. Part IV reconciles the informant's safety and autonomy interests with reference to the rich literature on paternalism and argues for a "soft" paternalistic approach that emphasizes the importance of informed decision-making by the informant. Part V reviews existing legal doctrines and statutory schemes and concludes that they provide insufficient protection for vulnerable informant interests. Finally, Part VI proposes legislative and law enforcement policy changes to provide appropriate protections for active criminal informants. These include requiring court approval for the use of particularly vulnerable informants and prosecutorial consent for the use of all others, providing training for informants and law enforcement agents to minimize the risk of harm to informants, and encouraging law enforcement to include informants in the scope of existing workers' compensation schemes.

I. ACTIVE CRIMINAL INFORMANTS

The term "informant" refers broadly to any civilian who provides information to the police.[21] This Article limits its discussion to active criminal informants for three reasons. First, the heterogeneity of informants makes it impossible to discuss their varied interests meaningfully and comprehensively.[22] Second, among all informants active criminal informants are both numerous and the "most prized by law enforcement."[23] Third, active criminal informants engage in

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21. Michael L. Rich, *Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 SANTA CLARA L. REV. 681, 689 (2010).

22. Informants may be referred to by a wide range of cultural tropes, such as "jailhouse snitches," "criminal accomplices," "concerned citizens," and "innocent eyewitnesses." *Id.* at 689–90.

23. MADINGER, *supra* note 1, at 28. No hard data exists to detail the precise extent of informant usage, but estimates place the number of active informants at any given time in the hundreds of thousands. Natapoff, *supra* note 16, at 657. Of these, a majority of them are likely to be criminal informants, as leniency is the most common incentive used in the recruitment of informants. MADINGER, *supra* note 1, at 51; *see* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 112 (3d ed. 1994) ("To maintain an informant network, police must pay off each informer, usually by arranging for a reduction of charge or sentence or by not acting as a complainant . . . ."). Police literature suggests that many informants take an active role in investigations. *See* MALLORY, *supra* note 1, at 3 (discussing the importance of informants "who can conduct surveillance, testify in court, identify potential targets, initiate contact with targets, and provide law

particularly risky activity, both in terms of the threat of physical injury should they be discovered and the potential for moral harm as they continue to associate with criminals and engage in crime.[24]

Active criminal informants are distinguished from other informants by three characteristics.[25] First, an active criminal informant is a criminal. Second, an active criminal informant cooperates with law enforcement in exchange for some sort of leniency with respect to her criminal activity, such as a reduction in sentence or a decision not to prosecute. Third, an active criminal informant provides information to the police on an ongoing basis by maintaining her existing criminal connections and developing new ones.[26]

A. Use of Active Criminal Informants

Active criminal informants are most useful to law enforcement because the threat of criminal prosecution makes them highly motivated in their pursuit of evidence against others,[27] and their criminal connections permit law enforcement to infiltrate illicit organizations more efficiently and effectively.[28] Undercover law enforcement agents must devote substantial time and resources to infiltrating criminal organizations while exposing themselves to significant risk; even then, they are not always successful.[29] An active criminal informant can expedite that process significantly by

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enforcement with this information, or introduce an undercover agent to these targets").

24. *See infra* Part III (expanding on the vulnerabilities of and risks to criminal informants).

25. There is no standard terminology used to refer to different kinds of informants. Thus, the term "active criminal informant" is not a term of art, but merely descriptive. *See* MADINGER, *supra* note 1, at 28 (referring to an "active informant" as one who "provide[s] information while remaining in position in the criminal setting"). Moreover, the term "snitch" will be avoided because of the unhelpful pejorative implications of the word. *See* Rich, *supra* note 12 (manuscript at 1–2) (discussing how the term "snitch" plays into a belief from childhood that being a "tattle-tale" is wrong).

26. *See* MADINGER, *supra* note 1, at 28–29 (noting that an informant may have to commit crimes on the orders of agents). This characteristic distinguishes the active criminal informant from the cooperator whose assistance is limited to testifying for the government at trial or providing previously-obtained information to the police. *See generally* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 2 (1992) (discussing cooperation agreements involving the exchange of leniency for information or testimony).

27. *See* Rich, *supra* note 21, at 694 (indicating that when an informant does not have a specialized motivational interest, police or prosecutors can generally leverage criminal charges or lengthy prison sentences).

28. MALLORY, *supra* note 1, at 3–4, 9–10.

29. *Id.* at 9–10.

vouching for the agent.[30] In some cases, these informants can remove the need for undercover work entirely by continuing their involvement in the organization and obtaining evidence of criminal activity directly.[31] They also assist law enforcement by letting police know about crimes that may never have been detected otherwise and by using their knowledge of criminal communities to direct police investigations to higher-value targets.[32]

Because active criminal informants are most useful in helping police infiltrate criminal conspiracies and detect vice crimes, they have historically been of particular importance in the areas of drug enforcement and organized crime.[33] Active criminal informants are also increasingly used in counterterrorism efforts and white-collar investigations.[34] Nonetheless, active criminal informants are employed to investigate all types of crime.[35] Active criminal informants are a cross-section of criminals[36]: many have mental

30. *Id.* at 77; MOTTO & JUNE, *supra* note 1, at 57.
31. MALLORY, *supra* note 1, at 10.
32. *Id.* at 8, 13–14.
33. *See* MALACHI L. HARNEY & JOHN C. CROSS, THE INFORMER IN LAW ENFORCEMENT 12 (2d ed. 1968) ("The short summary of the stated value of the informer from the prosecution point of view is that he is almost indispensable in narcotics cases. With this we agree . . . ."); ACLU STUDY, *supra* note 1, at 3 (reporting that law enforcement agencies regularly use informants for drug crimes); JAMES Q. WILSON, THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS 76 (1978) ("[W]ithout an informant, few cases can be made at all, and thus the DEA can monitor its agents' performance by examining case output or undercover buys . . . .").
34. *See* MALLORY, *supra* note 1, at xi (noting the importance of informants in combating "[r]ising terrorist activity" and "the emerging economic crime wave"); NATAPOFF, *supra* note 13, at 30, 154 (explaining that informants brought down white collar criminals such as Kenneth Lay and that the Department of Justice has increasingly relied on criminal informants in its white collar division); Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 688 (2010) (noting the rising use of confidential informants in criminal terrorism prosecutions since September 11, 2001).
35. *See* HARNEY & CROSS, *supra* note 33, at 14 ("The fact is that the informer is valuable to the police in practically every spectrum of crime."); NATAPOFF, *supra* note 13, at 26 (explaining the extremes of informants from high-level corporate executives to drug addicts on street corners). That they are considered to be the most valuable informants does not mean that the use of active criminal informants does not have its pitfalls for law enforcement. *See* NATAPOFF, *supra* note 13, at 31–38 (detailing some of the problems for law enforcement caused by informants, including allowing criminals to walk free, enhancing criminality, flouting "the worse the crime, the worse the punishment" rule, exacerbating racial disparities, allowing informants to control investigations, corruption, and informant misconduct). However, even critics of widespread informant use recognize their utility. *See id.* at 29–31 (explaining how informants enable law enforcement to infiltrate particular criminal rings and reduce law enforcement costs).
36. *See* ACLU STUDY, *supra* note 1, at 10 (noting that no ban exists on using juvenile informants). For an in-depth discussion of the use of juvenile informants, see generally Andrea L. Dennis, *Collateral Damage? Juvenile Snitches in America's "Wars" on Drugs, Crime, and Gangs*, 46 AM. CRIM. L. REV. 1145, 1147 (2009) (discussing the ambivalence American society has for juveniles within the criminal justice realm).

health problems, suffer from mental deficiencies, or are drug addicts.[37] Many criminal informants are on the lower rungs of the criminal ladder, and law enforcement offers them leniency only if they can deliver evidence against more "valuable" targets.[38]

Along with being the most useful of informants to law enforcement, active criminal informants also engage in the most risky activity.[39] For instance, the prototypical active criminal informant in the drug context arranges to purchase contraband from another criminal so that police can apprehend the seller.[40] In other cases, the informant may wear a wire, join subversive organizations, or even engage in a sexual relationship with a target.[41] These activities are distinct from other informant activity: they typically require the active criminal informant to be outside of police protection and in proximity to the target of the investigation, risking immediate and violent retribution should the informant's cooperation be discovered.[42] Moreover, those low-level informants seeking evidence against "big fish" may find themselves out of their depth, involving targets who are more serious criminals and prone to violence.[43]

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37. *See* ACLU STUDY, *supra* note 1, at 51–53 (detailing a community survey in which drug-addicted respondents and those with mental health issues reported working as informants). Though these informants pose additional risks for the police, their use is viewed as inevitable because of the frequency of mental health and drug abuse problems among criminals. *See* MADINGER, *supra* note 1, at 186–90 (elaborating on the use of addicts and those with mental health problems as informants); MALLORY, *supra* note 1, at 25 (discussing "restricted use informants," including juveniles and drug addicts).

38. *See* Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 556 (2009) (explaining how "big fish" (the criminal organizers) can implicate more "little fish" (agents of the crime) but "little fish" can deliver the more valuable "big fish").

39. This is not to say that informants who only provide information or testify on behalf of the government are not subject to harm. *See* McCray v. Illinois, 386 U.S. 300, 308 (1967) (noting the importance of anonymity to all informants who fear harm to themselves and their family).

40. *See* MALLORY, *supra* note 1, at 77 (listing purchasing contraband as one of the common tasks of informants); MOTTO & JUNE, *supra* note 1, at 57 (describing how an informant can set up a "buy-bust" by paying for drugs with marked money).

41. Rich, *supra* note 21, at 691.

42. *See* Alexander v. DeAngelo, 329 F.3d 912, 918 (7th Cir. 2003) (recognizing the informant's "usual risk of being beaten up or for that matter bumped off by a drug dealer with whom one is negotiating a purchase or sale of drugs in the hope of obtaining lenient treatment from the government"); Susan S. Kuo, *Official Indiscretions: Considering Sex Bargains with Government Informants*, 38 U.C. DAVIS L. REV. 1643, 1661–62 (2005) (discussing the risks of physical harm to informants).

43. *See, e.g.*, ACLU STUDY, *supra* note 1, at 11 ("[M]ere motor vehicle traffic violators were used in some cases to infiltrate criminal enterprises run by interstate drug traffickers."); Rich, *supra* note 21, at 681–83 (detailing the case of Rachel Morningstar Hoffman, a confidential informant and low-level marijuana dealer who was killed during the purchase of ecstasy, cocaine, and a handgun—a transaction that she arranged at the instruction of her police handlers).

B. Recruitment of Criminal Informants

Recruitment of active criminal informants typically occurs without the oversight of courts or the involvement of defense counsel.[44] Police attempt to recruit informants immediately after, or sometimes in lieu of, their arrest, as this is when the potential informant is most afraid of jail time and thus most likely to agree to cooperate.[45] To best utilize an arrestee's fear of punishment as an incentive to cooperate, police emphasize the maximum penalties that the potential informant might face and suggest that cooperation is her only option to avoid those penalties.[46] In some cases, police may even bluff by threatening charges for which there is insufficient evidence to convict.[47] Because defense counsel may discourage a potential informant from cooperating or try to extract a better bargain for her client, police will sometimes discourage their involvement.[48] The agreements between police and informants also are often informal and rarely memorialized in writing.[49]

In some cases, prosecutors negotiate with the potential informants instead of the police as police are limited in what they can deliver to an informant. When a potential informant has just been arrested and no charges have been filed, police can truthfully promise not to disclose her most recent crime to the prosecutor if she cooperates.[50] But the police typically lack the authority to bind prosecutors,[51] so the

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44. *See* NATAPOFF, *supra* note 13, at 16 (contrasting the constitutional protections that criminal defendants receive to the lack of protections informants receive).

45. *See* ACLU STUDY, *supra* note 1, at 12, 54 (discussing the street-level and arrest-related recruitment of informants); Rich, *supra* note 21, at 694 (stressing the uncertainty about consequences that leads arrestees to be likely to agree to cooperate).

46. *See* Rich, *supra* note 21, at 696 (explaining that officers emphasize the maximum penalties to secure informants); *see also* ACLU STUDY, *supra* note 1, at 10 ("Police 'squeeze' criminal defendants by threatening them with additional charges or counts related to their own cases if they do not 'cooperate' by becoming [informants].").

47. *See* ACLU STUDY, *supra* note 1, at 52–53 (reporting that the police threaten to plant incriminating evidence on witnesses or charge them with crimes like obstruction of justice or hindering prosecution if such witnesses fail to provide or gather evidence for the police); Rich, *supra* note 21, at 696 (noting that the police will discourage defendants from speaking to attorneys).

48. Rich, *supra* note 21, at 696.

49. *See* NATAPOFF, *supra* note 13, at 19 (noting that many agreements are verbal and may be written down later); *see also* ACLU STUDY, *supra* note 1, at 11 (explaining that while written cooperation agreements are required by New Jersey guidelines, the mandate is rarely followed).

50. *See* NATAPOFF, *supra* note 13, at 18–19 (asserting that the police may bluff to convince a potential informant to cooperate).

51. *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 780 n.140 (2003) (collecting cases); *see also* Joaquin J. Alemany, Comment, *United States Contracts with Informants: An Illusory Promise?*, 33 U. MIAMI INTER-AM. L. REV. 251, 260–66 (2002) (same). *But see* United States v. Carrillo,

relevant prosecutor must be involved if the informant is to negotiate a valid and binding cooperation agreement for leniency on charges that are either under investigation or have already been filed. If the negotiations involve pending charges, the potential informant has a constitutional right to have counsel involved.[52] However, the right to counsel typically does not attach until formal charges are brought against a potential informant.[53] Thus, prosecutors are free to negotiate cooperation agreements with potential informants without providing them with an opportunity to consult with counsel.[54]

Even where an informant has negotiated with a government representative who has the authority to bind the State, cooperation agreements typically vest substantial discretion in government agents to determine whether the informant has met her obligations and is thus entitled to the promised leniency.[55] Moreover, because a prosecutor cannot bind a court's sentencing discretion, the offered leniency is usually limited to a promise to convey the fact of the informant's cooperation to the sentencing tribunal and to seek a

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709 F.2d 35, 37 (9th Cir. 1983) (upholding dismissal of drug charges based on a finding that the defendant fulfilled the terms of cooperation agreement with DEA agents, who promised that he would not be prosecuted). Occasionally, courts find that the apparent authorization by a government agent of an informant's criminal activity is a defense to charges arising from that activity. *See, e.g.*, United States v. Abcasis, 45 F.3d 39, 43–44 (2d Cir. 1995) (holding that a defendant could claim entrapment by estoppel if he reasonably relied on representations by a government agent that his criminal activity was authorized as part of a cooperation agreement).

52. *See* Maine v. Moulton, 474 U.S. 159, 170 (1985) (recognizing that denying access to counsel before trial may be extremely damaging to the fate of the accused).

53. *See* United States v. Moody, 206 F.3d 609, 616 (6th Cir. 2000) (holding that the Sixth Amendment right to counsel does not attach at pre-indictment plea negotiations).

54. Though some prosecutors' offices may have formal or informal policies requiring the presence of counsel, it is implausible that, in the absence of some constitutional or statutory prohibition, some prosecutors would not meet with potential informants outside of the presence of defense counsel. *See id.* (upholding pre-indictment negotiations where counsel was not present).

55. For instance, the United States Sentencing Guidelines give the prosecutor discretion to decide whether to file a motion for a downward departure in light of the defendant's "substantial assistance" to the government, bounded only by constitutional limitations. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2011); *see* Wade v. United States, 504 U.S. 181, 185–86 (1992) (asserting that a court may examine the substantial assistance motion if the refusal implicates the Constitution). Similarly, the requirements of most cooperation agreements specify only that the informants must render "full cooperation" or its equivalent to receive leniency. *See* Hughes, *supra* note 26, at 47 (citing United States v. Brown, 801 F.2d 352, 353 (8th Cir. 1986)) (noting the requirement of full cooperation from the defendant for immunity). Whether informants have met that standard is the subject of a steady stream of litigation that rarely ends in the informant's favor. *See* Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 589–91 (1999) (examining the varying interpretations courts have used to address substantial assistance motions, each of which generally favors the government).

lower sentence.[56] Should the court disagree with the prosecutor's recommendation or adjudge the informant's cooperation insufficient, the informant is left with little recourse.[57]

C. Disdain for Active Criminal Informants

Though active criminal informants play a crucial role in law enforcement, they are subject to widespread societal disdain. In society's eyes, the first mark against them is that they are criminals. By engaging in criminal activity, the informant becomes a marginalized "other" whose claims on basic rights, such as housing, employment, voting, and sustenance, are lost or severely curtailed.[58] This demonization of the criminal is reinforced by the sensationalizing of crime in the news media and popular culture.[59] The distaste is compounded in the case of the criminal informant because she betrays her criminal compatriots when she cooperates with the police and does so for selfish reasons.[60] She is, in common parlance, a "snitch," a "squealer," and a "rat."[61] This perception of the informant as disloyal is particularly strong in the high-crime communities that are most marginalized from mainstream society and in which active criminal informants are likely to live.[62]

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56. *See* Weinstein, *supra* note 55, at 588, 591–92 (explaining that defendants are held to their agreements but the decision to mitigate sentences lies ultimately within the court's discretion).

57. *See id.* at 592 (emphasizing that the court's decision on whether to mitigate the sentence is unreviewable).

58. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489–94 (2010) (explaining the collateral consequences for individuals in the U.S. with criminal convictions in housing, voting, employment, and public benefits); *see also* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1074 (describing John Locke's view that "one who commits a crime forfeits his right to participate in the political process—if not his rights to property and person").

59. *See* Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689, 729 (2009) ("[B]eyond reinforcing the master crime narrative by individualizing and decontextualizing crime, media criminology consistently dehumanizes and demonizes perpetrators and effectively exoticizes their criminality."); Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 395 ("The news media keeps up a steady drumbeat of crime—'if it bleeds, it leads'—and portrays criminal defendants as unworthy and less than human.").

60. *See* Rich, *supra* note 12 (manuscript at 13–17) (discussing how society views the accomplice-informant negatively because of *perceived self-serving motives).*

61. *See* Roberts v. United States, 445 U.S. 552, 570 (1980) (Marshall, J., dissenting) (listing cultural terminology used to describe informants to demonstrate that these individuals offend social values of loyalty and personal privacy).

62. For instance, the perception of informant disloyalty lies at the heart of the "Stop Snitching" movement, which discourages even law-abiding citizens in these communities to cooperate with the police. Rich, *supra* note 12 (manuscript at 17–28).

The broader societal disdain of criminal informants is magnified within the law enforcement community, which generally views informants "with aversion and nauseous disdain."[63] Police officers have such a well-developed sense of loyalty that they punish severely those officers who are perceived to be disloyal.[64] It is thus unsurprising that in handling informants, police are cautioned to mask their distaste of the informant's disloyalty.[65] Both police and prosecutors frequently speak of the informant as being, at best, a "necessary evil."[66] Indeed, a popular aphorism used frequently by prosecutors to explain to juries their use of criminal informants as witnesses is instructive of the law enforcement perspective on criminal informants: "[i]f you are going to try the devil, you have to go to hell to get your witnesses."[67]

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63. Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1093 (1951). This background distaste for the informant does not mean that police officers and prosecutors never come to like individual informants with whom they deal on a personal level. Indeed, police are cautioned for good reason against becoming too friendly with their informants, particularly those of the opposite sex. *See* MADINGER, *supra* note 1, at 185–86 (discussing the risks of informants becoming romantically involved with their contacts). Rather, the assertion is that active criminal informants specifically are disliked *as a class* by prosecutors and police officers, even though individual government agents may develop a personal affinity for *individual* informants.

64. *See* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 256–61 (1998) (discussing the ostracism, retaliation, and physical violence suffered by police who report wrongdoing by other officers); *see also* MALLORY, *supra* note 1, at 17 ("This code of silence is even upheld in many law enforcement entities. Covering for a partner or not disclosing illegal activity is all too common in the police community.").

65. *See* MALLORY, *supra* note 1, at 28 (cautioning that "[r]eferring to informants as damn snitches, scum bags, rats, etc. . . . are not very effective methods to obtain accurate information"); MOTTO & JUNE, *supra* note 1, at 58–59 ("It has been said a thousand ways. Police officers should handle informants with respect and refrain from using the word 'informer', 'squeal', 'rat', 'narc', 'stool' or other similar derogatory descriptions.").

66. MALLORY, *supra* note 1, at x; *see* John Monk, *Did Freeing Accused Killer Lead to Murder?*, CHARLOTTE OBSERVER, Aug. 7, 2011, at B2 (quoting a prosecutor who described releasing one criminal to catch another as "a dirty business").

67. This maxim comes in many forms, all of which essentially equate criminal informants to denizens of hell. *See, e.g.*, Belisle v. State, 11 So. 3d 256, 303 (Ala. Crim. App. 2007) (quoting a prosecutor's opening statement in which he stated: "[u]nfortunately, sometimes if you want to get the devil, you've gotta go to hell for witnesses"); Moore v. State, 820 So. 2d 199, 207 (Fla. 2002) (per curiam) (quoting a prosecutor for the aphorism: "[c]rime conceived in hell will not have any angels as witnesses"); Monk, *supra* note 66 (quoting a prosecutor who said, "[w]hen you want to convict the devil, sometimes you got to go to hell to get the witnesses").

II. PROTECTING THE VULNERABLE

A. Society's General Duty to Protect the Vulnerable

The protection of the vulnerable is one of the principal duties of society and a foundational goal of the legal system.[68] Support for the existence of this duty is found in various schools of political, legal, and philosophical thought. Natural law, for instance, includes an individual's right to life, liberty, and security and imposes an obligation on governments to protect those rights.[69] Social contract theory teaches that the government takes on the duty to protect its citizens in exchange for the citizen's surrender of some measure of their inherent freedom.[70] Social justice theory instructs that the government must protect the liberty of all citizens and must protect that liberty fairly, regardless of an individual's social or political status.[71] From the legal standpoint, society's duty to protect the vulnerable is often conceived as the State's *parens patriae* power and obligation to protect the vulnerable, such as children and the mentally ill.[72]

Those arguing for changes in positive law to protect various subgroups often cite society's duty to protect the vulnerable to justify their efforts. Children's advocates argue for the expansion of legal doctrines and the enactment of legislation to protect children on the ground that they are among the most vulnerable members of

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68. *See* Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. 1172, 1172 (2010) (discussing the government's duty to protect the vulnerable); Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. HEALTH CARE L. & POL'Y 331, 373 (2011) (same).

69. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmbl. para. 3, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (asserting that human rights should be protected by the law); *see also* Laura Moranchek Hussain, Note, *Enforcing the Treaty Rights of Aliens*, 117 YALE L.J. 680, 720 (2008) (noting that international recognition of human rights goes beyond U.S. constitutional protections for aliens and are inherent in personhood).

70. *See* THOMAS HOBBES, LEVIATHAN 170 (G.A.J. Rogers & Karl Schuhmann eds., Thoemmes Continuum 2003) (1651) (arguing that an individual must cede control to the sovereign for stability).

71. *See* SAM SOURYAL, ETHICS IN CRIMINAL JUSTICE: IN SEARCH OF THE TRUTH 189–91 (3d ed. 2003) (detailing John Rawls's ethical theory, which is based on a presumption of equality); Janet Thompson Jackson, *What is Property? Property Is Theft: The Lack of Social Justice in U.S. Eminent Domain Law*, 84 ST. JOHN'S L. REV. 63, 74–75 (2010) (explaining John Rawls's Theory of Justice, which perceives fairness as a balancing of claims).

72. *See* Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305, 322 (2010) (noting that the *parens patriae* power is most commonly utilized to separate a child from his parent); Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1370–71 (2010) (explaining *parens patriae* for children and other legally incompetent persons).

society.[73] Arguments for expanded protection of the mentally and physically disabled also rely on the notion that their vulnerability gives rise to enhanced societal duties.[74] Similar arguments are used to advocate on behalf of legal protections for the elderly[75] and for various immigrant groups.[76] Moreover, the Supreme Court has recognized that the protection of vulnerable groups is a legitimate governmental interest in a variety of contexts.[77]

B. Defining Vulnerability

Though the term "vulnerable" is often used to describe those we normatively wish to protect, it is rarely clearly defined.[78] As used herein, a specific instance of an individual's vulnerability is defined by two variables. One must identify first what the individual is vulnerable to.[79] In other words, to what harm is the individual susceptible? The harm can be physical, but can also involve less tangible "interests," such as one's psychological or economic well-being.[80] Additionally, vulnerability is defined by whom the individual is vulnerable to.[81] Put another way, who, through their action or

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73. Jessica R. Feierman & Riya S. Shah, *Protecting Personhood: Legal Strategies to Combat the Use of Strip Searches on Youth in Detention*, 60 RUTGERS L. REV. 67, 88 (2007); Janet Weinstein & Ricardo Weinstein, *Before It's Too Late: Neuropsychological Consequences of Child Neglect and Their Implications for Law and Social Policy*, 33 U. MICH. J.L. REFORM 561, 577 (2000).

74. *See* Pamela Fadem et al., *Attitudes of People with Disabilities Toward Physician-Assisted Suicide Legislation: Broadening the Dialogue*, 28 J. HEALTH POL. POL'Y & L. 977, 980–81 (2003) (detailing two Supreme Court cases where people with disabilities are recognized as an at-risk group).

75. *See* Arthur Meirson, Note, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 HASTINGS L.J. 431, 432 (2008) (arguing that elder populations should be protected because of their unique vulnerability).

76. *See* Alexander Betts, *Soft Law and the Protection of Vulnerable Migrants*, 24 GEO. IMMIGR. L.J. 533, 535 (2010) (explaining that migrant groups are particularly vulnerable to exploitation).

77. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 731 (1997) (upholding a ban on assisted suicide by relying, in part, on a governmental interest in protecting vulnerable groups, including the poor, the elderly, and the disabled, from coercion, prejudice, and societal indifference); Heller v. Doe, 509 U.S. 312, 332 (1993) (recognizing that "'the state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable . . . to care for themselves'" (quoting Addington v. Texas, 441 U.S. 418, 426 (1979))); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 394–95 (1937) (holding that freedom of contract could be restricted in order to protect vulnerable groups).

78. *See, e.g.*, Carl H. Coleman, *Vulnerability as a Regulatory Category in Human Subject Research*, 37 J.L. MED. & ETHICS 12, 12 (2009) (criticizing the imprecise use of the term "vulnerability" in human subject protection regulations).

79. ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES 112 (1985).

80. The specific question of what counts as an individual's "interest" such that it might be deserving of protection is itself a normative question. *Id.* at 111.

81. *Id.* at 112.

inaction, can cause the individual the harm to which she is susceptible?

This bifurcated definition of vulnerability suggests two observations relevant to the criminal informants. First, an individual is vulnerable both to a person affirmatively threatening her with harm as well as to a person capable of protecting her from harm.[82] For instance, the victim of a mugging is vulnerable both to the mugger who can cause her injury by firing his gun and to the passerby who witnesses the crime and could prevent the harm by alerting the police. Second, this definition means that all people are vulnerable in many ways, in that every person is susceptible to harm from the action or inaction of a variety of people.[83] For example, one person may be vulnerable simultaneously to, inter alia, emotional injury from her loved ones, physical injury from the drivers of nearby vehicles or passing pedestrians, and economic injury from her employer or the manager of her investments.

C. Identifying the Vulnerabilities Entitled to Society's Protection

If every person is vulnerable, then it is both unfeasible and undesirable for society to protect all people against each vulnerability they face.[84] One must therefore determine how society should decide which vulnerabilities to protect. Answering this question requires a normative analysis that must be undertaken on a case-by-case basis.

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82. *Id.*

83. *See* Bray, *supra* note 68, at 1173 (distinguishing vulnerability to direct harm from vulnerability to power); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1 (2008) (arguing that "vulnerability is—and should be understood to be—universal and constant, inherent in the human condition").

84. First, protecting one individual from vulnerability inevitably interferes in some way with the interests of another, at a minimum because it requires the redirection of society's limited resources. Moreover, there are vulnerabilities that society, acting through its government, is ill-suited to protect individuals from because, for instance, they may be difficult to predict or the heavy hand of government intervention may be inappropriate to address them. *See, e.g.*, Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 406–30 (2008) (discussing the demise of "heartbalm" torts and noting that it resulted, at least in part, from practical difficulties of measuring damages and discouraging frivolous suits); Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 510 (1999) (arguing that even in the limited arena of vulnerability to crime, vulnerabilities that arise from certain factors, such as simple bad luck, do not demand state protection). Finally, government efforts to protect everyone against all vulnerabilities would almost certainly be viewed as unacceptably paternalistic. *See* Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 889 ("Although the motivation for paternalistic intervention may be altruistic, it inevitably involves an element of autonomy-deprivation for the 'protected' party."). For a discussion of paternalism concerns in the informant context, see *infra* Part IV.

Nonetheless, two widely-accepted societal norms are useful in undertaking this analysis in the criminal informant context. First, society generally provides greater protection to unchosen vulnerabilities than to those that arise from an individual's voluntary and intelligent choices. Second, engaging in socially-beneficial activity typically entitles an individual to greater protection from resulting vulnerabilities.

1. The importance of choice

The liberal ideal of equality[85] suggests first that "all men are created equal"[86] and thus are entitled to equal protection under the law,[87] particularly with respect to personal characteristics over which one has little or no control.[88] Similarly, the liberal tradition of respecting an individual's autonomy[89] suggests that an individual is entitled to less protection from the negative repercussions of decisions that are a product of her free will.[90] With these liberal ideals in mind, society undertakes an enhanced duty to protect individuals from vulnerabilities that arise from what can be called, borrowing from equal protection law, immutable characteristics and

85. *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 49–50 (2010) (asserting that it would violate equality norms for similar offenders to be given disparate punishments).

86. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

87. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."); Romer v. Evans, 517 U.S. 620, 632 (1996) (requiring that disparate government treatment be justified, at a minimum, by a rational relationship with some legitimate government interest).

88. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006) (prohibiting discrimination in employment on the basis of "race, color, religion, sex, or national origin"); Americans with Disabilities Act, 42 U.S.C. § 12112(a) (2006) (prohibiting discrimination in employment on the basis of disability); Parham v. Hughes, 441 U.S. 347, 351 (1979) (plurality opinion) (recognizing enhanced protection against state action on the basis of "immutable human attributes," such as national origin, illegitimacy, and gender); U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (2010) (mandating a sentencing enhancement when a defendant selects a victim on the basis of "perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation").

89. *See* Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 663–64 (2004) (discussing the liberal tradition of autonomy).

90. For instance, the criminal law punishes only those actions that are the result of an individual's free and voluntary choice. *See* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 326–27 (1985) ("Central among the beliefs that underlie the criminal law is the distinction between nature and will, between the physical world and the world of voluntary human action. . . . Voluntary human actions are not seen as the product of relentless forces, but rather as freely chosen expressions of will.").

a diminished duty to protect individuals from vulnerabilities arising from an exercise of free will.[91]

This clean-sounding dichotomy masks some difficult line-drawing issues, however. First, the concept of immutability is itself surprisingly malleable.[92] The most clearly "immutable" personal characteristics are those that could be described as pure coincidences of birth over which an individual truly has no control, such as race, color, national origin, genetic makeup, and disability.[93] But society also provides enhanced protection against discrimination on the basis of attributes that are central to an individual's identity, even though they might be mutable in fact, such as religion or gender.[94] The decision to protect this latter group of characteristics is based on a normative judgment that they are either so difficult to change or so central to the individual's identity that society should not expect them to be changed.[95]

Moreover, some vulnerabilities arise from choices, such as hairstyle, clothing, or language, that are expressions of an individual's immutable characteristics.[96] Others stem from characteristics, including poverty, homelessness, obesity, and drug or alcohol addiction, that can be exceedingly difficult to change but are at least in part the result of past choices.[97] Empirical questions about

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91. *See* Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 632 (2011) (recognizing that all liberal egalitarian theories "tolerat[e] unequal outcomes due to choices" and do not tolerate "unequal outcomes stemming from the chance circumstances of one's birth"); Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CALIF. L. REV. 1181, 1204–07 (1994) (arguing that individuals whose vulnerability to crime arises from involuntary factors should receive enhanced protection from crime). *But see* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 490 n.14, 509–19 (1998) (contributing to criticism of immutability as a basis for enhanced equal protection scrutiny).

92. *See* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1511–13 (2011) (discussing two primary definitions of "immutability" within Supreme Court and appellate court decisions).

93. *Id.* at 1515.

94. *Id.* at 1517–18.

95. *Id.* at 1517.

96. Most famously, the U.S. District Court for the Southern District of New York rejected a challenge under Title VII of the Civil Rights Act of 1964 to an American Airlines policy that prohibited certain employees from wearing their hair in braids. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232, 234 (S.D.N.Y. 1981). The court reasoned that the wearing of hair in braids is an "easily changed characteristic," i.e. a choice, and thus not an immutable characteristic protected by Title VII. *Id.* at 232. Scholars have pointed out how this analysis fails to appreciate the complex interplay between the choice made by Rogers to braid her hair and her immutable status as an African-American woman. *E.g.*, Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

97. *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006)

whether a particular vulnerability is the result of an individual's choice or is an accident of her birth can also muddy the waters. For example, the debate between supporters and opponents of protections based on sexual orientation often is framed as a factual question of whether sexual orientation is a choice.[98] Similar questions arise about genetic predisposition for other vulnerabilities, such as drug addiction and obesity.[99]

Though the existence of these issues complicates how choice impacts the determination of the extent of society's obligation to protect against a given vulnerability, the principle that choice matters remains. More specifically, society's responsibility is inversely proportional to the strength of the causal relationship between an individual's voluntary choice and the vulnerability at issue.[100]

("[G]enerally one cannot become a drug addict or alcoholic, as those terms are commonly used, without engaging in at least some voluntary acts (taking drugs, drinking alcohol). Similarly, an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable."), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

98. *Compare* Frederick M. Lawrence, *The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crimes Prevention Act of 2007*, 19 STAN. L. & POL'Y REV. 251, 264 (2008) ("First, there is much evidence that sexual orientation is indeed immutable, whether for genetic reasons alone, or some combination of genetic and environmental reasons. Even if this evidence is not conclusive, there is certainly no scientific basis to conclude that sexual orientation is a matter of personal choice." (footnote omitted)), *with* Rena M. Lindevaldsen, *The Fallacy of Neutrality from Beginning to End: The Battle Between Religious Liberties and Rights Based on Homosexual Conduct*, 4 LIBERTY U. L. REV. 425, 456 (2010) (contending that unlike "race or national origin," which are "immutable characteristics," sexual orientation is not treated as a suspect classification because there is "at a minimum, some element of choice").

99. *See* Linda C. Fentiman, *Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution*, 14 U. PA. J.L. & SOC. CHANGE 233, 246–47 (2011) (discussing contrasting theories as to whether drug addiction involves individual choice); Allison K. Hoffman, *Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1873, 1930 (2011) (taking note of studies suggesting genetic or socioeconomic predispositions to smoking and obesity).

100. The Supreme Court's decisions in *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968) (plurality opinion), are helpful in illustrating the importance of the presence or absence of this causal relationship. In *Robinson*, the Court held that California violated the Eighth and Fourteenth Amendments by imposing criminal liability solely on the ground of the petitioner's status as a drug addict. 370 U.S. at 666–67. The Court reasoned that "in the light of contemporary human knowledge, a law which made a criminal offense of such a disease [as drug addiction] would doubtless be universally thought to be an infliction of cruel and unusual punishment." *Id.* at 666. In *Powell*, however, the Court upheld the conviction of the petitioner for public intoxication. 392 U.S. at 516 (plurality opinion). The plurality in *Powell* distinguished *Robinson* by noting that Powell was not criminally liable for being an alcoholic, but "for public behavior which may create substantial health and safety hazards." *Id.* at 532. *Powell* thus recognizes the important difference between an individual's status of being a drug addict, which is almost always the product of a past choice on her part but is now an immutable

2. Socially-beneficial activities

Society also has an enhanced duty to protect those vulnerabilities that arise from socially-beneficial activities. For instance, few would argue that a soldier's voluntary decision to assume the risks of service means that society has no duty to protect her from those risks. Rather, her socially-beneficial activity gives rise to an enhanced duty of protection, both to prevent harm[101] and to compensate when harm occurs.[102] Similarly, society protects police officers and firefighters from the risks that arise as a result of their service. Thus, police are provided bullet-proof vests and other safety equipment,[103] and constitutionally-recognized interests of suspects give way to concerns for the safety of officers.[104]

Socially-beneficial activities entitled to societal protection extend beyond prototypical and politically-popular public-service employment. Take unpopular speech, for example. It benefits society by, inter alia, inviting discussion, stirring the dissatisfied into action, and inspiring change.[105] The importance of protecting those who engage in unpopular speech is borne out by the First Amendment's prohibition on the prosecution of those who engage in such speech and the imposition on police of the obligation to

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characteristic, and her intoxication on a given occasion, which is the more direct result of a choice by the defendant. This is not to say that this distinction is beyond reproach. *See* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1311–14 (2011) (criticizing the normative value of distinguishing status and conduct); Douglas N. Husak, *Addiction and Criminal Liability*, 18 L. & PHIL. 655, 658–59 (1999) (arguing that the pain of withdrawal could satisfy the threat of harm element of a duress defense to a charge of illegal drug use). Nevertheless, *Powell* and *Robinson* can be read to reflect the understanding that as the causal relationship between an individual's past choice and the resulting vulnerability becomes more attenuated, society's obligation to protect against that vulnerability becomes more prominent.

101. *See, e.g.*, Editorial, *A Failure to Protect Our Troops*, N.Y. TIMES, June 14, 2007, at A30 (criticizing the Pentagon's decision to ignore requests from field commanders in Iraq for better armor-protected vehicles).

102. *See* Feres v. United States, 340 U.S. 135, 145 (1950) (noting that the compensation system for soldiers "compare[s] extremely favorably" with workers' compensation statutes in finding that additional recovery is not permitted under the Federal Tort Claims Act); Paul R. Gugliuzza, *Veterans Benefits in 2010: A New Dialogue Between the Supreme Court and the Federal Circuit*, 60 AM. U. L. REV. 1201, 1255–56 (2011) (noting broad increases in eligibility for and funding of veterans benefits in 2010).

103. *See, e.g.*, James Guelff and Chris McCurley Body Armor Act of 2002, 42 U.S.C. § 3796*ll*-3 (2006) (providing for the donation of used body armor by federal law enforcement to state law enforcement agencies in light of the substantial risk to law enforcement officers who do not have body armor).

104. *See* Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, 22 HASTINGS CONST. L.Q. 623, 635 (1995) (discussing the officer safety rationale for a *Terry* frisk).

105. *See* Texas v. Johnson, 491 U.S. 397, 408–09 (1989) (discussing some functions of free speech, including inducing unrest, creating dissatisfaction, or inciting anger).

prevent violence that might result.[106] Unpopular religious practices are entitled to enhanced legal protection on similar grounds.[107] Society's duty to protect also extends to socially-beneficial activities not enumerated in the Constitution.[108] As a corollary to this proposition, the existence of society's duty generally does not depend upon the motivation behind the vulnerable individual's engagement in socially-beneficial activity. Thus, when the government attempts to encourage enlistment in the military through substantial monetary bonuses,[109] there is no concomitant reduction in protection.

III. THE VULNERABILITIES OF ACTIVE CRIMINAL INFORMANTS

Throughout the process of cooperating with the State, from her recruitment to the eventual completion of her cooperation obligations, the active criminal informant primarily has three vulnerable interests: an interest in avoiding punishment, an interest in avoiding harm, and an interest in autonomy.[110] These interests are vulnerable to harm because of both inherent characteristics of the informant system and individual characteristics of informants that make some informants more vulnerable than others. The following discussion will outline the systemic vulnerabilities and individual vulnerabilities in turn and consider in each case the extent of society's obligation to protect against the vulnerability.

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106. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1011–12 (2011) (discussing the "heckler's veto" in Supreme Court precedent).

107. *See* Frederick Mark Gedicks, *God of Our Fathers, Gods for Ourselves: Fundamentalism and Postmodern Belief*, 18 WM. & MARY BILL RTS. J. 901, 910 (2010) (noting the Supreme Court's careful interpretation of federal statutes to protect small or unpopular minority religions).

108. For instance, in light of the substantial health benefits of breastfeeding, nearly every state now protects a woman's right to breastfeed in public. Heather M. Kolinsky, *Respecting Working Mothers with Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States*, 17 DUKE J. GENDER L. & POL'Y 333, 333–34 (2010).

109. *See* Simon Romero, *Iraq or No, Guard Bonus Lures Some to Re-enlist*, N.Y. TIMES, Feb. 19, 2005, at A10 (noting that National Guard re-enlistment rates rose after $15,000 bonuses became available to those who re-listed for six years).

110. The informant system has been subject to criticism on a number of other grounds, including its negative impact on the purposes of law enforcement, the potential it creates for corruption, its deleterious effect on crime victims, and its tendency to result in inaccurate outcomes. *See* NATAPOFF, *supra* note 13, at 31–39, 69–81 (discussing the varied social and legal costs of reliance on informants). At some level, criminal informants share these interests with society at-large. Indeed, criminal informants on average would likely benefit more than the rest of society from improving the accuracy of criminal justice outcomes because they come into personal contact with the criminal justice system more frequently than most. Nonetheless, such diffuse interests do not approach in importance the individual potential informant's immediate concerns about avoiding punishment, remaining unharmed, and being able to make knowing and voluntary choices.

A. Systemic Vulnerabilities

1. The vulnerable interest in avoiding punishment

Criminal informants have an interest in avoiding punishment for their crimes, and this interest is vulnerable to government interference when informants cooperate.[111] But the informant's interest in avoiding punishment is harmful to society and thus not entitled to protection.[112] First, allowing an informant to avoid punishment undermines the retributive goals of the criminal system because she is not punished in accordance with her moral desert.[113] Moreover, the release of known criminal informants back into society without punishment interferes with the expressive function of criminal law by suggesting that criminal culpability is fungible and that the criminal justice system is more important than criminal justice itself.[114] Finally, to the extent that punishment itself may provide some benefit to the informant, avoiding that punishment is ultimately harmful to her.[115] For these reasons, the discussion of the informant's interests will ignore the informant's interest in avoiding criminal punishment.

2. The vulnerable interest in being free from harm

Most concretely, informants risk bodily harm or death should their cooperation be discovered.[116] An informant's cooperation can be discovered through bad luck or through malfeasance or misfeasance

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111. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1928 (1992) (arguing that abolishing plea bargaining on paternalism grounds would harm many defendants by exposing them to longer prison sentences).

112. The notion that an individual's interest in engaging in socially-harmful activity is not entitled to society's protection is a corollary to the principle discussed above that vulnerabilities arising from socially-beneficial activities are entitled to greater protection. *See supra* notes 101–09 and accompanying text.

113. *See* Rich, *supra* note 21, at 741 (asserting that reducing leniency for criminal informants will deter crime and increase community faith in police). *But see* Simons, *supra* note 13, at 54 (arguing that cooperation itself may be a form of punishment that counsels in favor of lighter formal punishments for some informants).

114. Natapoff, *supra* note 16, at 680–82.

115. *See, e.g.*, Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 264 (1981) (emphasizing the good of the wrongdoer as a justification for punishment within the paternalistic theory).

116. *See* HARNEY & CROSS, *supra* note 33, at 68 (considering the social and physical vulnerability of an informant if his identity becomes known to his peers); GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 146 (1988) (attributing increased homicide rates in the 1970s, in part, to retaliatory violence against suspected informants).

by law enforcement.[117] While there are no data on the frequency of violence against informants, reported cases involving violent crimes against informants are legion.[118] And the informant is vulnerable to harm not only at the hands of those against whom she is cooperating; rather, the criminal population at-large may punish a "snitch," and the risk is especially acute if the informant's cooperation is revealed while she is incarcerated.[119]

The potential harm facing criminal informants is not limited to physical injury. They also risk moral harm to the extent that they are required to commit additional and more severe criminal offenses to receive leniency.[120] Committing these criminal acts, even though they may not be strictly illegal due to State authorization, acclimatizes the informant to a level of criminality with which she may not yet be familiar. For instance, an informant who is believed to be involved in small-time marijuana dealing may be pressured to set up deals involving more serious drugs, like cocaine or heroin, or other contraband, such as firearms.[121] Beyond the risk that the informant will be at risk of physical violence as a result of being out of her depth in this more serious criminality,[122] this exposure may also break down internal barriers to participating in more serious offenses, resulting in a sort of "moral corrosion" of the informant.[123] Similarly, because the informant will likely recognize cooperation as itself an immoral act of betrayal, it will leave her demoralized and ill-at-ease with the

117. *See* ACLU STUDY, *supra* note 1, at 9–10 (discussing reports that police inadvertently or intentionally "burn[ed]" informants, exposing them as cooperators).

118. *See* Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 958 n.213 (2009) (collecting cases in which informants were harmed or killed).

119. *See* Benefield v. McDowall, 241 F.3d 1267, 1272 (10th Cir. 2001) (holding that labeling a prison inmate a "snitch" creates a "substantial risk of serious harm" to the inmate and collecting cases to that effect from other courts); Simons, *supra* note 13, at 29–30 ("In prison, the cooperator will be exposed to the continual threat of physical retaliation, even from prisoners completely unconnected with the cooperator.").

120. This risk is analogous to the type faced by undercover police officers who engage in authorized illegality to maintain their cover and gain the trust of the targets of their investigation. *See* Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 190 (2009) (discussing the psychological harms and temptations suffered by undercover agents who participate in authorized crimes).

121. *See* Rich, *supra* note 21, at 681–84 (discussing the case of Rachel Morningstar Hoffman).

122. *See id.* at 683–84 (asserting that Hoffman risked injury and death in order to cooperate with the police).

123. *See* Joh, *supra* note 120, at 190 (discussing the "moral corrosion" of undercover agents who participate in crimes).

actions that she undertakes.[124]

Finally, criminal informants also risk harm to their relationships with others, a harm that will be referred to as "social harm."[125] Specifically, if her cooperation is discovered, the criminal informant is likely to be ostracized by both her criminal and law-abiding communities. She may find it difficult to continue making a living through illicit means, as other criminals will be unwilling to trust a known "rat."[126] Moreover, she may be deprived of legitimate business opportunities, as well as interaction with others in her religious or ethnic communities.[127] Such isolation, combined with the constant threat of physical harm, can take a substantial psychological toll on the informant.[128] The concept of "social harm" as used herein therefore includes both economic and psychological harm to the informant.

The informant's vulnerabilities to harm arise from her involvement in the socially-beneficial activity of assisting the police.[129] As a result,

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124. Simons, *supra* note 13, at 31.

125. This use of the term "social harm" is entirely distinct from the concept of "social harm" that underpins criminal law. *See, e.g.*, Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought To Be*, 78 ST. JOHN'S L. REV. 725, 805 (2004) (discussing the traditional use of the concept of "social harm" in criminal law, where a "harm is referred to as 'social harm' because the prohibited conduct is a public wrong that offends the common good").

126. *See* Simons, *supra* note 13, at 29–31 (observing the costs of ostracism of cooperators from criminal and legitimate social groups).

127. *Id.* at 30; *see* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 79–80 (1995) (noting the "social cost" of becoming an informant).

128. *See* Estate of Rhoad v. East Vincent Twp, No. 05-5875, 2006 WL 1071573, at *1–2 (E.D. Pa. Apr. 18, 2006) (deciding a § 1983 claim involving an informant who committed suicide after police refused to allow him to cease cooperation and enter drug rehabilitation); Williamson v. City of Virginia Beach, 786 F. Supp. 1238, 1241, 1245–46 (E.D. Va. 1992) (adjudicating a § 1983 claim that a seventeen-year-old informant committed suicide as a result of threats received after he agreed to cooperate), *aff'd per curiam*, 991 F.2d 793 (4th Cir. 1993); David Hasemyer & Mark T. Sullivan, *Courtroom Suicide Exposes DEA Dark Side: Informant's Death Reveals Seamy Underworld of the Drug War*, SAN DIEGO TRIB., Jan. 27, 1992, at A1 (discussing the case of an informant who committed suicide in courtroom after being sentenced to twenty-five years in prison).

129. The description of assisting the police as a socially-beneficial activity does not reflect an empirical assessment of whether the assistance that any one informant provides to the police in fact provides a net benefit to society. *Cf.* Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903, 905–10 (2011) (suggesting that cooperation may cause a net harm to society and recommending studies of informant use to determine the extent of such harm). Rather, it acknowledges two less debatable propositions. First, assisting the police is behavior that society wishes to encourage because enforcement of the criminal laws is necessary to social stability and cannot be accomplished efficiently without civilian cooperation. *Cf.* Miranda v. Arizona, 384 U.S. 436, 477–78 (1966) ("It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."). Second, though assistance may not benefit society in all cases, it would be unjust for society to externalize that risk at the expense of the criminal informant, who is less capable than the relevant agents of the State to determine whether cooperation in a

society owes the informant a greater duty to protect her against the resulting risks of harm.[130] But the contention may be made that the promise of leniency offered to an informant is compensation enough for those risks and that additional protections are not required.[131] In this vein, Judge Posner, explaining why inducing an informant to engage in sexual intercourse with the target of an investigation is not necessarily a constitutional violation, argued in dicta that:

> [C]onfidential informants often agree to engage in risky undercover work in exchange for leniency, and we cannot think of any reason, especially any reason rooted in constitutional text or doctrine, for creating a categorical prohibition against the informant's incurring a cost that takes a different form from the usual risk of being beaten up or for that matter bumped off by a drug dealer with whom one is negotiating a purchase or sale of drugs in the hope of obtaining lenient treatment from the government.[132]

There are two responses to this argument. First, informant recruitment is so inherently coercive that the decisions of some criminal informants to cooperate are not voluntary.[133] Even on the terms of Judge Posner's argument, an informant who does not agree voluntarily to exchange her cooperation for the promise of leniency is still entitled to protection.[134]

Second, Judge Posner's argument delineates only the State's legal obligations to criminal informants, not society's normative duties.[135]

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given case will be beneficial. For these reasons, cooperation is properly viewed as socially beneficial activity that gives rise to a duty to protect the cooperator.

130. *See* Garcia v. United States, 666 F.2d 960, 962–63 (5th Cir. 1982) (observing that the federal Witness Protection Program was created "in response to a felt moral obligation to repay citizens who risk life by carrying out their duty as citizens to testify"); *cf.* Piemonte v. United States, 367 U.S. 556, 559 & n.2 (1961) (recognizing that an accomplice to a crime has a duty, like every other citizen, to testify despite threats of physical reprisals, even though the State also has an obligation to protect citizens from harm).

131. *See, e.g.*, Vélez-Díaz v. Vega-Irizarry, 421 F.3d 71, 81 (1st Cir. 2005) (rejecting a *Bivens* claim by family members of a murdered criminal informant because "[t]here are risks inherent in being a cooperating witness . . . and the witness voluntarily assumes those risks"); Summar v. Bennett, 157 F.3d 1054, 1058–59 (6th Cir. 1998) (dismissing a constitutional claim arising from the murder of a criminal informant who "voluntarily agreed to serve as a confidential informant, albeit 'motivated by . . . promises regarding the decedent's pending drug charge'").

132. Alexander v. DeAngelo, 329 F.3d 912, 918 (7th Cir. 2003).

133. *See supra* Part I.B (detailing the coercive influences police exert over potential informants, including capitalizing on fear of punishment and emphasizing the maximize penalties).

134. *See Alexander*, 329 F.3d at 918 (recognizing that police tactics rising to the level of coercion are actionable under § 1983 based on the premise that the informant's consent is deemed involuntary).

135. Posner is of course correct as a legal matter: the Supreme Court in *DeShaney v. Winnebago County Department of Social Services* held that because the Due Process

As discussed previously, choice is not the only touchstone in ascertaining whether society has a duty to protect a vulnerable individual.[136] Rather, society also has a normative duty to protect those who engage in socially-beneficial activities, such as assisting law enforcement. This duty governs despite the admittedly selfish motivations that drive most informants.[137] Moreover, failing to protect informants runs contrary to due process norms by stripping criminal informants of society's protections and essentially punishing them for their criminal activity without requiring a conviction and providing them the benefit of due process.[138]

3. The vulnerable interest in autonomy

Like everyone else, criminal informants have an interest in preserving their autonomy, i.e., in being permitted to make decisions about their own lives free from government intervention.[139] With respect to cooperation, this means that informants have an interest in being permitted to weigh the risks and benefits of assisting the police, to decide whether cooperation is in their best interest, and to have that decision be given full effect.

The impact of the informant recruitment system on the autonomy of potential informants has been the subject of only limited scholarly discussion.[140] Scholarship on the impact of plea bargaining on a criminal defendant's autonomy is far more voluminous, however.[141]

Clause only limits the State's power to act, it does not require the government to protect citizens from injury at the hands of third parties absent some State action depriving the individual of the power to protect herself. 489 U.S. 189, 195–96 (1989).

136. *Supra* notes 101–09 and accompanying text.

137. *See* Simons, *supra* note 13, at 2 ("[C]ooperators want what only prosecutors can offer: leniency, or at least a recommendation for leniency.").

138. Though this does not give rise to a constitutional claim, it runs contrary to the due process principle that one should not be subject to punishment prior to conviction for a crime. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (considering whether the conditions of the defendant's pretrial detention constituted punishment under the Fourteenth Amendment).

139. *See* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1153 (2010) (discussing the autonomy interest associated with a criminal defendant's conditional rights). Though autonomy can be a "protean concept," Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994), the application of the ideal of autonomy herein is sufficiently straightforward that complexities about its precise definition can be set aside.

140. *See* NATAPOFF, *supra* note 13, at 40–41 (discussing the imbalance of power and disparity of information between law enforcement and potential new informants).

141. *See* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992) (arguing for the abolition of plea bargaining and questioning "[t]he presumptive fairness of settlement"); Scott & Stuntz, *supra* note 111, at 1910 (analyzing plea bargaining under a contract theory); *see also* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 289 (1983) (analyzing plea bargaining as an element of a market system, part of what "set[s] the 'price' of

Given the structural similarity between plea bargains and cooperation agreements,[142] plea bargaining literature provides an instructive starting point for analyzing the impact of cooperation agreements on informant autonomy.

From the standpoint of enhancing autonomy, permitting cooperation, like allowing plea bargaining, gives the negotiating civilian more choices than she would have available otherwise.[143] That said, the institution of plea bargaining is frequently criticized for encumbering defendants with many bargaining disadvantages, including the critique that the "freedom" to plea bargain is neither free nor voluntary.[144] Some of these criticisms are particularly relevant to cooperation agreements. Critics argue, inter alia, that threats of criminal sanction are so coercive as to render any plea bargain involuntary; that plea agreements are unconscionable because of the vastly superior bargaining position occupied by the State; and that plea bargains are essentially fraudulent because defendants lack information material to their ability to make an informed agreement.[145] These arguments will be discussed in turn below, with a particular emphasis on what the differences between plea bargains and cooperation agreements suggest about a potential informant's entitlement to protection of her autonomy interests.

a. The coercive threat of criminal sanctions

Whenever a civilian negotiates with the State with the possibility of criminal sanctions on the line, the civilian is faced with the "difficult choice" of deciding what she is willing to give up to avoid that sanction.[146] In the case of a pleading defendant, the State demands that she give up her constitutional right to trial in exchange for some

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crime").

142. Specifically, in the context of both plea bargaining and cooperation agreements, an individual suspected of criminal activity contemplates whether to exchange something of great value, be it her right to trial or her active assistance, for leniency in an actual or potential criminal prosecution. *See* Natapoff, *supra* note 16, at 664–65 (describing cooperation agreements as "an extreme form of plea bargain").

143. *See* Scott & Stuntz, *supra* note 111, at 1913–17 (discussing the autonomy benefits of plea bargains); *see also* Easterbrook, *supra* note 141, at 317 (same). Without the option of becoming an informant, the choices of a majority of potential criminal informants would be limited to those available to any individual suspected of a crime.

144. John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 490 n.231 (2001).

145. *See* Scott & Stuntz, *supra* note 111, at 1919–24 (collecting and responding to arguments that plea bargaining is coercive or unconscionable).

146. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

measure of certainty about the punishment she will receive.[147] The potential criminal informant is offered a similar bargain: she can work for the police in exchange for a more lenient punishment—or possibly no punishment at all—for her crimes.[148]

But difficult choices are not necessarily involuntary ones.[149] Thus, in the plea bargaining context, the question boils down to whether the threat of criminal sanctions is so severe or the offer of leniency so compelling that the defendant agrees to the bargain involuntarily.[150] Critics of plea bargaining claim that criminal sanctions are so inherently unpleasant, and the opportunity to avoid them so desirable, that an offer of leniency overcomes the will of the negotiating defendant in all cases.[151]

A similar argument could be made, of course, in the context of potential informants who negotiate with law enforcement officers who are threatening them with criminal sanctions if they fail to cooperate. Such an argument gives rise to the same question: are threats of criminal sanctions so inherently coercive that they render one incapable of entering into a voluntary agreement? The Supreme

147. Scott & Stuntz, *supra* note 111, at 1914.

148. *See* Rich, *supra* note 21, at 713–16 (arguing that demanding cooperation under the threat of more severe criminal punishment violates the Thirteenth Amendment's prohibition on involuntary servitude).

149. In Aristotle's famous example, a ship's captain caught in a storm who jettisons cargo in order to save his crew has acted voluntarily in the sense that he freely made a choice between two undesirable results. *See* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 469 (2000) (using Aristotle's example to illustrate that, even in cases of duress, the element of choice exists); *see also* Scott & Stuntz, *supra* note 111, at 1920 ("[C]oercion in the sense of few and unpalatable choices does not necessarily negate voluntary choice.").

150. *See Bordenkircher*, 434 U.S. at 363 (noting the validity of plea bargaining so long as the defendant is free to accept or decline for her own reasons). It should be noted that critics of plea bargaining and the informant system both raise numerous other concerns with these two aspects of the criminal justice system. *See, e.g.*, NATAPOFF, *supra* note 13, at 31–38 (discussing numerous critiques of the informant system); Schulhofer, *supra* note 141, at 1979 (arguing that plea bargaining "impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent"). These arguments are outside the scope of this Article, however, which focuses on interests typically ignored in the literature: those unique to the potential criminal informant.

151. Critics of plea bargaining go as far as to analogize plea bargain negotiations to negotiating at gunpoint or under threat of torture. *See* Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1417 (2003) (arguing that guilty pleas, following protestations of innocence and induced by threats of additional punishment, cannot be relied upon); Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 97–99 (1976) (noting that, whether threatened with a gun during a robbery or with the death penalty during a trial, a reasonable victim may have no choice but to give in to the coercion); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 3 (1978) (arguing parallels in the origin, function, and doctrine of the laws of modern plea bargaining and medieval torture).

Court[152] and supporters of plea-bargaining[153] have argued that they are not. However, the claim that the potential informant should be entitled to per se protection from this possible coercion fails for another reason: the informant's vulnerability to the coercive threat of criminal sanctions is the result of her choice to engage in criminal activity.[154] Put simply, every individual knows that, should she commit a crime and authorities discover it, she will face difficult choices that hinge on the threat of criminal sanctions.[155] Moreover, citizens are generally aware of criminal sanctions and expect them to be sufficiently unpleasant to deter crime.[156] Thus, a potential

152. *See Bordenkircher*, 434 U.S. at 364 ("While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" (alteration in original) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973))); Brady v. United States, 397 U.S. 742, 755 (1970) (rejecting the argument that a plea bargain is per se involuntary if prosecution seeks the death penalty); *see also* United States v. Mezzanatto, 513 U.S. 196, 209–10 (1995) (holding that requiring a waiver of otherwise excluded statements made during negotiation as a condition of entering into plea discussion was not unconstitutionally coercive, as the dilemma facing the defendant "is indistinguishable from any of a number of difficult choices that criminal defendants face every day").

153. Scott and Stuntz argue that under a contract theory of duress, a contract is voidable by one party only if the other wrongfully compelled her to enter into the contract. Scott & Stuntz, *supra* note 111, at 1919. Consequently, the dispositive question in the plea-bargaining context is whether the prosecutor is responsible for the coercive nature of the plea bargain. *Id.* at 1920–21. In a typical case, absent strategic manipulation of post-trial sentences by the prosecutor, sentencing policy is to blame for the coercion, so there is no duress as a matter of contract law. *Id.*

154. Of course, this may not always be the case. Another significant objection to plea-bargaining is that prosecutors can coerce risk-averse innocent defendants into pleading guilty to avoid the chance that they might be found guilty and subjected to a lengthy prison sentence. Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125, 1171–72 (2011). Similarly, when the State erroneously threatens an innocent individual with prosecution, she might decide to become an active informant to avoid the risk of allowing the threatened prosecution to move forward. Although there is no hard data on how frequently police threaten innocent people with criminal charges to coerce cooperation, anecdotal reports suggest that it does occur. *See* ACLU STUDY, *supra* note 1, at 52–53. While such cases fall outside the scope of this Article, potential informants who are innocent of threatened charges would particularly benefit from the information-enhancing proposals set forth *infra* Part VI.C.

155. Indeed, the possibility of avoiding punishment through cooperation is an ingrained fact in criminal culture. *See* NATAPOFF, *supra* note 13, at 43–44 (lamenting the trend toward criminals mitigating punishment for serious crimes by seeking cooperation with prosecutors); Richard Rosenfeld et al., *Snitching and the Code of the Street*, 43 BRIT. J. CRIMINOLOGY 291, 298–300 (2003) (observing that informers weigh—and perhaps underestimate—risks to avoid detention, yet experience has taught several that routine police pressure tactics often overstate the threat of jail time).

156. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1390 (2003) (invoking Jeremy Bentham and Immanuel Kant, who viewed punishment's pain as a way to offset its benefits while also communicating to society both

informant's vulnerability to such threats can be said to arise from her knowing, voluntary choice to engage in criminal activity,[157] and society should not forbid cooperation on the ground that potential criminal informants deserve protection from the unpleasant choice between jail and cooperation.[158]

b. The State's superior bargaining position

Critics of plea-bargaining also contend that the inherent differential in bargaining power between the prosecutor and the defendant is so vast that plea bargains are unconscionable.[159] According to these critics, prosecutors face little risk of acquittal at trial, while defendants face a steeply increased punishment in the

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condemnation and the unpleasant consequences of criminality).

157. Interestingly, the Supreme Court's decisions in the plea-bargaining context hinge on the assumption that only guilty defendants plead guilty. *See* Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 19–20 & n.89 (2002) (collecting various Supreme Court cases that presume the accuracy of guilty pleas and thus declining to upset their finality). As a result, they suggest that part of the reason why society will not protect criminal defendants from the potential coercion in the plea-bargaining context is that the defendant's vulnerability arises from her choice to engage in criminal conduct.

158. Of course, just because society should not forbid *all* cooperation agreements on the ground that the threat of criminal sanction is coercive does not mean that all such agreements are valid. *See* United States v. Mezzanatto, 513 U.S. 196, 210 (1995) ("[A]lthough some waiver agreements 'may not be the product of an informed and voluntary decision,' this possibility 'does not justify invalidating *all* such agreements.'" (quoting Town of Newton v. Rumery, 480 U.S. 386, 393 (1987))). The Due Process Clause forbids involuntary confessions and plea agreements, and the Supreme Court's plea-bargaining jurisprudence instructs lower courts to engage in a case-by-case review to ensure that no due process violations have occurred. *See id.* (suggesting that courts should engage in a case-by-case review of waiver agreements to ensure a lack of coercion or fraud); Brady v. United States, 397 U.S. 742, 750–55 (1970) (refusing to forbid plea agreements entirely and instead asking whether, on the facts of the case, the defendant entered into the agreement involuntarily); Jackson v. Denno, 378 U.S. 368, 376 (1964) ("It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . ."). Such a case-by-case analysis in the informant context would permit potential informants protection from vulnerabilities, including those discussed *infra* Part VI.C, that are not the result of their own choice. *Cf.* Stanley v. Illinois, 405 U.S. 645, 656 (1972) ("[O]ne might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials . . . .").

159. *See* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 45–51 (dividing prosecutors' dominance into four elements: (1) low risk to the prosecutor of acquittal if the case goes to trial; (2) high risk to a defendant of a "trial penalty"; (3) ability to charge a defendant with crimes more serious than warranted; and (4) alignment of defense attorneys' personal interests in acquiescing; resulting in "a process which is not an adversarial negotiation").

likely event that they are found guilty.[160] As a result, prosecutors have the power to determine the defendant's sentence unilaterally and impose it in the form of a non-negotiable offer.[161] Plea-bargaining's supporters contend that the prosecutor's bargaining power advantage is not as great as feared.[162] This is because, unlike an individual customer of a mass-market good who has little to offer the seller, each defendant has the right to force a costly and time-consuming trial.[163] According to these scholars, the power to allow the prosecutor to forego such a trial is sufficient to prevent the plea bargain from being unconscionable.[164]

Cooperation is similar to plea-bargaining because the State's offer of leniency is of great value to the potential informant. But the bargaining position of potential informants varies more than the plea-bargaining defendant's and often is much weaker. In particular, while a plea-bargaining defendant always has something valuable to offer the prosecutor, the information and access that most potential informants can provide is essentially fungible.[165] For instance, low-level drug offenders generally can do little more than use their criminal connections to arrange for controlled drug buys that allow police to arrest other minor criminals.[166] Though these connections have some value, legions of individuals commit minor drug offenses and have such connections.[167] Moreover, an offender who refuses to cooperate places only a slight burden on the arresting officer who tried to obtain her cooperation. At most, the officer must bear the cost of passing any evidence of the offender's wrongdoing on to a

160. *Id.* at 45–46.
161. *Id.*
162. Scott & Stuntz, *supra* note 111, at 1923–24 & n.55.
163. *Id.* at 1924.
164. *Id.*
165. A handful of informants do possess substantial bargaining power in that few others share their access to evidence. For instance, an informant with established contacts to a suspected criminal organization—be it a terrorist group, a street gang, or a corrupt business—is in a strong position to negotiate with the police. These informants can save law enforcement untold hours of work and mitigate many of the potential risks to agents and thus can exact a heavy price for their information. The relative utility of such high-value informants and their scarcity can be seen in the extensive protections provided by the federal Witness Security Program to a small number of federal informants. *See infra* notes 251–56 and accompanying text (detailing extensive measures authorized to protect potential witnesses to serious crimes).
166. *See* ACLU STUDY, *supra* note 1, at 51 (finding that drug-addicted informants typically arranged stings that caught dealers in possession of ten to twenty bags or vials of drugs).
167. *See* SKOLNICK, *supra* note 23, at 121–22 (noting that while "the police need informers," the target of an informant's sting often "cannot bring themselves to believe how little they have been sold out for").

prosecutor and testifying at trial.[168] Thus, most potential informants resemble the consumer of a mass-marketed good: she can impose only a minimal cost on the government agent by refusing to cooperate while the agent can impose a substantial cost on her should she refuse.[169] This puts the potential informant in a "take-it-or-leave-it" situation typical of a contract of adhesion.[170]

Yet here again, the potential informant's vulnerability to the State's unequal bargaining power results from the informant's voluntary and knowing decision to engage in criminal conduct.[171] By engaging in criminal activity, an individual knowingly submits herself to the State's monopoly over criminal punishment, and it is no secret that the decision of whether to grant her leniency in exchange for cooperation is at the discretion of law enforcement agents. Similarly, courts will refuse to find adhesion contracts unconscionable where the weaker party failed to avail herself of alternatives prior to negotiating, including the option to walk away.[172] As such, the

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168. In most drug cases the burden on officers will not include testifying in court, as more than ninety percent of those convicted of drug offenses are convicted through a guilty plea, and very few charges are resolved through acquittal. Beth A. Freeborn, *Arrest Avoidance: Law Enforcement and the Price of Cocaine*, 52 J.L. & ECON. 19, 29–30 (2009).

169. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2565 (2004) ("In a system (like ours) that rewards snitches generously, some defendants will be punished very harshly—nominally for their crimes, but actually for not having the kind of information one gets only by working at high levels of criminal organizations.").

170. *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 202 (2005) ("Similarly, adhesion contract doctrine explicitly incorporates inequality of bargaining power by defining adhesion contracts as those presented on a 'take-it-or-leave-it' basis by a party with stronger bargaining power to a party with weaker bargaining power."). *See generally* Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863, 866–73 (2010) (discussing approaches taken by courts and scholars to so-called "pizza-box" contracts in the consumer realm: classical and formalistic, as well as relational and behavioral).

171. Again, this analysis is based on the assumption that the potential informant is a potential *criminal* informant, i.e., an individual who in fact has engaged in criminal activity. *See supra* note 154 and accompanying text (explaining that avoiding the risk of worse outcomes can incentivize innocent defendants to plead guilty); *supra* note 157 (contemplating the Supreme Court's reliance on the assumption of truth).

172. *See* Barnhizer, *supra* note 170, at 204–05 (underscoring the fact that negotiating parties always have the option to refuse agreement, so adhesive terms are not inherently coercive). Moreover, equalizing the bargaining power would permit potential informants to maximize their interest in avoiding criminal punishment. This interest is not one that the State should protect. *See supra* notes 111–15 and accompanying text (explaining that asymmetrical bargaining creates a disincentive for harmful activity and that the resulting vulnerabilities do not arise from socially-beneficial activities entitled greater protection). In contrast, enabling the consumer to negotiate on a relatively equal footing in an open market vindicates broader societal interests. *See* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1411–16 (2004) (arguing that underestimating costs at the time of agreement translates into ultimately bearing that burden when conditions make it relatively costlier,

potential informant, unlike the consumer facing an unconscionable adhesion contract, is not entitled to protection from her weakness in bargaining position vis-à-vis the State.[173]

c. Information asymmetry

Critics also argue that plea bargains are unconscionable because the prosecutor has superior knowledge of the strength of the case against the defendant as well as the "'market value' for such a case."[174] The supporter's response is that the terms of a plea bargain are usually straightforward, and thus even the most substandard defense counsel can assist a defendant in effectively negotiating a plea.[175]

Unlike the plea-bargaining defendant, however, the potential informant has no right to counsel.[176] As a result, she does not have access to a lawyer's expertise in evaluating government offers in light of the facts and "customary practices."[177] The potential informant faces numerous unknowns, including the charges she might confront, the chance of being convicted on those charges, the possible sentence she might receive, and the going market value of any cooperation she could provide.[178] Police and prosecutors, on the other hand, know the evidence they have against the potential

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distorting incentive structures critical to the freedom of contract).

173. The conclusion that potential informants are not entitled to per se protection from coercion by the strong arm of the State may seem unjust at first blush. Importantly, however, the absence of per se safeguards does not preclude measures more narrowly-tailored to protect individual informants who are particularly susceptible to coercion for reasons that are not the direct result of their choices. *See infra* Part VI.B (detailing the specialized protections in place for certain classes of at-risk informants).

174. *See* Kevin O'Keefe, Comment, *Two Wrongs Make a Wrong: A Challenge to Plea Bargaining and Collateral Consequence Statutes Through Their Integration*, 100 J. CRIM. L. & CRIMINOLOGY 243, 260 (2010); *see also* Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 430–31 (2009) (asserting that the limited access the defense has to information during the discovery process further exacerbates bargaining disparities).

175. *See* Easterbrook, *supra* note 141, at 309–10 (asserting that there is little reason to believe that discrepancies in lawyer access or information translates to less effective counsel); Scott & Stuntz, *supra* note 111, at 1922–23 (crediting experience and custom for narrowing the "bargaining range" to one "both small and familiar to the parties," resulting in "a good sense of the [particular case's] 'market price'").

176. *See* United States v. Moody, 206 F.3d 609, 616 (6th Cir. 2000) (identifying indictment as the threshold for the Sixth Amendment right to counsel).

177. *See* Scott & Stuntz, *supra* note 111, at 1923 & n.50 (asserting that criminal defendants do not necessarily have knowledge of likely trial outcomes or the sentence usually assigned to a guilty plea at the plea bargain stage of the process).

178. *See id.* at 1959 (recognizing that a defense lawyer is necessary in the plea-bargaining context because only the lawyer has the background experience to differentiate between a good and a bad deal based on her knowledge of trial outcomes and sentencing and the market for plea-bargains).

informant and have the experience to ascertain the charges that she is likely to face and the sentences that might result from such charges.[179] As a result, cooperation agreements "are often struck on the basis of incomplete, highly imperfect information and little more than the [potential informant's] guess about what a trial might reveal if one were held."[180]

The potential informant's vulnerability to this information asymmetry—unlike coercive threats of criminal sanctions and inherently unequal bargaining power—does *not* directly result from a knowing and voluntary choice. The criminal justice system operates on an explicit constitutional guarantee that a defendant has a right to notice of the charges against her.[181] Though the system almost certainly does not require specific notice of charges prior to cooperation negotiations,[182] the explicit statement of that right also does not suggest to the potential informant that law enforcement may seek her cooperation without informing her of the specific charges against her.[183] Moreover, police tactics that discourage the potential informant from consulting with counsel or taking time to consider the wisdom of accepting the government's offer exacerbate her ignorance.[184] Because the potential informant's vulnerability to this information asymmetry is not the result of a knowing and

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179. *See* Taslitz, *supra* note 174, at 430–31 (discussing the information asymmetry between the prosecution and defendant in the plea bargaining context). Of course, many potential informants are themselves "repeat players" in the criminal justice system. Nonetheless, the personal experience of even the most hardened criminal with charging and sentencing decisions pales in the comparison with that of a police officer or prosecutor.

180. Stephen J. Schulhofer, *A Wake-Up Call from the Plea-Bargaining Trenches*, 19 LAW & SOC. INQUIRY 135, 137 (1994) (referring to attorneys' guesses for defendants' odds of conviction).

181. U.S. CONST. amend. VI.

182. *See In re* Gault, 387 U.S. 1, 33 (1967) ("Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity." (internal quotation marks omitted)).

183. Though the maxim that "ignorance of the law is no excuse" embodies important norms, *see* Dan M. Kahan, *Ignorance of Law* Is *an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 127–28 (1997), it applies only in those situations where it can be said that a rule exists and that at least constructive notice of such a rule is possible. *See* Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1587–90 (2005) (observing that, where the law is unknowable even in principle, the notice requirement has no practical effect, inconsistent with its "sacred and inviolable" status in other contexts). Here, the exercise of law enforcement discretion in the negotiation of cooperation agreements is not definable by rules, and even if it were possible to glean a set of rules from practice, the potential informant does not have access to an attorney, who would be the only one with the necessary experience to ascertain those rules.

184. *See supra* notes 46–47 and accompanying text (characterizing high-pressure police tactics reported by the ACLU).

voluntary choice, society should protect the informant against it.

d. Unenforceability

Cooperation agreements also threaten a potential informant's autonomy interests because they are usually unenforceable. First, the length or nature of the assistance required of the informant or the nature of the leniency promised by the government may be so vague as to be unenforceable.[185] Second, the government agent who enters into a cooperation agreement may lack the authority to bind the government.[186] Third, the agreement almost always reserves to the government complete discretion to decide whether the informant's cooperation warrants leniency.[187] Thus, an active informant is vulnerable to the risk that she will agree to work for the police only to be denied, without recourse, any benefit for doing so.[188]

Absent some express notice to the potential informant of the likely unenforceability of any promise made by the State, the informant's

185. *Cf.* Krug v. United States, 168 F.3d 1307, 1308–10 (Fed. Cir. 1999) (rejecting a claim by an IRS informant for a monetary award on the ground that no contract arises from an indefinite award offer and informant conduct in response).

186. *See, e.g.*, United States v. Flemmi, 225 F.3d 78, 84–91 (1st Cir. 2000) (rejecting an informant's claim to use and derivative use immunity arising from promises made by FBI agents on the ground that the agents lacked the authority to grant immunity); Confidential Informant v. United States, 46 Fed. Cl. 1, 7 (2000) (holding that IRS and FBI agents did not have the actual authority to promise reward to IRS informant); *see also* Alemany, *supra* note 51, at 260–66 (collecting cases where the courts denied plaintiff-informants' sums allegedly promised to them on the basis that the agents involved had no actual authority to contract on the agencies' behalf).

187. *See* Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1662 (2003) (adding that a defendant's only recourse is to assert constitutional claims for the promised motions); Richman, *supra* note 127, at 102 n.114 (collecting cases affirming prosecutors' exclusive discretion).

188. It is worth noting that there are good reasons for the doctrines that render cooperation agreements unenforceable. The requirement of definiteness, for instance, guarantees that the government is held to perform only those promises that they intended to make. *See* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1649–51 (2003) (summarizing the common law approach that courts will not infer an intent to be bound if the parties leave material terms unspecified and also delineating its tension with a modern trend toward contextually supplying terms). The requirement of actual authority to bind the government stems from concerns about sovereign immunity and a desire to protect the public fisc from the actions of unauthorized government agents. *See* Alan I. Saltman, *The Government's Liability for Actions of Its Agents That Are Not Specifically Authorized: The Continuing Influence of* Merrill *and* Richmond, 32 PUB. CONT. L.J. 775, 781 (2003) (stating that conserving public moneys and the separation of powers informs the doctrine of sovereign immunity). Additionally, by maintaining discretion to assess the informant's compliance with the agreement, the State helps to guarantee the informant's enthusiastic and honest cooperation and to maintain its control over the informant. *See* Richman, *supra* note 127, at 95–102 (explaining that the government needs a mechanism in place to discourage a defendant from defecting from an agreement). Whether these reasons justify the unwillingness of courts to enforce cooperation agreements is a separate question, however, and one outside the scope of the instant inquiry.

vulnerability to the risk that she will be unable to enforce the State's promise is not the result of her informed choice. A potential informant may believe, entirely reasonably, that when an agent of the State makes a promise, even one that is in some way indefinite, the promise will be enforceable. As such, the State has a duty to protect against this vulnerability.

Moreover, at least in some cases, government agents make promises to potential informants for the purpose of encouraging cooperation but with the knowledge that they are unenforceable.[189] In doing so, agents take advantage of the pre-existing information asymmetry between them and informants.[190] This is particularly troubling where the agent has dissuaded the potential informant from seeking the assistance of counsel, who would no doubt inform her of the likely unenforceability of the State's promise.[191] The former resembles a case of promissory estoppel;[192] the latter looks like promissory fraud.[193] In either event, the equities favor requiring the

189. No data are available to suggest how frequently police officers make such promises, but there is ample reason to believe that such cases are not uncommon. First, it is well-established that law enforcement agents are permitted to lie and engage in other trickery in their dealings with suspected criminals. *See* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 778–79 (1997) (highlighting the Supreme Court's deference to law enforcement agents' judgment that valuable information would be inaccessible without deception). Some experts specifically encourage police to lie when attempting to recruit criminal informants. *See* MALLORY, *supra* note 1, at 23 (advocating for "informed bluff[ing]" as an effective tool in recruiting informants). Moreover, law enforcement guidelines for the handling of confidential informants often make clear that agents lack the authority to promise immunity or leniency to informants and instruct agents not to make such promises. *See Flemmi*, 225 F.3d at 88–89 (discussing historical FBI guidelines on the use of informants relating to promises of immunity); JOHN ASHCROFT, OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS 5 (2002) [hereinafter DOJ GUIDELINES], *available at* http://www.ignet.gov/pande/standards/invprg1211apph.pdf (describing cases where informants claim that law enforcement agents made unauthorized promises of leniency or immunity continue to arise).

190. *See* Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1140 (2009) (discussing the benefits to a party of knowingly including unenforceable terms in a contract).

191. *See supra* text accompanying note 48 (referring to defense counsel's ability to increase bargaining power as one reason police attempt to discourage their presence).

192. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . is binding if injustice can be avoided only by enforcement . . . ."); David G. Epstein et al., *Reliance on Oral Promises: Statute of Frauds and "Promissory Estoppel,"* 42 TEX. TECH L. REV. 913, 915 (2010) (setting forth the elements of promissory estoppel: "(1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment," and adding that various authorities have adopted essentially the same approach (quoting English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983))).

193. *See* Ian Ayres & Gregory Klass, *Promissory Fraud Without Breach*, 2004 WIS. L. REV. 507, 508–09 ("If a court finds that a defendant-promisor did not intend at the

State to protect the potential informant from the risk that she might rely on unenforceable promises made knowingly by its agents.[194]

B. Individual Vulnerabilities

Beyond the systemic characteristics of the informant system that make all informants vulnerable to coercion and harm, an informant who is a minor, mentally ill, or mentally handicapped is especially vulnerable to harm or interference with her autonomy interests. Social scientists and courts recognize that minors are more susceptible than adults to coercion from authority figures, such as police and prosecutors,[195] and that they are less capable of accurately assessing the likely consequences of their decisions.[196] Similarly, individuals who are mentally ill are more susceptible to authoritarian pressure in situations that may not appear coercive to others.[197] The

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time of promising to perform her promise, then the court can subject her to both compensatory and punitive damages under the doctrine of promissory fraud . . . .").

194. This is not to say that informants should be able to bring actions for either promissory estoppel or promissory fraud, as the same reasons justifying the unenforceability of the agent's promises, *see supra* note 188, also would counsel against allowing such actions. *See generally* Ayres & Klass, *supra* note 193, at 526–32 (discussing situations where fraud with respect to unenforceable promises should not give rise to valid actions for promissory fraud).

195. *See* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (reviewing precedent and concluding that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go"); *In re* Gault, 387 U.S. 1, 55 (1967) (holding that in the absence of counsel "the greatest care must be taken to assure that [a minor's] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair"); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 518 ("[C]hildren and juveniles . . . are also more predisposed to submissive behavior when questioned by police."); Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 992–99 (2005) (reviewing the social science and biological research on juvenile decision-making and concluding that "children are most vulnerable to coercive police deception").

196. Richard Rogers et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 PSYCHOL. PUB. POL'Y & L. 63, 66–67 (2008) (reviewing research on developmental issues relating to the ability of juveniles to make meaningful decisions regarding *Miranda* waiver, including tendencies to overweigh immediate gains and undervalue long-term negative consequences and diminished maturity of judgment).

197. *See* Claudio Salas, Note, *The Case for Excluding the Criminal Confessions of the Mentally Ill*, 16 YALE J.L. & HUMAN. 243, 265–66 (2004) ("Mental illness makes people suggestible and susceptible to the slightest forms of pressure; coercion can take place much more easily, and in situations that a 'normal' person might not find coercive. The police can much more easily take advantage of the trust and dependence that develops between a confessor and confessant when questioning someone who is mentally ill. This trust and dependence on the part of a suspect will make it impossible for him to understand the true, adversarial context of his interrogation and possible confession."). Note that the inquiry here of whether someone who is mentally ill or handicapped is particularly vulnerable to having her autonomy interests impinged by the State is different from the question of whether she has been subject to government coercion sufficient to give rise to a constitutional

mentally handicapped have difficulty recognizing when they are in an adversarial situation with authority figures and are particularly susceptible to agreeing to the wishes of those in positions of authority.[198] The vulnerabilities of these classes of potential informants unquestionably arise from immutable personal characteristics and therefore deserve protection.

Drug addicts and alcoholics also are particularly vulnerable to coercion and harm. In addition to typical pressures felt by all potential informants from the threat of a lengthy prison sentence if they do not cooperate, potential informants who are addicts face the short-term concern of experiencing acute withdrawal symptoms should they refuse to cooperate and be jailed.[199] The threat of withdrawal may be sufficiently severe to render the agreement to cooperate involuntary and to force such potential informants into unnecessarily dangerous situations.[200] The difficult question, however, is whether the addict's vulnerability to potential coercion is a sufficiently direct result of a knowing and voluntary choice, thus extinguishing her entitlement to society's protection.

Obviously, an individual's addiction in almost every case is the result of a voluntary choice, at some point, to begin using intoxicants. Still, that choice also likely occurred a substantial time in the past, as addictions tend to develop over time.[201] The more crucial issue is

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violation. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that coercive police activity is a prerequisite to a finding that a confession was not made voluntarily). As the Court explained in *Connelly*, the constitutional question focuses on the actions of the police, not on whether an individual's actions were the result of "'free choice' in any broader sense of the word." *Id.* at 170. Thus, a mentally ill individual's decision to assist the police may not be the product of her free will in some sense without the police's conduct meeting the constitutional standard of government coercion.

198. *See* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 511–13 (2002) (reviewing literature recognizing that the mentally handicapped are "unusually susceptible to the perceived wishes of authority figures," "are unable to discern when they are in an adversarial situation, especially with police officers," and often "overrate their skills").

199. Kevin Fiscella et al., *Benign Neglect or Neglected Abuse: Drug and Alcohol Withdrawal in U.S. Jails*, 32 J.L. MED. & ETHICS 129, 131 (2004) ("Acute drug and alcohol withdrawal is distinguished from most other medical conditions in that the onset of symptoms typically coincides with arrest and detention.").

200. *See* Commonwealth v. Paszko, 461 N.E.2d 222, 230 (Mass. 1984) (collecting cases and recognizing that confessions made during drug withdrawal may be involuntary); Fiscella et al., *supra* note 199, at 131 ("The threat of withdrawal associated with continued detention can implicitly serve to coerce arrestees into providing information they might not otherwise volunteer."); Douglas N. Husak, *Addiction and Criminal Liability*, 18 LAW & PHIL. 655, 658–59 (1999) (arguing that the pain caused by withdrawal could satisfy the threat of harm element of a duress defense to a charge of illegal drug use).

201. *See* Raymond Anton, *Substance Abuse Is a Disease of the Human Brain: Focus on*

whether continued addiction is properly viewed as a voluntary choice. Scientific literature tends to view addiction as a disease and thus out of the addict's control,[202] though there are dissenting voices.[203] Meanwhile, the Supreme Court, in striking down a statute criminalizing narcotics addiction, suggested in *Robinson v. California*[204] that it may support the disease model.[205] Thus, support certainly exists for the conclusion that society has a duty to protect drug addicts from the vulnerability that arises from their addiction.[206]

The potential informant who is intoxicated at the time she is asked to cooperate also presents a thorny problem. Intoxication can cause both cognitive and volitional impairments, leading the intoxicated individual to misunderstand what is occurring and to be less able to control her actions.[207] As a result, the intoxicated potential informant is vulnerable to coercion by State agents to cooperate in situations where the resulting danger may have dissuaded her had she been sober. But should this vulnerability be protected? Put another way, did the potential informant choose to suffer the vulnerabilities of intoxication on the given occasion?

As noted above, the scientific community largely views addiction as a disease that impairs the volitional capacity of the addict or alcoholic, thus making it difficult for her not to abuse the object of

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Alcohol, 38 J.L. MED. & ETHICS 735, 737 (2010) (reporting that alcoholism, for example, develops slowly, over the course of ten or even twenty years); Alan I. Leshner, *Addiction Is a Brain Disease, and It Matters*, 278 SCI. 45, 46 (1997) (explaining that drug abuse causes persuasive changes to brain function that last long after the period of addiction).

202. *See* David M. Eagleman et al., *Why Neuroscience Matters for Rational Drug Policy*, 11 MINN. J. L. SCI. & TECH. 7, 15–19 (2010) (explaining that brain dysfunction eventually impairs impulse control and the ability to act volitionally); Fentiman, *supra* note 99, at 234 & n.4 (reiterating the perception that drug addicts are the "choiceless victims of their illness," including the concept of people who behave compulsively despite adverse consequences).

203. *See* Fentiman, *supra* note 99, at 246–47 (discussing recent research suggesting that continued addiction is the result, at least in part, of the individual's failure to make the choice to stop using the addictive good).

204. 370 U.S. 660 (1962).

205. *See id.* at 666–67 (likening a statute that criminalized narcotic addiction to one that would outlaw mental illness and holding that imprisonment under the addiction statute constituted cruel and unusual punishment).

206. As noted *supra* notes 99–109 and accompanying text, the entitlement of a given vulnerability to protection is often a complex normative question. It is beyond the scope of this Article to resolve that question in an area as hotly contested as drug addiction.

207. *See* Cynthia Calkins Mercado et al., *Decision-Making About Volitional Impairment in Sexually Violent Predators*, 30 LAW & HUM. BEHAV. 587, 589 (2006) ("[C]onsiderable physiological and neuroscience research seems to support a link between alcohol and substance use and impairment in the inhibitory and activational aspects of behavioral control."); Steven S. Nemerson, *Alcoholism, Intoxication, and the Criminal Law*, 10 CARDOZO L. REV. 393, 405, 429 (1988) (explaining that consuming high quantities of alcohol reduces behavioral inhibitions).

the addiction.[208] Nevertheless, difficulty in controlling one's actions is not the same as an inability to do so, and the decision to abuse on a given occasion is volitional despite the influence of addiction.[209] For example, even if a cocaine addict uses cocaine in response to an incredibly strong desire, the decision to use is still a choice, and it is one undertaken with full knowledge of its impact on the addict's cognitive and volitional abilities.[210]

In this vein, substantive criminal law provides little leeway to addicts. Addiction generally provides no defense to charges of illegal intoxication,[211] and voluntary intoxication is rarely a defense to any crime, even if the defendant is an addict.[212] Similarly, those recovering from addiction are entitled to protection from employment discrimination, but those currently taking illegal drugs are not.[213]

This analysis thus suggests a meaningful distinction between intoxication and addiction. Both result from an individual's voluntary choice, but the decision that led to the addiction is sufficiently distant in time that the individual can no longer be said to have voluntarily subjected herself to the vulnerabilities arising from it. On the other hand, the decision to be intoxicated on a given occasion, though possibly influenced by addiction, is recent enough that the individual is responsible for knowingly making herself vulnerable to harm. Consequently, an addict deserves protection

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208. *See supra* note 202 and accompanying text (exploring addiction as an organic dysfunction rather than the mischievous result of poor decision-making).

209. *See* Stephen J. Morse, *Addiction, Genetics, and Criminal Responsibility*, 69 LAW & CONTEMP. PROBS. 165, 184–85 (2006) (arguing that analogies that presuppose mechanistic behavior mischaracterize strong addictive desires by mistaking extreme difficulty of impulse control for physical lack of it).

210. *See id.* at 193 (highlighting the fact that addicts have lucid thoughts both before and during addiction and almost always remain cognizant of the risks to decision-making).

211. *See* Powell v. Texas, 392 U.S. 514, 535 (1968) (plurality opinion) ("We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication.").

212. *See generally* Donald A. Dripps, *Recreational Drug Regulation: A Plea for Responsibility*, 2009 UTAH L. REV. 117, 122–26 (discussing why addiction does not constitute a defense and concluding that the ultimate choice to seek treatment theoretically remains available).

213. *See* Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 46 (1999) (noting that the ADA's "safe harbor" clause does not apply to people "currently engaging in the illegal use of drugs" (internal quotation marks omitted)).

from vulnerabilities arising from her addiction, but not from her immediate intoxication.

IV. PATERNALISM AND MORAL HARM

The preceding account provides a portrait of the vulnerabilities faced by potential informants in the current environment of non-regulation. Efforts to protect informants against vulnerabilities to harm—some of which will be advocated for in more detail below—will inevitably restrict, either directly or indirectly, the ability of some individuals to become informants.[214] Any such reforms thus raise additional autonomy concerns for the potential informant and are paternalistic to the extent that they are justified in whole or in part by the claim that they protect informant interests from harm.[215]

This conflict between the potential informant's interest in being free from harm and her autonomy interests highlights two issues. First, not all kinds of harm are equal. In particular, societal protection against moral harm interferes doubly with individual autonomy: not only do these protections inhibit the individual's ability to assess her own personal tolerance for risk and harm, but they also impose majoritarian moral judgments on the individual. Second, society must formulate some methodology to weigh the competing interests. This Article addresses these questions in turn.

A. The Problem of Moral Harm

Potential informants are vulnerable to physical, social, and moral harms as a result of their cooperation with law enforcement.[216] Moral harm is different from physical and social harm, however. "Harm," the prevention of which might justify restrictions on an individual's autonomy, requires some injury to an interest of the harmed.[217] With

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214. Of course, a variety of other grounds unrelated to the specific interests of informants may also justify reforms of the informant system: minimizing inaccurate outcomes, increasing law enforcement effectiveness, improving the perception of law enforcement in communities, and minimizing law enforcement corruption. *See generally* NATAPOFF, *supra* note 13, at 175–200 (proposing reforms on these grounds).

215. *See* Gerald Dworkin, *Paternalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/paternalism/ (last updated June 1, 2010) (defining paternalism broadly as "the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm"). Though the term "paternalism" often carries a negative connotation, the concept itself is non-normative. *Id.*

216. *See supra* notes 116–28 and accompanying text (discussing various types of vulnerabilities to which informants are susceptible).

217. *See* 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 33–36 (1984) (concluding, after surveying various senses of "harm," that criminal law should address only wrongs that also set back interests).

respect to physical harm, the interest at issue is straightforward and universal: the interest in one's physical health and life.[218] The interests injured by social harm, as defined by this Article,[219] are similarly universal: the interests in one's psychological well-being, ability to maintain social relationships, and minimal economic stability.[220]

On the other hand, the interest threatened by moral harm is one's interest in being good.[221] Unlike one's interest in avoiding physical injury or death, or in making a minimal living, one's interest in being good is highly individualized. Disagreements will arise both over whether a particular activity is in fact morally harmful to the actor[222] and over how much moral harm an activity will cause.[223] As a result, attempts to protect an individual from moral harm impose a greater restraint on her liberty than efforts to protect her from physical or social harm. Not only do such attempts interfere with the individual's freedom of action, they also impinge on her entitlement to assess what constitutes morally harmful activity.[224] Moreover, attempting to protect against moral harms runs the risk of imposing an inaccurate moral judgment.[225] In other words, when two groups differ about whether a particular activity causes moral harm to the actor, there is a danger in imposing the will of one over the other in that the winning side may simply be wrong.[226]

In the context of informants, the issue of moral harm is particularly complicated. For instance, the informant may perceive his cooperation as disloyal, and thus immoral, and suffer "moral harm"

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218. *See id.* at 37 (listing possible welfare interests broadly distinguishable as either physical or emotional).

219. *See supra* notes 125–28 and accompanying text (discussing social harms that may result from an individual's cooperation with police).

220. *See* FEINBERG, *supra* note 217, at 37 (sorting interests broadly as "welfare" and "ulterior," with the former being the most important).

221. *Id.* at 69–70.

222. *See* 4 JOEL FEINBERG, MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 308 (1988) (discussing moral relativism).

223. *See* Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1022–24 (2010) (criticizing attempts to correlate the degree of moral disapprobation with the allocation of resources).

224. *See* FEINBERG, *supra* note 222, at 309 ("When we give moral license to state enforcement of the majority will, overruling individual autonomy even in matters that do not violate the rights of others, that is unfair in itself . . . .").

225. *Id.* at 310.

226. These concerns about moral harm therefore are not morally relativistic; rather, they recognize that genuine disagreements exist about the moral wrongfulness of certain activities and place substantial value on individuals' interests in resolving these disagreements. *See id.* at 308–10 (suggesting that because individuals disagree about moral norms, legal enforcement of moral norms is unfair).

as a result.[227] But the judgment of whether an individual has acted disloyally is highly individualized. Thus, it is possible for an individual informant to feel she has acted disloyally when mainstream society does not agree[228] and for society more generally to perceive cooperation as disloyal even though the informant does not agree.[229] Assuming the majority outlaws cooperation that it perceives to be morally wrong, such a law would not prevent the informant in the former case from cooperating and suffering moral harm. In contrast, the law would prevent the latter informant from cooperating even though she would suffer no such harm, thus impinging on her autonomy interests without any commensurate benefit.

Moral harm also may arise from requiring the informant to engage in more serious criminal conduct than that she is accused of committing, thus desensitizing her to greater criminality.[230] The extent of this moral harm is also highly individualized. Some informants may be minor criminals forced to commit much more serious offenses, while others may be hardened criminals against whom the police only have evidence of minor offenses. Moreover, some minor criminals may have little interest in their own goodness, while some who have committed more serious offenses may nonetheless maintain strong moral boundaries that are subject to corrosion. Thus, a law targeting this kind of harm by forbidding the use of those charged with minor crimes as informants would fail to protect some informants who would suffer moral harm and protect others who are not at risk. For these reasons, protections against moral harm should be avoided, or, if they are deemed necessary, such protections must be exceedingly well-tailored.

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227. *See* Simons, *supra* note 13, 28–29 (stating that even though informants' actions benefit society, there is nevertheless a disdain for their own willingness to betray others).

228. The "Stop Snitching" phenomenon in some high-crime communities provides an example of this disconnect. In such communities, individuals who cooperate against other community members often perceive their cooperation to be immoral, while members of mainstream society believe that cooperation is proper. *See* Rich, *supra* note 12 (manuscript at 21–27) (noting that when a witness in a high-crime community refuses to be a "snitch," mainstream society views this as disloyal in regards to the enforcement of criminal law).

229. For instance, an informant who feels no special obligation to her son will not feel that she has been disloyal by cooperating with the police against him. But society more generally will believe that the informant has been disloyal because of the widely-held belief about the obligations of a mother to her son. *See id.* (manuscript at 10–11) (utilizing the normative view that a son and a mother have a certain relationship where there is expected to be a high degree of loyalty).

230. *See supra* notes 120–23 and accompanying text.

B. How Much Paternalism?

Turning then to the question of whether and to what extent paternalism is appropriate, answers run along a spectrum.[231] At one end, libertarians embrace autonomy above all else; consequently, they deplore paternalism.[232] At the other end are so-called "hard" paternalists, who would permit the government to prevent dangerous but self-regarding activities, even when such activities are conducted with the free and informed choice of the actor.[233] A middle ground is found in "soft" paternalism, which allows the State to prevent dangerous, self-regarding behavior only when it is non-voluntary or when intervention is necessary to establish whether the action in question is voluntary.[234]

To further understand these distinctions, take John Stuart Mill's classic example of a traveler with whom we cannot communicate, and who is about to walk across a damaged bridge.[235] A strict libertarian would oppose any government interference on the ground that the traveler is bound to harm no one but herself and is free to do so, while a paternalist would believe that stopping her is appropriate to prevent injury.[236] If, after the person is stopped, it is revealed that she is both competent and aware of the danger but nevertheless wishes to proceed, the soft paternalist would permit her to do so because her assumption of the risk is voluntary.[237] Meanwhile, a hard paternalist would argue that stopping even the knowledgeable and competent traveler may be permissible in some circumstances.[238]

In the case of the potential criminal informant, the strict libertarian, anti-paternalistic view is unsuited to the importance of the rights at issue. Unlike a commercial free-market transaction

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231. For a more complete discussion of definitions and perspectives on legal paternalism, see 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 3-26 (1986).

232. *See* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1160 (2003) (describing traditional libertarianism).

233. *See* Joel Feinberg, *Paternalism*, *in* ENCYCLOPEDIA OF PHILOSOPHY 137–38 (Donald M. Borchert ed., Supp. 1996).

234. *Id.* at 138. The soft paternalist's consideration of voluntariness includes contemplation of conditions affecting an actor's capacity, such as the influence of drugs, age, or mental impairment. *See* FEINBERG, *supra* note 231, at 12 (noting that soft paternalism stresses the voluntariness of a person's actions).

235. *See* MILL'S ON LIBERTY: A CRITICAL GUIDE 215 (C. L. Ten ed., 2008) (explaining that a public officer could stop a man from crossing an unsafe bridge because the man's desire would not be to fall off the bridge).

236. *See* Dworkin, *supra* note 215 (distinguishing between the hard and soft paternalist in the context of John Stuart Mills' bridge example).

237. *Id.*

238. *Id.*

involving the sale of goods, the potential informant is engaged with the State in a negotiation that implicates her freedom, her right to trial, her right to counsel, and her safety.[239] When the criminal informant agrees to cooperate, she foregoes those protections, at least temporarily,[240] and is placed in a position where she must choose either to collaborate with the State or to face criminal prosecution. At a minimum, some guarantee should be made that the informant's decision to cooperate is made freely and voluntarily.

The protections provided to the plea-bargaining defendant suggest society's unease with a purely laissez-faire approach to the waiver of fundamental rights.[241] Prior to a defendant pleading guilty, she must be provided an opportunity to speak to counsel, and the court considering the plea must make a record that establishes, at least at some minimum level, that the pleading defendant has waived her rights knowingly and voluntarily.[242] Of course, a strict libertarian might argue that the informant's freedom of choice is of the utmost importance precisely because such foundational rights are at issue. Yet, in the plea bargaining context, even libertarian academics have recognized that "[l]iberty *is* too important to be allocated by unregulated bargaining. The potential for irrationality and mistake to work irrevocable, life-destroying injustice *is* too high not to police the bargain."[243]

On the other hand, a hard paternalist response—namely, a complete ban on the use of criminal informants to protect informant interests—also goes too far. To justify a flat ban, all informants

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239. *See* Rich, *supra* note 21, at 695 (noting that cooperation agreements lack the safeguards that attach to a formal plea and do not involve judicial oversight).

240. Should the informant fail to cooperate to the State's satisfaction and is prosecuted, these rights will not have been waived.

241. Indeed, the fact that certain fundamental rights, such as the Eighth Amendment right against cruel and unusual punishment and the Thirteenth Amendment right to be free of involuntary servitude, cannot be waived suggests that a certain level of paternalism pervades our constitutional government. *See* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 780 (1983) (arguing that restrictions on one's freedom of contract, including one's ability to enter into a contract of self-enslavement, are best justified by the threat that such contracts pose to "the promisor's integrity or self-respect"); Kimberly A. Yuracko, *Education Off the Grid: Constitutional Restraints on Homeschooling*, 96 CALIF. L. REV. 123, 153–54 (2008) (stating that waivers of constitutional rights should not be permissible when they do harm to broader social functions and government protections). *But see* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1387–88 (1984) (arguing that the nonwaivability of these rights is better justified on non-paternalist grounds).

242. FED. R. CRIM. P. 11; *see* Santobello v. New York, 404 U.S. 257, 261–62 (1971) (affirming Rule 11's requirement that states a federal court must develop, on the record, the factual basis for the defendant's plea).

243. Scott & Stuntz, *supra* note 111, at 1930.

would have to suffer a net harm as a result of cooperation. This seems unlikely. Many informants successfully cooperate in exchange for promised leniency without suffering any physical harm.[244] Moreover, some informants successfully cooperate with law enforcement without their cooperation being discovered.[245] These informants will not be subject to the social harm that accompanies the discovery of cooperation.[246] Finally, the moral harms potentially suffered by an informant are highly individualized and ill-suited to government protection.[247] Consequently, no matter how strongly or weakly one values an informant's autonomy interests, at least in some cases the benefits to the informant of permitting cooperation will outweigh the harm.

Alternatively, a flat ban could be justified if the aggregate harm suffered by all informants as a result of cooperation outweighs the aggregate benefit and if it is impossible to tailor reforms with greater precision to ameliorate the harms without eradicating the benefits. The first condition requires a balancing of the harms and benefits to informants that is a difficult, if not impossible, normative and empirical task well beyond the scope of this Article. Fortunately, reforms can be crafted that might alleviate the harmful impact of the informant system on those criminal informants most likely to suffer a net harm while preserving the net benefit to the remainder. These

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244. Despite the numerous published reports of informants who are injured or killed as a result of their cooperation with police, those reports pale in comparison to the hundreds of thousands of informants who are estimated to be active at any given time. *See* Natapoff, *supra* note 16, at 657 (noting that there are hundreds of thousands of informants who are guarded with protection and as a result, harm would be hard to inflict upon them). Moreover, with respect to the question of whether informants actually receive leniency, a large percentage of sentenced federal defendants have been granted substantial assistance departures under the U.S. Sentencing Guidelines. *See* U.S. SENTENCING COMM'N, SENTENCES RELATIVE TO THE GUIDELINE RANGE BY EACH PRIMARY OFFENSE CATEGORY (2010), *available at* www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table27.pdf (reporting that 9421 federal defendants, or 11.5% of all defendants, received downward departures for substantial assistance).

245. As with all empirical matters regarding informants, it is impossible to discern precisely how often an informant's cooperation is not discovered. Nonetheless, law enforcement guidelines forbidding agents from revealing the identity of informants suggest that it should not be a rare occurrence. *See* DOJ GUIDELINES, *supra* note 189, at 6, 11–13 (providing protections for criminal informants, including confidentiality and possible immunity, that can be granted if informants provide truthful information).

246. *See supra* notes 125–28 and accompanying text (noting that criminal informants also risk social harm in addition to any physical harm that may be incurred).

247. *See supra* notes 216–40 and accompanying text (stating that a moral harm may be suffered by an informant resulting from societal pressures, both in their own community and in mainstream society).

reforms, set forth below,[248] largely take the form of so-called "soft" paternalistic measures aimed at enhancing the voluntariness of the decisions made by potential informants.

V. CURRENT PROTECTIONS FOR ACTIVE CRIMINAL INFORMANTS

Despite society's general disapproval and law enforcement's disdain, the interests of criminal informants are not entirely unprotected. That said, available safeguards protect only a small minority of criminal informants effectively, and such safeguards minimally shield the interests of the vast majority. Moreover, most are unintended side-effects of law enforcement policies created to serve law enforcement interests and thus continue only so long as they forward those interests.

A. Witness Protection Programs

The most widely-known protection available to criminal informants are the witness protection programs found in many jurisdictions. Of these, the most comprehensive and best-funded is the federal Witness Security Program.[249] It empowers the United States Attorney General to protect and relocate those individuals, including criminals, who might serve as witnesses in the prosecution of any "serious offense."[250] Among other things, the Attorney General may provide the witness and her family with a new identity, housing, employment, and cash payments, and may refuse to disclose the identity or location of the protected individuals.[251] Various state governments also have witness protection programs that can be used to protect criminal informants.[252]

Witness protection programs are limited in the protection that they provide to informants in three ways. First, they protect only a small minority of cooperating witnesses.[253] These witnesses tend to be

248. *See infra* Part VI (proposing reforms that increase the information available to potential informants and protect their ability to choose whether to cooperate).

249. *See* 18 U.S.C. § 3521 (2006) (allowing for the provision of relocation and protective services by the Attorney General to potential witnesses).

250. *Id.* § 3521(a)(1).

251. *Id.* § 3521(b)(1).

252. *See, e.g.*, CAL. PENAL CODE § 14020 (West 2011) (creating a witness relocation and assistance program); R.I. GEN. LAWS § 12-30-1 (2011) (same); VA. CODE ANN. § 52-35 (2012) (same).

253. *See* Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" Against Terrorism?*, 51 EMORY L.J. 1059, 1077 (2002) ("While the Federal Witness Protection Program presents an opportunity to grant noncitizens the right to live and work in the United States, it is numerically restricted, expensive, and may not suit the needs of many individuals who cooperate with law enforcement."). For instance, in the forty years since its enactment in 1971,

"high-value" informants, i.e. those who can provide substantial information relevant to particularly serious prosecutions.[254] Second, witness protection programs protect only the person and immediate family of "witnesses," meaning those informants who are expected to testify in court.[255] Many active criminal informants are never expected to testify, however, and thus are ineligible for protection.[256] Third, witness protection programs provide only physical protection to informants. They are not designed to protect against informants from the potential moral and social harms of cooperation.[257]

B. Internal Law Enforcement Policies

The most robust law enforcement guidelines governing the use of criminal informants are those issued by the Department of Justice (DOJ) and applicable to federal law enforcement agencies.[258] The

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the Witness Security Program has provided protection to more than 8300 witnesses and their family members. *See* U.S. MARSHALS SERV., U.S. DEP'T OF JUSTICE, FACT SHEET: WITNESS SECURITY (2011), *available at* http://www.usmarshals.gov/duties/factsheets/witsec-2011.pdf. The California Witness Relocation and Protection Program, one of the most prolific state witness protection programs, serves at most hundreds of witnesses each year. *See* CAL. S. RULES COMM., BILL ANALYSIS, S. 2007-594, 1st Sess., at 4–5 (reporting that 388 new witness protection cases were opened during fiscal year 2004–2005, according to the Department of Justice). The Massachusetts Witness Protection Program protected 167 witnesses in its first three years. MASS. EXEC. OFFICE OF PUB. SAFETY & SEC., THE COMMONWEALTH OF MASSACHUSETTS WITNESS PROTECTION PROGRAM: AN OVERVIEW OF CASES DURING FISCAL YEAR 2007, 2008, AND 2009, at 7 (2010), *available at* http://www.mass.gov/eopss/docs/eops/fy-09-witness-protection-analysis-no-appendix.pdf. Though not insubstantial, the number of protected witnesses, many of whom may not be informants, pales in comparison to the estimated hundreds of thousands of criminal informants who are active at any given time. *See* Natapoff, *supra* note 16, at 657 (noting that many of the defendants who cooperate receive no credit at all).

254. *See* 18 U.S.C. § 3521(c) (requiring the Attorney General to assess, inter alia, "the seriousness of the investigation or case in which the person's information or testimony has been or will be provided" and "the relative importance of the person's testimony"); CAL. PENAL CODE § 14023 ("The Attorney General shall give priority to matters involving organized crime, gang activities, drug trafficking, human trafficking, and cases involving a high degree of risk to the witness."); VA. CODE ANN. § 52-35 (limiting protection to those who provide information about serious violent felonies, felony drug offenses, domestic violence, and certain sexual assaults).

255. *See* 18 U.S.C. § 3521(c) (requiring the Attorney General to consider the value of the potential witness' testimony); *id.* § 3521(d)(1) (requiring the Attorney General to obtain the agreement of the witness or potential witness "to testify in . . . all appropriate proceedings"); CAL. PENAL CODE § 14021(a) (defining "witness" to mean only those persons reasonably expected to be summoned to testify in a criminal matter).

256. *See* NATAPOFF, *supra* note 13, at 18–23 (detailing the processes involved in police recruitment of informants and asserting that a great deal of prosecutorial discretion is exercised over the informant's ultimate fate).

257. Indeed, to the extent that informants are uprooted from their communities, moved to new locations, and provided new identities through a witness protection program, the social harm they suffer is substantial.

258. DOJ GUIDELINES, *supra* note 189.

DOJ Guidelines provide some protections for criminal informants. They impose a duty of candor on agents in their dealings with informants and forbid law enforcement agents from promising immunity or giving the erroneous impression that they have the authority to do so.[259] Moreover, in recruiting a potential informant, an agent must consider factors including the person's age, her history of substance abuse, and the risk of physical harm to the informant should she cooperate.[260] A supervisor must then approve the agent's suitability determination.[261] After the informant has agreed to cooperate, the agent is required to review the terms of the agreement with her and in the presence of a witness.[262] These terms include a promise that the government will "strive to protect the [informant's] identity" and the recognition that the agent is not authorized to promise the informant immunity.[263] Finally, when deciding whether to authorize the informant's engagement in criminal activity, the relevant law enforcement agent must consider, inter alia, the anticipated extent of the informant's participation in the activity and the risk that the informant will suffer physical injury.[264]

On their face, these protections appear substantial. By forcing agents to consider the potential harm to the informant from cooperation generally and from engagement in authorized criminal activity specifically, the guidelines protect the informant's interest in avoiding physical harm. By requiring consideration of the informant's age and substance abuse history, they permit recognition that young or addicted informants may be less capable of making an informed decision to cooperate. Similarly, the duty of candor, the ban on false promises of immunity, and the requirement that the terms of cooperation be reviewed with the informant enhance the likelihood that the informant's decision to cooperate is made knowingly and voluntarily. The requirement that decisions about informant suitability be reviewed by a supervisor ensures that the guidelines are followed.

The DOJ Guidelines provide only the *opportunity* for the protection of informant interests, however, and the realities of law enforcement discourage agents from prioritizing those interests.[265] Though some

259. *Id.* at 5.
260. *Id.* at 8–9.
261. *Id.* at 8.
262. *Id.* at 11.
263. *Id.*
264. *Id.* at 21.
265. Moreover, the DOJ Guidelines explicitly state that they create no right of enforcement by confidential informants. *Id.* at 7.

of the guideline requirements are strict, such as the prohibition on offers of immunity, most leave substantial discretion to law enforcement agents. For instance, the guidelines list seventeen factors to be considered in determining the suitability of a potential informant, only two of which suggest concern for informant vulnerabilities.[266] No standard is provided for how those factors should be weighed, and most focus the agent's attention on the informant's potential utility to law enforcement.[267] Likewise, the guidelines require an agent to consider seven factors in deciding whether to authorize the informant to engage in criminal activity, only one of which touches on the informant's interests, and the guidelines provide no standards for how those factors should be weighed.[268]

At the same time that the guidelines leave substantial discretion in the hands of federal agents, those agents are subject to pressures to gather evidence, make cases, and obtain convictions.[269] For instance, the most common measure of an agent's performance is her clearance rate, the rate at which she manages to satisfactorily close reported crimes, either through apprehension of the perpetrator or a determination that the offender cannot be apprehended.[270] These clearance rates matter not only to the agent's direct supervisor; they also are reported publicly and can form a basis for public pressure on the agency.[271] Additionally, limited resources put pressure on agents to clear cases quickly and efficiently.[272] Considered together, these pressures suggest that when agents are faced with a close call over the suitability of a vulnerable informant or the potential risks to an informant of authorizing criminal activity, they will be inclined to make the decision in favor of using the informant or authorizing the activity. Indeed, the FBI has come under fire for its persistent failure

266. *See id.* at 8–9 (requiring consideration of the potential informant's age and substance abuse history).

267. For instance, the guidelines require consideration of the potential informant's credibility, criminal history, the relevance of the information she could provide, and the risk that she might adversely impact a current or future investigations. *Id.*

268. *Id.* at 21.

269. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 322–27 (describing the institutional pressures on police to make arrests and obtain convictions); *see also* David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Police Under Federalism*, 30 FLA. ST. U. L. REV. 679, 721–22 (2003) (theorizing that utility-maximization encourages police to prioritize making drug arrests).

270. Findley & Scott, *supra* note 269, at 325–26.

271. *See id.* at 324 (concluding that police administrators pressure officers to solve as many cases as possible so the statistics released will bolster public opinion).

272. *Id.* at 325.

to abide by the DOJ Guidelines.[273] Finally, institutional pressures to favor law enforcement interests over informant interests are reinforced by the underlying distaste many agents feel toward those criminals who are willing to "snitch."[274]

Moreover, as noted previously, the DOJ Guidelines are the most detailed law enforcement regulations on informant use. In many jurisdictions, no guidelines exist at all. In others, guidelines are little more than recordkeeping regulations with no provision for consideration of informant interests.[275] Others follow the DOJ approach of suggesting some consideration of the risks that informants face but leave discretion in the hands of law enforcement to ultimately weigh the importance of those risks.[276] Finally, very few jurisdictions place hard limitations on informant use.[277] As a result, law enforcement agents in most jurisdictions have even more discretion in the recruitment and handling of informants than federal agents. In such a flexible, discretionary environment, the

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273. *See* Dan Eggen, *FBI Agents Often Break Informant Rules*, WASH. POST, Sept. 13, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091201825.html (reporting on an internal investigation of compliance with DOJ rules for handling confidential informants that found violations in eighty-seven percent of cases); *see also* ACLU STUDY, *supra* note 1, at 30–32 (reporting results of a law enforcement survey in which a majority of officers reported being unaware of the existence of relevant policies on informant handling or failure to abide by them).

274. *See supra* notes 63–67 and accompanying text (noting that many prosecutors and police officers view criminal informants with disdain and low regard).

275. *See, e.g.*, Omer Gillham, *TPD Releases Drug-Case Policies*, TULSA WORLD, Aug. 8, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20100808 _11_A1_USAtto839786&allcom=1 (setting forth the informant guidelines of the Tulsa, Oklahoma police department).

276. *See, e.g.*, FLA. STAT. § 914.28(5) (2011) (requiring, among other things, that agents consider the age and maturity of a potential informant and the risk of physical harm during the recruitment process).

277. Inflexible limits on informant use are difficult to enact because they inevitably face opposition from law enforcement groups that contend that tightened restrictions on law enforcement discretion will result in less effective law enforcement. For instance, Florida legislators introduced a bill in 2009 that would have required that potential informants be given an opportunity to consult with counsel and forbade the use of certain classes of informants. H.R. 271, 2009 Leg., Reg. Sess. (Fla. 2009). The more restrictive provisions of the bill met substantial law enforcement opposition on the grounds that they would impede investigations and endanger informants by involving individuals outside of law enforcement in their recruitment and use. *See* FLA. H.R., STAFF ANALYSIS, H. 2009-271, at 6 (Feb. 20, 2009) (reporting criticism from the Florida Sheriff's Association and the Florida Department of Law Enforcement). As passed, the bill stripped away any strict limits on the use of informants. Jennifer Portman, *Crist Signs "Rachel's Law,"* TALLAHASSEE DEMOCRAT, May 8, 2009, at 1A. The only major jurisdiction that imposes any firm limits on who can be an informant is California, which forbids the use of criminal informants under the age of twelve and allows the use of criminal informants under the age of eighteen only with court approval. *See* Dennis, *supra* note 36, at 1160–61 (explaining that a child must be found by a court to have voluntarily, knowingly, and intelligently agreed to serve as an informant).

institutional pressures to make arrests, coupled with the general distaste of informants, are even more likely to overwhelm any concern individual agents may feel about informant interests.[278]

C. Legal Action

Successful civil claims by injured informants may deter government action that puts them at risk. Such claims typically arise in one of two ways. First, a criminal informant who has suffered injuries as a result of her cooperation with law enforcement may allege a federal constitutional claim; in addition, such an informant may allege a federal or state law tort claim, based in statute or the common law.[279] Second, a criminal informant may claim improper police conduct as a defense to criminal liability or cite it as a circumstance entitling her to a lesser sentence.[280]

1. Civil claims

Though civil suits by informants against government agencies and agents can be successful,[281] they face significant legal hurdles. With respect to statutory or common-law claims, most jurisdictions place substantial limits on official liability.[282] At the federal level, the Federal Tort Claims Act provides for a limited waiver of sovereign immunity by which the federal government is liable in tort "in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."[283] Moreover, the Act includes a discretionary function exception, which excludes claims "based upon the exercise or performance or the failure to exercise or perform a

278. *Cf.* JOHN KLEINIG, THE ETHICS OF POLICING 93–94 (1996) (arguing that police discretion must be restricted to comply with broader societal norms and calling for an administrative rule to monitor police discretion).

279. *See, e.g.*, Butera v. District of Columbia, 235 F.3d 637, 641 (D.C. Cir. 2001) (affirming a judgment awarding $530,000 in compensatory damages under the Survival and Wrongful Death Acts in favor of the family of an informant who died while engaged in drug buy planned at behest of police); McIntyre v. United States, 447 F. Supp. 2d 54, 60 (D. Mass. 2006) (holding federal government liable under Federal Tort Claims Act for the wrongful death of criminal informant).

280. *See, e.g.*, United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983) (noting that a defendant argued that an indictment should be dismissed because it alleged crimes that had been authorized by federal agents); People v. Ruggiero, 920 N.Y.S.2d 226, 227–28 (App. Div. 2011) (remanding for resentencing upon finding that the prosecution unilaterally changed the terms of the cooperation agreement).

281. *See McIntyre*, 447 F. Supp. 2d at 120 (awarding over $3 million to family of informant); *see also Butera*, 235 F.3d at 641 (affirming an award of more than $500,000 in compensatory and punitive damages).

282. *See* Rich, *supra* note 21, at 701 n.123 (describing cases which limit police liability).

283. 28 U.S.C. § 2674 (2006).

discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[284] State governments have enacted similar limitations on the liability of their agencies and officials.[285]

The Supreme Court has interpreted the discretionary function exception to protect federal officials from liability so long as they do not run afoul of a "federal statute, regulation, or policy [that] specifically prescribes a course of action . . . to follow"[286] and their actions and decisions are "based on considerations of public policy."[287] With respect to the first requirement for the application of the exception, the use of informants is an area in which firm policies are few and substantive discretion lies with law enforcement agents.[288] As for the second requirement, courts have found that decisions on how to handle investigations and protect informants are based on considerations of public policy.[289] As a result, informants who allege tort claims arising from injuries suffered while cooperating frequently find their claims barred.[290]

Informants making constitutional claims typically allege substantive due process violations.[291] The first hurdle to these claims is the

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284. *Id.* § 2680(a).

285. For state limitations on punitive damages, see, for example, HAW. REV. STAT. § 662-2 (2011); IOWA CODE § 669.4 (2011); MD. CODE ANN., CTS. & JUD. PROC. § 5-522(a)(1) (LexisNexis 2012). With respect to state analogues of the discretionary function exception, see, for example, ALASKA STAT. § 09.65.070(d)(2) (2012); GA. CODE ANN. § 50-21-24(2) (2011); IDAHO CODE ANN. § 6-904(1) (2012); MASS. GEN. LAWS ch. 258, § 10(b) (2011); NEV. REV. STAT. § 41.032(2) (2011); N.D. CENT. CODE § 32-12.1-03(3)(d) (2011).

286. United States v. Gaubert, 499 U.S. 315, 322 (1991) (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

287. *Id.* at 323 (quoting *Berkovitz*, 486 U.S. at 537).

288. *See supra* notes 269–78 and accompanying text (noting that there are few guidelines in regulating informant use, and that the DOJ has published the most comprehensive guidelines).

289. Shuler v. United States, 531 F.3d 930, 934 (D.C. Cir. 2008) (noting other circuit court cases where the treatment of an informant was highly dependent on public policy).

290. *See, e.g.*, *id.* at 934–35 (dismissing a Federal Torts Claims Act action on ground that law enforcement's decision of when to arrest target of investigation falls within the discretionary function exception); Vaughn v. City of Athens, 176 F. App'x 974, 979 (11th Cir. 2006) (per curiam) (dismissing claims under discretionary function exception where the police used the arrestee, who was later murdered, to arrange drug buys); Best v. United States, 522 F. Supp. 2d 252, 260–61 (D.D.C. 2007) (dismissing a claim on the ground that law enforcement's decision about how to protect the informant fell within the discretionary authority exception). *But see* Litif v. United States, 682 F. Supp. 2d 60, 81 (D. Mass. 2010) (finding that the discretionary function exception did not apply to shield an FBI agent's decision to leak the name of an informant).

291. *See* Rich, *supra* note 21, at 701–02 (explaining that an injured informant is more likely to succeed with a substantive due process claim founded upon the Fifth or Fourteenth Amendments).

general bar on constitutional claims for injuries inflicted by third parties.[292] Informants attempt to overcome this bar by arguing that the government is liable under the "special relationship" and "state-created danger" doctrines.[293] Some circuits reject these claims outright when they are brought by informants on the ground that informants voluntarily assume any risks that arise from cooperating with the government.[294] Even in those jurisdictions where such claims could succeed, the plaintiff still must establish that the government conduct met the substantive due process "shocks the conscience" standard.[295] This standard is amorphous in any context,[296] but in the informant arena, courts have been especially deferential to discretionary decisions by police.[297] And even when police conduct might shock the conscience, qualified immunity poses another potential hurdle to recovery,[298] albeit one that may diminish over time.[299]

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292. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 198 (1989) (noting that the state has affirmative duties of care and protection only in limited circumstances under the Constitution).

293. Rich, *supra* note 21, at 702.

294. *Id.* at 703 n.132 (surveying cases where courts denied informants relief stemming from injuries sustained based on their role as informants).

295. *See* County of Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998) (defining the notion of "shocks the conscience" as being so vulgar and offensive as not to comply with traditional standards of decency).

296. *See id.* at 861–62 (Scalia, J., concurring) (criticizing the "shocks the conscience" test for permitting arbitrariness in judicial decision-making while forbidding it in executive or legislative action); Fagan v. City of Vineland, 22 F.3d 1296, 1308 (3d Cir. 1994) (calling the "shocks the conscience" test an "amorphous and imprecise inquiry").

297. *See* Matican v. City of New York, 524 F.3d 151, 158–59 (2d Cir. 2008) (holding that police actions in planning a sting that revealed an informant's identity did not shock the conscience because it was the result of police decision-making that involved the balancing of concern for their own safety against concern for the informant's).

298. *See* Butera v. District of Columbia, 235 F.3d 637, 647–52 (D.C. Cir. 2001) (dismissing a substantive due process claim based on police failure to protect an informant from a state-created danger on the ground that, while a due process violation may have occurred, the officers were entitled to qualified immunity because an informant's right to be protected from such a danger was not clearly established).

299. Theoretically, as courts render decisions and the obligations of law enforcement agents with respect to informants become "clearly established," the qualified immunity defense will no longer be available to those agents who fail to fulfill them. *See* Camreta v. Greene, 131 S. Ct. 2020, 2031 (2011) (recognizing lower court discretion in deciding when to address constitutional questions in the qualified immunity context "so as to promote 'the law's elaboration from case to case'") (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). In applying the qualified immunity doctrine, however, Supreme Court decisions suggest that the standard for demonstrating that a right has been clearly established is a stringent one that tolerates substantial errors in judgment by law enforcement. *See* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1131 & n.123 (2006) (framing the qualified immunity doctrine as a product of judicial culture). Coupled with this

2. Arguments in an informant's criminal case

Criminal informants also seek to protect their interests by raising claims of mistreatment in the context of any criminal charges brought against them. These claims take the form of either a defense to liability or an argument for reductions in sentence. With respect to the former, criminal informants assert the related affirmative defenses of public-authority and entrapment by estoppel.[300] The public-authority defense requires the defendant to prove her reasonable reliance on a public official's directive to engage in activity she knows to be illegal.[301] Similarly, entrapment by estoppel requires that the defendant reasonably believed her conduct was legal because of an official statement of the law.[302]

These defenses face both doctrinal and practical hurdles. Doctrinally, many jurisdictions will only allow these defenses if the official who allegedly empowered the defendant to engage in the illegal conduct had the actual authority to do so.[303] The absence of

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standard, the relatively low volume of substantive due process cases brought by informants suggests that qualified immunity will remain a significant hurdle to recovery for quite some time.

300. *See* FED. R. CRIM. P. 12.3 (setting forth the required procedure for asserting the public-authority defense); United States v. Strahan, 565 F.3d 1047, 1051 (7th Cir. 2009) (contrasting the public authority defense, which was claimed by the defendant, and entrapment by estoppel, which is available to "a defendant who believed his conduct legal because of an official's statement of the law"); United States v. Giffen, 473 F.3d 30, 39–40 (2d Cir. 2006) (noting the relationship between entrapment by estoppel and the public authority defense, the latter of which was claimed by the defendant, a government informant, for each of the crimes charged); United States v. Achter, 52 F.3d 753, 755 (8th Cir. 1995) (explaining the difference between the two defenses, and holding that the defendant had provided insufficient evidence to support either).

301. *Strahan*, 565 F.3d at 1051.

302. *Id.*; *Achter*, 52 F.3d at 755.

303. With respect to the public-authority defense, *see Giffen*, 473 F.3d at 39 (holding that a valid assertion of public-authority defense requires that the public official who allegedly authorized conduct had actual authority to do so); United States v. Fulcher, 250 F.3d 244, 253–54 (4th Cir. 2001) (same); United States v. Pitt, 193 F.3d 751, 758 (3d Cir. 1999) (same); *Achter*, 52 F.3d at 755 (same); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994) (same). *But see* United States v. Jumah, 493 F.3d 868, 872 n.1 (7th Cir. 2007) (citing pattern jury instructions on public-authority defense requiring only reasonable reliance on an official's statement, not actual authorization to approve of criminal activity). With regard to entrapment by estoppel, see United States v. Spires, 79 F.3d 464, 466–67 (5th Cir. 1996) (requiring actual authority to interpret the relevant statute before a defendant may claim entrapment by estoppel); United States v. Collins, 61 F.3d 1379, 1385 (9th Cir. 1995) (same); United States v. Duggan, 743 F.2d 59, 83–84 (2d Cir. 1984) (same). *But see Pitt*, 193 F.3d at 758–59 (noting that "[t]he defense of entrapment by estoppel turns on [the] credibility" of the government agent, and "shifts the focus from the conduct of the defendant to the conduct of the government"); United States v. Hedges, 912 F.2d 1397, 1405 (11th Cir. 1990) (rejecting as irrelevant the government's argument that the defendant could not claim entrapment by estoppel because the official in question did not have authority to authorize proscribed activity).

informant guidelines creates a practical hurdle to proving such authority, as public officials typically are not empowered to sanction criminal conduct without explicit authorization.[304] Moreover, even when an informant can claim that a public official had the power to authorize the relevant criminal conduct, the issue of whether the official in fact did so is often a disputed question of fact that calls for the jury to evaluate the relative credibility of the official and the informant.[305] A criminal informant is unlikely to prevail in such a credibility contest.[306]

Criminal informants also argue their entitlement to the benefits of a cooperation agreement—namely, leniency in a criminal case—under what is essentially a breach of contract theory. Though these arguments are sometimes successful,[307] formal cooperation agreements typically leave prosecutors with broad discretion to decide whether an informant's efforts merit leniency, and courts

304. For instance, the DOJ Guidelines on the use of informants authorize agents to sanction criminal activity in only very limited situations and only with the written and advance approval of a supervisor. *See* DOJ GUIDELINES, *supra* note 189, at 20 (requiring that authorization of illegal activity occur within a ninety-day window and be approved by specific field agents and prosecutors).

305. *See* United States v. Doe, 63 F.3d 121, 125 (2d Cir. 1995) (holding that the public-authority defense must be tried to a jury and is not a basis for dismissal of an indictment).

306. *See* Rich, *supra* note 21, at 701 (asserting that the social positions of the informant and the officer translate to credibility decisions generally being made against the informant). In addition to the public-authority and entrapment by estoppel defenses, courts have recognized that situations may arise where police involvement in criminal conduct is so outrageous that convicting a defendant for that conduct would violate due process. *See* United States v. Gurolla, 333 F.3d 944, 950 (9th Cir. 2003) (noting that the defense of outrageous government conduct may be used in extreme cases where "the government's conduct violates fundamental fairness"). The Due Process Clause is violated only where police conduct is "shocking to the universal sense of justice," however. *Id.* (quoting United States v. Russell, 411 U.S. 423, 431–32 (1973)) (internal quotation marks omitted). *But see* United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995) (rejecting the outrageous government conduct defense). Given that no court has ever allowed a criminal informant to invoke the outrageous government conduct defense and the high standard of proof required to establish it, such application is unlikely in the future. *See* Kenneth M. Lord, *Entrapment and Due Process: Moving Toward a Dual System of Defenses*, 25 FLA. ST. U. L. REV. 463, 505–06 (1998) (noting that the outrageous government conduct defense requires proof of "a significantly higher degree of government misconduct" than entrapment).

307. *See, e.g.*, Bowers v. State, 500 N.E.2d 203, 204 (Ind. 1986) (ordering the dismissal of a case against a defendant as a result of a breach of a cooperation agreement by the prosecutor on public policy grounds); People v. Jackson, 480 N.W.2d 283, 287 (Mich. Ct. App. 1991) (upholding the dismissal of charges against an informant who complied with agreement to provide information relating to a bank robbery in exchange for immunity); People v. Delaney, 436 N.Y.S.2d 336, 337 (App. Div. 1981) (affirming the dismissal of an indictment where the defendant established that he acted as an informant in an unrelated case upon a promise of leniency from law enforcement officials).

loathe interfering with that discretion.[308] Meanwhile, oral cooperation agreements are difficult for criminal informants to prove, as the issue of their existence often comes down to a pitched battle of credibility between law enforcement agents and criminal informants.[309] Finally, even if the informant can prove the existence of an agreement, law enforcement agents often do not have the authority to promise leniency, thus leaving open the possibility that such promises will prove to be unenforceable.[310]

VI. PROTECTING ACTIVE CRIMINAL INFORMANTS

The preceding discussion demonstrates that substantial informant interests in autonomy and safety are currently unprotected. Society should protect many, but not all, of these interests in light of the valuable service that informants provide and the lack of responsibility that they often bear for their vulnerabilities. This Part discusses policy proposals to protect those informant interests deserving of protection while considering the costs of such policies in terms of money, other resources, and harm to effective law enforcement, as well as their political feasibility.

A. Providing Counsel to Potential Informants

The most straightforward way to ensure that potential informants' autonomy interests are protected would be to provide them an opportunity to consult with counsel while considering whether to cooperate with law enforcement.[311] Defense counsel could remedy the information asymmetry between law enforcement and potential informants by guaranteeing that their clients are fully informed of the risks and potential benefits of cooperation. They also could act as a check on unduly coercive law enforcement tactics and assess the capacity of their clients to cooperate effectively and safely. And counsel could negotiate to ensure that cooperation agreements are set forth in writing and in terms that are enforceable; in doing so, they could provide their clients with the maximum possible protection from harm. Finally, if such agreements are not honored by law enforcement, counsel could step in to compel compliance.

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308. Rich, *supra* note 21, at 700–01.
309. *Id.* at 701.
310. *See supra* note 186 and accompanying text (providing examples of cases in which law enforcement agents' lack of authority resulted in the unavailability of immunity for the defendant).
311. *See* NATAPOFF, *supra* note 13, at 183–84 (proposing that counsel should be made available to "uncharged suspects who are considering cooperation").

This is not to say that the opportunity to consult with counsel would be a panacea. Distrust of appointed counsel is endemic among criminals,[312] and thus many potential informants may forego their chance to consult. Moreover, in cases where cooperation is informal, there is no obvious place for an institutional check on whether the opportunity to consult was provided.[313] Finally, the mere presence of defense counsel may make opportunities for arrestees to cooperate less available, thereby lessening their options.[314] Nevertheless, providing potential informants with the entitlement to counsel would provide substantial protection against threats to the autonomy and safety interests of informants.

Practical problems with this proposal cast serious doubt on its feasibility, however. From a political standpoint, opposition to providing counsel to criminal informants will be substantial, particularly from law enforcement officials who will argue that the involvement of counsel will hamper the informants' effectiveness.[315] Even if such opposition could be overcome, any new entitlement to counsel is unlikely to be funded. Currently, many jurisdictions do not allocate sufficient funds to allow for the provision of appointed counsel that satisfies the requirements of the Sixth Amendment.[316] Expanding the entitlement to counsel beyond the Sixth Amendment requirements will exacerbate this problem and swell public defenders' already crushing caseloads.[317] Thus, even if an entitlement

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312. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2478 (2004) (noting that when it comes to appointed counsel, "clients still believe the adage that you get what you pay for").

313. This is to be distinguished from the plea bargaining context, where the plea colloquy provides some guarantee that the defendant at least had an opportunity to consult with counsel. *See* FED. R. CRIM. P. 11(b)(1)(D) (explaining that, in the plea context, the court must inform the defendant of the right to be represented by counsel).

314. *See* NATAPOFF, *supra* note 13, at 184 (hypothesizing that the presence of counsel "might mean that fewer suspects would cooperate, and more might end up being charged with crimes"). For instance, some defense attorneys are simply unwilling to represent informants. *See* Richman, *supra* note 127, at 69–70 (providing an example of an attorney who generally did not represent clients in cooperation agreements with the government because he found such negotiations offensive).

315. *See supra* note 277 (discussing the opposition faced by a proposed law in Florida requiring that potential informants be provided the opportunity to consult with counsel).

316. *See* Heather Baxter, Gideon*'s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 353–54 (explaining that the recent recession has resulted in billions of dollars worth of budget cuts, which has had a detrimental impact on funds allotted to indigent defense); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 802 (2004) (arguing that "[w]ithout [a] constitutional mandate, legislatures fail to provide adequately for criminal defense").

317. *See* Baxter, *supra* note 316, at 355–58 (providing data on the staggering caseloads faced by public defenders).

to counsel for potential informants could be passed, it is unlikely that the vast majority of potential informants who are unable to pay for their own counsel would receive a level of representation that realizes the hoped-for benefits.[318]

While at first blush, providing counsel to potential informants seems to be an ideal broad-brush remedy for many informant vulnerabilities, it is unlikely to be feasible. Rather, more targeted proposals are needed.

B. Court Approval for the Use of Particularly Vulnerable Informants

As set forth above, certain classes of informants—minors, the mentally handicapped and mentally ill, and drug addicts—are particularly vulnerable to coercion and deserving of society's protection.[319] One might argue, then, that the easiest way to protect these informants would be to forbid their use entirely.[320] But such a proposal throws out the baby with the bathwater. Though particularly vulnerable to coercion, these individuals retain their autonomy interest in making their own choices to the fullest extent possible and with a minimum of government intervention.[321] Forbidding all members of these classes from becoming informants destroys that interest in the name of saving them. That said, there doubtlessly are some members of these classes who are so vulnerable to coercion and so incapable of making informed and intelligent decisions that their autonomy interests cannot be protected by any informant use policy short of complete prohibition.[322] Thus, a calibrated approach is needed.

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318. Meanwhile, the autonomy and safety interests of those who can afford to pay an attorney will receive greater protection. Such a result will only aggravate the effect that a defendant's financial resources have on criminal justice outcomes. *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1789–90 (2001) (describing the lack of funding for indigent criminal defense and noting that "[o]nly defendants who have celebrated cases or can meet steep charges . . . have ready access to the highly skilled advocacy").

319. *See supra* notes 195–202 and accompanying text (describing the susceptibility of minors, the mentally handicapped, and the mentally ill).

320. For instance, proposed informant use rules in Florida would have prohibited law enforcement from using as informants any individual currently in a drug treatment program. *See* Portman, *supra* note 277, at 1A (describing how Florida's informant law requires law enforcement to consider a potential informant's age and maturity).

321. *See* Fallon, *supra* note 139, at 891 n.97 (noting how vulnerable classes such as minors and the mentally handicapped still possess some level of autonomy and associated "rights to personal sovereignty").

322. Such a flat ban is analogous to regimes in the medical context that allow for surrogate decision-making for patients unable to give informed consent. *See generally* Norman L. Cantor, *The Bane of Surrogate Decision-Making: Defining the Best Interests of Never-Competent Persons*, 26 J. LEGAL MED. 155 (2005) (describing the doctrine of *parens*

1. Juvenile informants

California's "Chad's Law," which governs the use of minor informants, sets forth such an approach by balancing these informants' safety and autonomy interests.[323] First, it provides maximum protection to the youngest juveniles by completely forbidding the use of informants who are twelve-years-old or younger.[324] Second, it gives some assurance that an older juvenile's decision is voluntary and intelligent by requiring that law enforcement disclose with the potential informant some crucial information, such as the potential benefit of cooperating and the sentence range that the juvenile might face if she does not inform.[325] Third, it lessens the risk that an innocent juvenile may be coerced into cooperating through empty law enforcement threats by requiring that a court find probable cause that the juvenile committed the crime for which she has been offered leniency before she can be used as an informant.[326] Fourth, it diminishes the risk of involuntary cooperation by requiring a court to consider the specific characteristics of the juvenile, such as her age and maturity, and find that the juvenile's decision to cooperate is voluntary, knowing, and intelligent.[327] Finally, despite these protections, it preserves the core of the juvenile's autonomy interest by not replacing the juvenile's assessment of her best interests with a court's.[328] Other jurisdictions should adopt policies dictating similar procedures for the handling of juvenile informants.[329]

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patriae, which in the medical context enables others to take over decision making for individuals that are not medically competent). Unlike the medical context, however, where the issue of identifying the proper treatment can be complex, the risks to informants make it clear that those who are incapable of knowingly and voluntarily deciding to cooperate should be forbidden from doing so.

323. *See* CAL. PENAL CODE § 701.5 (West 2011) (setting forth California's regulation of the use of minor informants, including certain conditions that must be met to permit use of such informants).

324. *Id.* § 701.5(a).

325. *Id.* § 701.5(d).

326. *Id.*

327. *Id.* § 701.5(c).

328. Rather, the statute permits only the potential informant's parent or legal guardian to veto the juvenile's decision to cooperate. *See id.* § 701.5(d)(4). This limited intrusion on the juvenile's autonomy interest is necessary to vindicate the interest of parents in having control over the important decisions in their child's life. *See* Darci G. Osther, Note, *Juvenile Informants—A Necessary Evil?*, 39 WASHBURN L.J. 106, 125–26 (1999) (noting that a parent's right to decide whether his or her child may serve as an informant is integral to the right to make child-rearing decisions and determine the best interests of his or her child).

329. This is not to say that Chad's Law perfectly protects juvenile informants' interests. For instance, it requires the court to consider factors—such as the severity of the juvenile's alleged offense and safety to the public—that are clearly irrelevant to the court's determination of whether the juvenile's decision to cooperate is

2. Mentally ill and mentally handicapped informants

A similar approach should also be implemented for potential informants who are mentally ill or mentally handicapped. The central inquiry in permitting their use should be whether the potential informant's decision to cooperate is voluntary, knowing, and intelligent.[330] This inquiry should involve consideration of the specific characteristics of the informant and her situation and should be entrusted to a neutral decision-maker, such as a judge or magistrate, who is at least somewhat insulated from law enforcement pressures.[331] Moreover, to ensure that the decision to cooperate is made intelligently, the decision-maker should be required to inform the vulnerable potential informant of the benefits of cooperation and the sentences she might face should she not cooperate. Finally, the decision-maker should be obliged to find that probable cause exists to believe that the potential informant committed the crime for which leniency is promised before approving any cooperation agreement.

Mental health issues present detection and line-drawing problems that are not present in the juvenile context, however. Unlike age, which can be ascertained generally on sight and to a certainty with minimal investigation, mental health issues can be difficult for

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voluntary, knowing, and intelligent. CAL. PENAL CODE § 701.5(c). Other jurisdictions should not dictate such extraneous considerations.

330. The use of the voluntary, knowing, and intelligent standard is appropriate here, given the similarities between cooperation agreements and plea bargains. In the plea bargaining context, the defendant's guilty plea must be voluntary, knowing, and intelligent because it involves a waiver of fundamental constitutional rights. Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005). Though the decision to cooperate does not involve a de jure waiver of constitutional rights, the cooperation agreement often supplants the formalized criminal justice system, particularly when an agreement is reached without the filing of formal charges. The informant essentially concedes her guilt on the threatened charges and accepts the required cooperation as part of the appropriate punishment, obviously without a jury trial and usually without consultation with counsel. *See supra* notes 44–48 and accompanying text (discussing tactics employed by police officers, outside of the presence of a judge or counsel, to attempt to gain cooperation from an informant). Thus, agreeing to cooperate involves a de facto waiver of these rights. Of course, the informant may at any point stop cooperating, face criminal charges, and once again be entitled to the rights enjoyed by other criminal defendants. Consequently, a cooperation agreement is not a legal waiver and all such agreements need not be tested under a voluntary, knowing, and intelligent standard. But when concerns about coercion and lack of knowledge are heightened because of the vulnerabilities of the civilian at issue, the standard used to judge plea bargains is useful to address those concerns. Moreover, the familiarity of judges with this standard will allow them to apply it consistently in cooperation cases.

331. *See supra* notes 269–78 and accompanying text (describing the pressure on law enforcement agents to dispose of cases expeditiously and how this may translate into a lack of concern for the best interests of informants).

untrained laypersons to detect.[332] Moreover, individuals with mental health issues often try to hide those issues out of embarrassment or fear.[333] Meanwhile, law enforcement training on the identification and treatment of individuals with mental health issues is inconsistent across jurisdictions.[334] Consequently, crafting a bright-line rule between those individuals with mental health issues who can voluntarily agree to cooperate and those who are unable to do so is impractical.[335]

Rather, the only feasible approach is a flexible one that requires a closer examination of those potential informants who are at risk of acting involuntarily or unknowingly as a result of mental illness or retardation. With this in mind, law enforcement agents should be required to seek court approval for the use of any informant whom they reasonably believe may suffer from mental illness or mental retardation that substantially impacts her ability to agree to cooperate intelligently, knowingly, and voluntarily. Once alerted to law enforcement concerns, a neutral magistrate should then be empowered to engage in fact-finding that might include a discussion with the potential informant and consultation with psychologists or social workers with mental health experience. Ultimately, law enforcement should use an individual as an informant only if the court determines that the informant can agree to cooperate intelligently, knowingly, and voluntarily.

Requiring law enforcement to refer to the court all potential informants about whom they have substantial concerns is easier for untrained law enforcement than applying a bright-line rule. But for

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332. Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 822–23 (2009).

333. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430–31 (1985).

334. *See* Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 2 (2010) (noting that police receive little training on how to deal with mentally impaired defendants); Natalie Pifer, Note, *Is Life the Same as Death?: Implications of* Graham v. Florida, Roper v. Simmons, *and* Atkins v. Virginia *on Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOY. L.A. L. REV. 1495, 1527–28 (2010) (explaining that few states' police departments have training programs on the special challenges posed by mentally handicapped defendants). This is true even though a substantial percentage of criminals suffer from mental health issues of some kind. *See* America's Law Enforcement and Mental Health Project, Pub. L. No. 106-515, § 2, 114 Stat. 2399, 2399 (2000) (codified at 42 U.S.C. § 379ii) (reporting data from a Bureau of Justice Statistics report that sixteen percent of inmates in state prisons and local jails suffer from mental illness).

335. Of course, there will be some potential informants whose mental health issues clearly preclude them from being effective informants. Given law enforcement interests in effectiveness and efficiency, there is no need for a rule making such individuals ineligible to cooperate.

it to be effective, it requires "buy-in" from agents: if they believe that court review is merely an impediment to law enforcement, they will avoid it in all but the most obvious cases and thus undermine the goals of the reform. For this reason, law enforcement agents also must be trained to recognize that their interest in obtaining arrests and convictions converges with society's interest in protecting the mentally ill and mentally handicapped.[336]

Specifically, the same issues that interfere with the capacity of a potential informant to cooperate knowingly, intelligently, and voluntarily also impact her ability to be a useful informant. For instance, a potential informant who is vulnerable to coercion due to mental illness or handicap also would be more likely to fabricate information to gain the approval of law enforcement.[337] Similarly, delusional or paranoid informants are likely to provide useless information as they may have difficulty distinguishing fantasy from reality.[338] Helping law enforcement recognize that their interests are synchronous with society's will foster the realization that the court's involvement is not merely a roadblock to an effective investigation and enhance compliance.

3. Drug-addicted informants

Drug-addicted informants present similar challenges. Police training on the detection of drug addiction and drug use is inconsistent.[339] And addicts have strong incentives to keep their addiction a secret, including the desire to cooperate to "work off" any charges and remain out of jail. Nevertheless, drug addicts are well-known by law enforcement to be unreliable informants.[340] Thus,

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336. An alternative, or perhaps additional, reform might impose some sort of sanction on those agents who fail to comply with the requirement of court review. I do not advocate for this proposal, however, because sanctions on the police are often politically unfeasible and under-enforced.

337. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 21 (2010) (noting the tendency of the mentally handicapped to desire to please persons in positions of authority); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79, 81–82 (2010) (observing how inherent vulnerabilities put individuals with mental illness at an especially high risk of making a false confession).

338. *See* MADINGER, *supra* note 1, at 189 ("Someone who is paranoid and delusional about imagined plots or contrived schemes is not going to be a very successful informant.").

339. *See* Joseph Osmond, Note, *The Plight of the Unsuspected Drug User: A Police Officer's Take on* Arizona v. Gant, 47 AM. CRIM. L. REV. 1257, 1273 (2010) (discussing the cost and infrequency of training police in drug use recognition).

340. *See* MADINGER, *supra* note 1, at 187–88 (discussing the unreliability of addicted informants); MALLORY, *supra* note 1, at 25 (noting that many jurisdictions recognize that drug-addicted informants are less reliable).

society's interests again align with those of law enforcement, and the approach to handling drug-addicted informants should be similar to that of the mentally ill. Namely, the police should be required to obtain court approval before using any informant whom they reasonably believe suffers from a drug addiction that substantially impacts her ability to agree to cooperate intelligently, knowingly, and voluntarily. Similarly, training should again be used to reinforce the synchronicity between law enforcement's interest in accurate arrests and convictions and society's interest in protecting addicts.

C. Remedying Information Asymmetries

As discussed above, all criminal informants are vulnerable to coercion due to information asymmetries not of their own making. Specifically, they are unable to evaluate the claims made by law enforcement agents about the potential charges and sentences they might face if they do not cooperate and the potential benefits they might receive by cooperating. Furthermore, they cannot evaluate the enforceability of the promises made by law enforcement.[341]

One potential solution to these information asymmetries would be to expand the previous proposal and require court involvement in the use of any informant.[342] Doing so would remedy the information asymmetries at issue. On the other hand, given the sheer number of informants used by law enforcement, it also would almost certainly overburden the court system. Moreover, increasing the number of individuals who know the identity of a potential informant would increase the possibility that her cooperation would become known, thus endangering the informant.

A more moderate step would be to require consent from the relevant prosecutor's office prior to the use of any criminal informant. Specifically, a representative of the relevant prosecutor's office with authority to bind the office would assess the case against the potential informant, provide a non-binding determination of the charges she might face and the sentence she could receive, and commit the office to providing a specified benefit should the

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341. *See supra* notes 185–94 and accompanying text (describing how law enforcement officers may make promises to informants without authority, and how informants lack access to the information needed to evaluate such promises).

342. Another possible solution would be to require police to tell potential informants the truth. Though attractive in its simplicity, such a requirement would run contrary to police practice and recent precedent, which permit and even condone police lying to suspected criminals. *See* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 427–32, 451–56 (1996) (describing the types of lies police tell to coerce informants and detailing evidence of judicial tolerance for police deception).

individual agree to cooperate. The results of the prosecutor's assessment would be reduced to writing and shared with the potential informant.

The benefits of this requirement from the standpoint of protecting the informant are obvious: the potential informant would no longer be forced to rely on police assertions about her guilt and the possible sentence she might face; instead, she would receive an enforceable, written promise of a benefit from the relevant prosecutor should she cooperate.[343] This procedure would also minimize the risk that the informant's identity might be disclosed, and the informant's safety thus compromised, by limiting disclosure of the informant's identity to the recruiting officer and a single member of the prosecutor's office designated for this task.

Moreover, the procedure is not unduly burdensome on police or prosecutors. While the proposal does deprive individual officers of the discretion to recruit informants without outside interference, law enforcement experts on informant recruitment and handling do not condone unfettered discretion and already recommend that informant recruitment be subject to supervisory approval.[344] Meanwhile, determining the existence of probable cause is a routine task for a prosecutor who often must assess the validity of arrests and the prospects of winning cases at trial. Similarly, the task of making a non-binding assessment of the sentence that an arrestee might face is part and parcel of the plea bargaining process. Of course, requiring prosecutors to make a binding promise to a potential informant will impose costs on society as those promises are then enforced, but such is the price that society must pay to vindicate the autonomy of its members.

D. Training Police and Informants to Minimize Risk

The safety interests of informants can best be protected through better training of both police and informants. Often, harm to informants can be traced back to inadequate training of police, either in how to safeguard the identity of informants or in how to

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343. Though the prosecutor's assessment of the possible charges and sentence that the informant might face if she chooses not to cooperate would be non-binding, the prosecutor would be constrained to be honest in her assessment by her narrow obligation as an attorney not to lie to third-parties, *see* MODEL RULES OF PROF'L CONDUCT R. 4.1 (2010), and her more general duty as a prosecutor to truth, *see* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 313–14 (2001) (arguing that a prosecutor has a "legal and ethical duty to promote truth" and describing the scope of that duty).

344. *See* MALLORY, *supra* note 1, at 113 (describing how supervisory approval and consultation with legal counsel is required prior to working with an informant).

plan operations so as to provide the maximum possible protection to the informants who are involved.[345] Police officers, particularly those involved in areas of law enforcement in which the use of informants is common, should receive additional training so as to minimize unnecessary risks to informant safety.

Informants also receive little or no training in how to handle potentially dangerous situations.[346] The threat of criminal sanctions should they fail to satisfy their police handlers often causes informants to remain in a dangerous situation longer than is wise. To counteract this incentive, informants should receive at least rudimentary training in how to recognize when they are in a dangerous situation and how to remove themselves before they are harmed. Moreover, police should be instructed not to punish informants who exit dangerous situations prior to obtaining the evidence sought.

E. Including Informants in Existing Workers' Compensation Schemes

Even with better training for police and informants, police still will have substantial discretion in their use of informants. This discretion will be exercised in manner responsive to internal and external pressures to maximize arrests and convictions.[347] These pressures, combined with the generally dim view of criminal informants held by law enforcement, suggest that police will inevitably sacrifice informant safety for the opportunity to increase arrest and convictions rates. Incentives are therefore needed to encourage police to protect informant safety. Such incentives would most reasonably take the form of some combination of internal law enforcement regulations and the potential for external sanctions. Unfortunately, internal regulations relating to informants have proven to be ineffective at shaping police conduct with respect to informants.[348]

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345. *See, e.g.*, ACLU STUDY, *supra* note 1, at 33 (finding that approximately sixty-three percent of surveyed officers reported receiving no training in the handing of informants); John Riley, *Expert: Cops Put His Life in Danger*, NEWSDAY, Sept. 22, 2011, at A41 (reporting, in the case of two officers sued for negligently revealing the identity of an informant who later was killed, that the officers received no formal training in how to handle and protect confidential informants).

346. *See, e.g.*, *Hoffman's Attorneys Release Statement Critical of TPD*, TALLAHASSEE DEMOCRAT, May 11, 2008, at 6A (reporting that an informant killed during an arranged drug deal received no training from police).

347. *See supra* notes 269–73 and accompanying text (describing the institutional job pressures, such as clearance rates, that cause law enforcement officers to increasingly rely on informants).

348. *See supra* note 273 and accompanying text (noting that the national law enforcement agency, the FBI, has been criticized for failing to follow the DOJ

This leaves external sanctions as the most practical means of deterring police from unnecessarily endangering informants. But what form should these sanctions take? The consensus among criminologists is that the certainty of punishment is the most critical factor in deterring misconduct.[349] This being so, the current threat of external sanctions is unlikely to deter police from unduly endangering informant interests because the possibility of recovery under a tort theory depends largely on the informant's ability to establish egregious misconduct; as a result, damages are awarded only in the most exceptional cases.[350] Such uncertainty in the imposition of sanctions against police, even if the sanctions themselves are severe, deters very little misconduct.[351] While lowering the standard for civil liability would provide greater certainty of punishment, and thus greater deterrence, doing so would require either a wholesale change in substantive due process jurisprudence or the political will to open law enforcement to substantial civil liability.[352] To be frank, neither seems particularly likely.

Workers' compensation, however, already provides a regime by which individuals who are injured while working are awarded a set, modest compensation regardless of fault.[353] The theory is straightforward: workers' compensation benefits employees by providing a streamlined, efficient way for them to recover for injuries relating to their employment, while employers benefit from lower and certain damages awards.[354] As a legislative matter, extending workers' compensation benefits to criminal informants would require only the amendment of the definition of "employee" in the relevant states to include informants whose services are provided in exchange for a promise of leniency from law enforcement.[355]

Guidelines intended to enhance the safety and protections afforded to informants).

349. Michael J. Zydney Mannheimer, *Not the Crime but the Cover-Up: A Deterrence-Based Rationale for the Premeditation-Deliberation Formula*, 86 IND. L.J. 879, 907 (2011).

350. *See supra* notes 281–99 and accompanying text (discussing the significant legal hurdles facing the plaintiff in a civil suit against law enforcement).

351. *See* Guyora Binder, *Victims and the Significance of Causing Harm*, 28 PACE L. REV. 713, 717 (2008) (describing the theory that "moderate but certain punishment deters more effectively than severe but uncertain punishment").

352. In the rare cases where informant claims survive, jury awards tend to be large. *See, e.g.*, Butera v. District of Columbia, 235 F.3d 637, 640–41 (D.C. Cir. 2001) (amending an award of $70 million in compensatory damages and $27 million in punitive damages to a total award of just over $1 million in a case where the informant was murdered while attempting a drug purchase).

353. Workers' compensation schemes exist in every jurisdiction. Jason M. Solomon, *What Is Civil Justice?*, 44 LOY. L.A. L. REV. 317, 332 (2010).

354. Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 800–01 (1982).

355. Narrow tailoring the definition of "employee" already is the rule in workers' compensation statutes. *See, e.g.*, FLA. STAT. § 440.02(15) (2011) (setting out explicit

For the purposes of deterring police from taking unnecessary risks with informant safety, workers' compensation is an excellent fit. The cost to law enforcement agencies of obtaining workers' compensation insurance for informants would depend upon the number of informants they employ and their track record of past injuries.[356] As a result, law enforcement agencies would be incentivized to minimize the risk of physical harm to informants.[357] Because the increased costs would apply agency-wide, so too would reforms of informant policies, thus widening the scope of reforms to an extent unlikely with substantial but scattershot jury awards. Finally, this approach properly places the incentive and responsibility for reform on law enforcement agencies, which are most capable of formulating effective policies.

One additional point is worth noting. Folding criminal informants into existing workers' compensation schemes will do little to deter the most flagrant police misconduct that threatens the safety of informants.[358] By allowing certain low-level recovery for harms suffered by informants, the workers' compensation scheme will encourage law enforcement agencies to adopt policies that impose low-cost limitations on the most dangerous practices. These policies are likely to influence officers who tend to follow the rules, but are unlikely to deter extremely reckless or intentional endangerment of informants, activities which typically are already forbidden. Many states do exclude from workers' compensation schemes intentional torts by the employer,[359] but these exceptions are construed narrowly and often require a finding of actual intent to harm by the employer.[360] Even if egregious law enforcement misconduct were excluded from the workers' compensation scheme, the informant would be left to rely on uncertain tort recovery.[361] The inability of this

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definitions of the term "employee," including what conduct the term does not encompass); MICH. COMP. LAWS . § 418.161 (2011) (same); N.C. GEN. STAT. § 97-2(2) (2011) (same).

356. *See* 9 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 150.06 (2011) (noting that workman's insurance rates are calculated based on the number of employees who receive compensation).

357. Agencies also may decide to use fewer informants. While this would harm the interest of potential informants in avoiding punishment, that is not an interest that society ought to protect. *See supra* notes 111–15 and accompanying text (discussing the harm to society incident to an informant's desire to avoid punishment).

358. *See* Epstein, *supra* note 354, at 814 ("Unlike ordinary negligence, intentional harms introduce an element of moral hazard that is very difficult to control by a set of rules designed for accidents.").

359. 6 LARSON & LARSON, *supra* note 356, § 103.01.

360. *Id.* § 103.03.

361. *See supra* notes 281–99 and accompanying text (discussing the legal hurdles

solution to deter the worst misconduct should not be fatal to the plan, however. Rather, it is part of a larger struggle to ultimately deter such wrongdoing.

CONCLUSION

The preceding discussion has attempted to remedy the oversight of scholars who have largely ignored the interests of informants by focusing on those interests exclusively. But informant interests do not exist in a vacuum, and obvious questions arise from such a single-minded focus. Among them, one might well ask why, in an era of limited government resources, should resources be devoted to protecting the interests of active criminal informants? More specifically, why should protecting these informants be prioritized over other pressing law enforcement concerns?

Answering these questions, important as they are, exceeds the scope of this Article. However, it is worth noting that the proposals made herein would address, at least in part, many of the concerns raised by scholars about the broader societal implications of widespread informant use. For instance, scholars have argued that informant use negatively impacts policing by allowing investigations to be driven by informants rather than law enforcement agents.[362] Similarly, regular interaction with informants can lead to police corruption.[363] Both of these problems would be curtailed at least somewhat by requiring prosecutorial involvement in the recruitment of informants.

The use of informants also can have corrosive effects on the high-crime communities in which they are most often used and the relationship between the police and those communities. Releasing criminals to inform on their neighbors' activities weakens social ties, increases crime, and communicates to members of high-crime communities that crime in those communities will not be punished.[364] Moreover, civilians often view the recruitment and use of informants as coercive and exploitative.[365] These concerns, in turn, give rise to civilian distrust of police, a reduced willingness by law-abiding citizens

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that impede and generally prevent an informant from recovery against law enforcement in a civil suit).

362. *See* NATAPOFF, *supra* note 13, at 32–33 (describing the ways in which the use of informants "flips the law enforcement endeavor on its head").

363. *Id.* at 32.

364. *See* Natapoff, *supra* note 16, at 691–92 (describing how a culture of informing can breed distrust and fear in communities, breaking down social ties and relationships).

365. *See* ACLU STUDY, *supra* note 1, at 52–55 (describing the types of corrupt practices employed by law enforcement in recruiting informants).

to cooperate, and an adversarial relationship between law enforcement and the communities they are meant to serve.[366] By slightly increasing the transaction costs involved in recruiting a new informant, the proposals contained herein will reduce the number of informants used and thus ameliorate the sense that informants are infiltrating high-crime communities. In addition, restrictions on the use of particularly vulnerable informants and guarantees that informants must agree to cooperate knowingly and voluntarily will counter the impression that police agents exploit informants. The ultimate result would hopefully be an increase in trust and cooperation between law enforcement and communities.

Finally, the use of informants may ultimately undermine the deterrent effect of criminal sanctions if the perceived benefits of cooperation to the criminal outweigh the increased risk that an informant will detect their crimes.[367] The obvious solution to this problem is to reduce the rate at which informants are recruited, but such reforms are unlikely to be implemented internally by law enforcement.[368] Once again, by increasing the transaction cost of informant recruitment, the proposals set forth herein would require law enforcement to enact such a reduction.

But these answers to the question of why we should protect informants allow society to do the right thing for the wrong reasons. Ultimately, society should protect informants because informants are vulnerable members of society meriting protection according to widely-accepted norms. Often their vulnerabilities are unchosen, and some arise from their decision to engage in activities that benefit society. This compels society's protection.

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366. *See* Rich, *supra* note 12 (manuscript at 20) (explaining how the origins of the "Stop Snitching" movement are rooted in racism in policing and the negative experiences with law enforcement common to many residents of high-crime communities).

367. *See* Baer, *supra* note 129, at 963 (explaining that, if criminals presume they will be able to reduce consequences through cooperation, they will be more willing to commit crimes).

368. *See id.* at 964 (noting how law enforcement agencies will be unlikely to reduce the use of informants where such use "impact[s] all-important conviction and arrest statistics, which are the source of resources and prestige").